CHAPTER FIFTY

Alternative and Appropriate Dispute Resolution in Context

Formal, Informal, and Semiformal Legal Processes

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THE EVOLUTION OF CONFLICT RESOLUTION IN THE LEGAL SYSTEM

This Handbook explores the many dimensions of conflict in intrapersonal, interpersonal, intergroup, and international settings, with a broad array of disciplinary insights about diagnosis, analysis, resolution, management, and handling of conflicts and disputes in our lives. As modern conflict resolution theory and practice came of age in the 1970s (operationalizing earlier theories of the late nineteenth century and 1920s, 1930s, 1940s, 1950s, and 1960s in psychology, sociology, and political science), the formal institutions of conflict resolution in our society, the courts, responded by encouraging alternative forms of dispute resolution both within (referred to as “annexed”) and outside the formal justice system. Legal theorists and practitioners outlined different ways to resolve disputes, rather than submitting all conflicts for binary adjudication before a judge. Theories of integrative and problem-solving negotiation for case settlement led to theories and practices of mediation, and then to more hybrid forms of dispute resolution in arbitration, mediation-arbitration, arbitration-mediation, and summary jury and minitrials.

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These hybrid forms of dispute resolution were used both within formal court and legal systems and also outside it, as parties to conflicts chose to adapt various processes of conflict resolution to meet their different needs for privacy, confidentiality, tailored, not binary, outcomes, and more contingent, future-focused solutions to legal and political disputes. Some legal processes were client or lawyer directed; others used third-party neutrals as decision makers (judges or arbitrators) or facilitators (mediators). As these alternatives became more common and are now more likely to be used than formal trials, we began to talk about “appropriate,” not “alternative,” dispute resolution for legal disputes.

This chapter describes the theories, intellectual histories, practices, and evolution of “A” (alternative and appropriate) dispute resolution in the justice system. The chapter traces how a reaction against the brittle and formal aspects of the legal system produced a variety of more flexible and creative forms of informal dispute resolution that have led to hybridization of both formal and informal processes, leading to yet another set of semiformal processes for conflict resolution in the legal system. Whether these different processes of conflict resolution produce different kinds of justice for the parties and the larger society remains a critical issue, which is explored here.

The movement for more informal justice in the United States in the late 1970s and early 1980s drew its inspirations from a variety of sources, including the desire for qualitatively better options and solutions for dispute resolution problem solving in substance and more party participation in procedure and process. The impetus for much procedural reform, however, came from courts and judicial officials, including Chief Justice Warren Burger, who sought to shorten dockets and case processing time, reduce litigation cost and complexity, and, for the cynics among us, move cases away from federal courts to other forums, including state courts, small claims venues, and other processes outside the courts, tied together in the nomenclature of “alternative dispute resolution.” Thus, 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 solutions to their problems that would be less brittle and binary than the win-lose outcomes of formal courts, with “limited remedial imaginations.”

In recent years, I have labeled the progress of dispute resolution variations as “process pluralism,” while others have used the label “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.\(^5\) This is a serious questioning of the American procedural ideal of “transsubstantive” procedure,\(^6\) and such claims invoke both notions of technocratic assignment of cases to efficient or appropriate forums,\(^7\) 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”\(^8\) and the loss of formal procedures, as fewer and fewer cases make it all the way to full adjudication in the United States (only about 2 percent of cases filed in a wide variety of courts, both federal and state, general and specialized now go to full trial), have raged among scholars, judges, and lawyers; 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, \textit{stare decisis} legal regime to transparently produce reasoned rules and principles for the governance of our society.\(^9\) As I argued some years ago, this is a question of “Whose Dispute Is It Anyway?”: 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”?\(^10\) The relationship of process to assessments of justice is a serious jurisprudential question that many procedural theorists have considered. A separate field of procedural justice or the social psychology of justice has claimed for decades, through empirical study, that users of dispute resolution process assess the justice and fairness of processes independent of the outcomes parties achieve.\(^11\) From the American side, I have long claimed that Lon Fuller (the American jurisprudence scholar and Harvard law Professor, who also served in the 1940s through 1960s as an arbitrator and mediator in both public and private settings) is our “jurisprude of process,”\(^12\) 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.\(^13\)

In the modern experience of so many varied processes used for dispute resolution (reviewed below), I often ask if Lon Fuller would approve of the great hybridization of process that has occurred in recent decades with such new forms as mediation and arbitration combined to form med-arb or arb-med\(^14\) (in labor, family, commercial disputes), “early neutral evaluation”\(^15\) or “settlement conferences,” a process comprising both judges and lawyers, giving evaluative feedback to counsel and parties in pretrial settings,\(^16\) “summary jury trials”\(^17\) (jury advisory opinions in public courts for settlement purposes), “mini-trials”\(^18\) (private hybrid processes using
witness testimony, argument, negotiation, mediation, and sometimes arbitration), “private judging”\textsuperscript{19} where private parties hire judges to adjudicate matters in secrecy, with full appellate processes and protection of the courts (as is authorized by state constitutions and statutes, such as in California), and now even private juries\textsuperscript{20} are hired to resolve disputes outside the courts so there is independent lay fact finding but no public record of the outcome or deliberations. What would 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 the parties themselves or the larger system of legal dispute resolution?

In this chapter, I address these questions by suggesting that in the United States, we now have more than formal or informal processes: we have many semiformal processes, and the question is, How shall we evaluate the efficacy, efficiency, and legitimacy of so many different kinds of process? In the United States, we have a very elaborate formal justice system of federal and state rules of procedure (both civil and criminal), as well as countless specialized tribunals with their own procedural rules, such as in bankruptcy, labor, family law, securities, technology, trade, patent and trademark, and taxes. We also have many informal forums for dispute resolution, including private uses of mediation, arbitration and related processes, religious courts and mediation agencies, specialized business and industry panels of dispute resolution (e.g., banking, insurance, franchise, construction, technology, sports, and energy, among others), using both mediation and arbitration techniques,\textsuperscript{21} community and neighborhood dispute resolution processes,\textsuperscript{22} online consumer forms of dispute resolution,\textsuperscript{23} internal organizational forms of dispute resolution (ombuds or internal dispute resolution,\textsuperscript{24} including grievance processes in large corporations, universities, trade unions, government agencies, and nongovernmental institutions\textsuperscript{25}), as well as dispute resolution forums even in illegitimate enterprises—gangs\textsuperscript{26} and organized crime. We now also have a more hybrid set of processes that can be called \textit{semiformal forms of dispute resolution}, which use 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 programs 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 award\textsuperscript{27}), as well as the elaborate structure of international commercial arbitration that is now quite “formal” in its conduct, if still mostly unattached to formal courts.\textsuperscript{28}
For purposes of this chapter, I use the term *semiformal* from American etiquette dressing requirements (“smart casual” is the British equivalent) to connote the attempt to locate dispute processes halfway between tuxedos and evening gowns of the bygone days of formal gatherings, and the totally informal or casual dress more common in today’s variety of professional, family, and entertainment gatherings. To request semiformal dress is to ask the gentlemen to wear ties and jackets, if not tuxedos, and to hope the women will wear, if not dresses and skirts, then at least “fancy pants.” The idea is to preserve some notion of order, elegance, solemnity, and seriousness to the social event. Thus, semiformal 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.

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 United States. 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 United States, 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 that require certain forms of dispute resolution (usually arbitration) even where consumers and employees do not really know or understand what they are signing.  

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 negotiation); they occur without formal clarity about the procedural rules applied or what can happen if the process fails. The question here is whether semiformal 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 processes to different kinds of evaluative criteria, or should all process be judged by the same criteria?

This increasing complexification, segmentation, and differentiation of process that 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 “semiformal” 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, 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 semiformal 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? Is “process pluralism” itself a “just” good?

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 similar cases and, most important, are governed by formal rules—Federal (or state) Rules of Civil or Criminal Procedure—and are subject to appellate and other review procedures. For Lon Fuller, adjudication or “formal justice” is warranted when there is a need for reasoned argument to decide disputes, not only for the immediate disputants but to elucidate rules for the larger society, when rights (and especially competing rights) are at issue. Adjudication requires the decision of “authoritative” and “neutral” decision makers who explain their rea-
sons (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. The neutrality and disinterestedness of the decider or arbiter in formal justice is so important to many jurisprudences of formal process that any departure from the distinctive adjudicative role (such as to manage or mediate cases) is regarded as sullying the basic process.

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
- **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-based or rule of law–based outcomes and decisions**
  With appropriate and authorized 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 (e.g., when “rights” are necessary to make “right”) acknowledge that some situations call for different elements
of dispute resolution or decision making at the individual (e.g., family or workplace) or societal (the polity) level. Fuller acknowledged both that some relationships (family, workplace, repeat commercial customers) and some matters (the polycentric dispute with many intersecting and mutually affecting 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.

Thus, for 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 own35) 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 and binary decisions, which could lead to desires for revenge or retribution in repeat play settings. Parties might want to “share” (e.g., children in divorce) or preserve, rather than divide, resources. Rules of law might give both or all sides to a particular dispute similar or nondispositive claims of right. Coordinated rather than competitive action could lead to creative new outcomes and solutions to new or unlegislated for problems or issues.36 Some communities might prefer to resolve their disputes or solve their problems within their own community norms.37

INFORMAL JUSTICE IN THE UNITED STATES

Although there is a long history of informal justice in the United States, with religious, local community, and business groups negotiating, mediating, or arbitrating their own disputes since the early colonial period and continuing to the present,38 modern informal dispute resolution in the United States is derived from several different substantive fields (labor,39 commercial, civil rights,40 environmental,41 and family law42), a judicial movement (docket clearing efficiency43), and a social movement (party empowerment, consumer44 and civil rights accountability, and more tailored solutions to social and legal problems) of the 1970s and 1980s that together produced a turn to private negotiation, mediation,45 community consensus building,46 and commercial arbitration processes.47

Modern American dispute resolution has a strong intellectual grounding48 in decision sciences,49 game theory,50 international relations, economics, social and cognitive psychology,51 anthropology,52 sociology,53 and political science, as claims for “better” solutions to legal and social problems were articulated with reference to interest- and needs-based negotiations,54 pie-expanding (not dividing) resource allocation,55 efficient information sharing
and processing, and a move away from purely “competitive” processes to collaborative and coordinated decision making.

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 multiparty negotiation, mediation, arbitration, and hybrid processes like community consensus building, ombuds within organizations, and victim-offender mediation in criminal matters. 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, and policymaking by courts. Judges, like Chief Justice Warren Burger, who wanted to reduce caseloads 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 nonlawyer mediators for such matters as neighborhood disputes, minor (misdemeanor) 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 groups to provide community-based alternatives to criminal punishment, especially, 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 (e.g., Wisconsin).

Specialized areas of law, like family law and labor law, had long used informal processes like negotiation and mediation for dispute resolution, but the practices of both family and labor mediation began to be applied and opened 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 this date, however, there is virtually no official licensing or credentialing for mediators or other dispute resolution professionals.

Perhaps most interesting, various forms of informal dispute resolution have been used to great effect in extralegal, nonlegal, or illegal enterprises. The film The Godfather dramatized the use of elder mediation in resolving disputes within organized crime, 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.\textsuperscript{64} I have come to call this form of informal dispute resolution $A^2$ (alternative) dispute resolution, when I learned some years ago about the effectiveness of gang leaders in mediating disputes in the \textit{favelas} of Rio de Janeiro.\textsuperscript{65}

Those who were dissatisfied with the “limited remedial imaginations” of courts’ limited power to order creative relief\textsuperscript{66} or the “adversarial culture” of legal problem solving,\textsuperscript{67} and others who wanted to encourage more direct party participation without the need of professionals (lawyers and judges) in dispute resolution, combined to form what was later called the “informal justice movement.”\textsuperscript{68} This social movement encouraged individuals and communities to seek resolution of social, political, economic, and even legal problems outside the courts, using community mediation, consensus building, group organizing, and strategies that allowed more than two parties to seek resolution of problems by negotiated and consensual, not court-commanded, solutions. Over time, these informal processes were criticized for “privatizing” justice that many thought should remain in the public and formal sector\textsuperscript{69} for transparency of process, generation of public precedential rulings, and equalization of unequal power or economic endowments. Others, including me, 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 \textit{party empowerment and participation} in case presentation and resolution
- \textit{Self-determination}
- \textit{Consent}
- \textit{Tailored solutions}, based on party needs and interests, not necessarily rights and claims of law (using tailored individual, religious, ethical, or communitarian principles for resolution, e.g., joint custody in divorce and children’s custody)
- \textit{Nonmonetized outcomes} and solutions (apologies, trades, in-kind, other forms of relief)
- \textit{Future-}, not just past-, \textit{oriented problem solving}, without need necessarily of fact finding or assessment of blame
- \textit{Confidentiality}, producing the opportunity for changed positions, trades and nonprecedential accommodations or solutions, as well
as *privacy* protection for disputants of all kinds—individuals and organizations

- Inclusion of more than two litigant parties in interest (*multiparty dispute resolution*)
- *Reduction of elite and professional decision makers* in parties’ lives and disputes, utilization 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
- *Reorientation of the parties to each other*—promoting healing relationships, not rupture and continued conflict and resentment of formal litigation or punitive results in criminal matters
- 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 formalize in contracts uses of mandatory arbitration, and a variety of organizations began to internalize 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, the pretrial settlement conference morphed into a mediation session, and multiparty participatory consensus-building forums turned into public “negotiated rule-making” proceedings in administrative and regulatory law and proceedings, all of which eventually received legal recognition in formal rules and legislative authorizations. 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, and even single dramatic mass disasters like the deaths arising out of the September 11, 2001, terror attack on New York were dealt with by use of informal settlement processes with public funds and public recognition. The “informal” has become “semiformal.”
SEMIFORMAL JUSTICE IN THE UNITED STATES

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 at both federal and state levels began to offer voluntary, and then mandatory, programs of court-annexed mediation and arbitration processes and 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 criticized as conflating the public function of the jury, 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 (e.g., for 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 (e.g., civil rights) against the will of the parties, litigants began to appeal to higher courts, and the process has declined in use 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.

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 organize discovery and case evaluation in complex cases (also asbestos and other mass claims and class actions, as in the famous Agent Orange case) 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.

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 pretrial conference and many federal courts used the local rule power of Federal Rule of Civil Procedure 83 to craft local rules for the use of ADR in “court-annexed” programs.) 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
Now, by virtue of federal legislation, the Civil Justice Reform Act of 1990 (requiring all federal courts to implement some cost and delay ameliorative programs), 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 (authorizing the use of negotiated rule-making processes in administrative regulation), and the Alternative Dispute Resolution Act of 1998 (requiring all federal courts to implement some program of ADR, while allowing each district court to decide what is best for its region), virtually every federal court in the United States has some form of ADR. These courts report on the use rates of mediation, arbitration, and settlement programs. Statistical reports available from many of the most populous states (including New York, California, Texas, and Michigan) demonstrate high use of a variety of non-trial forms of dispute resolution within the formal court, with “settlement rates” ranging from 30 to over 70 percent in some courts. Virtually all of the federal courts of appeals now have formal mediation programs, most with full-time staffs, and a few rely on volunteer mediators. (I have been a mediator in the District of Columbia Circuit Court of Appeals).

Even the executive branch of the US government strongly encouraged the use of ADR. During President Clinton’s administration, Attorney General Janet Reno required mediation training of herself and her senior staff (I performed this training), authorized an “ADR czar” position in the Justice Department (currently it is 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 programs. In addition, the Interagency ADR Working Group representing all major federal agencies began to meet regularly to discuss dispute resolution programs 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 program honored such branches of the government as the Army Corps of Engineers and the Navy for instituting nonlitigation dispute resolution processes in procurement contracts, and later even in dispute resolution issues in war zones. In addition, many federal agencies now have internal dispute resolution programs, including ombuds to resolve internal conflicts (employment, policy), as well as to deal with disputes with clients or customers of particular agencies (e.g., 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 semiformal dispute resolution, sometimes authorized by
regulation, 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 live up to their promises and intended goals.

In the middle of the 1990s, the federal government supported a major $5 million research program (fielded by the RAND Corp.) to determine if ADR in the courts 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, but the study itself was criticized for studying a moving target. Many of the courts in the study were changing their policies to conform to legislation 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.

At the same time as the RAND study was conducted, a smaller study, also funded by the federal government through 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. 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. 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 semiformal in the private sector. With the growth of ADR in the 1980s, the prime movers were actually large American corporations that in 1979 founded the Center for Public Resources (CPR) to promote the uses of mediation, arbitration, and other private consensual processes in American business. Commercial arbitration has always been a common way to resolve disputes among and within participants in the same industry, 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 "A"DR and help develop new ones such as the minitrial. The minitrial allowed private companies (the first big case was *TRW v. Telecredit* in a patent infringement dispute) to privatize 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. Minitrials 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.

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, labor-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 formalized 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 major commercial centers in the United States and beginning to compete with the international tribunals (the International Chamber of Commerce in Paris, the London Court of International Arbitration, the AAA's [American Arbitration Association] Center for International Dispute Resolution) for arbitration and mediation services. Former judges and private attorneys now earn upwards of five thousand dollars a 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; 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 United States 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 (e.g., Israel) that
now treat mediation agreements in some settings as if they were arbitration
awards, with relatively easy enforcement in courts.

As commercial arbitration has emerged as an important (but still not
the only preferred) form of dispute resolution between and among com-
mercial parties, large companies (e.g., telecommunications, health and
hospitals, banks, car rentals, computers) 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. The United
States 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 defenses 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 (for-
mer lawyer) individual complainant tried to use small claims court as a way
around some of the contractual limits of arbitration and class action litiga-
tion. Her victory in small claims court was appealed by Honda, who won,
and the suit was dismissed. 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 predispute contractual arbitration in con-
sumer, employment, and franchise disputes). A few states (California is one
of them) have managed to add a few protections for consumers (conflicts of
interest of arbitrators) through civil procedure rules or other state legisla-
tion (which is now often invalidated in federal court as preempted by the
Federal Arbitration Act). This attempt to regulate consumer arbitration,
however, has also led to some efforts in the private sector to make consumer
or employment arbitration subject to some basic due process protocols.

In addition to private contracting at both the industry and individual lev-
els, 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 agree-
ment of a religious court, or when one party seeks public court control to
require another party to satisfy legal requirements of the religious court
for secular benefit. The interplay of private religious courts and doctrines
for dispute resolution has become a legal issue in a variety of multicultural
nations, including the United States, Canada, the United Kingdom, and
Australia in the common law world and France and other legal regimes
in Asia and Europe. Recently several states in the United States (Oklahoma, Arizona, Nebraska) famously used their “democratic” referenda and legislative processes to ban the use of “foreign, international or Shar‘ia law” in their state courts. Many other states (e.g., Alabama, Texas, South Carolina, Wyoming, South Dakota) are attempting in one form or other to do the same thing. Most of us in the legal academy and many 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 centers in family matters are used by Jews (Bet Din), Christians, and Muslims and for the most part have had their outcomes confirmed by courts that 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 mediation) to resolve land use; environmental, cultural, and ethnic conflict; budget allocation; and other disputes outside formal processes. With a new cadre of professionals specifically trained to engage complex communities in such disputes and group decision making, complex multiparty disputes may be resolved with agreements, often contingent, and monitoring programs (such as in resource management, land use and zoning, waste siting) that straddle public and private decision-making rules and bodies. 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.

Thus, the conundrum, paradox, and issues in these semiformal forms of dispute resolution are 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, for appeal to public or state values, or to get state enforcement of relief, or to reverse what was accomplished in the more informal process.

**ASSESSING JUSTICE IN PLURAL PROCEDURAL PRACTICES**

Dispute resolution in the United States is now characterized 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. Some parties may have no choice at all (such as the consumers and employees who are required to agree to mandatory arbitration processes in their form 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 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 United States now contains both scholars and practitioners who urge the return to courts and trials for more transparency, equalization 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 percent 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 semiformal process may be considered to be “empty suits” (no visibility or accountability to those outside the dispute resolution process), to continue the social dressing metaphor. Others among us, and I am one of those, still prefer to see process pluralism as offering the opportunity for party choice about both process and 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 affected by Lon Fuller’s claims that each process has its own integrity or purpose—one set of values (privacy, ongoing 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 as in Brown v. Board of Education). Thus, Fuller and others would suggest that we should be clear about both 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 United States; some courts, for example, prohibit the use of ADR in constitutional cases, prisoners’ cases, civil rights matters, and pro se (self-representation); others do...
not. In part, this is because, in the hands of skilled parties, lawyers, and third-party neutrals, almost any informal or semiformal process can be made more flexible, cheaper, faster, and more creative than formal processes, so process choice and effectiveness often turn 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. Yet it remains unclear whether it is structure and function or personality 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 realized that we need both qualitative and quantitative measures of effective dispute resolution, and also that measures of success for a system 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 recognizing 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)
- Number of issues
- Number of cases resolved, settled, closed, or disposed of (“settlement rates”)
- Number of cases referred to another process
- Number of cases dropped
- Case types (categories within systems, e.g., employment promotion, dismissal, communication)
- Number of parties
- Types of agreements, resolutions, outcomes
- Time to process case
- Cost of processing case—to complainant, to third-party neutral, to program or system
• Comparisons (where possible) of all of above of comparable cases in different systems
• Comparisons of preconflict resolution program claiming (grievance systems, litigation) or violence with postprogrammatic claiming
• Comparisons of rates of compliance with agreements, judgments, or orders
• Durability or longevity of outcomes
• Longitudinal comparisons of changes in use, time for processing, case types
• Demographic data on users, third-party neutrals, and other facilitators or professionals
• Variations in use, outcomes, solutions by demographics, and differential characteristics of disputants and third-party neutrals (e.g., “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 (postconflict societies such as Rwanda, families, workplaces, commercial relations)
• Improved communication
• Enhanced workplace productivity
• Learned conflict resolution, communication, and relational skills (transformative mutual intersubjective understandings or learned use of new processes, e.g., lawyers using mediation and other forms of problem solving)
• “Better” (more creative, individually tailored, deeper solutions) outcomes
• Perceived self-determination, autonomy, control over decision making
• Compliance with national, systemic, family, company, workplace, contractual norms or rules when legitimacy 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 organization or institution
But this list, whether exhaustive or not, cannot quantify, combine, or equalize measures of justice with measures of efficiency, and disputants cannot subject themselves either simultaneously or sequentially to formal, semiformal, 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 semiformal processes are perhaps the most problematic processes. Informal processes are those we believe the parties have consented to. But are they? Semiformal 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 programs 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 the processes. Those who choose private processes, even with elaborate internal rule systems, also may have no recourse to subsequent review, especially when agreements are confidential. Perhaps this explains why so many of the newer international dispute resolution organizations are now using or proposing appellate processes (e.g., the World Trade Organization Appellate Body, ICSID [International Centre for the Settlement of Investment Disputes]), both for review and for transparency and consistency of results.  

Is process pluralism always a good thing (Is there a time when too many choices may be a bad idea?), 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 come up with a uniform and universally satisfying dress code. So in the United States, for the near future, it may be “come as you are”: formal, informal, or semiformal. 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. I wouldn’t wear a ball gown to a barbecue, and I wouldn’t wear a bathing suit to the courthouse.

Notes


3. Ibid.


7. The idea that the “forum should fit the fuss” was originally Professor Maurice Rosenberg’s (Columbia University), now captured by Frank E. A. Sander and Stephen B. Goldberg, “Fitting the Forum to the Fuss: A User Friendly Guide to Selecting an ADR Procedure,” 10 *Negotiation J.* 49 (1994).


21. CPR Industry Panels Dispute Resolution.


34. See, e.g., Resnik and Luban, supra note 32.


44. Christine Harrington, Shadow Justice: The Ideology and Institutionalization of Alternatives to Court (Greenwood Press, 1985).


50. Duncan Luce and Howard Raiffa, Games and Decisions: An Introduction and Critical Survey (Dover, 1987).
63. A few states (e.g., 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.


66. See Menkel-Meadow, supra note 2.


68. See Abel, supra note 1; Harrington, supra note 44.

69. See, e.g., Abel, supra note 1; Resnik, supra note 32; Luban, supra note 32; Fiss, supra note 9.


83. See, e.g., N.D. California Rules of ADR.


89. Donna Stienstra, Molly Johnson, Patricia Lombard, & Melissa 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 (Federal Judicial Center, 1997).


91. CPR’s private corporate strategy was picked up in the United Kingdom 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, May 21, 2008).


93. Theodore Eisenberg & George Miller, “The Flight from Arbitration: An Empirical Study of Ex Ante Arbitration Clauses in the Contracts of Publicly Held Companies,” 56 DePaul L. Rev. 3335 (2007) (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).


98. The premier of the province of Ontario in Canada sought to ban the use of faith-based family arbitration in his jurisdiction (see Helfand, supra note 31 at n. 30), while the archbishop of the United Kingdom called for the inclusion of Shar’ia law in British family law determinations. Ibid.

99. This referendum has been held to be unconstitutional; see *Awad v. Ziriax* No. CIV-10–1186-M 2010 WL 4814077 (W.D. Oklahoma).


110. Chris Guthrie, “Panacea or Pandora’s Box? The Costs of Options in Negotiation,” 88 *Iowa L. Rev.* 601 (2003). Is a rosé a good choice when some of the dinner guests want red wine and the others want white?