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Regulation of Dispute Resolution in the United States of America: From the Formal to the Informal to the 'Semi-formal'

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*Regulation of Dispute Resolution in
the United States of America: From
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'Semi-formal'*

CARRIE MENKEL-MEADOW

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I. INTRODUCTION: HISTORY AND CHARACTERISTICS OF DISPUTE
RESOLUTION IN THE US: FORMALISM, INFORMALISM AND
'SEMI-FORMALISM' WITH AND WITHOUT REGULATION

THE STORY OF ADR in the US is one of '*co-optation*' of what was to be a *serious challenge to formalistic and legalistic approaches* to legal and social problem solving and is now highly institutionalised by its more formal use in courts.¹ At the same time, use of private forms of dispute resolution in mediation, arbitration and newly hybridised forms of dispute resolution among disputants who can choose (and afford) to leave the formal justice system (in both large commercial matters and private family matters) has resulted in claims of increased *privatisation of justice*, with consequences for access to justice in different areas of legal dispute resolution. These consequences include difficulty of access to some forms of private dispute resolution for those who cannot afford them and claims that, with mass exits from the formal system by those who can afford to 'litigate' elsewhere, there is less interest in judicial service and reform. In addition, in recent years consumers and employees have

¹ See C Menkel-Meadow, 'Pursuing Settlement in an Adversary Culture: The Law of ADR' (1991) 19 *Florida State Law Review* 1.

been subjected to contractual commitments to mandatory arbitration, sustained by the US Supreme Court, which has all but eliminated choice about where to resolve certain kinds of disputes. All of these claims are highly contested by practitioners, judges and scholars of the American legal system.²

The uses of various forms of ADR are difficult to assess as much occurs in private, non-reportable settings and there is no national or centralised form of ‘regulation’ of dispute resolution in the US. As reported below, there are many sources of regulation in case law, statutes and local procedural rules at both federal and state levels, but much dispute resolution activity in the US remains private and market based, as parties may choose contractually before, during or after a dispute has arisen, how to manage their disputes—through private negotiation and settlement, mediation, arbitration, fact-finding, neutral evaluation or a variety of newly hybridised forms of dispute resolution. There is no formal reporting requirement of such processes or their outcomes, so much remains unknown about the actual dimensions of private dispute resolution, now often fully approved of and sanctioned by public institutions. As this paper will describe, dispute resolution in the US is now formal, informal and ‘semi-formal’.

The watershed years for regulation of formal dispute resolution in the US might be considered to be both 1938 (the year that both the Federal Rules of Civil Procedure were drafted by a stellar committee of lawyers, judges and academics, and enacted (by passive approval of the US Congress) and *Erie v Tompkins*³ was decided (ruling that procedural rules were federal (national) and substantive rules would be state law in diversity cases in American federal courts, thus overturning the prior practice of the reverse, state procedural law in all federal courts with enforcement of ‘federal common law’ for substantive decisions) and 1976 (when the Pound Conference on the Causes of Popular Dissatisfaction with the Administration of Justice included a paper by Harvard Professor Frank Sander⁴ which heralded the beginning of consideration for formal judicial policy ‘varieties of dispute processing’, including mediation, arbitration, neutral evaluation, fact-finding and ombuds as ‘alternatives’ to formal adjudication).

The juxtaposition of these important historical events in a single paragraph should give one the sense that dispute resolution and its regulation in the US is inherently complex, involving both national (what we call federal) and state regulation (with 50 different states), and a great variety of informal and private processes that remain largely unregulated in the public sphere (though sometimes scrutinised in public litigation when constitutional, contractual or other challenges are made). This chapter attempts to describe this complex legal landscape and, in the end, concludes that, at least in the US, ‘model laws of ADR’ are unlikely to succeed at the national level. Current efforts to create ‘uniform state laws’ (a separate process for making uniform those subjects that transcend state boundaries, as in the Uniform Commercial Code⁵)

² See, eg J Resnik, ‘Many Doors? Closing Doors? Alternative Dispute Resolution and Adjudication’ (1995) 10 *Ohio State Journal on Dispute Resolution* 211.

³ 304 US 64 (1938).

⁴ FEA Sander, ‘Varieties of Dispute Processing’ in A Levin and R Wheeler (eds), *The Pound Conference: Perspectives on Justice in the Future* (St Paul, MN, West Publishing Co, 1979) 111.

⁵ The National Conference on Commissioners for Uniform State Laws (NCCUSL) has successfully drafted and promoted the Uniform Commercial Code for contract law, family law (adoption measures) and many other subjects, but has been less successful in dispute resolution matters. At the time of writing, the Uniform Mediation Act (2001) (specifying rules for confidentiality in mediation) has been adopted in only 11 states, making it hardly a ‘uniform’ regulation.

have been largely unsuccessful in dispute resolution. The formal regulatory landscape in dispute resolution in the US now consists of at least the following legal sources:

- The US Constitution (what process is ‘due’ in what (public) procedures and what governmental bodies are assigned what dispute resolution functions, eg separation of powers?)
- Federal legislation (eg Civil Justice Reform Act of 1990,⁶ Administrative Dispute Resolution Act of 1996,⁷ Alternative Dispute Resolution Act of 1998⁸)
- Federal rules of civil procedure (and criminal procedure for plea bargaining rules), including
 - Local rules for each federal district (94)
 - Circuit Court of Appeals rules and practices for mediation and other forms of settlement and ADR procedures (11 circuits and two specialty appeals bodies, for trade and patents⁹)
- Common law jurisprudence and many precedents from US Supreme Court and appellate federal courts on many ADR issues (including mandatory arbitration (see below), confidentiality, privileges, enforceability and ‘good faith’ participation requirements, among others)
- Administrative agency rules and practices in a variety of subject areas, including securities regulation, civil litigation, energy and environment, education, business and commerce, labour and military procurement (and including a federal governmental coordinating body for ADR efforts in federal agencies¹⁰)
- State legislation (50 states and several territories, eg Puerto Rico)
- State common and decisional law¹¹
- Uniform Mediation Act/ Uniform Arbitration Act (efforts to create common state law regulation in different aspects of dispute resolution)
- Private contracts (specifying conditions and rules for dispute resolution, often enforced by courts, making common law rulings (with precedential effects) and including mass, trade association, institutional and organisational forms of ‘internal’ dispute resolution)
- Private decisional law (eg arbitration awards, some public (eg investment and labour) and most private (eg commercial arbitration) awards)
- Private organisational rule systems (eg American Arbitration Association rules for arbitration, mediation; International Institute for Conflict Prevention and Resolution (CPR), Association of Conflict Resolution (ACR), including
 - Substantive
 - Procedural and
 - Ethical Rules

At the level of procedural rules, little was said in 1938 about anything other than

⁶ 28 USC § 471.

⁷ 5 USC § 571.

⁸ 28 USC § 651.

⁹ RJ Niemic, *Mediation and Conference Programs in the Federal Appeals Courts* (Washington, DC, Federal Judicial Center, 1997).

¹⁰ Office of Dispute Resolution, Department of Justice, Interagency Working Group on ADR, see <www.usdoj.gov>.

¹¹ See, eg J Coben and P Thompson, ‘Disputing Irony: a Systematic Look at Litigation about Mediation’ (2006) 11 *Harvard Negotiation Law Review* 43.

formal trials, though innovations in information sharing and American-style discovery, class actions, simplicity of pleading rules, and a rule (Rule 16) about pre-trial settlement conferences with judges introduced some new processes for dispute resolution outside of a full-blown trial. Over the years, those rules have been amended many times to include complex rules about settlement offers (Rule 68), the use of court appointed special masters to facilitate discovery and settlement (Rule 53), limits on discovery, and increased participation of both judges and court adjuncts to ‘intervene’ and promote settlement activity,¹² among other relevant rule amendments, the most important being the role that the Rules of Civil Procedure (Rule 83) allocates to each individual federal trial (district) court (94 of them in 50 states) to make its own ‘local rules’, which has turned out to be a major source for ADR regulation in federal courts.¹³ Over the years, most states have conformed their formal procedural rules to look much like the federal rules, though with respect to ‘ADR’ some states took the lead in promoting (and regulating) the use of court-adjunct processes to encourage settlement (eg Massachusetts, Florida, Ohio, New York, Texas and California).¹⁴

After the procedural ‘revolution’ in 1938, American formal law turned most of its attention to creating new substantive rights, through the activism of a variety of social and legal movements, civil (and now human) rights, consumer rights, women’s rights, environmental protection, gay rights and anti-poverty activism, using both legislation and litigation to create, establish and litigate about these new legal rights and entitlements. At the same time, the procedural innovation of class actions led to many more law suits to efficiently claim on behalf of discriminated individuals and groups, securities and consumer frauds, mass tort victims and other aggregated claims. All of this led to an expansive increase in litigation and to the somewhat contested claim that the US was the most litigious nation in the world.¹⁵

The movement for more ‘informal’ justice in the US in the late 1970s and early 1980s¹⁶ drew its inspirations from a variety of sources, including the desire for qualitatively better options and solutions for dispute resolution problem solving in substance,¹⁷ and more party participation and empowerment in procedure and process, as part of larger political movements seeking democratic participation in the polity and the legal system. The impetus for much procedural reform, however, came from courts and judicial officials, including then Chief Justice Warren Burger, who sought to decrease court dockets and case processing time, reduce litigation cost and complexity, and for the cynics among us, move cases away from federal courts to other fora, including state courts, small claims venues, and other processes outside of the courts, tied together in the nomenclature of ‘alternative’ dispute resolution. Thus,

¹² See, eg C Menkel-Meadow, ‘For and Against Settlement: Uses and Abuses of the Mandatory Settlement Conference’ (1985) 33 *UCLA Law Review* 485.

¹³ E Plapinger and D Stienstra, *ADR and Settlement in the Federal District Courts* (Washington, DC, Federal Judicial Center, 1996).

¹⁴ See N Rogers, C McEwen, S Cole, J Coben and P Thompson *Mediation, Law Policy and Practice*, 3rd edn (St Paul, MN, Thomson Reuters, 2011).

¹⁵ M Galanter, ‘Reading the Landscape of Our Disputes: What We Know, Don’t Know (and Think We Know) about Our Allegedly Contentious and Litigious Society’ (1983) 31 *UCLA Law Review* 4.

¹⁶ RL Abel (ed), *The Politics of Informal Justice: The American Experience* (New York, Academic Press, 1982).

¹⁷ C Menkel-Meadow, ‘Toward another View of Legal Negotiation: The Structure of Problem Solving’ (1984) 31 *UCLA Law Review* 754.

from the beginning, at least two different motivations for alternative or less formal processes were present—the ‘*quantitative-efficiency*’ concerns to make justice more accessible, cheaper, faster and efficient, and the more ‘*qualitative-party empowering*’ ideas that, with greater and more direct party participation, and identification of underlying needs and interests, parties might identify more tailored solutions to their problems that would be less brittle and binary than the win/lose outcomes of formal courts, with ‘limited remedial imaginations’.¹⁸

In recent years, the progress of dispute resolution variations has been labeled, by this author, as ‘*process pluralism*’,¹⁹ and by others as ‘*appropriate*’ (not alternative) *dispute resolution*, connoting recognition that not all matters should be subjected to the same treatment—‘one size of legal process does not fit all’. Different kinds and numbers of parties, issues, structures of disputes and legal matters might dictate different formats of dispute processing.²⁰ This is a serious questioning of the American procedural ideal of ‘transsubstantive’ procedure,²¹ and such claims invoke both notions of ‘technocratic’ assignment of cases to efficient or appropriate fora,²² as well as more deeply jurisprudential concerns about whether different processes are necessary to ensure different kinds of justice in different situations. Must ‘all cases’ be treated ‘alike’ or, if ‘like cases’ are to be treated ‘alike’, how do we know which cases are ‘like enough’ each other to be treated with the same process and procedure?

Debates about ‘the vanishing trial’²³ and the loss of formal procedures, as fewer and fewer cases make it all the way to full adjudication in the US (only about 2 per cent of cases filed in a wide variety of courts, both federal and state, general and specialised, now go on to full trial), have raged among scholars, judges and lawyers, as there is now concern, on the part of some, that not enough cases are available to generate the precedents we need in a common law, stare decisis legal regime to transparently produce reasoned rules and principles for the governance of our society.²⁴ As I argued some years ago, this is a question of ‘Whose Dispute Is It Anyway?’²⁵—the parties seeking dispute resolution or the larger society that needs transparent and certain kinds of (adversarial?) processes to produce law and justice for the ‘many’ out of the disputes of the ‘few’.

The relationship of process to assessments of justice is a serious jurisprudential question, considered by many procedural theorists. A separate field of ‘procedural justice’ or ‘the social psychology of justice’ has claimed for decades, through empirical study,

¹⁸ Ibid.

¹⁹ C Menkel-Meadow, ‘Peace and Justice: Notes on the Evolution and Purposes of Legal Processes’ (2006) 94 *Georgetown Law Journal* 553.

²⁰ C Menkel-Meadow, *Dispute Processing and Conflict Resolution: Theory, Practice, and Policy* (Burlington, Ashgate Press, 2003).

²¹ SN Subrin, ‘The Limitations of Transsubstantive Procedure: An Essay on Adjusting the “One Size Fits All” Assumption’ (2010) 87 *Denver University Law Review* 377.

²² The idea that the ‘forum should fit the fuss’ was originally Professor Maurice Rosenberg’s (Columbia University) is now captured by FEA Sander and SB Goldberg, ‘Fitting the Forum to the Fuss: A User Friendly Guide to Selecting an ADR Procedure’ (1994) 10 *Negotiation Journal* 49.

²³ M Galanter, ‘The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts’ (2004) 1 *Journal of Empirical Legal Studies*, 459.

²⁴ SN Subrin, ‘Litigation and Democracy: Restoring a Reasonable Prospect of Trial’ (2011) 46 *Harvard Civil Rights-Civil Liberties Law Review* 399; O Fiss, ‘Against Settlement’ (1984) 93 *Yale Law Journal* 1073.

²⁵ C Menkel-Meadow, ‘Whose Dispute Is It Anyway? A Philosophical and Democratic Defense of Settlement (in Some Cases)’ (1995) 83 *Georgetown Law Journal* 2663.

that users of dispute resolution process assess the ‘justice’ and ‘fairness’ of processes independently from the outcomes parties achieve.²⁶ From the American side, I have long claimed that Lon Fuller is our ‘jurisprudent of process’,²⁷ for in a series of articles Fuller has argued that each different process, whether adjudication, arbitration, mediation, legislation or regulation (and other processes, such as voting) has its own ‘integrity’—that is, its own norms, ethics and types of outcomes produced, each requiring its own philosophical justification, as well as the possibility of its own set of ‘rules’.²⁸

In the modern-day experience of so many varied processes used for dispute resolution (reviewed below), I often ask if Lon Fuller would approve of the great *hybridisation* of process that has occurred in recent decades, with such new forms as mediation and arbitration combined to form *med-arb* or *arb-med*²⁹ (in labour, family, commercial disputes), ‘*early neutral evaluation*’³⁰ or ‘*settlement conferences*’, a process comprising both judges and lawyers, giving evaluative feedback to counsel and parties in pre-trial settings,³¹ ‘*summary jury trials*’³² (jury advisory opinions in public courts for settlement purposes), ‘*mini-trials*’³³ (private hybrid processes using witness testimony, argument, negotiation, mediation and sometimes arbitration) and ‘*private judging*’,³⁴ where private parties hire judges to adjudicate matters in secrecy, with full appellate processes and protection of the courts (as is authorised by state constitutions and statutes, such as in California)—and now even *private juries*³⁵ are hired to resolve disputes outside of the courts, so there is independent lay fact-finding, but no public record of the outcome or deliberations. What would Lon Fuller, and what should we, scholars and practitioners of procedural law, make of all these various processes? How do we know if these processes are fair, just and appropriate for either the parties themselves or the larger system of legal dispute resolution?

In this chapter I will address these questions by suggesting that, in the US, we now have more than ‘formal’ or ‘informal’ processes—we have many ‘semi-formal’ (hybrids or mixtures of processes), and the question is how shall we evaluate the efficacy, efficiency and legitimacy of so many different kinds of process. In the US, we have

²⁶ EA Lind and T Tyler, *The Social Psychology of Procedural Justice* (New York, Plenum Press, 1988); N Welsh, ‘Remembering the Role of Justice in Resolution: Insights from Procedural and Social Justice Theories’ (2004) 54 *Journal of Legal Education* 49.

²⁷ C Menkel-Meadow, ‘Mothers and Fathers of Invention; The Intellectual Founders of ADR’ (2000) 16 *Ohio State Journal of Dispute Resolution* 13.

²⁸ K Winston (ed), *The Principles of Social Order: Selected Essays of Lon Fuller*, revised edn (Oxford and Portland Oregon, Hart Publishing, 2001).

²⁹ C Menkel-Meadow, L Love, A Kupfer Schneider, J Sternlight, *Dispute Resolution: Beyond the Adversarial Model*, 2nd edn (New York, Wolters Kluwer, 2011) 526–29; C Menkel-Meadow (ed), *Complex Dispute Resolution: Vol 1 Foundational Processes and Vol 2, Multi-Party Dispute Processes, Decision Making and Democracy* (Farnham, Ashgate Press, 2012).

³⁰ W Brazil, ‘A Close Look at Three Court-Sponsored ADR Programs: Why They Exist, How They Operate, What They Deliver, and Whether They Threaten Important Values’ [1990] *University of Chicago Legal Forum* 303.

³¹ C Menkel-Meadow, ‘For and Against Settlement: The Uses and Abuses of the Pre-Trial Settlement Conference’ (1985) 33 *UCLA Law Review* 485.

³² J Alfini, ‘Summary Jury Trials in State and Federal Courts: A Comparative Analysis of the Perceptions of Participating Lawyers’ (1989) 4 *Ohio State Journal of Dispute Resolution* 213.

³³ ED Green, *The CPR Legal Program Mini-Trial Handbook* (New York, Matthew Bender & Co, 1982).

³⁴ Cal Civ Proc Code §§ 638-645 (West Supp 2004); Fla Stat Ann § 44.104 (West 2003 & Supp 2004); A Kim, ‘Rent-a-Judges and the Cost of Selling Justice’ (1994) 44 *Duke Law Journal* 166.

³⁵ M Jacobs, ‘Legal Beat: Private Jury Trials: Cheap, Quick and Controversial’, *Wall Street Journal*, 7 July 1997.

a very elaborate *formal justice system of federal and state rules of procedure (both civil and criminal)*, as well as countless specialised tribunals with their own procedural rules, such as in bankruptcy, labour, family law, securities, technology, trade, patent and trademark, and taxes.

We also have many *informal fora* for dispute resolution, including private uses of mediation, arbitration and related processes, religious courts and mediation agencies, specialised business and industry panels of dispute resolution (eg banking, insurance, franchise, construction, technology, sports and energy), using both mediation and arbitration techniques,³⁶ community and neighbourhood dispute resolution processes,³⁷ online consumer forms of dispute resolution,³⁸ internal organisational forms of dispute resolution (ombuds or 'IDR' (internal dispute resolution³⁹), including grievance processes in large corporations, universities, trade unions, government agencies and non-governmental institutions⁴⁰), as well as dispute resolution fora even in illegitimate enterprises—gangs⁴¹ and organised crime.

We now also have a more hybrid set of processes which can be called '*semi-formal*' forms of dispute resolution, which utilise both private and public processes with increasingly structured and formal aspects of process, even if there is little to no recourse to more formal adjudication or appellate review. These include the 'ADR' programmes 'annexed' to courts, with a great deal of federal and state variations in rules, and access to courts after use, mandatory arbitration clauses found in many consumer and business contracts, which obligate parties to use structured out of court arbitration tribunals, some with very detailed procedural rules, but little to no appeal to courts (under the Federal Arbitration Act's limited grounds for vacatur of an arbitration award⁴²), as well as the elaborate structure of international commercial arbitration which is now quite 'formal' in its conduct, if still mostly unattached to formal courts.⁴³ Thus, the notion of any omnibus 'regulation' of ADR is simply

³⁶ CPR Industry Panels Dispute Resolution.

³⁷ S Merry and N Milner, *The Possibility of Popular Justice: A Case Study of Community Mediation in the United States* (Ann Arbor, University of Michigan Press, 1993).

³⁸ E Katsh and J Rifkin, *Online Dispute Resolution: Resolving Conflicts in Cyberspace* (San Francisco, Jossey Bass, 2001); MSA Wahab, E Katsh and D Rainey (eds), *Online Dispute Resolution: Theory and Practice* (The Hague, Eleven International Publishing, 2012).

³⁹ L Edelman, H Erlanger and J Lande, 'Internal Dispute Resolution: The Transformation of Civil Rights in the Workplace' (1993) 27 *Law & Society Review* 497.

⁴⁰ W Ury, J Brett and S Goldberg, *Getting Disputes Resolved: Designing Systems to Cut Costs of Conflict* (San Francisco, Jossey Bass, 1988).

⁴¹ S Venkatesh, *Gang Leader for a Day* (New York, Penguin, 2008).

⁴² 9 USC § 10; *Hall Street Associates v Mattel*, 552 US 576 (2008).

⁴³ Y Dezalay and B Garth, *Dealing in Virtue: International Commercial Arbitration and the Construction of a Transnational Legal Order* (Chicago, University of Chicago Press, 1996). But see A Stone Sweet, 'Arbitration and Judicialization' (2011) 1(9) *Onati Socio-Legal Series 1*, who argues that some forms of international arbitration (state-investor arbitration) are becoming increasingly judicialised by explicitly publishing rulings, giving reasons in opinions and decisions, which include common legal doctrines like proportionality and balancing, allowing *amicus curiae* briefs, treating past decisions as precedential and arguing for appellate processes. Some scholars (I am among them, see C Menkel-Meadow, 'Are Cross-Cultural Ethics Standards Possible or Desirable in International Arbitration?' in P Gauch, F Werro, P Pichonnaz (eds), *Melangés en l'honneur de Pierre Tercier* (Geneva, Schulthess, 2008)) think that even international commercial arbitration, a creature of private contract, is in fact, dependent on the state—national courts for enforcement and recognition of awards, pursuant to a public international law treaty (the New York Convention for the Recognition and Enforcement of Foreign Arbitral Awards, 1958) and that international commercial arbitration is, in fact, creating a common law of modern *lex mercatoria*, T Carbonneau, *Lex Mercatoria and Arbitration: A Discussion of the New Law Merchant*, (Huntington, NY, Juris Net, 1997).

impossible to imagine in the US with this great variety of types of process and locations of process in both public and private, and now 'hybrid' spheres.

Years ago, in an effort such as the present one, I imagined that a 'core' set of ethical guidelines for conducting mediation could be designed,⁴⁴ and I spent five years chairing a commission to write uniform ethical rules for lawyers serving as third-party neutrals (arbitrators and mediators) in alternative processes⁴⁵ (a subject that had never been regulated by American ethical and professional responsibility rules for lawyers in general).⁴⁶ Though many private organisations have now followed with rules of ethics (confidentiality, conflicts of interest, etc) for third parties and advocates in ADR proceedings, there are in fact not that many 'core' principles upon which everyone can agree. Even within the US, conflicts of interest, ex parte communications with arbitrators, practice with non-legal professionals, methods of fee payment,⁴⁷ and a host of other issues remain variable and contested.

As I have written before, when ADR is taken to multi-national or international contexts, the issues become even more complicated, as different systems impose different rules with respect to such issues as whether witnesses may be prepared before testimony (malpractice if not done in the US, unethical in England and Germany), discovery, cross-examination, written versus oral testimony, conflicts of interest⁴⁸ and many other procedural differences. The European Directive on Mediation (2008/58/EC) has an ethics code appended to it (European Code of Conduct for Mediators⁴⁹), but I predict that these principles will have many difficult legal and social cultural issues in application, and they already fail to deal with all the issues that might arise in a multi-national mediation setting.

For purposes of this chapter, I use the term 'semi-formal' from American etiquette dressing requirements ('smart casual' is the British equivalent) to connote the attempt to locate dispute processes half way between formal tuxedos or 'black tie' and evening gowns of the bygone days of formal gatherings (and formal regulation), and the totally informal or casual dress more common in today's variety of professional, family and

⁴⁴ C Menkel-Meadow, 'Professional Responsibility for Third Party Neutrals' (September 1993) 11(9) *Alternatives*; C Menkel-Meadow, 'Ancillary Practice and Conflicts of Interest: When Lawyer Ethics Rules Are Not Enough' (February 1995) 13(2) *Alternatives*.

⁴⁵ CPR-Georgetown Commission on Ethics and Standards in ADR, Model Rule for the Lawyer as Third Party Neutral (2002), <www.cpradr.org/Resources/ALLCPRArticles/tabid/265/ID/622/Model-Rule-for-The-Lawyer-as-Third-Party-Neutral.aspx>.

⁴⁶ There is now some minimal regulation in the American Bar Association Model Rules of Professional Conduct which recognises that lawyers may serve in these capacities, MRPC Rule 2.2, but 'tribunals' to which a lawyer owes a duty of candor includes arbitration, but excludes mediation (Rule 1.1 definition (o)), which has been assimilated to include a slightly different set of ethics for negotiation found in Model Rule 4.2 (allowing some forms of 'puffing' (exaggeration), no duty to disclose true 'opinions' or one's real principal).

⁴⁷ Whether ADR should permit 'contingent fees' (or a percentage of the settlement amount for the mediator or award for the arbitrator), as is permitted in American litigation, remains a hotly contested subject. Some private mediators and arbitrators also charge very large (and unregulated) daily or hourly fees as well, rising to as much as tens of thousands of dollars a day or many thousands of dollars an hour in high stakes matters. For lawyers in more traditional practice, the ethics rules now require at least some written disclosures of 'reasonable' fees, and in some settings (eg class actions, bankruptcy, and statutory fee cases) there is some judicial review of fees in some matters.

⁴⁸ C Rogers, *Ethics in International Arbitration* (Oxford, Oxford University Press, 2013).

⁴⁹ The new International Mediation Institute (based in The Hague) has also been promulgating suggested standards and rules for mediators, both for competence and ethics, and for cultural competency as well, see <www.IMImediation.org>.

entertainment gatherings. To request 'semi-formal' dress is to ask the gentlemen to wear ties and jackets, if not tuxedos, and to hope that the women will wear, if not dresses and skirts, than at least 'fancy pants'. The idea is to preserve some notion of order, elegance, solemnity and seriousness to the social event. Thus, 'semi-formal' uses of mediation and arbitration in the courts suggest (sometimes falsely) that someone is looking over or supervising the choice of mediators or arbitrators and ensuring their competence and ethics, and, in some cases, permitting a further appeal to the black-robed (and formal) adjudicator. What level of regulation is appropriate for formal, informal and now 'semi-formal' dispute resolution remains, for me, somewhat problematic, as I report below on a wide variety of regulatory differences in both federal and state courts in the US, as well as some private settings in which dispute resolution occurs. More problematic is the assumption that 'regulation' will be effective and can guarantee some measure of both quality of process and access to process in such a variegated environment.

For example, the elaborate rules of the American Arbitration Association, if not full-on Federal Rules of Civil Procedure, still provide for some discovery and mandatory information exchange, that old American practice of document production and factual inquiries of the other side, in person (depositions) and through detailed (and costly) document and now computer searches, preliminary relief, and in some cases the same relief (punitive damages) as courts would provide in the US. Though virtually all of this occurs without full public transparency or appellate review, at least (in theory) everyone knows the rules they have selected (usually through contract or selection of a particular arbitral administering institution). Recently in the US, many efforts to challenge the true 'voluntariness' of these now 'mandatory' clauses to arbitrate contract, consumer, business and employment disputes have failed, as the formal courts, including the US Supreme Court, have sustained contracts which require certain forms of dispute resolution (usually arbitration), even where consumers and employees do not really know or understand what they are signing.⁵⁰

Totally casual or informal forms of dispute resolution are now called 'litigation-lite' (arbitration) or 'mediation-heavy' (evaluative mediation where third party neutrals decide or strongly suggest solutions to parties, rather than simply facilitating party negotiation⁵¹), and occur without formal clarity about the procedural rules applied or what can happen if the process fails. The question here is whether 'semi-formal' processes can legitimately operate in a space between the transparency and presumed consistency of formal justice, and the confidentiality, flexibility and self-determination of informal processes. Should we be subjecting different kinds of process to different

⁵⁰ See, eg *Gilmer v Interstate/Johnson Lane Corp* 500 US 20 (1991); J Sternlight, 'Fixing the Mandatory Arbitration Problem: We Need the Arbitration Fairness Act of 2009' (2009) 16 *Dispute Resolution Magazine* 5; J Sternlight, 'Is the US Out on a Limb? Comparing the US Approach to Mandatory Consumer and Employment Arbitration to That of the Rest of the World' (2002) 56 *University of Miami Law Review* 831.

⁵¹ L Love, 'The Top Ten Reasons Why Mediators Should Not Evaluate' (1997) 24 *Florida State Law Review* 937. Some commentators have called this healthy 'intra-process pluralism', where parties can choose variations of forms of mediation or arbitration or negotiation approaches; others are more concerned that processes lose their purity or integrity when they depart from a central 'core'. See, eg L Riskin and NA Welsh, 'Is That All There Is? The Problem in Court-Oriented Mediation' (2008) 15 *George Mason Law Review* 863-932; LL Riskin, 'Decision-Making in Mediation: The New Old Grid and New New Grid System' (2003) 79 *Notre Dame Law Review* 1.

kinds of evaluative criteria and rules or should all process be judged by the same criteria?

This increasing complexification, segmentation and differentiation of process, which was intended to express and be justified by such important justice values as *party choice, consent, self-determination* and *party-tailored solutions to problems*, now potentially threatens other justice notions of *consistency, transparency, true consent and knowledge*, as well as *equity, equal treatment, clarity*, and *socially 'uniform' and just solutions*.

By describing and reviewing some of the more interesting current developments in modern American process pluralism here, I hope to expose the difficulties, paradoxes and contradictions of processes that have different goals and purposes (especially if parties have different goals and purposes within the same dispute), especially when 'semi-formal' is neither formal nor informal. Consider, as reviewed below, the paradox of enforcing private arbitral awards in public courts, the absence of clear enforcement rules for private mediation, the conflicts of private religious 'courts' with public values expressed in formal state courts,⁵² the role conflation of judges who mediate or manage settlement conferences rather than adjudicate, and the absence of records by which to judge any of this when parties choose to take their informal or semi-formal dispute resolution processes to entirely private settings. To what extent do we need 'formalism' in the form of public or transparent, uniform rules of process and procedure to judge the legitimacy, fairness or justice of any particular dispute resolution process? To what extent should different processes be permitted to have different forms of legitimacy or justification? Are values of '*party control*' and '*consent*' contradictory to the needs of the state to provide '*public justice*' and both *procedural and substantive 'transparency'*? Is '*process pluralism*' itself a 'just' good?

II. THE CHARACTERISTICS OF 'FORMAL' JUSTICE

Conceptions of formal justice in modern American jurisprudence include, in a trial or formal hearing setting, transparency or publicity of proceedings, reasoned legal arguments based on legal precedent and 'proven' facts, including witness examination and testimony, and discovery of facts, documents and information, even from adverse parties and sources, public officials (whether elected or appointed in both state and federal variations) as judges who advise fact finders (juries) about the law or engage in fact-finding themselves, as well as make legal rulings, write formal, reasoned opinions that have precedential or *stare decisis* impact on other, like, cases, and most importantly, are governed by formal rules (Federal (or state) Rules of Civil or Criminal Procedure), and are subject to appellate and other review procedures.⁵³ For Lon Fuller, adjudica-

⁵² MA Helfand, 'Religious Arbitration and the New Multi-culturalism: Negotiating Conflicting Legal Orders' (2011) 86 *New York University Law Review* 1231; E Waldman, *Mediation Ethics* (San Francisco, Jossey-Bass, 2011) ch 9.

⁵³ L Fuller, 'The Forms and Limits of Adjudication' in Winston (ed), *The Principles of Social Order* and (1978) 92 *Harvard Law Review* 353; Fiss, 'Against Settlement'; M Shapiro, *Courts: A Comparative and Political Analysis* (Chicago, University of Chicago Press, 1981); D Luban, 'Settlements and the Erosion of the Public Realm' (1995) 83 *Georgetown Law Journal* 2619; J Resnik, 'Managerial Judges' (1982) 96 *Harvard Law Review* 374.

tion or 'formal justice' is warranted when there is a need for reasoned argument to decide disputes, not only for the immediate disputants, but also to elucidate rules for the larger society, especially when *rights* (and especially competing rights) are at issue. Adjudication requires the decision of 'authoritative' and 'neutral' decision makers who *explain their reasons* (assumed to be agreed to or binding on the disputants and the larger society in which they are embedded), which are derived from what we now commonly call '*the rule of law*', or properly enacted law (legal positivism) or common law interpretive law.

The third party neutral judge or 'universal third' (as historian Martin Shapiro describes the role) is expected to be detached from the parties and the issues, and to 'rule' on the basis of agreed to substantive and procedural rules. This assumes the foundational principle of 'consent' to the juridical form and 'jurisdiction' (power to speak) of the tribunal. Many Anglo-American writers on formal justice also assume a particular kind of process—adversary argument, with assumptions that 'truth', as well as justice, will be produced by hearty and contested, if 'policed', production of evidence, and arguments from 'both' (assuming two) sides.⁵⁴ The neutrality and disinterestedness of the 'decider' or 'arbiter' in formal justice is so important to many jurists of formal process that any departure from the distinctive adjudicative role (such as to 'manage' or mediate cases) is regarded as sullyng the basic process.⁵⁵

In summary, conceptions of the core aspects of formal justice include:

- Formal and clear *rules of procedures*, known to or consented to by the parties, including allocation of tasks of production of proof and *evidence rules*
- Transparency/*publicity of hearing*
- *Neutrality and disinterestedness of deciders* of both fact (sometimes juries) and law (judges)
- *Access to information* from all parties (under oaths of truth telling), with limited confidentiality or other policy protections
- *Rights or 'rule of law' based outcomes and decisions*
- With appropriate and authorised *legal remedies* ordered by
- *Public officials* (judges) or their delegates (juries), with
- *Public and reasoned decisions* explaining outcomes and legal basis of outcomes for
- *Clarification of rules and basis of decision* for the parties, and guidance for others in similar situations
- *Possibility of review of decisions* for error or other faulty process or substantive reasons

All of these elements define various aspects of the content of the American (and Anglo) conception of 'due process'. Unfortunately (for formal justice and the parties), even some of the strongest proponents of the need for 'adjudication' in some circumstances (eg when 'rights' are necessary to make 'right') acknowledge that some situations call for different elements of dispute resolution or decision making both at the individual (eg family or workplace) and societal (the polity) level. Lon Fuller acknowledged that some relationships (family, workplace, repeat commercial customers) and some matters (the 'polycentric' dispute with many intersecting and mutually affecting

⁵⁴ See S Hampshire, *Justice is Conflict* (Princeton, Princeton University Press, 2000).

⁵⁵ See, eg Resnik, 'Managerial Judges' and Luban, 'Settlements and the Erosion of the Public Realm'.

issues) were better handled in other forms of resolution (mediation with trades, in some settings, votes of aggregate masses in democratic legislatures, arbitration when privacy, speed and consistency are desired). Rights sometimes conflict with each other, without a clear or single allocation to 'right' (eg consider rights of privacy and public rights to know; parental 'rights' in custody matters, and various conflicts in religious and secular rights in modern constitutional orders). And even some important public matters (eg domestic violence, child abuse, drug use) might be better handled with less public adjudication (and shame) and more private and caring solutions (as in modern problem-solving courts or private restorative justice settings). Categories of case types and proper process treatments do not always neatly converge.

Thus, for Lon Fuller, 'other' processes are themselves morally, politically, socially and legally legitimated by what parties might want or need, or the situation requires. Fuller's (and my own⁵⁶) claims for other processes are based on the 'integrity of process differences' themselves, not just the need for faster, cheaper or more efficient forms of traditional adjudication. Parties might want to preserve relationships or communities or workplaces without brittle, rigid or binary decisions (which could lead to desires for revenge or retribution in repeat play settings). Parties might want to 'share' (eg children in divorce) or preserve, rather than divide, resources. Rules of law might give both or 'all' sides to a particular dispute similar or non-dispositive claims of right. Coordinated, rather than competitive, action could lead to creative new outcomes and solutions to new or unlegislated for problems or issues.⁵⁷ Some communities might prefer to resolve their disputes or solve their problems within their own community norms.⁵⁸

III. INFORMAL JUSTICE IN THE US

Although there is a long history of informal justice in the US, with religious, local community and business groups negotiating, mediating or arbitrating their own disputes since the early colonial period and continuing to the present,⁵⁹ modern informal dispute resolution in the US is derived from several different substantive fields (labour,⁶⁰ commercial law, civil rights,⁶¹ environmental⁶² and family law⁶³), a judicial

⁵⁶ See, eg C Menkel-Meadow, 'Peace and Justice: Notes on the Evolution and Purposes of Process' (2006) 94 *Georgetown Law Journal* 553 and C Menkel-Meadow, 'The Trouble with the Adversary System in a Post-Modern, Multicultural World' (1996) 38 *William & Mary Law Review* 5.

⁵⁷ C Menkel-Meadow, 'Aha! Is Creativity Possible in Legal Problem Solving and Teachable in Legal Education' (2001) 6 *Harvard Negotiation Law Review* 97.

⁵⁸ O Chase, *Law, Culture and Ritual: Disputing Systems in Cross-Cultural Context* (New York, NYU Press, 2005); PH Gulliver, *Disputes and Negotiations: A Cross Cultural Perspective* (New York, Academic Press, 1979); L Nader and H Todd (eds), *The Disputing Process—Law in Ten Societies* (New York, Columbia University Press, 1978); C Freshman, 'Privatizing Same-Sex Marriage through Alternative Dispute Resolution: Community Enhancing Versus Community Enabling Mediation' (1997) 44 *UCLA Law Review* 1687.

⁵⁹ JS Auerbach, *Justice without Law? Resolving Disputes without Lawyers* (Oxford, Oxford University Press, 1983).

⁶⁰ JT Barrett, *A History of Alternative Dispute Resolution: The Story of a Political, Social and Cultural Movement* (San Francisco, Jossey Bass, 2004).

⁶¹ A Pfund (ed), *From Conflict Resolution to Social Justice: The Work and Legacy of Wallace Warfield* (New York, Bloomsbury Press, 2013).

⁶² L Bacow and M Wheeler, *Environmental Dispute Resolution* (New York, Springer, 1984).

⁶³ G Friedman, *A Guide to Divorce Mediation* (New York, Workman, 1993).

movement (docket clearing efficiency⁶⁴) and a social movement (party empowerment, consumer⁶⁵ and civil rights accountability and more tailored solutions to social and legal problems) of the 1970s and 1980s, which together produced a turn to private negotiation, mediation,⁶⁶ community consensus building,⁶⁷ and commercial arbitration processes.⁶⁸

Modern American dispute resolution has a strong intellectual grounding⁶⁹ in decision sciences,⁷⁰ game theory,⁷¹ international relations, economics, social and cognitive psychology,⁷² anthropology,⁷³ sociology⁷⁴ and political science, as claims for 'better' solutions to legal and social problems were articulated with reference to 'interest and needs'-based negotiations,⁷⁵ pie-expanding, not dividing, resource allocation,⁷⁶ efficient information sharing and processing,⁷⁷ and a move away from purely 'competitive' processes to collaborative and coordinated decision making.⁷⁸

In the 1970s and 1980s, theorists of better problem solving, combined with judicial and political activists, called attention to many processes 'alternative' to court- and formal-based dispute resolution, including dyadic and multi-party negotiation, mediation, arbitration and hybrid processes like community consensus building, ombuds within organisations and victim-offender mediation in criminal matters.⁷⁹ What was formerly under the radar screen (negotiation as the most common form of dispute resolution, through settlements prior to, during or even after trial) became the subject of formal instruction in law schools, empirical and social science study,⁸⁰ and policy making by courts.⁸¹ Judges like Chief Justice Warren Burger, who wanted to reduce

⁶⁴ W Burger, 'Isn't There a Better Way?' (1982) 68 *American Bar Association Journal* 274.

⁶⁵ C Harrington, *Shadow Justice: The Ideology and Institutionalization of Alternatives to Court* (Westport, Greenwood Press, 1985).

⁶⁶ C Menkel-Meadow, L Love and A Schneider, *Mediation: Practice, Policy, and Ethics* (New York, Wolters Kluwer, 2006); C Menkel-Meadow (ed), *Mediation: Theory, Policy and Practice* (Aldershot, Ashgate, 2000).

⁶⁷ See, eg L Susskind, S McKernan and J Thomas-Lermer, *The Consensus Building Handbook: A Comprehensive Guide to Reaching Agreement* (Thousand Oaks, Sage Publications, 1999); R Schoenholtz, 'Neighborhood Justice Systems: Work Structure and Guiding Principles' (1984) 5 *Mediation Quarterly* 3.

⁶⁸ S Mentschikoff, 'Commercial Arbitration' (1961) 61 *Columbia Law Review* 846.

⁶⁹ C Menkel-Meadow, 'Roots and Inspirations: A Brief History of the Foundations of Dispute Resolution' in M Moffitt and R Bordone (eds), *Handbook of Dispute Resolution* (San Francisco, Jossey Bass, 2005).

⁷⁰ R Zeckhauser, R Keeney and J Sebenius (eds), *Wise Choices: Decisions, Games and Negotiations* (Boston, MA, Harvard Business Press, 1996).

⁷¹ D Luce and H Raiffa, *Games and Decisions: An Introduction and Critical Survey* (New York, John Wiley, reproduced by Dover, 1987).

⁷² K Arrow et al, *Barriers to Conflict Resolution* (New York, WW Norton, 1995); D Pruitt and SH Kim, *Social Conflict: Escalation, Stalemate and Settlement* (New York, McGraw Hill, 2004).

⁷³ K Avruch, *Culture and Conflict Resolution* (Washington DC, USIP Press, 1998).

⁷⁴ L Coser, *The Functions of Social Conflict* (New York, Free Press, 1956).

⁷⁵ C Menkel-Meadow, 'Chronicling the Complexification of Negotiation Theory and Practice' (2009) 25 *Negotiation Journal* 415.

⁷⁶ R Fisher, W Ury and B Patton, *Getting to YES*, 3rd edn (New York, Penguin, 2011).

⁷⁷ C Menkel-Meadow, 'Know When To Show Your Hand' (2007) 10(6) *Negotiation Newsletter, Program on Negotiation Harvard*.

⁷⁸ J Nash, 'Two Person Cooperative Games' (1953) 21 *Econometrica* 129; R Walton and R McKersie, *A Behavioral Theory of Labor Negotiations* (New York, McGraw-Hill, 1965); M Deutsch, *The Resolution of Conflict: Constructive and Destructive Processes* (New Haven, Yale University Press, 1973).

⁷⁹ C Menkel-Meadow, 'Restorative Justice: What Is It and Does it Work?' 3 *Annual Review of Law and Social Science* 10:1 (Annual Reviews, Stanford, 2007).

⁸⁰ C Menkel-Meadow, 'Dispute Resolution' in P Cane and H Kritzer (eds), *Oxford Handbook of Empirical Legal Research* (Oxford, Oxford Press, 2010).

⁸¹ C Menkel-Meadow and B Garth, 'Civil Procedure: Policy, Politics and People' in P Cane and H Kritzer (eds), *Oxford Handbook of Empirical Legal Research* (Oxford, Oxford Press, 2010).

case loads in the courts, touted the advantages of more responsive, private forms of dispute resolution in out of court negotiation, mediation and other forms of dispute resolution. The US Congress appropriated money for ‘neighborhood justice centers’ which were to deal with ‘minor disputes’, using both lawyers and non-lawyer mediators for such matters as neighbourhood disputes, minor (misdemeanour) crimes, small commercial disputes, landlord–tenant disputes and a variety of other matters. Restorative justice, in the form of victim–offender mediation, ‘healing’ and ‘sentencing circles’, were derived from American (and Canadian and Australian) indigenous (‘Indian’) groups to provide community-based alternatives to criminal punishment, especially, but not exclusively, used for juvenile offenders. Such efforts at community-based restorative justice are now used even in felony and serious crimes in a few pioneering states (eg Wisconsin).⁸² National level processes, in other countries, are now used for restorative justice in the form of truth and reconciliation commissions, supplemental to or substitutive for formal adjudication in post-conflict, post-civil war and acknowledgement of national wrongs (eg Canada Indian Residential Schools Truth and Reconciliation Process⁸³), but so far have been rejected with respect to the American experience of slavery, destruction of indigenous communities and other national or government supported harms.

Specialised areas of law, like family law and labour law,⁸⁴ had long used informal processes, like negotiation and mediation, for dispute resolution, but the practices of both family and labour mediation began to be applied and opened out to a greater variety of legal (class actions, torts and contracts claims), political (resource allocation, environmental disputes, local government disputes) and social disputes (community policing, racial tensions, ethnic tensions, educational institutions). Lawyers and law students, as well as other professionals, began to seek training in mediation and the ‘healing arts’, as well as continuing study of more conventional litigation skills. To date, however, there is virtually no official licensing or credentialing for mediators or other dispute resolution professionals.⁸⁵

Perhaps most interestingly, various forms of ‘informal’ dispute resolution have been used to great effect in ‘extra-, non- or il-’ legal enterprises. The film *The Godfather* dramatised the use of ‘elder’ mediation in resolving disputes within the ‘*cosa nostra*’ (Mafia) and, more recently, sociologist Sudhir Venkatesh gained access to both internal gang mediation and informal ‘community policing’ mediation of gang-related disputes in Chicago, within gangs and in relations that gang members have with the larger community.⁸⁶ I have come to call this form of informal dispute resolution A² (*alternative alternative*) Dispute Resolution, having learned some years ago about the effectiveness of gang leaders in mediating disputes in the *favellas* of Rio de Janeiro.⁸⁷

Those who were dissatisfied with the ‘limited remedial imaginations’ of courts’

⁸² J Geske, ‘Why Do I Teach Restorative Justice to Law Students’ (2005) 89 *Marquette Law Review* 327.

⁸³ P Regan, *Unsettling the Settler Within: Indian Residential Schools, Truth Telling and Reconciliation in Canada* (Vancouver, University of British Columbia Press, 2010).

⁸⁴ C Menkel-Meadow, ‘The National Labor Relations Act Legacy: Collective or Individual Dispute Resolution or Not?’ (2011) 26 *ABA Labor & Employment Journal* 249.

⁸⁵ A few states (eg Florida, Texas, Massachusetts, California) require some limited training and certification to perform mediation or other dispute resolution services in the courts, but not in private practice.

⁸⁶ Venkatesh, *Gang Leader for a Day* 96–111, 158–63.

⁸⁷ First National Congress of Mediation, Brasília, Brazil, March 2008.

limited power to order creative relief⁸⁸ or the 'adversarial culture' of legal problem solving,⁸⁹ and others who wanted to encourage more direct party participation without the need for professionals (lawyers and judges) in dispute resolution, combined to form what was later called the 'informal justice movement'.⁹⁰ This social movement encouraged individuals and communities to seek resolution of social, political, economic and even legal problems outside of the courts, using community mediation, consensus building, group organising and strategies that allowed more than two parties to seek resolution of problems by negotiated and 'consensual', not court-commanded, solutions. In the private corporate sector, hundreds of Fortune 500 companies and their large law firms signed the 'Center for Public Resources Pledge' to pursue out of court dispute resolution procedures with each other before continuing or initiating litigation. Over time, these 'informal' processes were criticised for 'privatising' justice that many thought should remain in the public and formal sector⁹¹ for transparency of process, generation of public precedential rulings and equalisation of unequal power or economic endowments. Others, including this author, continued to maintain that some aspects of 'informal' dispute resolution (absence of some formal rules, confidentiality, 'trading of preferences', creation of new party-specific norms and tailored solutions to problems) produced better 'justice' for some, if not all, disputants. Thus, core claims of value for 'informal' justice included:

- Direct *party empowerment and participation* in case 'presentation' and resolution
- *Self-determination*
- *Consent*
- *Tailored solutions*, based on party needs and interests, not necessarily 'rights' and claims of law (utilising tailored individual, religious, ethical or communitarian principles for resolution, eg 'joint custody' in divorce and children's custody)
- *Non-monetised outcomes* and solutions (apologies, trades, in-kind, other forms of 'relief')
- *Future*, not just past, *oriented problem solving*, without need necessarily of fact finding or assessment of blame
- *Confidentiality*, producing the opportunity for changed 'positions', trades and non-precedential accommodations or solutions, as well as *privacy* protection for disputants of all kinds, individuals and organisations
- Inclusion of more than two litigant 'parties in interest' (*multi-party dispute resolution*)
- *Reduction of elite and professional decision makers* in parties' lives and disputes, utilisation of party 'consent', not command, as legitimating value
- *Flexible, situation specific, rules* and practices of proceedings
- *Contingent solutions* (capable of being revisited with changing conditions) without precedential force or rigidity

⁸⁸ See C Menkel-Meadow, 'Toward another View of Legal Negotiation'.

⁸⁹ R Kagan, *Adversarial Legalism: The American Way of Life* (Cambridge, MA, Harvard Press, 2001); D Tannen, *The Argument Culture: Moving from Debate to Dialogue* (New York, Random House, 1998).

⁹⁰ See Abel, *The Politics of Informal Justice*; Harrington, *Shadow Justice*.

⁹¹ See, eg Abel, *The Politics of Informal Justice*; Resnik, 'Managerial Judges'; Luban, 'Settlements and the Erosion of the Public Realm'; Fiss, 'Against Settlement'.

- ‘Reorientation’ of the parties to each other⁹²—promoting healing relationships, not rupture and continued conflict and resentment of formal litigation or punitive results in criminal matters⁹³
- Potentially faster and cheaper dispute resolution (‘efficiency’)
- Greater legitimacy of and compliance with party-chosen outcomes

The relative success and power of some forms of informal processes led, beginning in the 1980s, to adaptations and transformations of private informal processes like negotiation, mediation and arbitration, and their hybrids, to use in more public settings—thus courts began to ‘annex’ mediation and arbitration processes (and in some cases to make them mandatory), business began to formalise, in contracts, uses of mandatory arbitration, and a variety of organisations began to ‘internalise’ and mandate the use of informal grievance processes as a condition precedent of any recourse to public and formal litigation processes. At the same time, even formal public court processes began to use and transform themselves into more ‘informal’ processes such as ‘problem-solving courts’ in drug, youth, family, mental health and vice courts,⁹⁴ the pre-trial settlement conference morphed into a mediation session,⁹⁵ and multi-party participatory consensus building fora turned into public ‘negotiated rule-making’ proceedings in administrative and regulatory law and proceedings,⁹⁶ all of which eventually received legal recognition in formal rules and legislative authorisations.⁹⁷ Uses of informal negotiation and dispute resolution processes (hybrids of mediation and arbitration) were increasingly used to settle mass class actions in tort, consumer law, securities, employment and other matters,⁹⁸ and even single dramatic mass disasters like the deaths arising out of the 11 September 2001 terror attack on New York⁹⁹ were dealt with by use of informal settlement processes with public funds and public recognition. The ‘informal’ has become ‘semi-formal’.

IV. ‘SEMI-FORMAL’ JUSTICE IN THE US

With the expansion and acceptance of ideas of informal consensual problem solving and dispute resolution in the early 1990s, all branches of the US government responded. Courts began, at both federal and state levels, to offer, at first voluntary, then later mandatory, programmes of court-annexed mediation and arbitration processes, and

⁹² See, eg L Fuller, ‘Mediation: Its Form and Its Functions’ (1971) 44 *Southern California Law Review* 305.

⁹³ M Umbreit, *The Handbook of Victim–Offender Mediation* (San Francisco, Jossey Bass, 2000).

⁹⁴ Center for Court Innovation, *2011 Annual Report* (New York, 2011); G Berman and J Feinblatt, *Good Courts: The Case for Problem Solving Justice* (New York, New Press, 2005).

⁹⁵ R Wissler, ‘Court-Connected Settlement Procedures: Mediation and Judicial Settlement Conferences’ (2011) 26 *Ohio State Journal on Dispute Resolution* 271; P Robinson, ‘Judicial Settlement Conference Practices and Techniques’ (2009) 33 *American Journal of Trial Advocacy* 113.

⁹⁶ P Harter, ‘Negotiating Regulations: A Cure for the Malaise?’ (1982) 71 *Georgetown Law Journal* 1; J Freeman, ‘Collaborative Governance in the Administrative State’ (1997) 45 *UCLA Law Review* 1.

⁹⁷ See Menkel-Meadow, Love, Kupfer Schneider and Sternlight, *Dispute Resolution* ch 12 and 13.

⁹⁸ D Hensler, ‘A Glass Half Full, a Glass Half Empty: The Use of Alternative Dispute Resolution in Mass Personal Injury Litigation’ (1995) 73 *Texas Law Review* 1587; C Menkel-Meadow, ‘Ethics and the Settlement of Mass Torts: When the Rules Meet the Road’ (1995) 80 *Cornell Law Review* 1159.

⁹⁹ K Feinberg, *What’s A Life Worth? The Unprecedented Effort to Compensate the Victims of 9/11* (New York, Public Affairs, 2006).

later included such processes as 'early neutral evaluation' (a process in which counsel in a case meet with a volunteer or paid lawyer to review claims, schedule discovery and information exchange, pursue settlement and get an informal 'evaluation' of the merits of the case). A few innovative judges, like Thomas Lambros in Ohio and Jack Weinstein in New York, began to adapt private settlement techniques for public cases. Lambros originated the 'summary jury trial' in which lawyers (and witnesses) presented shortened versions of their cases (usually in no more than one day) to those in the jury *venire* for an 'advisory opinion' by the jurors for use in further case settlement negotiations. This practice was criticised as conflating the public function of the jury,¹⁰⁰ whose members came to court expecting to find facts in a litigated case, and instead were used to assist private negotiation discussions. Summary jury trials were often used in high-value fact disputes (asbestos and other mass claims) in order to set baseline lay fact evaluations of the quality of formal proof and evidence. When some judges ordered the use of this process in individual cases (eg civil rights) against the will of the parties, litigants began to appeal to higher courts and the process has declined in usage in recent years. Legal questions also were raised about whether there could be public access to these proceedings, which were a hybrid of private negotiations, but conducted in a public courtroom.¹⁰¹

Federal District Judge Jack Weinstein, among others, used the formal Civil Procedure Rule permitting the use of Special Masters (Fed R Civ Proc 53) to organise discovery and case evaluation in complex cases (also asbestos and other mass claims and class actions, as in the famous Agent Orange case¹⁰²) and then permitted special masters (such as the now similarly famous Ken Feinberg, special master of the 9/11 Fund) to act as mediators in settling such cases, with some controversial imprimatur of the judicial office.¹⁰³

The 1980s and 1990s saw modification of the Federal Rules of Civil Procedure to allow the use of some of these settlement practices (Rule 16 was amended to make negotiation of settlement an explicit part of the pre-trial conference and many federal courts used the local rule power of Fed R Civ Proc 83 to craft local rules for the use of ADR in 'court annexed' programmes).¹⁰⁴ The federal courts in New York City, San Francisco, Boston and Washington, DC were among the early pioneers of complex menus of ADR choices and requirements to use some form of ADR.¹⁰⁵ Now, by virtue of federal legislation, the Civil Justice Reform Act of 1990 (requiring all federal courts to implement some cost and delay ameliorative programmes), the Judicial Improvements and Access to Justice Act of 1988 (allowing experimentation with mandatory arbitration in federal courts), the Administrative Dispute Resolution Act of 1990 (authorising the use of negotiated rulemaking processes in administrative regulation) and, finally, the Alternative Dispute Resolution Act of 1998 (requiring all federal courts to implement some programme of ADR, while allowing each district court to decide

¹⁰⁰ R Posner, 'The Summary Jury Trial and Other Methods of Alternative Dispute Resolution: Some Cautionary Observations' (1986) 53 *University of Chicago Law Review* 366.

¹⁰¹ *Cincinnati Gas & Elect Co v General Electric Co*, 854 F 2nd 900 (6th Cir 1988).

¹⁰² P Schuck, *Agent Orange On Trial* (Cambridge, MA, Harvard Press, 1988).

¹⁰³ J Weinstein, *Individual Justice in Mass Tort Litigation* (Evanston, Northwestern Press, 1995).

¹⁰⁴ J Maull, 'ADR in the Federal Courts: Would Uniformity Be Better?' (1996) 34 *Duquesne Law Review* 245.

¹⁰⁵ See, eg ND California Rules of ADR.

what is best for its region), virtually every federal court in the US has some form of ADR. These courts report on the usage rates of mediation, arbitration, and settlement programmes in a non-uniform manner. Statistical reports available from many of the most populous states (including New York, California, Texas and Michigan; see below) demonstrate high usage of a variety of non-trial forms of dispute resolution, within the formal court, with 'settlement rates' ranging from 30 per cent to over 70 per cent in some courts. Virtually all of the federal courts of appeals now have formal mediation programmes, most with full-time staffs, a few relying on volunteer mediators¹⁰⁶ (this author has been a mediator in the District of Columbia Circuit Court of Appeals and has also trained the staff and volunteer mediators, as well as judges, in many federal courts).

Even the executive branch of the US government strongly encouraged use of ADR. During President Clinton's presidential term, Attorney General Janet Reno required mediation training of herself and her senior staff (I performed this training), authorised an 'ADR czar' position in the Justice Department, currently the Program of Dispute Resolution in the Justice Department, allocated funds for the settlement of cases involving the federal government, and changed policies having to do with federal government participation in arbitration and mediation programmes. In addition, an Interagency ADR Working Group representing all the major federal agencies began to meet regularly to discuss dispute resolution programmes throughout the federal government. Many agencies now provide for 'collateral duty' in which employees in one agency act as mediators or dispute resolution consultants to other agencies in the government (thus providing some neutrality and lack of conflict of interest in internal agency matters). An awards programme honoured such branches of the government as the Army Corps of Engineers and the Navy for instituting non-litigation dispute resolution processes in procurement contracts, and later even in dispute resolution issues in war zones.¹⁰⁷ In addition, many federal agencies now have internal dispute resolution programmes, including ombuds to resolve internal conflicts¹⁰⁸ (employment, policy), as well as to deal with disputes with clients or customers of particular agencies (eg Environmental Protection Agency, Securities and Exchange Commission, National Institutes of Health, Department of Energy).

These uses of 'informal' dispute processes within the formal government are one form of 'semi-formal' dispute resolution, sometimes, but not always, authorised by regulation, at other times just by agreed-to practices or recommendations. Practices can change with the change of political administration. To what extent should formal rules of procedure, requirements of transparency, publicity, rule of law, appeals from decisions or mediation or negotiated agreements be applied to such processes? To what extent are such processes really 'consensual'? And if, instead, they are 'mandated', what redress is there to formal courts? Finally, questions have been raised about whether these processes really do live up to their promises and intended goals.

In the middle of the 1990s, the federal government supported a major \$5 million research programme (funded by the RAND Corp) to determine if ADR in the courts

¹⁰⁶ SP Davidson, 'Privatization and Self-Determination in the Circuits: Utilizing the Private Sector within the Evolving Framework of Federal Appellate Mediation' (2006) 21 *Ohio Journal of Dispute Resolution* 1.

¹⁰⁷ J Joseph, 'Mediation in War: Winning Hearts and Minds Using Mediated Condolence Payments' (2007) 23 *Negotiation Journal* 219.

¹⁰⁸ H Gadlin, 'The Ombudsman—What's In a Name?' (2000) 16 *Negotiation Journal* 37.

really did ‘reduce cost and delay’. The results were decidedly mixed and controversial. RAND found that there was little actual reduction in cost and delay in courts that used mediation, arbitration or early neutral evaluation processes,¹⁰⁹ but the RAND study itself was criticised for studying a moving target. Many of the courts in the study were changing their policies to conform to the legislation discussed above as the study was ongoing. Courts in the federal system that were ‘matched’ because of similar caseloads for comparison and ‘control’ purposes were, in fact, quite different, geographically, culturally and in terms of their caseloads.¹¹⁰ At the same time as the RAND study was conducted, a smaller study, also funded by the federal government (by the Federal Judicial Center), did find that certain ADR practices in the courts were effective in reducing time to trial and total costs for final dispute resolution.¹¹¹ Both studies found considerable user satisfaction with different court-based dispute resolution options, even where respondents had no comparison base because they could not take their single dispute to different or controlled treatments for comparison.¹¹² Thus, the effectiveness, efficiency and efficacy of ADR in the courts, as compared to an ever-shrinking number of cases actually tried in courts (what is an appropriate ‘baseline’ measure of ‘normed’ dispute resolution?), continues to be vociferously contested and debated among legal practitioners and scholars.

As the courts and formal governments have made more use of informal processes, there has also been a growth and extension of informal processes becoming more ‘semi-formal’ in the private sector. With the modern growth of ADR in the 1980s, the prime movers were actually large American corporations which, in 1979, founded the Center for Public Resources to promote the uses of mediation, arbitration and other private consensual processes in American business.¹¹³ Commercial arbitration has always been a common way to resolve disputes among and within participants in the same industry,¹¹⁴ but in the 1980s large corporations, through CPR, signed a ‘pledge’ to pursue ADR first when disputing with each other (within and across industries). Though not all members were compliant—many corporations continued to use traditional lawsuits—CPR used its bully pulpit and private funds to promote the use of both traditional forms of ‘ADR and help develop new ones—such as the ‘mini-trial’. The mini-trial allowed private companies (the first big case was *TRW v Telecredit* in

¹⁰⁹ J Kakalik, T Dunworth, L Hill, D McCaffrey, M Oshiro, N Pace and M Vaiana, *An Evaluation of Mediation and Early Neutral Evaluation Under the Civil Justice Reform Act* (Santa Monica, RAND, 1996).

¹¹⁰ C Menkel-Meadow, ‘When Dispute Resolution Begets Disputes of its Own Conflicts among Dispute Professionals’ (1997) 44 *UCLA Law Review* 1871; E Plapinger and D Stienstra, *ADR and Settlement in the District Courts* (Washington, DC, Federal Judicial Center, 1996); C McEwen and E Plapinger, ‘RAND Report Points Way to Next Generation of ADR Research’ (1997) 10 *Dispute Resolution Magazine*.

¹¹¹ D Stienstra, M Johnson, P Lombard and M Pecherski, *Report to the Judicial Conference Committee on Court Administration and Case Management: A Study of Five Demonstration Programs Established Under the Civil Justice Reform Act of 1990* (Washington, DC, Federal Judicial Center, 1997).

¹¹² EA Lind, R MacCoun, P Ebener, W Felstiner, D Hensler, J Resnik and T Tyler, *The Perception of Justice: Tort Litigants’ Views of Trial, Court-Annexed Arbitration and Judicial Settlement Conferences* (Santa Monica, RAND, 1989).

¹¹³ CPR’s private corporate strategy was picked up in the UK with Karl Mackie’s founding of CEDR (Center for Effective Dispute Resolution, <www.cedr.com>) in London, and now the International Mediation Institute, <www.immediation.org>, headquartered in the Netherlands, as an attempt to promote and certify commercial and ‘cultural’ competence in mediation (encouraged by the passage of the European Directive on Mediation 2008/52 Directive of the European Parliament and Council, 21 May 2008).

¹¹⁴ See, eg L Bernstein, ‘Opting Out of the Legal System: Extralegal Contractual Relations in the Diamond Industry’ (1992) 21 *Journal of Legal Studies* 115.

a patent infringement dispute) to privatise their dispute (protecting confidentiality of evidence, trade secrets, customer lists, experts), choose the decision makers (expert arbitrators or facilitative mediators) and the form of process (negotiation, mediation and witness examination), and control costs and evidence presented. Mini-trials were used in a wide variety of large cases in the 1980s and 1990s, concurrent with continued use of courts in cases where large companies were sued by customers or in class action securities, mass torts, consumer or employment matters. Most recently CPR has developed a new pledge for the twenty-first century, encouraging corporations, in times of economic downturns, to develop more 'systematic approaches' to dispute resolution management, as a good business management principle—encouraging more system design of iterative dispute resolution, more early dispute settlement, and recognition that there are many possible ways to resolve corporate disputes outside of costly litigation, including internal conflict audits, accountability for dispute costs to functional, not legal units, and other business management devices.¹¹⁵

Thus, private ADR was often combined with public ADR and different processes are selected for use against and with different classes of parties. In general, many courts allowed stays of public litigation while parties pursued various forms of private ADR. CPR, as well as the American Arbitration Association, another private provider of dispute resolution services, also developed formal protocols for industry-wide and specific forms of dispute resolution—thus, oil and gas, franchise, construction, health care and hospital, labour management, mass disasters, environmental, pharmaceutical and other industry-specific 'model rules and clauses' for dispute resolution were drafted and disseminated. In some industries, the success of these private protocols and 'model rules' provides a fully formalised alternative to the public justice system.

In addition to these private tribunals serving industry, several new providers of dispute resolution services emerged in the 1980s. The Judicial Arbitration and Mediation Service (now known solely by its acronym JAMS) was founded by a state court judge in California who retired from the bench to found one of the most successful purveyors of private dispute resolution services, now serving all the major commercial centres in the US (and now including offices in many world capitals) and beginning to compete with the international tribunals (the International Chamber of Commerce in Paris, the London Court of International Arbitration, the AAA's Center for International Dispute Resolution, the Hong Kong, Cairo and Stockholm tribunals for international dispute resolution) for arbitration and mediation services. Former judges and private attorneys now earn upwards of \$5,000 per day for private dispute resolution services.

In international settings, arbitration may be enforced in national courts where countries have signed on to the UN New York Convention for the Recognition and Enforcement of Foreign Arbitral Awards (1958); domestically enforcement is through the Federal Arbitration Act, as if a court judgment has been rendered (with a limited number of grounds for vacatur). In contrast, mediation agreements in the US have no more formal legal force than a contract and must be sued on for enforcement as with any private contract. This is in contrast to some other countries (eg Israel) which now treat mediation agreements, in some settings, as if they were arbitration awards, with relatively easy enforcement in courts.

¹¹⁵ 'CPR Launches 21st Century Corporate ADR Pledge', *National Law Journal*, 21 January 2013.

As commercial arbitration has emerged as an important (but still not the only preferred) form of dispute resolution¹¹⁶ between and among commercial parties, large companies, in fields ranging from telecommunications to health and hospitals, banks, car rentals and computers, etc, have now imposed mandatory 'private' arbitration on consumers and employees, a practice that has been sustained against many legal attacks, by the US Supreme Court.¹¹⁷ The US is an outlier in permitting this form of private dispute resolution to be mandated in private contracts, without, so far, guaranteed recourse to a public court challenge, except in a few limited instances. Even claims of unconscionability or other coerced contract defences have been rejected in this context. Thus, 'informal' private contractual arbitration (often dictated by the terms of a form contract written by a powerful corporation) has become the 'norm' for many kinds of disputes. Recently a courageous (former lawyer) individual complainant tried to use a small claims court as a way around some of the contractual limits of arbitration and class action litigation. Her victory in the small claims court was reversed on appeal taken by the losing company (Honda).¹¹⁸ There have been increasing efforts to attempt to regulate private consumer and employment arbitration (so far through unsuccessful efforts to pass federal legislation, the Arbitration Fairness Act, prohibiting the use of mandatory pre-dispute contractual arbitration in consumer, employment and franchise disputes). A few states (like California) have managed to add a few protections for consumers (conflicts of interest of arbitrators) through civil procedure rules or other state legislation (which is now often invalidated in federal court as pre-empted by the Federal Arbitration Act). This attempt to 'regulate' consumer arbitration has, however, also led to some efforts in the private sector to make consumer or employment arbitration subject to some basic 'due process protocols'.¹¹⁹

In addition to private contracting, both at the industry and individual level, smaller communities have also continued to use informal out of court processes in a variety of contexts. Religious and ethnic groups have long offered their own courts, mediation and arbitration services for disputes within their own communities. Recently, tensions have been exposed when, as in family law, the formal court must still be the final authority on divorce or spousal or child support, when one party asks for acceptance of the agreement of a religious court, or when one party seeks public court orders to require another party to satisfy legal requirements of the religious court for secular benefit.¹²⁰ The interplay of private religious courts and doctrines for dispute resolution has become a legal issue in a variety of multi-cultural nations, including

¹¹⁶ T Eisenberg and G Miller, 'The Flight from Arbitration: An Empirical Study of Ex Ante Arbitration Clauses in the Contracts of Publicly Held Companies' (2007) 56 *DePaul Law Review* 3335 (finding that many large companies are not using arbitration clauses in their contracts with each other, though they are often imposing such clauses on their contracts with individual consumers).

¹¹⁷ See J Sternlight, 'Creeping Mandatory Arbitration: Is It Just?' (2005) 57 *Stanford Law Review* 1631. See, eg *AT&T v Concepcion*, 131 Sup Ct 1740 (2011).

¹¹⁸ J Hirsh, 'Honda Civic Loses Unusual Small Claims Suit (to Heather Peters)', *Los Angeles Times*, 1 February 2012, Business Section, 1.

¹¹⁹ See, eg Employment Due Process Protocol; J Dunlop and A Zack, *Mediation and Arbitration of Employment Disputes* (San Francisco, Jossey Bass, 1997); C Drahozal and S Zyontz, 'Private Regulation of Consumer Arbitration' (2011), <ssrn.com/abstract=1904545>.

¹²⁰ See, eg Helfand, 'Religious Arbitration and the New Multi-culturalism'; M Grossman, 'Is This Arbitration? Religious Tribunals, Judicial Review and Due Process' (2007) 107 *Columbia Law Review* 169; CL Wolfe, 'Faith Based Arbitration: Friend or Foe?' (2006) 75 *Fordham Law Review* 427.

the US, Canada,¹²¹ the UK and Australia in the common law world and France and other legal regimes in Asia and Europe. Recently, several states in the US (Oklahoma, Arizona and Nebraska) famously used their ‘democratic’ referenda and legislative processes to ban the use of ‘foreign, international or *Shar’ia* law’ in their state courts.¹²² Many other states (eg Alabama, Texas, South Carolina, Wyoming and South Dakota) are attempting in one form or other to do the same thing. Most of us in the legal academy and many, but not all, of those on the bench (the judiciary) believe these laws are unconstitutional, but they represent a strong sentiment to police the use of communitarian, religious and ethnic enclaves’ use of their own formal rules and laws, as well as processes. Religious courts or arbitration or mediation centres in family matters are used by Jews (Bet Din¹²³), Christians¹²⁴ and Muslims,¹²⁵ and for the most part have had their outcomes confirmed by courts which apply the regular standards for enforcing arbitration awards under the Federal Arbitration Act.

Local communities have also used informal processes (consensus building, deliberative democracy, public policy mediation¹²⁶) to resolve land use, environmental, cultural and ethnic conflict, budget allocation and other disputes, outside of formal processes. With a new cadre of professionals specifically trained to engage complex communities in such disputes and group decision making, complex multi-party disputes may be resolved with agreements, often contingent, and monitoring programmes (such as in resource management, land use and zoning, waste siting) which straddle public and private decision making rules and bodies.¹²⁷ The legal issue often then involves whether a public body, such as a regional zoning land-use or federal resource agency, must participate and approve agreements reached in private settings, outside of formal court, legislative or administrative hearings. These processes may themselves now be quite ‘formal’, adhering to community developed rules of engagement, delegation of state, federal or local authority, but such negotiated agreements still often require formal governmental approval, and what was accomplished through these creative informal processes may unravel when returned to more formal and adversary proceedings.¹²⁸

Thus, the conundrums, paradoxes and issues in these ‘semi-formal’ forms of dispute resolution include the relation of the private form of dispute resolution and its ‘outputs’ or agreements to the state—when and if one party seeks to move dispute resolution from one sector to the other—for appellate review, appeal to public or state

¹²¹ The Premier of the province of Ontario in Canada sought to ban the use of faith-based family arbitration in his jurisdiction, see Helfand, ‘Religious Arbitration and the New Multi-culturalism’ fn 30, while the Archbishop of the UK called for the inclusion of *Shar’ia* law in British family law determinations. *Ibid.*

¹²² This referendum has been held to be unconstitutional, see *Awad v Ziriax* No CIV-10-1186-M 2010 WL 4814077 (WD Oklahoma).

¹²³ See, eg *Kingsbridge Ctr of Israel v Turk*, 469 NYS 2d 732 (App Div 1983); *Kovacs v Kovacs*, 633 A 2d 425 (Md 1993).

¹²⁴ G Waddell and J Keegan, ‘Christian Conciliation: An Alternative to “Ordinary” ADR’ (1999) 29 *Cumberland Law Review* 583.

¹²⁵ *Abd Alla v Mourssi*, 680 NW 2d 569 (Minn Ct of App 2004).

¹²⁶ S Carpenter and WL Kennedy, *Managing Public Disputes: A Practical Guide for Professionals In Government, Business and Citizen Groups* (San Francisco, Jossey Bass, 2001); SL Podziba, *Civic Fusion: Mediating Polarized Public Disputes* (Chicago, ABA Press, 2012).

¹²⁷ C Menkel-Meadow, ‘Getting to Let’s Talk: Commentary on Collaborative Processes in Environmental Dispute Resolution’ (2008) 8 *Nevada Law Journal* 835.

¹²⁸ See, eg A Camacho, ‘Mustering the Missing Voices: A Collaborative Model for Fostering Equality, Community Involvement and Adaptive Planning in Land Use Decisions, Installment Two’ (2005) 24 *Stanford Environmental Law Journal* 269.

values, or to get state enforcement of relief or to reverse what was accomplished in the more informal process.

V. WHAT LITTLE WE KNOW ABOUT DISPUTE RESOLUTION USE AND
REGULATION

Since the beginning of the modern ADR movement in the US, scholars have called for the ability to empirically study and assess claims made about the relative uses and satisfaction with such processes. Evaluation research (such as in the RAND studies reported above) has sought to look at comparisons between different processes. Social scientists at the Federal Judicial Center have long urged uniform reporting requirements and uniformity of case types and categories on case dockets for comparisons between cases and types of process and for accurate time series to study developments over time. Alas, such uniformity of data reporting does not, for the most part, exist, even within the federal system. Much like the US Census, which has changed its categories of 'nationality' in almost every decennial census,¹²⁹ case categories, dispositions and other reported information are ever changing. Below, I report on some of the available data from both court (public) and a few private sources.¹³⁰

I reviewed a sample of federal and state court ADR systems for whatever data were available on cases actually referred to ADR and whatever data were available on dispositions. The data available are scanty (it appears the Administrative Office of the Courts at the federal level is not keeping track of ADR statistics by court on a regular basis). Courts vary on their requirements to use some form of ADR (based on local rules, local legal cultures and interpretations of the requirements to provide some form of ADR in all federal cases, as now required by the Alternative Dispute Resolution Act of 1998—which 'required' use of some form of ADR in every federal court, but provided no funding appropriation for this purpose). Examples of the kind of information that has been collected are the rates of mediation success in some courts. For example, the Eastern District of New York (including two counties of New York City and the rest of Long Island) tracks mediation success rates by case type. Successful mediations resulting in settlement vary by case type, ranging (for a seven-year reporting period from 2003 to 2010) from 38.5% in employment discrimination, 36% in other civil rights, 43% in personal injury matters, 32% in contract disputes and 51% in insurance matters to a much lower rate for intellectual property matters (22% in trademark, 30% in copyright and a low of 13% in patent cases). The Western District of Missouri (another relatively active district in ADR) offers voluntary facilitative mediation, early neutral evaluation, case evaluation and settlement conferences with most usage of settlement conferences (54%); followed by mediation (34%) and lower rates of utilisation of neutral case evaluation.

Over time, use of (voluntary) mediation has increased somewhat in federal courts offering such processes; early neutral evaluation practices are used, though only in a

¹²⁹ N Mezey, 'Erasure and Recognition: The Census, Race and the National Imagination' (2003) 97 *Northwestern University Law Review* 1701.

¹³⁰ An earlier paper of mine reports summarily on empirical research to date on dispute resolution, Menkel-Meadow, 'Dispute Resolution'.

few courts, and are the least used in courts that provide a fuller menu of choice (the Northern District of California (federal) and state courts in Michigan were primary innovators in this evaluative form of ADR), and settlement conferences (with judges or magistrate judges) remain the most common form of ADR in the federal courts. A few courts (a federal statute provided legal support for experimental, now permanent, arbitration programmes for five federal districts) require mandatory arbitration of civil cases below a certain value. The arbitrators are volunteer panel lawyers and ‘appeals’ from those arbitrations are de novo to trial, with a ‘penalty’ of costs if the appellant does not do better at trial than in the arbitration. These practices have been challenged in the US as violating the constitutional ‘right to jury’ in civil cases under the Seventh Amendment, but these challenges have failed as long as some ability to go to trial *after* arbitration is still permitted, even if it is ‘taxed’ with a bond or penalty payment.¹³¹ Offers of settlement under Rule 68 of the Federal Rules also ‘tax’ refusals to settle by requiring any party to whom a settlement offer is made and refused to pay legal fees and costs if that party does not do better than the settlement offer at trial.

All federal courts of appeal now offer mediation before argument; all but one circuit now employs paid staff mediators. The District of Columbia (in the nation’s capital) still relies on volunteer lawyers. It is difficult to compare numbers and practices in particular districts because processes vary so much. Virtually all federal courts rely on unpaid lawyers to conduct ADR sessions, with the exception of mandatory settlement conferences which are conducted either by full Article III (life-time appointed) judges or statutory magistrate judges. Whether such court adjunct personnel should be paid from public funds remains a controversial issue. A few district court rules provide for the parties to pay fees for mediators beyond a certain minimal period of mediation (usually one day or more than five hours). Different courts provide for different forms of training and assessment of such court adjuncts, and there has been concern about addition to or removal from the ‘rolls’ of this prestigious ‘federal’ listing, often used for career enhancement.

What should be clear from this simple report is that there is a profound irony in federal ADR—when the 1938 federal rules of procedure were enacted the idea was for some uniformity of federal procedural rules in civil matters; the reality with respect to ADR practice is that it varies enormously by local rule, local legal culture and practice.¹³²

At the state level, most states do provide some statistical summaries of the uses of various forms of ADR, but methods of data collection, categories about which data are collected and outcome measures vary considerably. For example, Florida, which is another state which pioneered use of ADR (and provides rules for training and credentialising of its court mediators), reports extensive data by district (circuit) within the state (documenting great local variations in use of ADR) on case types ordered to ADR (mediation primarily with some arbitration and abandonment of another form

¹³¹ See D Golann, ‘Making Alternative Dispute Resolution Mandatory: The Constitutional Issues’ (1989) 68 *Oregon Law Review* 487; L Bernstein, ‘Understanding the Limits of Court-Connected ADR: A Critique of Federal Court-Annexed Arbitration Programs’ (1993) 141 *University of Pennsylvania Law Review* 2169. These rulings of American courts are analogous to recent European courts rejecting claims that mandatory ADR referrals might violate Art 6 of the European Convention on Human Rights.

¹³² See J Maull, ‘ADR in the Federal Courts: Would Uniformity be Better?’ (1996) 34 *Duquesne Law Review* 245.

of ADR, summary jury trial formerly used in Florida¹³³) and ratios of cases ordered to ADR with ADR actually conducted, ranging by case type and locale from a low of about 33% to close to 100%, evidencing great variations in the acceptance of ADR local 'cultures'. New York reports that, for a seven-year reporting period (2002–09), close to 300,000 cases in the state were submitted to some form of ADR, also with great variations by city and county (eg 80,000 for New York City and less than 100 for Hamilton County, a more rural county). The percentage of cases resolved by some form of ADR in this same period ranged from 45% for the whole state to 41% for New York City and a low of 16% in Saratoga, with highs as much as 60–70% in some counties (including Westchester, a suburban county just north of New York City, which has been an active locale for training mediators). Massachusetts, another state active in promoting ADR reports high settlement rates of cases, without allocating reports to particular ADR processes.

States vary considerably in the rules and regulations promulgated for use of ADR, ranging from mandatory assignments for all cases under a particular monetary amount, particular case types, exceptions for some case types (eg common exclusions for constitutional cases, prisoner's rights, social security cases), to court informal referrals or compelled order to ADR after settlement conferences, voluntary selection or mandated referral in particular matters (eg in medical malpractice, some form of ADR is often required as a condition precedent for bringing a lawsuit). States vary in their practices as to whether they use 'opt-out' rules (all cases under certain values automatically subjected to some form of mediation or ADR, unless the parties have a good reason for opting out) or 'opt-in' systems in which parties choose to use some form of ADR. There is at present a very robust debate in court practice and the academic literature about which is 'better' for the parties (where party choice is the primary value) or the 'system' (higher settlement rates and reduced costs). Many states have subject-specific statutes requiring informal dispute resolution mechanisms for particular kinds of disputes, often medical malpractice, certain kinds of consumer disputes (eg 'lemon laws' for defective cars or products¹³⁴). As a result of the 2008 economic downturn, it was predicted that there would be an increase in use of various form of ADR as parties could less afford expensive litigation. In 2012, the state of California announced it would close hundreds of local courts in a multi-million dollar budget cut for governmental expenditures. Although many predicted that this would increase the use of mediation, many local jurisdictions, including my own in Los Angeles, also terminated the local court mediation programme to reduce additional court costs.¹³⁵

Many consumer and employment contracts now contain mandatory arbitration clauses, challenges to which have been denied as 'pre-empted' under federal law by the Federal Arbitration Act. A few states, concerned about claimed abuses in some forms of ADR (conflicts of interests of mediators or arbitrators, coerced settlements

¹³³ J Alfani, 'Summary Jury Trials in State and Federal Courts: A Comparative Analysis of the Perceptions of Participating Lawyers' (1989) 4 *Ohio State Journal on Dispute Resolution* 213.

¹³⁴ S Taleh, 'The Privatization of Public Legal Rights: How Manufacturers Construct the Meaning of Consumer Law' (2009) 43 *Law & Society Review* 527.

¹³⁵ Although many decried this action, some private mediators I know think this is a good result as there was little quality control of the state-operated 'volunteer' mediator programme. Private mediators hope that, at least in bigger cases, the parties will now choose the more expensive, but allegedly better quality, private mediation services they provide.

in some court-annexed mediation programmes), have attempted regulation of ADR practice through special rules of procedure (California has conflicts of interests rules for arbitrators in its rules of civil procedure), or in lawyer or other professional ethics codes. The status of state regulation of arbitration is now clouded by a US Supreme Court case which held that the Federal Arbitration Act pre-empts, at the federal level, any effort at state interference with or regulation of arbitration.¹³⁶

Although the use of contractual arbitration has now been federally 'legitimated' by a series of Supreme Court cases sustaining such clauses, how those arbitrations are actually conducted remains essentially private, determined by contractual provisions or by the private rule systems of the leading arbitral tribunals and administering organisations, such as the American Arbitration Association and JAMS. Although some states have attempted to regulate some aspects of arbitration, such as by restricting and limiting its use in some contexts (consumer, employment or other matters), most of those statutes have now been rendered void by the US Supreme court's recent decision in *AT&T Mobility v Concepcion* (holding that a state ruling that class actions in arbitration were permissible was 'pre-empted' by federal arbitration law). In the mediation area there is very little state legislation, except for those states which have provided for confidentiality protections and in some cases, evidentiary privileges for mediators (and/or arbitrators)¹³⁷ (who cannot be called to testify in later formal legal proceedings).

The US does not, at either the federal or state level, regulate who may be an ADR professional—there are no certification or licensing requirements for mediators, arbitrators or others who attempt to resolve disputes 'informally', though, increasingly, some states, eg Florida, Massachusetts and California, do attempt to regulate training and standards for court-adjunct ADR professionals. Mediators and arbitrators in private settings often are non-lawyer professionals such as engineers and architects in construction disputes, accountants in financial and contractual cases, social workers and psychologists in family matters.

Mediation is increasingly used in more and more settings (internal family issues without dissolution, education matters, probate, internal business relationships without lawsuits, organisational dispute resolution) that are far removed from courts and not subject to any reporting or regulatory schemes. Thus, the ability to generate any accurate accounting of just how much mediation or ADR there is is virtually impossible.¹³⁸

Whatever data and formal rules may be available from the formal and 'semi-formal' arenas, the largest sector of 'ADR' is clearly private (involving voluntary and now contractually mandated mediation, arbitration or choices to use some of the newer hybrids), and the private sector remains fiercely private. I have served on various study committees which have attempted to gather data on the use, outcomes and other

¹³⁶ See *AT&T Mobility v Concepcion*, 131 Sup Ct 1740 (2011).

¹³⁷ See, eg Cal Evidence Code §§ 703.5 and 1115–28 (requirements for privilege of mediators and arbitrators not to testify in subsequent litigation and requirements for preserving confidentiality of mediation proceedings).

¹³⁸ See T Stipanowich, 'The Vanishing Trial: The Growth and Impact of Alternative Dispute Resolution' (2004) 1 *Journal of Empirical Legal Studies* 843 (reporting on difficulty of obtaining data on private ADR and reporting a limited set of data sets from a variety of private providers of ADR services such as the American Arbitration Association, etc).

information on private dispute resolution. Although a few studies have now appeared in some sectors (comparative employment arbitral data from the American Arbitration Association and the US Postal Service,¹³⁹ and some data on consumer arbitration),¹⁴⁰ analysing whether employees and consumers fare equitably when disputing with larger companies or 'repeat players'¹⁴¹ (the results are decidedly mixed), most information from the largest private providers of dispute resolution services remains relatively obscure, with no formal requirements to report information. One ADR provider sought to become publicly traded on the New York Stock Exchange, which would have required public disclosures, but that effort proved unsuccessful.¹⁴² Having had some access to some informal data from one of the largest providers of private arbitration and mediation services in the country (JAMS and another private 'firm' providing mediation services) I have seen first hand one aspect of the 'repeat player effect'. Large companies with multiple disputes (in California, the major banks, the major supermarkets, Kaiser Permanente Health Care, Toyota car dealerships, etc) tend to use the same providers over and over again. Thus the providers have some incentive to 'please' their repeat player clients with awards that favour them to continue to receive business. Since all kinds of contracts now provide for arbitration or mediation by some of these major private providers, the 'one-shotters' (consumers, tenants, employees) may not even know how often a provider works for a particular company and will therefore be ignorant of possible biases, incentives, etc. (My own home rental agreement some years ago included a form requiring arbitration with JAMS for any dispute arising under the lease. As a dispute resolution professional, I struck the clause from the contract.¹⁴³)

Thus, to the extent that we know so little about how much arbitration actually occurs and how it is in fact conducted in the private sphere, it is difficult to assess how it should and could be regulated. In the last 15 years a wide variety of consumer and employee representative groups have attempted to pass federal legislation, the Arbitration Fairness Act, to limit uses of mandatory arbitration in a wide variety of contexts, so far to no avail (with the exception of one statute that prevents mandatory arbitration of dealer-franchisee disputes among car manufacturers and dealers; this special statute does not restrict the use of mandatory arbitration for consumer purchases of automobiles!).¹⁴⁴

¹³⁹ See L Bingham, *Mediation at Work: Transforming Workplace Conflict at the United States Postal Service* (Washington, DC, IBM Center for The Business of Government, 2003); L Bingham, 'Employment Arbitration: The Repeat Player Effect' (1997) 1 *Employment Rights and Employment Policy Journal* 189.

¹⁴⁰ Searle Civil Justice Institute, *Consumer Arbitration before the American Arbitration Association* (Chicago, Searle Center on Law, Regulation, and Economic Growth, Northwestern University School of Law, 2009).

¹⁴¹ C Menkel-Meadow, 'Do the Haves Come Out Ahead in Alternative Justice Systems? Repeat Players in ADR' (1999) 15 *Ohio State Journal Dispute Resolution* 19.

¹⁴² Judicate, originally based in Philadelphia, sought to become a publicly traded company in the late 1980s. JAMS, the most successful of private ADR providers remains a private corporation.

¹⁴³ W Glaberson, 'Misuse of Arbitration?', *New York Times*, 1996, 1.

¹⁴⁴ Congress has provided that pre-dispute arbitration agreements are not valid in two instances. The Motor Vehicle Franchise Contract Arbitration Fairness Act of 2001 protects car dealers from arbitration imposed by car manufacturers, but interestingly does nothing to prohibit car dealers from requiring their customers to arbitrate future disputes, as has become common. Another piece of legislation protects members of the military from arbitration imposed by payday lenders. It is 'unlawful for any creditor to extend consumer credit to a covered member or a dependent of such member with respect to which . . . the creditor requires the borrower to submit to arbitration or imposes onerous legal notice provisions in the case of a dispute' (10 USC § 987(e)(3) (2000)).

date?

VI. ASSESSING JUSTICE IN PLURAL PROCEDURAL PRACTICES

Dispute resolution in the US is now characterised by multiple or parallel tracks, what I and others have called ‘process pluralism’. Parties, depending on their economic and legal circumstances, may often choose between formal legal proceedings or less formal forms of dispute resolution. On the other hand, some parties may have no choice at all (such as the ‘helpless’ consumers and employees who are required to agree to mandatory arbitration processes in their form (adhesion) contracts). In many matters, well-endowed disputants may switch from one form of dispute resolution to another—starting with litigation and then shifting to either court-mandated or chosen mediation, negotiation or arbitration, using private or publicly paid-for third-party neutrals. In other cases, parties may choose informal forms of dispute resolution and then seek enforcement of mediation or negotiated agreements or arbitral awards in public courts for enforcement (injunctive relief or execution on assets). The terrain is diverse, uphill, downhill and often rocky for the uninitiated or not so well endowed. Although the ‘ADR’ movement was originally formed to make access to justice easier and to reduce the reliance on legal or other professionals, the truth is that the landscape of disputing has indeed become more and more complex, with the predictions of outcomes, costs and strategies harder and harder to produce with any degree of accuracy.

The field of dispute resolution and litigation in the US now contains both scholars and practitioners who urge the return to courts and trials for more transparency, equalisation of rules and process and general monitoring of both processes and outcomes, many claiming that a trial rate (in civil matters) of less than 2 per cent of all matters filed is an inadequate number for a democratic society to produce legal precedents and fair process. For these commentators, informal or even ‘semi-formal’ process may be considered to be ‘empty suits’ (no visibility or accountability to those outside of the dispute resolution process), to continue the social dressing metaphor. Or, as another critique, one form of dispute resolution may seem to be ‘masquerading’ as another—seeming to have court formality or approval when, in reality, there is little to no (not even ‘informal’) review of what occurs in the dispute resolution process. Others among us, and I am one of those, still prefer to see process pluralism as offering the opportunity for party choice, both about process and about the kinds of outcomes that might be possible (trades, new creative solutions, shared commitments to agreements). I have always preferred a full closet from which to select my clothes for a particular event!

Yet, I remain haunted or affected by Lon Fuller’s claims that each process has its own ‘integrity’ or purpose—one set of values (privacy, on-going relationships, spider web-like intertwined issues in a single problem) for one kind of problem may dictate one kind of process (mediation) that would be inappropriate for another kind of problem (the elimination of injustice in a public institution like education: *Brown v Board of Education*). Thus, Lon Fuller and others would suggest that we should be clear about both the purposes and uses of each process. Attempts to specify in advance particular processes for particular kinds of disputes have not been particularly successful in the US (some courts prohibit the use of ADR in constitutional cases, prisoner’s cases, civil rights matters, *pro se* (self-representation); others do not), in part because, in the hands of skilled parties, lawyers and third-party neutrals, almost any informal or semi-formal process can be made more flexible, cheaper, faster and more creative than formal processes, so process choice and effectiveness often turns

on the particular actors in the process, not on the structure itself. Fuller's attempts to uncover the jurisprudential bases for process choice is now being applied to international or transnational disputing too, where 'the formal' has been even less effective, in public, if not private dispute resolution.¹⁴⁵ Yet, it remains unclear whether it is structure and function or personality¹⁴⁶ that determines how fair, just and effective a particular process is.

Some years ago, when I was consulting for a major international organization, I was asked to develop a formula for assessing the 'success' of any system of dispute resolution. The exercise was instructive for me because I realised that we need both qualitative and quantitative measures of effective dispute resolution, and also that 'measures' of success for a 'system'¹⁴⁷ may be different from measures of 'justice' or 'satisfaction' for disputants or users of any process. I offered the following set of criteria, variables and factors in the assessment of dispute processes (a combination of 'objective' and 'subjective' measures), while recognising that no single study could ever hope to include measures of them all.

Quantitative or "Objective" Measures

- Number of conflicts or disputes in relevant 'universe' (which and how many form into formal claim or complaint)
- Number of contacts or cases (in a particular process, as compared to the full 'universe' of possible cases or comparable cases in another process)
- Numbers of issues
- Number of cases resolved/settled/closed/disposed of ('settlement rates')
- Number of cases referred to another process
- Number of cases dropped
- Case types (categories within systems, eg employment promotion, dismissal, communication, etc)
- Numbers of parties
- Types of agreements, resolutions, outcomes
- Time to process case
- Cost of processing case—to complainant, to third-party neutral, to programme or system
- Comparisons (where possible) of all of the above comparable cases in different systems
- Comparisons of pre-conflict resolution programme claiming (grievance systems, litigation) or violence with post-programmatic claiming
- Comparisons of rates of compliance with agreements, judgments or orders

¹⁴⁵ R Michaels, 'A Fuller Concept of Law beyond the State? Thoughts on Lon Fuller's Contributions to the Jurisprudence of Transnational Dispute Resolution' (2011) 2(2) *Journal of International Dispute Settlement* 417.

¹⁴⁶ D Curran, J Sebenius and M Watkins, 'Two Paths to Peace: Contrasting George Mitchell in Northern Ireland with Richard Holbrooke in Bosnia-Herzegovina' (2004) 20 *Negotiation Journal* 513.

¹⁴⁷ The new field of 'dispute system design' in the US (and other countries) is tasked with both developing and evaluating 'systems' of dispute resolution in both public and private settings where there are iterative disputes, see (2009) 14 *Harvard Negotiation Law Review* special issue 'Dispute System Design'.

- Durability/longevity of outcomes
- Longitudinal comparisons of changes in usage, time for processing, case types, etc
- Demographic data on users, third-party neutrals, and other facilitators or professionals
- Variations in usage, outcomes, solutions by demographics, and differential characteristics of disputants and third-party neutrals, eg 'experience' ratings
- Awareness of ability to choose different processes (an attitudinal measure)

Qualitative or Subjective Measures

- Criteria for selecting particular processes
- Client satisfaction
- Improved relationships (post-conflict societies (eg Rwanda), families, workplaces, commercial relations)
- Improved communication
- Enhanced workplace productivity
- Learned conflict resolution/communication/relational skills ('transformative' mutual intersubjective understandings or learned use of new processes, eg lawyers using mediation and other forms of problem solving)
- 'Better' outcomes (more creative, individually tailored, deeper solutions)
- Perceived self-determination/autonomy/control over decision making
- Compliance with national, systemic, family, company, workplace and contractual norms/rules when legitimacy is less questioned
- Perceptions of fairness, justice and legitimacy of process
- Trust in institutions, both dispute processing and others
- Resolution of systemic issues (proactive conflict resolution, policy changes)
- 'Value added' to organisation or institution

But this list, whether exhaustive or not, cannot quantify, combine or 'equalise' measures of 'justice' with measures of 'efficiency', and disputants cannot subject themselves either simultaneously or sequentially to formal, semi-formal or informal processes to determine which works best for them in a particular matter. Yet, I worry that, while formal processes produce some modicum of review through formal procedures, court scrutiny, and published decisions and data, and informal processes promise only that the parties can do what they want 'if they agree' (consent based), then 'semi-formal' processes are perhaps the most problematic processes. Informal processes are those we believe the parties have consented to—are they? 'Semi-formal' processes may be monitored ('court annexed' or use of private arbitration tribunal rules of procedure) or made more formal by accessing state power (whether judicial or otherwise) for enforcement, but often, they are not. Court annexed programmes do not necessarily get reviewed by judges or other government officials. Private mediation and arbitration agreements and awards are not generally available to parties outside of the processes. Those who choose private processes, even with elaborate internal rule systems, may also have no recourse to subsequent review, especially when agreements are confidential. (Perhaps this explains why so many of the newer international dispute resolution organisations are now using or proposing appellate processes, eg the World Trade

Organization Appellate Body, ICSID, both for review and for transparency and consistency of results.)¹⁴⁸

Is process pluralism always a good thing (is there a time when too many choices may be a bad idea?¹⁴⁹), and how are we to know? When we have so many choices, and so many different possible measures of what constitutes a fair, just or good process, it may be virtually impossible to specify a uniform and universally satisfying dress code. So, in the US, for the near future, it may be ‘come as you are’—formal, informal or ‘semi-formal’. Perhaps in a country this diverse the choice of dispute process should be similarly diverse, but it makes one wonder, along with Lon Fuller, whether each process choice must or should have its own integrity (and policed rules?). I would not wear a ballgown to a barbecue and I would not wear a bathing suit to the courthouse. Do we need a dress code or forms of regulation for different kinds of dispute resolution? If so, how should we ‘dress’ for different kinds of disputes and processes? What rules of transparency, confidentiality or publicity, fairness, ethics, conflicts of interests, disclosures, procedures and accountability can be applied across all these different forms of process? I have more questions than I have answers (as I stand before my closet and try to decide what to wear to court, a negotiation session, a mediation, arbitration or session with my organisation’s ombuds).

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¹⁴⁸ See Stone Sweet, ‘Arbitration and Judicialization’.

¹⁴⁹ C Guthrie, ‘Panacea or Pandora’s Box? The Costs of Options in Negotiation’ (2003) 88 *Iowa Law Review* 601—is a rosé a good choice when some of the dinner guests want red wine and the others want white?

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