

Disputing Together: Conflict Resolution and the Search for Community

ROBERT M. ACKERMAN*

TABLE OF CONTENTS

I. INTRODUCTION.....	28
II. WHY SHOULD WE CARE ABOUT BUILDING COMMUNITY THROUGH DISPUTE RESOLUTION?	33
A. <i>Disputes with Public Implications</i>	33
B. <i>Private Disputes</i>	34
C. <i>The Desire for Community</i>	37
D. <i>Balancing Public Interest with Individual Autonomy</i>	42
III. DEFINING “COMMUNITY”: BUILDING AND MAINTAINING SOCIAL CAPITAL	45
A. <i>Building Bonding Social Capital Through Dispute Resolution Systems</i>	45
B. <i>The Need for Bridging Social Capital</i>	50
IV. PROCESS CHOICES	53
A. <i>Litigation: Collaboration in the Midst of Contention</i>	53
1. <i>Litigation as Affirmation of Community</i>	55
2. <i>The Therapeutic Value of Litigation</i>	58
3. <i>The Need for Cooperation in Litigation</i>	60
B. <i>Arbitration: When is a Choice Not a Choice?</i>	67
C. <i>Mediation: Taking Responsibility</i>	71
1. <i>Challenges Stemming from the Inherently Collaborative Nature of Mediation</i>	71
2. <i>Challenges Stemming from Party Responsibility for the Ultimate Outcome</i>	75

* Professor of Law and Director, Center for Dispute Resolution, The Dickinson School of Law of The Pennsylvania State University; B.A., Colgate University, 1973; J.D., Harvard Law School, 1976. The author wishes to thank Nancy Welsh and Dave Brubaker for their insightful comments and suggestions during the development of this article. The author is grateful to Michelle Anderson, Joel Toluba, James Metzger and especially Lee Ann Shupp for their excellent research assistance and to The Dickinson School of Law and its Dean, Peter Glenn, for the research stipend and other support that helped bring this article to fruition.

3. <i>Interest-Based Mediation: Empowerment and Recognition Versus Self-Absorption</i>	78
V. LAWYERS, CLIENTS, AND PROCESS CHOICES	82
VI. CONCLUSION: IS PROCESS ALONE ENOUGH?	88

I. INTRODUCTION

“All real living is meeting.”
— Martin Buber¹

In his excellent but troubling book, *Bowling Alone: The Collapse and Revival of American Community*, sociologist Robert Putnam describes in great detail the decline in participation by Americans in community activities. Putnam traces how reduced participation in civic organizations, social clubs, charitable organizations, and the like have diminished our store of social capital and with it, our civic connectedness.² Social capital—the connections between individuals that build social networks—is seen as critical to the norms of reciprocity and trustworthiness that allow us to function as a civil society.³ The term “bowling alone” uses the decline in participation in organized bowling leagues as a metaphor for the decline in civic life and the interconnectedness of Americans.⁴

The fragmentation of American society has been a frequent theme of communitarian discourse in recent years.⁵ Common to these commentaries is the notion that the social bonds of our society are in need of shoring up, that our preoccupation with individual rights and economic self-maximization has caused us to neglect the social nature of our existence, and that we therefore must recognize common values that bind us into a community that is more than

¹ MARTIN BUBER, *I AND THOU* 11 (Ronald Gregor Smith trans., Charles Scribner’s Sons 2d ed. 1958).

² See generally ROBERT D. PUTNAM, *BOWLING ALONE: THE COLLAPSE AND REVIVAL OF AMERICAN COMMUNITY* 19 (2000).

³ *Id.* at 19–20.

⁴ *Id.* at 15–28; 111–13.

⁵ See, e.g., MARY ANN GLENDON, *RIGHTS TALK: THE IMPOVERISHMENT OF POLITICAL DISCOURSE* (1991) [hereinafter GLENDON, *RIGHTS TALK*]; AMITAI ETZIONI, *THE SPIRIT OF COMMUNITY: RIGHTS, RESPONSIBILITIES, AND THE COMMUNITARIAN AGENDA* (1993) [hereinafter ETZIONI, *SPIRIT*]; ROBERT BELLAH ET AL., *HABITS OF THE HEART: INDIVIDUALISM AND COMMITMENT IN AMERICAN LIFE* (2d ed. 1996); Robert M. Ackerman, *Tort Law and Communitarianism: Where Rights Meet Responsibilities*, 30 WAKE FOREST L. REV. 649 (1995).

the sum of its parts.⁶ In an increasingly rights-conscious society, communitarians recognize the need to nourish social virtues as well as individual rights in order to preserve the social framework.⁷

Some commentators have identified the litigiousness of American society as a major culprit in the overindulgence of individual rights. Indeed, a good case can be made that the overuse of the courts has created an exaggerated sense of rights-consciousness, to the detriment of community needs.⁸ But it is the central thesis of this paper that our systems of conflict resolution—both formal and informal—can play important roles in advancing communitarian ideals. The array of devices, public and private, for the pacific resolution of conflict can be consciously employed to enhance social participation and strengthen a sense of community, while maintaining respect for individual autonomy.⁹

Some conflict resolution processes, like negotiation and mediation, are inherently collaborative.¹⁰ These processes ideally require the parties to engage

⁶ The public response to the tragedy of September 11, 2001 might provide some reassurance; the surge in blood donations, volunteer efforts, and patriotic spirit suggests a latent spirit of community that has become potent at a time of crisis. In a follow-up survey conducted from mid-October to mid-November 2001, Putnam found higher levels of political consciousness and engagement and “evidence of enhanced trust across ethnic and other social divisions.” Robert D. Putnam, *Bowling Together*, THE AMERICAN PROSPECT, (Feb. 11, 2002), available at <http://www.prospect.org/print/V13/3/putnam-r.html>. But Putnam also reports that while “occasional volunteering is up slightly, . . . regular volunteering . . . remains unchanged.” *Id.* He therefore wonders “how thoroughly and enduringly have American values and civic habits been transformed by the terrorist attacks.” *Id.* “Changes in attitude alone, no matter how promising, do not constitute civic renewal.” *Id.*

⁷ See AMITAI ETZIONI, THE NEW GOLDEN RULE 4 (1996) [hereinafter ETZIONI, GOLDEN RULE]. In an earlier work, Etzioni described communitarianism as “a social movement aim[ed] at shoring up the moral, social, and political environment” without plunging into “a dark tunnel of moralism and authoritarianism.” ETZIONI, SPIRIT, *supra* note 5, at 247. He proposed a four point agenda, consisting of (1) a moratorium on the manufacturing of new rights, (2) the notion that rights presume responsibilities, (3) a recognition that certain responsibilities may exist without an immediate payback in the form of capturable rights, and (4) “careful adjustments” to reconcile individual rights with the public welfare. *Id.* at 4–11; see also Ackerman, *supra* note 5, at 652–54. Still earlier, Professor Baruch Bush explained that “[t]he ‘communitarian theory’ of society claims to avoid both the individual excesses of liberalism and the collective excesses of welfarism by stressing the central role of community as a personal and social good and as a mediating structure between the individual and the society as a whole.” Robert A. Baruch Bush, *Between Two Worlds: The Shift from Individual to Group Responsibility in the Law of Causation of Injury*, 33 UCLA L. REV. 1473, 1530 (1986).

⁸ See generally GLENDON, RIGHTS TALK, *supra* note 5.

⁹ See Ackerman, *supra* note 5, at 684–90.

¹⁰ Commentators have used terms like “competitive,” “cooperative,” and “collaborative”

in constructive discourse resulting in a reconciliation of interests. In some instances, collaborative, consensus-building processes have at their core the idea of building community support for public policy initiatives or community projects. In other instances, the parties to a dispute may have more modest substantive goals, but may nevertheless acknowledge the interdependence of human beings and the need for collaboration. Transformative mediation, for example, strives to forge bonds between people through empowerment (with an emphasis on maturity and responsibility, rather than self-aggrandizement) and recognition (*i.e.*, the acknowledgment of legitimate interests and attributes in others).¹¹ And while much mediation is not explicitly transformative, the mediation process, at its best, requires that the parties engage in an exchange leading to an accommodation of their respective and mutual interests. Substantively, mediation is particularly useful in areas—such as workplace, neighborhood and family relations—in which the reduction of strife is critical to the maintenance of community.

Properly employed, even adversarial dispute resolution mechanisms can build a sense of community. Arbitration—which, at its outset, requires that the parties agree upon rules of engagement—is most widely and effectively used in the workplace and among merchants as a means of maintaining community norms while giving voice to individual grievances, at the same time keeping disruptions to a minimum. And litigation emerged, centuries ago, as a civilized means of extending commonly held norms to all individual claims through the genteel practices of an organized bar subscribing to a common code of conduct.

Regrettably, systems of conflict resolution can also serve as barriers to community building. The procedural nuances of litigation and arbitration can be manipulated to stifle meaningful discourse among the disputants. Formal dispute resolution processes can evolve into empty ritual, with little substantive meaning for the participants. Bargaining in negotiation and mediation can proceed strictly in an adversarial, distributive manner in which the parties become locked in a death-grip over limited resources. Mediation can also be transmogrified into a largely evaluative and even coercive process in which there is little direct communication between the parties and self-determination is compromised.¹² And even facilitative mediation, with its emphasis on interests,

to classify different negotiation strategies. *See, e.g.*, Donald G. Gifford, *A Context-Based Theory of Strategy Selection in Legal Negotiation*, 46 OHIO ST. L.J. 41, 43 (1985). But at its essence, negotiation (and its assisted cousin, mediation) is collaborative in a way that adjudicative processes rarely are.

¹¹ *See* ROBERT A. BARUCH BUSH & JOSEPH P. FOLGER, *THE PROMISE OF MEDIATION: RESPONDING TO CONFLICT THROUGH EMPOWERMENT AND RECOGNITION* 84–94 (1994).

¹² *See* Nancy A. Welsh, *Making Deals in Court-Connected Mediation: What's Justice Got to Do With It?*, 79 WASH. U. L.Q. 787, 805–09 (2001) [hereinafter Welsh, *Making Deals*]; Nancy A. Welsh, *The Thinning Vision of Self-Determination in Court-Connected*

DISPUTING TOGETHER

can cause parties to dwell upon their own interests in a self-indulgent manner. To bring communitarian values into disputing requires more than a push-button choice of process; it requires conscious use of process in a manner conducive to personal interaction, mutual recognition, and a sense that the parties and their dispute are part of a larger tapestry. Like good jazz, effective conflict resolution requires more than individuals playing the notes; musicians or disputants must consciously work together to produce good music or genuine accord.

The use of dispute resolution processes and techniques conducive to the building of community is the subject of this article. It will explore, in Section II, the desirability of employing processes and techniques to manage conflict in a manner conducive to the building of community, and in Section III, the use of conflict resolution systems to build and maintain social capital. Section IV will thereafter examine various conflict resolution processes and techniques, elaborating upon the following themes regarding the relationship between dispute resolution processes and the advancement of community:

- As a general rule, consensual processes, such as negotiation and mediation, are preferable to adjudicative processes, such as litigation and arbitration, in the building of community. In a consensual process the parties, usually through direct participation, attempt to collaborate in order to reconcile their interests and arrive at a solution from which they can derive mutual benefit. In some (but not all) such cases, the overall benefit exceeds that which would have been achieved through the litigation process (or through avoidance), with significant spillover benefits to the community at large. Sometimes the benefits are in the form of win-win substantive solutions; in other instances, they are inherent in the process itself in the form of enhanced communication; empowerment; and recognition of legitimate rights, feelings, and interests in others.
- Not all consensual processes are collaborative, nor do they all yield results superior to that of litigation. Collaboration is difficult, particularly in the context of conflict. As a consequence, settlements often are negotiated (and even mediated) without the active participation of the principals. Compromises are reached and money is exchanged, but the parties emerge with little satisfaction that their interests have been served, much less maximized. Sometimes mediation is co-opted into an evaluative, zero-sum game so that it more closely resembles the adversarial processes it is designed to replace than a collaborative process that admittedly requires greater effort. Sometimes

Mediation: The Inevitable Price of Institutionalization?, 6 HARV. NEGOT. L. REV. 1, 7–14 (2001) [hereinafter Welsh, *Thinning Vision*].

settlements are coerced. Sometimes parties become fixated on their selfish interests to the exclusion of other considerations.

- Adjudicative processes can, at times, be conducive to the building of community. The abstract legal principles that serve as the basis of decision-making are, presumably, derived from the community's idea of justice. The disputants' willingness to submit their dispute to adjudication by a recognized tribunal is itself an affirmation of community, far more so than the self-help remedies of the blood feud, duel, or riot. Religious communities, trade associations, and the like have established systems of arbitration to strengthen and maintain bonding capital. But we delude ourselves if we think that adjudicative dispute resolution processes can serve as a surrogate for the types of community bonds that can be forged only in the absence of coercion.
- Systems of adjudication also require a measure of collaboration. Opposing counsel must deal with one another as they work through discovery and pretrial, and they, as well as their respective clients, are most likely to benefit when the process unfolds with a reasonable level of courtesy and cooperation among counsel. Whether negotiating or litigating, lawyers at their best use the bonding social capital of the profession—formed through the acculturation of law school and practice, and commonly accepted norms of behavior—to create bridging social capital between their clients and among members of the community who observe the litigation process. Lawyers who forget this—and adopt an antagonistic posture toward their fellow practitioners—overlook the very basis for the special privileges conferred on their profession.
- While bonding social capital has its dark side, evidenced by such pernicious organizations as the Ku Klux Klan and German Nazi Party, individuals, organizations, and even nations are best positioned to build bridging social capital when their bonding social capital, and therefore their confidence and self-esteem, is strong. Transformative mediation, which uses empowerment of the disputants and mutual recognition of legitimate interests to build better relationships, employs an approach consistent with this premise.

Because lawyers so often serve as primary gatekeepers for conflict resolution processes, we will also discuss how relationships among lawyers may build social capital (primarily in Section IV.A.3) and the role of lawyers with respect to process choices made by disputants (in Section V). We will then conclude (in Section VI) by asking whether process alone is sufficient to build community, or whether real community requires an underlying repository of values and ongoing social interaction, a sharing of interests which creative use of processes can draw upon, but cannot supplant.

II. WHY SHOULD WE CARE ABOUT BUILDING COMMUNITY THROUGH DISPUTE RESOLUTION?

"We cannot live only for ourselves. A thousand fibers connect us with our fellow men."

— *Herman Melville*¹³

Why should we encourage those embroiled in disputes to seek out methods of conflict resolution that will enhance community? Is it fair to ask those engaged in conflict to think about the welfare of the larger community while attempting to resolve what might be the greatest crises of their lives? Or is it oppressive to impose such an agenda on people who are justifiably preoccupied with their own problems?

A. *Disputes with Public Implications*

Certain disputes have implications of such public impact that the answers to these questions are apparent. These disputes operate on what we might call the "macro" level; that is, the disputes, in terms of both process and outcome, have an effect on the community as a whole. Some of these disputes involve public bodies, like governments, and involve broad public interests by definition.¹⁴ Disputes that enter the criminal justice system might all fall under this category, because it is that system to which we turn to deal with behavior that disrupts the orderly functioning of the community. Other disputes—for example, those involving land use or environmental issues—while ostensibly private, may have a broad substantive effect on the community.¹⁵ The interest of the community in

¹³ Brainyquote, at <http://www.brainyquote.com/quotes/quotes/h/q100853.html>.

¹⁴ See, e.g., *Bush v. Gore*, 531 U.S. 98 (2000) (dispute over Florida vote count in presidential election); *City of Philadelphia v. New Jersey*, 437 U.S. 617 (1978) (dispute involving State of New Jersey, private landfill owners in New Jersey, and various cities over disposition of various solid/liquid wastes originating outside of New Jersey); *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952) (Steel Seizure Case); see also Janet C. Neuman, *Run, River, Run: Mediation of a Water-Rights Dispute Keeps Fish and Farmers Happy—For a Time*, 67 U. COLO. L. REV. 259 (1996) (discussion of Umatilla River Basin controversy and subsequent mediation).

¹⁵ Perhaps some of the best examples are cases filed pursuant to the citizen suit provision of the Clean Water Act, 33 U.S.C. § 1365(a) (1994). See, e.g., *Concerned Area Residents for the Env't v. Southwest Farms*, 34 F.3d 114 (1994) (runoff pollution resulting from concentrated animal feeding); *Vill. of Oconomowoc Lake v. Dayton Hudson Corp.*, 24 F. 3d 962 (1994) (establishment of a distribution center that is indirect source of air/ground pollution by increased vehicle traffic); *Sierra Club v. Colo. Ref. Co.*, 838 F. Supp. 1428

matters like these is obvious, and there is a growing body of literature on whether and how to involve the community, beyond the immediate parties to the conflict,¹⁶ in the dispute resolution process.

B. *Private Disputes*

But many disputes are private not only in appearance, but in fact. A commercial dispute between two corporations, a property division between a divorcing husband and wife, or a tort claim for an isolated injury may have little or no substantive impact beyond the disputing parties. These “micro” disputes may nevertheless have implications for communitarianism. First, insofar as they involve a publicly supported dispute resolution system (e.g., the courts¹⁷), there are public implications. The public finances the court system and, given the relatively small filing fees charged by the courts, subsidizes the parties’ disputing activity.¹⁸ The law pertaining to the public at large, whether a creation

(1993) (discharge of pollutants into groundwater). Other examples include decisions related to issues of ripeness and standing in environmental disputes. *See also, e.g.*, Palazzolo v. Rhode Island, 533 U.S. 606 (2001) (issue of ripeness in regulatory taking claim); Sierra Club v. Morton, 405 U.S. 727, 741–42 (1972) (Douglas, J., dissenting) (“Contemporary public concern for protecting nature’s ecological equilibrium should lead to the conferral of standing upon environmental objects to sue for their own preservation.”).

¹⁶ A great deal of this literature discusses various community and restorative justice programs operating within the criminal justice system. Such programs seek to address the underlying issues in the dispute and resolve it through a process involving the victim, offender, members of the criminal justice system and the community. *See, e.g.*, Gretchen Ulrich, *Widening the Circle: Adapting Traditional Indian Dispute Resolution Methods to Implement Alternative Dispute Resolution and Restorative Justice in Modern Communities*, 20 HAMLINE J. PUB. L. & POL’Y 419 (1999). Much attention has also been centered on involving the public in environmental regulation and policy. *See, e.g.*, Eileen Guana, *The Environmental Justice Misfit: Public Participation and the Paradigm Paradox*, 17 STAN. ENVTL. L.J. 3 (1998) (discussing the strengths and weaknesses of various public participation models); Patrick J. Skelley II, *Public Participation in Brownfield Remediation Systems: Putting the Community Back on the (Zoning) Map*, 8 FORDHAM ENVTL. L.J. 389 (1997) (discussing a local zoning based model of public participation in hazardous waste cleanup and land development). For more general commentary on problems of inclusion, see David Laws, *Representation of Stakeholding Interests*, in THE CONSENSUS BUILDING HANDBOOK 241, 263–69 (Lawrence Susskind et al. eds., 1999).

Note that many disputes with broad substantive ramifications present themselves ostensibly as private disputes: a few individuals bring a nuisance action against an alleged polluter; an employee brings a discrimination claim against a large employer; an injured person brings a product design defect claim against a manufacturer.

¹⁷ Along with the courts, we should include the many administrative agencies on the national, state, and local level that perform adjudicative functions.

¹⁸ *See* Richard A. Posner, *The Summary Jury Trial and Other Methods of Alternative*

of the legislature or the judiciary, is implicated and sometimes altered through the adjudication of private disputes. Because a publicly supported forum serves as the default mechanism when the relationship between private disputants breaks down,¹⁹ the public has a legitimate interest in the process and, in some instances, the outcome of these disputes. Particularly at times in which substantial public resources must be diverted to confront national emergencies of overriding importance, we can ill-afford the abuse of public dispute resolution fora through either the processing of substantively dubious or petty claims or the use of procedural devices that consume resources without providing commensurate substantive dividends.²⁰

Dispute Resolution: Some Cautionary Observations, 53 U. CHI. L. REV. 366, 392–93 (1986).

¹⁹ Even where the parties have employed a private process, such as mediation, a public process (most often the court system) serves as a default mechanism. The very existence of a governmentally-sponsored mechanism to which disputants can resort (and into which one disputant can force a reluctant adversary), and which can impose a resolution on the disputants, is the very engine that drives the private processes. As others have described it: “the threat of legal processes helps to mobilize informal consensual justice.” Sally Engle Merry & Susan S. Silbey, *What Do Plaintiffs Want? Reexamining the Concept of Dispute*, 9 JUST. SYS. 151, 153 (1984) (citing Craig A. McEwen & Richard J. Maiman, *Mediation in Small Claims Court: Achieving Compliance Through Consent*, 18 LAW & SOC’Y REV. 11 (1984)).

²⁰ Post-September 11th conduct on the part of lawyers and litigants indicates that at least some disputants have acknowledged this reality. The Association of Trial Lawyers of America, for example, urged, on September 12, 2001, “a moratorium on civil lawsuits that might arise out of these awful events” of the previous day. Leo V. Boyle, *A National Tragedy: ATLA Joins Nation in Mourning, Calls for Moratorium in this Time of Crisis on Civil Lawsuits that May Arise from Tragedy*, at <http://www.atla.org/homepage/tragedy.ht> (Sept. 12, 2001).

But silly cases persist, even at a time when people ought to know better. For example, as of December 2001, two baseball fans were locked in litigious combat over ownership of the baseball Giants outfielder Barry Bonds hit for his record-setting 73rd home run.

Only in America could a Popov sue a Hayashi over a bobble from a game . . . [with a] decision . . . made by Judge David Garcia There is no evidence that either Popov or Hayashi love Bonds’ ball, desire Bonds’ ball, want Bonds’ ball. They only want whatever Bonds’ ball can bring on the open market.

Frank Deford, *Solution to Who Caught Barry Bonds’ Record-Setting Home Run Ball* (National Public Radio broadcast, Dec. 5, 2001).

Communitarians might be equally concerned with opportunistic legislative efforts to limit tort remedies—and insulate from liability parties genuinely fault—that have gained ground since September 11. See, e.g., Air Transportation Safety & System Stabilization Act, Pub. L. No. 107–42, 115 Stat. 230 (2001); Terrorism Risk Protection Act, H.R. 3210, 107th Cong. (2001); David E. Rovella, *Ashcroft Rule Puts Defenders in a Bind*, NAT’L L.J., Dec. 3, 2001, at A1; Steven Labaton, *Added Rush on Revising Tort System*, N.Y. TIMES, Dec. 13, 2001, at C1.

The greatest threat posed by the abuse of the public disputing process, however, is not to the courts as institutions themselves. The courts can withstand a good deal of silliness in the processing of civil disputes, judging by their capacity to deal with the antisocial behaviors they must regularly confront on the criminal side of the docket. Frivolous civil claims and defenses may occupy a court's time, and incivility among counsel may try its patience. But courts expend a more significant amount of time and energy tending to the criminal docket.²¹ Criminal cases by their very nature involve allegations of anti-social behavior that is destructive to the community. The courts—together with law enforcement personnel, and, increasingly, people involved in restorative justice²²—serve as society's principal mechanisms for coping with such behavior. While the courts may perform imperfectly in administering this system, any institution accustomed to processing this antisocial behavior on a daily basis can withstand occasional hyperbolic civil pleading or want of civility on the part of some lawyers, however regrettable. Far more destructive than the consequences for the courts as institutions is the wear and tear on the parties and the public and private institutions surrounding them—families, neighborhoods, businesses, and not-for-profit organizations.²³ So too we will observe the

²¹ From 1996 to 2000, criminal case filings (including transfers) per authorized federal district judgeship grew 30 percent. ADMINISTRATIVE OFFICE OF THE U.S. COURTS, JUDICIAL BUSINESS: 2000, 13 (2001), at <http://www.uscourts.gov/judbus2000/front/2000artext.pdf>. During the twelve-month period ending September 30, 2000; “[f]ilings of criminal cases . . . and the number of defendants . . . reach[ed] the highest totals since 1933, when the Prohibition Amendment was repealed.” *Id.* at 18.

²² Restorative justice recognizes that “[b]ecause crime is more than lawbreaking, ‘justice’ cannot be achieved simply by punishing or treating the offender, but requires a focus on reparation and healing in the aftermath of the offense that seeks to involve victims and communities actively in the justice process.” Gordon Bazemore, *In Search of a Communitarian Justice Alternative: Youth Crime and the Sanctioning Response as a Case Study*, in *TO PROMOTE THE GENERAL WELFARE* 127, 129 (David E. Carney ed., 1999). This “community hand-on [sic]” approach rejects the historical view that societal accountability is achieved through individualized, retributive punishments to the offender. *Id.* at 130, 149. Instead, restorative sanctions are designed to obtain “behavioral, material, emotional, and cognitive benefits for victims, offenders, and community members.” *Id.* at 149. This objective communicates to the victims “that the system views them as important and values their involvement[,] . . . [to] the community that promoting victim restoration and community peace and safety is a top priority[,] . . . [and to the offenders] that they are capable of and responsible for making amends for the harm caused by their crimes . . .” *Id.*

²³ For example, the rancor generated by an October, 2001 strike by public employees in Minnesota was exacerbated by concern that such conduct by public servants at a time of national emergency would have a detrimental effect on public morale. *Strike in Minnesota Ends as State and Unions Settle*, N.Y. TIMES, Oct. 15, 2001, at A14 (discussing how strikers had drawn only “tepid support from the usually pro-labor public because of its timing after

fragmentation of society if the legal process is used as a ploy to divide people rather than bring them together, or at least resolve their conflicts with as little friction as possible.

C. *The Desire for Community*

The efforts of individuals to resolve their disputes and the desire to reinforce the societal fabric are, more often than not, compatible goals. We search for community in the course of conflict not so much because it is imposed upon us or because of some artificial dictate. In a free country, community doesn't seek us. Community is what we seek.²⁴ When we employ a dispute resolution process, such as litigation, we use it in part to obtain a concrete result, such as financial compensation. But we also invoke the process (and this may be more true of public than private processes) to obtain the community's blessing on our cause: a recognition of its justice, a ratification of our course of action, a vindication, be it public or private.²⁵ Even when private processes, such as mediation and arbitration, are employed, parties are likely to emerge most satisfied when they have been given "voice" (*i.e.*, when they have been sufficiently heard), and when they have been treated as fully enfranchised members of the community.²⁶ We sue because we feel that we have been

the September 11 terrorist attacks").

24

Community is important for two reasons: it is the key to social well-being and psychological health. Both society and the individual will fall apart unless some measure of community is achieved. Community is the essence of the social bond: it binds one person to another, transforming aggregates of individuals into coherent social groups.

WILLIAM A. DONOHUE, *THE NEW FREEDOM, INDIVIDUALISM AND COLLECTIVISM IN THE SOCIAL LIVES OF AMERICANS* 8 (1990).

25 "[T]ort plaintiffs in ordinary and mass tort litigation bring the same 'legal consciousness' to their disputes as the individuals whom Sally Merry (1990) observed in her studies of neighborhood and family disputes: a desire to vindicate rights . . . and a sense of entitlement to use the legal system." Deborah R. Hensler, *The Real World of Tort Litigation*, in *EVERYDAY PRACTICES AND TROUBLE CASES* 155, 162 (Austin Sarat et al. eds., 1998) (citing SALLY ENGLE MERRY, *GETTING JUSTICE AND GETTING EVEN: LEGAL CONSCIOUSNESS AMONG WORKING-CLASS AMERICANS* (1990)).

Whether or not the system actually fulfills these aspirations is questionable. See Hensler, *supra* at 155–56, 162–71.

26 "[P]erceptions of procedural justice are enhanced to the extent that disputants perceive that they had the opportunity to present their views, concerns, and evidence to a third party and had control over this presentation ("opportunity for voice"). Welsh, *Making Deals*, *supra* note 12, at 820; see also E. ALLAN LIND & TOM R. TYLER, *THE SOCIAL PSYCHOLOGY OF PROCEDURAL JUSTICE* 242 (1988); E. Allan Lind et al., *Individual and*

wronged, that our world has been knocked out of balance, and we wish to restore a sense of harmony to our lives and our relationships with those who surround us.²⁷ We employ collaborative processes like mediation not just as instrumental means to obtain compensation or dispose of a dispute, but ideally as a way of reestablishing discourse with our adversaries and bringing closure to conflict.²⁸ We *engage* in conflict as a way of righting ourselves with the world. It is precisely *because* we are in conflict, in crisis (having been wronged or unjustly accused of wrongdoing), that we seek out devices and solutions that restore balance to our lives. And because we are social animals, balance involves our relationship with the community that surrounds us.²⁹

True, people often engage in disputes for selfish motives, and in recent years there have been ample accounts of Americans employing the courts and other dispute resolution mechanisms to advance interests seemingly at odds with those of the public.³⁰ Some of these cases have achieved mythological proportions, serving as heuristics that belie the man-bites-dog nature of their

Corporate Dispute Resolution: Using Procedural Fairness as a Decision Heuristic, 38 ADMIN. SCI. Q. 224, 247 (1993). The inherent value of “voice” is explained in part by group value theory; *i.e.*, disputants are concerned about their standing as full members of society, and their assessments of their standing is dependent upon the way in which group authorities treat them. “To the extent that decision-making procedures are structured to reassure disputants that they are valued members of society—and thus included in ‘the group’—such procedures are more likely to be perceived as procedurally just.” Welsh, *Making Deals*, *supra* note 13, at 828; *see also* Tom R. Tyler, *Psychological Models of the Justice Motive: The Antecedents of Distributive Justice and Procedural Justice*, 67 J. PERSONALITY & SOC. PSYCHOL. 850, 850–58 (1994).

²⁷ “We are not the autonomous, lonely individuals celebrated by liberal democracy. We are connected to and dependent on one another.” THOMAS L. SHAFFER & ROBERT F. COCHRAN, JR., *LAWYERS, CLIENTS, AND MORAL RESPONSIBILITY* 73 (1994).

²⁸ Community mediators report that many agreements are motivated in part by a realization that the disputants will continue to live alongside one another as neighbors, and that there is a social aspect to their relationship. Discussion with Neighborhood Dispute Settlement volunteer mediators, in Harrisburg, Pa. (Nov. 15, 2001).

²⁹ “Social life . . . is produced by competent actors shaping their actions in accordance with local systems of rules and conventions.” ROM HARRÉ, *SOCIAL BEING* 237 (2d ed. 1993).

³⁰ Some of these lawsuits are downright silly. *See, e.g.*, *Coyle v. Purolator Armored, Inc.*, 729 F.2d 1446 (3d Cir. 1984) (unpublished opinion dismissing claim against armored truck company by man who had been convicted of taking cash that had fallen out of armored truck); *Matos, Jr. v. Rivera, Jr.*, 648 A.2d 337 (Pa. Super. Ct. 1994) (suit against pizza parlor by man who had stolen parlor’s delivery truck, which he crashed, injuring himself); *Mark v. Pacific Gas & Elec. Co.*, 496 P.2d 1276 (Cal. 1972) (action by trespasser against owner of premises which had not been rendered safe for their use); *see also* note 21, *supra*. There is a seemingly endless supply of such cases, which proves only that (1) some lawyers will take on most anything, (2) Lincoln was right when he said, “You can fool some of the people all of the time.”

DISPUTING TOGETHER

sometimes-extraordinary claims or inflated jury verdicts.³¹ Even discounting for this, there will no doubt be instances in which people will attempt to abuse dispute resolution processes or extract more than their share of justice or equity from the system. Americans are a diverse lot, and just as many of us will celebrate community (and embrace it at times of crisis), others will view it as their inalienable right to pursue their interests and enjoy their privacy unfettered by obligations to others.³² Members of other societies are amused—and sometimes appalled—at Americans' preoccupation with individual rights, and our readiness to resort to the courts to assert them.³³ But the empirical evidence suggests that most Americans will go to great lengths to avoid formal conflict, and that when they do, they will most often seek out the shortest route between the initiation of conflict and its termination.³⁴ And when Americans employ

³¹ A prominent example: The \$2.9 million verdict to a woman who had spilled hot McDonald's coffee on her lap, reduced by the court to \$480,000. *McDonald's Settles Out of Court Over Coffee Burns*, LEGAL INTELLIGENCER, Dec. 5, 1994, at 4. The initial jury award was widely used as an example of excessive jury verdicts requiring legislative reform; the subsequent remittitur went virtually unnoticed. See, e.g., Nancy Mathis, *House OKs Limits to Civil Suit Damages*, HOUS. CHRON., Mar. 11, 1995, at A1 (discussing "Contract with America" as an approach to ending "excessive jury awards such as the \$2.9 million in punitive damages awarded to an 81 year-old woman who spilled McDonald's coffee on her lap").

³² I am reminded of the *New Yorker* cover depicting scores of city-dwellers admiring a fireworks display together on their rooftops while a solitary neighbor takes in the same spectacle on his living room television set. THE NEW YORKER, July 5, 1999, at cover.

³³ I recently returned from Vienna, where I had the pleasure of teaching a course on the American legal system to a group of well-educated, highly motivated students from Central and Eastern Europe. My students were especially curious about Americans' fascination with firearms, and viewed our insistence on the right to bear arms as an example of the elevation of individual "rights" over the public welfare. (Our refusal to dispense with the death penalty was viewed, however, as an anomaly in the other direction.) They were also cognizant of historical differences, acknowledging, for example, that Austria's disastrous experience with National Socialism justified the suppression of hate speech in a manner perhaps unnecessary in the United States. But the impression of the United States as a litigious nation remains. As one student wrote on an examination, "[T]here seems to be a tendency in the United States to claim individual or constitutional rights faster[sic] and more often than in Austria."

³⁴ A 1992 survey of 822 American adults found only two percent of the respondents expressed an initial impulse to litigate when involved in a disagreement. NATIONAL INSTITUTE FOR DISPUTE RESOLUTION, QUANTITATIVE BENCHMARK SURVEY 6 (1992).

As to the avoidance of court, one commentator has said, "[I]n a nation in which trial and pretrial procedures are unusually expensive, in which litigation is unusually risky, in which delays are long, and in which the first goal of many judges is to avoid judging, Americans have not rushed to the courts in unusual numbers." Albert W. Alschuler, *Mediation with a Mugger: The Shortage of Adjudicative Services and the Need for a Two-Tier Trial System in*

dispute resolution processes, such conduct often can be seen as an affirmation of community values, an acknowledgement of the legitimacy of the institutions and processes invoked and the substantive rules employed when the processes are adjudicative.³⁵ In some respects, a lack of community engagement may be evidenced by a tendency to conflict avoidance, not the willingness to acknowledge conflict where it exists and have it resolved through formal or informal processes grounded in community institutions.³⁶

Communitarians have an interest in how people view and respond to problems in their lives. Do we act as self-absorbed, individuated units, or are we conscious of the rights, interests and feelings of others, and therefore responsive

Civil Cases, 99 HARV. L. REV. 1808, 1817 (1986).

As to settlement short of trial, another has said what most of us have long understood: "High settlement rates mean that most cases never reach trial." John Burrit McArthur, *Inter-Branch Politics and the Judicial Resistance to Federal Civil Justice Reform*, 33 U.S.F. L. REV. 551, 579 n.92 (1999). "[S]tatistical studies' demonstrate that approximately ninety-five percent of all civil cases are resolved or otherwise terminated without a trial." *Id.* (citing Louis Harris & Assocs., "Procedural Reform of the Civil Justice System (study conducted for The Foundation for Change, March 1989)" at 6, reprinted in *The Civil Justice Reform Act of 1990 and the Judicial Improvements Act of 1990, Hearings before the Committee of the Judiciary, United States Senate*, 101st Cong., 2d Sess., 91-184 (1990)).

For a general survey of the above points see Marc Galanter, *Reading the Landscape of Disputes: What We Know and Don't Know (and Think We Know) About Our Allegedly Contentious and Litigious Society*, 31 UCLA L. REV. 4 (1983).

In some communities, resort to "outsiders" to resolve conflict is "roundly condemned." Merry & Silbey, *supra* note 1919, at 173. In a report on a survey of three neighborhoods in a small New England city, the authors concluded that "the decision to turn to official third parties is situationally and morally constrained . . . These findings suggest that the notion of Americans as litigious, eager to rush into court with every trivial incident and personal problem, is wrong." *Id.* at 172.

³⁵ Professor Glendon comments:

In societies where the common sense of community is expressed in various customary, religious, or conventional understandings, it would be redundant to pile legal sanctions on top of social ones. In heterogeneous modern states, however, common values are harder to identify, while law and its official enforcement apparatus are more universal and highly developed than other forms of social regulation. Nowhere is this more so than in the United States. Whether meant to be or not, law is now regarded by many Americans as the principal carrier of those few moral understandings that are widely shared by our diverse citizenry.

GLENDON, RIGHTS TALK, *supra* note 5, at 87. To place Professor Glendon's comment in context, it is only fair to acknowledge her general concern regarding the pervasive role of law and lawyers in American society. See generally MARY ANN GLENDON, *A NATION UNDER LAWYERS* (1994) [hereinafter GLENDON, NATION].

³⁶ Conflict avoidance can be almost as anti-social as the fomenting of conflict. This is not to suggest that we should turn every little grievance or petty annoyance into a formal dispute. Neither society nor our nervous systems could long endure if we did.

to them?³⁷ It is not as though communitarians wish to serve as thought police, banishing every selfish notion from people's minds. But there is a legitimate interest in encouraging people to recognize that they are interconnected with one another, that they are part of a larger whole, so that society may remain not only free, but intact.³⁸ "Disputes . . . are social processes embedded in social relations," declares Jerold S. Auerbach. "They express personality and culture; they are not disembodied abstractions."³⁹ Efforts to resolve disputes in a civil manner can contribute to the building of social capital necessary for civic life to thrive, even at an interpersonal, "micro" level.⁴⁰

When accord cannot be reached on substance there is value, both for individual disputants and the community at large, in maintaining civil discourse even on those matters that divide us. Afternoon television "talk" shows may provide amusement to the type of people who are attracted to train wrecks, but the public could not withstand a world in which private disputes were routinely addressed through the pulling of hair and the throwing of chairs, accompanied by the catcalls of a studio audience. Better models are needed and available. The criminal justice and tort systems evolved as responses to an intolerable level of violence in breach of "the king's peace."⁴¹ Today we might speak of a "citizens' peace"—a mode of engaging in conflict deemed tolerable in a civilized community. The manner in which people go about resolving their private disputes is therefore of interest to communitarians, not so much from a

³⁷ Important to the discussion of communitarianism is the acknowledgment of collectivistic and individualistic social patterns. One social psychologist says:

Collectivism may be initially defined as a social pattern consisting of closely linked individuals who see themselves as parts of one or more collectives (family, co-workers, tribe, nation); are primarily motivated by the norms of, and duties imposed by, those collectives; are willing to give priority to the goals of these collectives over their own personal goals; and emphasize their connectedness to members of these collectives . . . [*Individualism* is a social pattern that consists of loosely linked individuals who view themselves as independent of collectives; are primarily motivated by their own preferences, needs, rights, and the contracts they have established with others; give priority to their personal goals over the goals of others; and emphasize rational analyses of the advantages and disadvantages to associating with others.

HARRY C. TRIANDIS, *INDIVIDUALISM AND COLLECTIVISM* 2 (1995).

³⁸ "Buried deep in our rights dialect," laments communitarian Mary Ann Glendon, "is an unexpressed premise that we roam at large in a land of strangers, where we presumptively have no obligations toward others except to avoid the active infliction of harm." GLENDON, *RIGHTS TALK*, *supra* note 5, at 77.

³⁹ JEROLD S. AUERBACH, *JUSTICE WITHOUT LAW?* 119 (1983).

⁴⁰ See PUTNAM, *supra* note 3, at 288–95.

⁴¹ CHARLES REMBAR, *THE LAW OF THE LAND: THE EVOLUTION OF OUR LEGAL SYSTEM* 214–18 (1980).

regulatory standpoint, but from the viewpoint of those interested in preserving civil discourse and recognizing the interdependence of humanity.⁴² Like a molecular bond, each conflict represents a strand of social capital that is either torn or repaired, depending on not just the result, but the process utilized for its resolution. An entire range of dispute resolution processes, ranging from negotiation to trial,⁴³ allows parties to disagree, with or without being unnecessarily disagreeable. And the role of public institutions in private disputing, along with the spillover effects of private disputes on the community, gives the public at large a legitimate interest in the regulation of disputing conduct.

D. *Balancing Public Interest with Individual Autonomy*

The foregoing assertions probably do not mean that disputants should be commandeered into placing community values foremost, in derogation of legitimate self-interest. People involved in disputes are often (though not always) facing personal crisis, and it would be unfair to demand that they place a broad community agenda ahead of their own.⁴⁴ Communitarians support

⁴² At certain stages of conflict, citizen intervention without the strong arm of government may be the only way to maintain the peace. Says one advocate of community mediation:

The community mediation movement appropriately placed prevention and early intervention responsibilities on citizens and organizations within neighborhoods. Only citizens, operating without state authority, have the ability to offer assistance when they see a problem or promote a conciliatory service when no crime has yet been alleged. Precisely because they do not have state authority, citizens are free to intervene on behalf of willing parties.

Raymond Shonholtz, *Community Mediation Centers: Renewing the Civic Mission for the Twenty-First Century*, 17 *MEDIATION Q.* 331, 335 (2000).

⁴³ It is common to view the range of dispute resolution processes as a progression from a consensual process that involves no third-party intervention (negotiation), through less intrusive and still consensual forms of third-party intervention (e.g., mediation), to adjudicative processes in which a third party can impose a binding resolution on the parties (arbitration and trial). Trial is generally viewed as involving greater third-party control than arbitration, as arbitration usually leaves the parties free to determine their own procedural rules. See STEPHEN B. GOLDBERG, ET AL., *DISPUTE RESOLUTION: NEGOTIATION, MEDIATION, AND OTHER PROCESSES* 4–5, Table 1–1 (3d ed. 1999).

⁴⁴ For example, many observers (the author included) thought it unfair for Élian Gonzales' Miami relatives to impose a political agenda on what was essentially a private custody matter. The legitimate concerns in *L'Affaire Élian* involved the best interests of a six-year-old boy, not the desire of Cuban expatriates to preserve their world view. Sheryl McCarthy, *For Elían, Nothing Can be Quite the Same Again*, *NEWSDAY*, Jan. 31, 2000, at A26 ("It would be a great blessing if all the adults around him would somehow calm the seas of the political arena and concentrate on a little boy having time to just absorb the fact that he

individual autonomy balanced by social responsibility, not a complete rejection of the former in favor of the latter. Disputants, like anyone else, should make choices based, at least in part, on their interests. They should recognize, however, that their long-term interests may well be dependent on the health of the community, that their own well-being may involve factors other than economic self-maximization, and that it is in their interests to build social capital, even if the immediate payback is not apparent.⁴⁵ Effective disputing also requires a measure of engagement and interaction with others, which might in turn promote mutual recognition of each other's interests. Self-interest is often best served by the realization that, more often than not, disputes involve problems to be solved rather than battles to be won.⁴⁶

has a life, that he is alive.”).

A sense of perspective (*i.e.*, of seeing one's concerns in the context of the larger picture) is important, however. As Senator John McCain has recently stated (in a different context), “America is [now] at war, which should mean that parochial agendas are set aside for the national goal of destroying terrorism.” John McCain, Editorial, *Business as Usual*, WASH. POST, Nov. 16, 2001, at A47.

⁴⁵ See ETZIONI, SPIRIT, *supra* note 5, at 10. A responsibility to the environment, the destruction of which may affect future generations far more gravely than our own, is Etzioni's most obvious example of this imperative. *Id.* at 11. With respect to interpersonal relations, Putnam quotes the contemporary philosopher Yogi Berra, who poignantly noted, “[i]f you don't go to somebody's funeral, they won't come to yours.” PUTNAM, *supra* note 3, at 20.

Often the single-minded pursuit of what appears to be one's own interests (regardless of the overall interests of the community) turns out to be counterproductive. In the post-Election Day maneuvers following the 2000 presidential election, Vice President Gore demanded a hand count of votes in four counties from which he hoped to gain a decisive advantage. The United States Supreme Court halted the count. *Bush v. Gore*, 531 U.S. 98 (2000). A subsequent unofficial recount by a media consortium showed that the limited recount demanded by Gore would have increased Governor Bush's margin of victory. However, a statewide recount (avoided by Gore, due to fear that it would have increased Bush's margin in Republican counties) apparently would have produced a Gore victory.

Governor Bush, meanwhile, opposed Gore's demands all the way to the Supreme Court; the Court thereby halted a recount that would have confirmed Bush's victory and sent him to the White House with a less suspect electoral mandate. As at least one commentator has suggested, “[a]lthough neither side knew it at the time, each did its candidate more harm than good by playing hardball.” E.J. Dionne, Jr., Editorial, *Lessons of the Long Recount*, WASH. POST, Nov. 16, 2001, at A47. Governor Bush may have also eroded his legitimacy by rejecting Vice President Gore's pleas for a joint meeting (however self-serving); both candidates missed an opportunity to build national consensus by ignoring intervention efforts by former Presidents Ford and Carter.

⁴⁶ Tom Arnold, *20 Common Mistakes in Mediation Advocacy*, 13 ALTERNATIVES TO THE HIGH COST OF LITIGATION 69, 71 (1995).

We should be careful, however, when we speak of the “interests of the community” with regard to disputes and disputing behavior. Repressive authoritarianism potentially lurks behind that phrase if it is employed as an abstraction without substance, or without inquiry as to the values being promoted. When we talk about the interests of the community in connection with dispute resolution, certainly we are not talking about mere institutional convenience, *e.g.*, the conforming of disputing behavior to a schedule arbitrarily set by a tribunal for its own comfort. Nor should we cultivate an ethic of ritualism, in which process is both a means and an end, and in which an *illusion* of harmony is promoted through public ceremony.⁴⁷ Nor, for that matter, should we be talking about conformity for conformity’s sake. While the community should be able to enforce mores based on justice or morality, it is insufficient to demand conformity to a rule or standard of behavior simply because “the community” demands it.⁴⁸ Simply saying that something is a community value that should override self-interest is not a self-proving proposition; to do so invites a form of authoritarianism that runs roughshod over legitimate individual rights and interests. There *is* a repository of individual rights that require recognition alongside community interests. Articulating the justification for community norms, then finding the proper titration between those norms and individual rights is the communitarian dilemma, but dispute resolution systems can be employed to good effect here.⁴⁹

⁴⁷ See William H. Simon, *The Ideology of Advocacy: Procedural Justice and Professional Ethics*, 1978 WIS. L. REV. 29, 91–92 (1978).

⁴⁸ There is a legitimate concern, however, that as our society has become increasingly tolerant and permissive of behavior once constrained by social mores, there is little in their place to knit together the social fabric. See ETZIONI, GOLDEN RULE, *supra* note 7, at 68–70. Many of us support the separation of church and state, and resent efforts to force either religion or blind patriotism down peoples’ throats. But in the absence of shared norms (based, in large part, on religious and national experience), we might ask whether we are left with no more than empty principles.

⁴⁹ While in the past, legal rules might have been justified through Blackstonian declarations of “natural law,” nowadays the justification for legal rules can be found in either pragmatic or justice-based explanations in common law decisions and statutory preambles. Efforts to strike a balance between community norms and individual rights can be found in cases such as *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290 (2000) (group prayer recited on public address system at high school football games violates establishment clause); *Wisconsin v. Yoder*, 406 U.S. 205 (1972) (free exercise clause mandates exemption from compulsory school attendance requirements); *W. Va. Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943) (first amendment prohibits state-enforced flag salute).

III. DEFINING “COMMUNITY”: BUILDING AND MAINTAINING SOCIAL CAPITAL

“He that troubleth his own house shall inherit the wind.”
— *Proverbs*⁵⁰

We should pause here to define “community” for our purposes. Amitai Etzioni suggests that

[c]ommunity is defined by two characteristics: first, a web of affect-laden relationships among a group of individuals, relationships that often crisscross and reinforce one another (rather than merely one-on-one or chainlike individual relationships), and second, a measure of commitment to a set of shared values, norms, and meanings, and a shared history and identity—in short, to a particular culture.⁵¹

In analyzing disputing behavior, it might be helpful to think in terms of both fairly small groupings in which conflict may arise, such as the workplace, a religious group, or a professional group, and larger political or geographic communities, such as a town, state or nation. While Etzioni’s definition might apply to both types of communities, they have different implications for disputing behavior.

A. *Building Bonding Social Capital Through Dispute Resolution Systems*

Putnam distinguishes between “bonding” (or exclusive) social capital that looks inward and cements homogeneous groups and “bridging” (or inclusive) social capital that is outward looking and encompasses people across diverse social cleavages.⁵² Disputing behavior involves both. Relatively small groupings, like companies, trades, religious groups, and indigenous tribes, have in many instances developed internal dispute resolution mechanisms to resolve disputes in accordance with established mores and with a minimum of disruption. These groups often, for a variety of reasons, place a premium on harmony. Either because of their small size, their precarious economic circumstances, or the need to maintain relationships on more than one level, they can hardly afford friction among their members.

⁵⁰ *Proverbs* 11:29 (King James).

⁵¹ ETZIONI, GOLDEN RULE, *supra* note 7, at 127.

⁵² PUTNAM, *supra* note 3, at 22.

An example of this phenomenon exists in the diamond trade. In this business, a relatively small, homogeneous (traditionally Jewish) group has developed a system of arbitration and conciliation to resolve conflict in an expeditious manner.⁵³ This group, handling valuable goods and often doing business on a handshake, can ill-afford major disruptions.⁵⁴ Its ability to resolve matters internally and quickly is buttressed by a centuries-old religious tradition as well as a pragmatic desire to contain both economic and reputational damage.⁵⁵ But while the system developed out of reputational bonds forged by a homogeneous group, it has been preserved as the industry has become more heterogeneous. Thus, both bonding and bridging capital have been created by this dispute resolution system. A shift toward an information technology-based regime seems to have played a role in maintaining reputational bonds as significant, even outside the homogeneous group that previously dominated the industry.⁵⁶

Religious groups have been instrumental not only in the creation of bonding social capital, but also in employing dispute resolution mechanisms to rebuild that capital when the community is threatened. The disruption and betrayal of community caused by economic or sexual scandal has been addressed through interventions by facilitators adept at “organizational trauma recovery.”⁵⁷ And in less stressful times, the routine use of dispute resolution mechanisms established by religious groups as diverse as Roman Catholics and Mennonites have kept disruptions within communities to little more than a simmer.⁵⁸ A similar

⁵³ While the diamond bourses have established an arbitration system that has supplanted state-created substantive and procedural law, eighty to eighty-five percent of the disputes submitted to arbitration are settled during the procedure’s conciliation phase. Lisa Bernstein, *Opting Out of the Legal System*, 21 J. LEGAL STUD. 115, 153 (1992).

⁵⁴ *Id.* at 135–37.

⁵⁵ *See id.* at 148. Professor Bernstein provides economic as well as social reasons for the efficiency of this system. *Id.* at 135–43. But it should not be a source of dismay that reputational bonds created by good business ethics have a salutary economic impact.

⁵⁶ *Id.* at 143–45. To the extent this remains true, it may address Putnam’s call for new systems of building social capital. PUTNAM, *supra* note 3, at 22–24; 170–80.

⁵⁷ *See, e.g.*, David Brubaker, *Organizational Trauma Recovery: The “God’s Fellowship Community Church” Reconciliation Process*, in THE CONSENSUS BUILDING HANDBOOK 1051 (Lawrence Susskind et al., eds., 1999).

⁵⁸ Disputes in colonial Puritan communities were often handled through a multistage process of informal resolution. Typically, the disputing parties would first decide on one or more arbitrators to resolve the dispute. If arbitration failed, elders and others in the community spoke with the disputants in an effort to achieve a solution and restore communal harmony. When all else failed, a proceeding was held before the minister and congregation. The proceeding bore no resemblance to our 21st century conception of due process. Ministers often acted as both judge and prosecutor, lawyers were not involved, the congregation was free to speak at will of facts, opinions, or admonitions and there were no

DISPUTING TOGETHER

mechanism is seen in the sentencing circle employed by many Native American tribes to deal with antisocial behavior. The very physical device of a circle emphasizes the interest of the community in treating an offender so as not only to deal with the offense at hand, but to draw the miscreant back into the community in a healing manner.⁵⁹

The Native American sentencing circle may be seen as an example of what Professor William Ury describes as the “third side.” The third side involves “the vigilant, active, and constructive involvement of the surrounding members of the community” in the management of conflict.⁶⁰ The surrounding community serves as a *container* for conflict, and “as a kind of *social immune system* preventing the spread of the virus of violence.”⁶¹ The third side may be served through a number of roles and may find a variety of “voices”: teachers, bridge builders, mediators, arbiters, witnesses and peacekeepers are some of the examples Ury furnishes.⁶² What is common to successful systems, formal and

appeals. While the church could not incarcerate or seize property, admonition and excommunication from the community were common penalties. AUERBACH, *supra* note 40, at 23–25.

Quakers, like the Puritans, had an elaborate system of dispute resolution. Known as the “gospel order,” the process first required the disputing parties to work out their differences in a brotherly fashion. If this failed, one or two “discreet, judicious friends” would encourage acceptance of arbitration by disinterested Quakers. If the preliminary arbitration failed, arbitrators referred the disputants to the “monthly meeting” where arbitrators were appointed and the parties had to accept their ruling under pain of disownment by their fellow Quakers. *Id.* at 29–31.

The Mennonite church also has a tradition of internal dispute resolution through mediation. For an in depth discussion of the Mennonite Conciliation Service, founded in 1979, see John Paul Lederach & Ron Kraybill, *The Paradox of Popular Justice: A Practitioner's View*, in THE POSSIBILITY OF POPULAR JUSTICE: A CASE STUDY OF COMMUNITY MEDIATION IN THE UNITED STATES (Sally Engle Merry & Neal Milner eds., 1993).

The Bet Din (Hebrew for “house of justice”) is a form of alternative dispute resolution dating back thousands of years ago and is used around the world by the Jewish community. For a thorough description and several case studies, see Randy Linda Sturman, *House of Judgment: Alternative Dispute Resolution in the Orthodox Jewish Community*, 36 CAL. W. L. REV. 417 (2000); see generally Andrew W. McThenia & Thomas L. Shaffer, *For Reconciliation*, 94 YALE L.J. 1660, 1665–68 (1985).

In some instances, mechanisms adopted by religious communities may be regarded as repressive and exclusionary. See, e.g., *Bear v. Reformed Mennonite Church*, 341 A.2d 105 (Pa. 1975) (involving Mennonite practice of “shunning”).

⁵⁹ Ulrich, *supra* note 16, at 432–34; 438–40.

⁶⁰ WILLIAM URY, THE THIRD SIDE: WHY WE FIGHT AND HOW WE CAN STOP 5 (1999).

⁶¹ *Id.* at 7.

⁶² *Id.* at 190–96.

informal, is their effectiveness in containing disputes and using community resources to resolve them in a peaceful fashion. As a prominent example of the third side, Ury describes the Bushmen of the Kalahari Desert who, in the absence of formal leaders or centralized government, “do a good job of controlling harmful conflict” by engaging in prolonged discussion of problems and arriving at consensus as to their resolution.⁶³

In America, where disputes often involve heterogeneous groups, the containment of conflict within a community is more likely to involve formal processes. For example, businesses and their unionized employees have developed a system of arbitration to resolve workplace disputes arising under collective bargaining agreements. Here, the disputants are less homogeneous than in the foregoing examples: while labor and management have a common interest in keeping the enterprise in operation, the parties to a workplace dispute are more likely to be culturally and economically diverse. Yet a “law of the shop” prevails as to both substance and procedure, drawn from a common economic endeavor and a culture developed through two generations of disputing under the National Labor Relations Act.⁶⁴ The availability of efficient and accessible grievance procedures obtained through collective bargaining and union representation promotes individual autonomy (without this procedure, few workers would have their grievances heard, and life in the workplace would be nasty, brutish and short) while maintaining peace in the workplace.⁶⁵

⁶³ *Id.* at 4–5.

⁶⁴ The decline in the proportion of the American workforce belonging to unions and covered by collective bargaining agreements has resulted in a decline in social capital. *See, e.g.,* PUTNAM, *supra* note 3, at 80–82. Putnam points out the role of labor organizations as “an important locus of social solidarity, a mechanism for mutual assistance and shared expertise.” *Id.* at 80. Labor economist Peter Pestillo has lamented, “[w]e are experiencing the cult of the individual, and labor is taking a beating preaching the comfort of coalition.” Peter J. Pestillo, *Can Unions Meet the Needs of a ‘New’ Work Force?*, MONTHLY LAB. REV., Feb. 1979, at 33 (1979) (quoted in PUTNAM, *supra* note 3, at 82). But the failure to engage in collective action has resulted in a decline in worker autonomy, as non-unionized workers become increasingly subject to the whims of employers and managers. The failure to make short-term sacrifices in recognition of a common interest—*i.e.*, the insistence not only on bowling alone, but bargaining alone—has unfortunately resulted in less autonomy for the individual worker.

⁶⁵ This system has its limitations. Mediation of collective bargaining agreements (under which grievances are arbitrated) typically occurs through “shuttle diplomacy,” a series of private caucuses with the mediator in which the two sides (labor and management) are rarely in the same room. *See* Welsh, *Making Deals*, *supra* note 13, at 810 (describing “shuttle diplomacy” mediation). An agreement usually emerges, but without the face-to-face engagement that may be preferable where an ongoing working relationship is at stake. Perhaps the formal arbitration process—in which a third party ultimately imposes a decision on the parties—would be resorted to less frequently if the parties were more engaged with one another during the collective bargaining process that brought about the agreement in the

Why do systems like this work? Putnam writes:

An effective norm of generalized reciprocity is bolstered by dense networks of social exchange. If two would-be collaborators are members of a tightly knit community, they are likely to encounter one another in the future—or to hear about one another through the grapevine. Thus they have reputations at stake that are almost surely worth more than gains from momentary treachery.⁶⁶

Why are good internal dispute resolution systems important? Not only does an effective internal dispute resolution system expeditiously resolve the dispute at hand, it mitigates fallout and helps prevent or alleviate the consequences of future disputes. At times of crisis (such as that faced by the nation following the September 11 attacks), communities evidencing strong bonding social capital are quickest to mobilize and deal effectively with external threats.⁶⁷ Organizations or micro-communities that maintain their bonding social capital through healthy conflict resolution processes (as distinguished from repression or coercion) are healthier and more confident, and therefore more able to deal with conflict with the outside world in a constructive manner.⁶⁸ In short, in ways seen and unseen, effective internal dispute resolution systems help build social capital conducive to the effective functioning of the community at large (or *macro*-community), as well as the micro-community.

first place. The system is, nevertheless, a substantial improvement on the violence and repression that preceded it.

⁶⁶ PUTNAM, *supra* note 3, at 136.

⁶⁷ The laudable conduct of New York City's Police and Fire Departments in the immediate aftermath of the September 11 attacks is a prominent example. These departments evidenced tight fraternal bonds long before the attacks galvanized them to heroic action. Note, however, that these departments had been heavily criticized prior to September 11 for racially biased attitudes and practices. See Ron Howell, *Fire in the Blood: Vulcan Leader who Follows in Family Footsteps Speaks Out*, NEWSDAY, May 6, 2001, at 7 (discussing hiring practices of New York City Fire Department); *Report Urges Retraining Cops; Diallo Panel Says Rules Not Violated*, SAN ANTONIO EXPRESS-NEWS, Apr. 27, 2001, at A19; Barbara Mikkelson, *Statue of Liberties*, at <http://www.snopes2.com/rumors/memorial.htm> (last modified Jan. 18, 2001) (discussing controversy regarding a memorial to New York City firefighters and noting that fewer than six percent of New York firefighters were African-American or Hispanic).

⁶⁸ We might compare instances in which bonding social capital has been maintained through repression, as in Nazi Germany and Taliban-ruled Afghanistan, and the destructive manner in which these entities have dealt with the outside world.

B. *The Need for Bridging Social Capital*

Yet the ability of homogeneous groups to build bonding capital or even the ability of more heterogeneous groups (like labor and management) to build bridging capital through internal dispute resolution procedures only begins to measure the value of dispute resolution processes in the search for community. We can speak of the "Amish community" or the "legal community" or the "African-American community," or even the "Rotisserie Baseball League community," and each would have meaning, particularly to their respective members. Conflict may develop within these communities, and bonding capital may be produced as their members employ mechanisms developed by their respective communities to resolve this conflict with a minimum of disruption. But the true test of conflict resolution mechanisms in a heterogeneous society involves disputes among people of *different* backgrounds and interests, whose shared experiences are not as deep and among whom there is likely to be less trust.

Communitarian Charles Taylor goes so far as to disparage "partial groupings" like ethnic minorities, adherents of particular religions and special interests. These "local" groups can fragment citizens' allegiance to the larger community.⁶⁹ Indeed, there is a dark side to narrow community identification, which can result in exclusion and anti-social behavior. Both the Ku Klux Klan and the *Cosa Nostra*⁷⁰ are examples of narrow groups adopting their own standards of behavior to the detriment of the community at large. Putnam, while acknowledging the value of bonding social capital, also recognizes that it may create "strong out-group antagonism."⁷¹ Indeed, invidious narrow groups such as the Klan and the *Cosa Nostra* have fostered unflattering and inaccurate stereotypes of certain regional or ethnic groups, such as Southerners or Italian-Americans.

But groups of people sharing a common background or interest can also enhance the larger community through constructive disputing behavior. A remarkable example is seen in the strategy of the National Association for the Advancement of Colored People (NAACP) in pursuing school integration in the 1950s and 1960s. That a historically excluded group, like African-Americans, would avail itself of the nation's legal apparatus, as it did in *Brown v. Board of Education*⁷² and similar cases, to attack an entrenched, officially endorsed

⁶⁹ BRUCE FROHNER, *THE NEW COMMUNITARIANS AND THE CRISIS OF MODERN LIBERALISM* 51 (1996).

⁷⁰ Literally, "our thing."

⁷¹ PUTNAM, *supra* note 3, at 360-61.

⁷² *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954).

DISPUTING TOGETHER

system of segregation, is an affirmation of community in its finest sense.⁷³ In *Brown* and subsequent cases, an oppressed minority group, members of which were victims of decades of legally sanctioned discrimination, accessed the larger community's legal mechanisms to obtain inclusion, rather than breaking off and wallowing in self-pity and segregation (or, for that matter, engaging in violence).⁷⁴ In so doing, the NAACP and its allies in the African-American community strengthened the African-American community while enhancing the community at large.⁷⁵

Community-based mediation programs employ elements of both bonding and bridging social capital: bonding capital because they typically are based in small geographic units; bridging capital because many of the communities they serve are economically, ethnically and culturally diverse. A communitarian ethos underlies much of the work of these programs. "A community's ability to reduce or prevent conflict and manage it reflects social cohesion and pervasive normative values. Concomitantly, the building of prevention mechanisms and skills within a community strengthens civic roots and promotes social

⁷³ In a 1958 interview, the African-American writer Ralph Ellison commented:

[I]n the United States, the values of my own people are neither "white" nor "black"; they are American. Nor can I see how they could be anything else, since we are a people who are involved in the texture of the American experience. And indeed, today the most dramatic fight for American ideals is being sparked by black Americans. Significantly, we are the only black peoples who are not fighting for separation from the "whites," but for a fuller participation in the society which we share with "whites." And it is of further significance that we pursue our goals precisely in terms of American constitutionalism. If there is anything in this which points to "black values" it must lie in the circumstance that we really believe that all men are created equal and that they should be given a chance to achieve their highest potentialities, regardless of race, creed, color or past condition of servitude.

Ralph Ellison, *Some Questions and Some Answers*, in *THE COLLECTED ESSAYS OF RALPH ELLISON* 291, 299 (John F. Callahan ed., 1995).

⁷⁴ See Robert L. Rabin, *Lawyers for Social Change: Perspectives on Public Interest Law*, 28 *STAN. L. REV.* 214–24 (discussing the development of the NAACP's legal program); see generally Derrick Bell, *Serving Two Masters: Integration Ideals and Client Interests in School Desegregation Litigation*, 85 *YALE L.J.* 470 (1976) (discussing litigation strategies of the NAACP under Thurgood Marshall and Jack Greenberg).

⁷⁵ There are those who will debate whether the legal battle to end public school segregation—with the ensuing white flight from the inner cities, the growth in residential segregation, and the decline of many urban and rural school districts—has strengthened either the African-American community or the nation as a whole. See PUTNAM, *supra* note 3, at 311–13. But I cannot conceive of an America in which legally enforced segregation in public institutions remained the norm. The end to officially sponsored apartheid was integral to the survival of the American community. I would further argue that the demise of segregation in private life is yet another necessary ingredient for national survival.

cohesion.”⁷⁶ Community therefore becomes both a *means* of resolving conflict and an *end* of the conflict resolution process. While outside assistance—in the form of training, funding, and organizational expertise—may help establish and maintain these programs, their vitality ultimately depends on the ongoing participation and engagement of community members who recognize the need to build and maintain social capital.

Of course, some people will not see the need to build the larger community. Some members of smaller groups, rebuffed and marginalized by the larger community, will see fit to carve out a separate path.⁷⁷ Even among those who have not been marginalized, the myth of the rugged individualist is deeply ingrained in the American psyche, and no amount of exposure to the novels of Wallace Stegner or the movies of Frank Capra will disabuse some people of the notion that they can go it alone. Some see isolating themselves from the larger world as a way of asserting their imagined superiority. Still others, withdrawing to their gated subdivisions, will regard their isolation as an act of self-defense. But inevitably, the complexities of modern society will draw all but the most ardent survivalist into interaction with others. And conflict will inevitably arise out of this interaction. We may pick our spots (after all, some petty annoyances are better off left ignored), but at some juncture, engagement is preferable to avoidance.⁷⁸

⁷⁶ Shonholtz, *supra* note 42, at 334.

⁷⁷ Examples can be found in the black separatist movement, most notably Marcus Garvey’s “Back to Africa” movement and the Nation of Islam.

⁷⁸ Individual psychology undoubtedly influences attitudes regarding conflict. Mnookin, Peppet and Tulumello, along with Thomas and Kilmann, have categorized conflict behavior in terms of the amount of empathy and assertiveness exhibited by an individual. Robert H. Mnookin et al., *The Tension Between Empathy and Assertiveness*, 12 NEGOT. J. 217, 219–21 (1996); Ralph H. Kilmann & Kenneth W. Thomas, *Interpersonal Conflict-Handling Behavior as Reflections of Jungian Personality Dimensions*, 37 PSYCHOL. REP. 971 (1975). A person with low empathy and low assertiveness is likely to *avoid* conflict; one with a high level of assertiveness and low empathy will *compete*; one with high empathy but low assertiveness will *accommodate*; one who exhibits both qualities in moderation will *compromise*. Perhaps the most desirable disputing behavior is evidenced by those with high levels of empathy *and* assertiveness; ideally, those individuals engage in *collaboration* so as to maximize gains for all. See Mnookin et al., *supra*, at 223–26.

I suspect that most disputants are not entirely frozen in their attitudes toward conflict. The levels of empathy and assertiveness (and therefore the responses to conflict) might vary with the nature of the dispute, the issues (legal and non-legal) involved, and the disputants’ perceptions of each other. They might also vary with the extent to which legal counsel (who might be seen as disputants’ coaches in disputing behavior) promote empathy and assertiveness. Historically, the conduct of lawyers seems to suggest more of the latter than the former; I would suggest that the cultivation of a client’s empathy is at least as legitimate a role for a lawyer as the promotion of assertiveness. See *infra* notes 185–206 and accompanying text.

IV. PROCESS CHOICES

*"Not to decide is to decide."
— Harvey Cox⁷⁹*

All dispute resolution processes have elements conducive to communitarianism, yet all such choices can be employed in a manner detrimental to the building of community. Those seeking out communitarian ends should therefore be conscious not only about which process is used, but the manner in which it is employed. Our discussion here will consider the communitarian implications of three primary processes: traditional courtroom litigation, arbitration, and mediation.⁸⁰

A. Litigation: Collaboration in the Midst of Contention

Legal structures can provide a framework for discourse necessary to community, but they can also erect barriers to constructive human interaction. In his fine little book, *Community and the Politics of Place*,⁸¹ Professor Daniel Kemmis describes the philosophy underlying the Federalist approach to the United States Constitution. Meeting in the aftermath of Shays' Rebellion (a revolt of farmers in western Massachusetts) and worrying about a reprise of this event, James Madison and the other Federalist framers developed "a machinery of government which would pump out solutions without requiring . . . direct citizen engagement."⁸² The constitutional system of checks and balances, in which one branch of government would serve a blocking function as to the urges of another, was, in Kemmis's view, at variance with Thomas Jefferson's notion of a "Republican tradition" based on a "face-to-face, hands-on approach

⁷⁹ Harvey Cox, in LAURENCE J. PETER, *PETER'S QUOTATIONS: IDEAS FOR OUR TIME* 297 (1977).

⁸⁰ Dispute resolution scholars distinguish between the primary processes of negotiation, mediation, arbitration and courtroom litigation and hybrid processes such as med-arb, fact-finding, summary jury trial, mini-trial, and private judging. See, e.g., GOLDBERG, ET AL., *supra* note 43, at 4–5. Because the secondary processes incorporate elements of the primary processes, our focus is on the three primary processes in which neutrals are employed.

⁸¹ DANIEL KEMMIS, *COMMUNITY AND THE POLITICS OF PLACE* (1990).

⁸² *Id.* at 11. Kemmis suggests that the framers were attempting to avoid insurrections like Shays' Rebellion. *Id.* Communitarian Mary Ann Glendon has suggested that the framers attempted to devise a machinery through which checks and balances would block legislative efforts to dilute property rights. GLENDON, *RIGHTS TALK*, *supra* note 5, at 24–25. This constitutional protection of "absolutes" in the form of private property rights may have had the substantive effect of erosion of broader community interests. *Id.* at 41–46.

to problem solving, with its implicit belief that people could rise above their particular interests to pursue a common good.”⁸³ Kemmis’s book goes on to describe several instances in which the blocking function performed by constitutional government at all levels has frustrated citizens’ efforts to improve their communities.⁸⁴ He also describes a limited number of instances in which citizens have risen above the constraints of constitutional government to engage in collaborative processes to build better solutions for their communities.⁸⁵

Kemmis’s conception of the Madisonian construct and the Jeffersonian ideal finds a parallel in dispute resolution processes. Much as the Constitution was developed as an antidote to the disorder of Shays’ Rebellion and similar

⁸³ KEMMIS, *supra* note 81, at 11. Jefferson in fact saw the need for a check on government excess, but he envisioned that this would occur through the popular will, possibly through periodic constitutional conventions. THOMAS JEFFERSON, *Query XIII: The Constitution of the State, and its Several Charters?*, in NOTES ON THE STATE OF VIRGINIA (1787), available at <http://www.yale.edu/lawweb/avalon/jeffvir.htm> (last visited Aug. 13, 2002).

⁸⁴ KEMMIS, *supra* note 81, at 39, 60 (discussing debates of citizens of Northern Rockies states and the federal government over environmental, recreational, agricultural, and mining issues). These “standoff struggle[s] . . . [have] sapped the energy and resources of all concerned.” *Id.* at 39. An extreme example of this struggle is the cancellation of a public hearing proposed to gather opinions on the Bridger-Teton National Forest draft plan. The hearing was cancelled due to security concerns: Louisiana-Pacific employees planned to bring in comments written on two-by-fours. *Id.* at 60; *see also id.* at 46 (The author also describes a maneuver by John Seiberling, Idaho legislator and chair of a House subcommittee on wilderness, to block passage of a wilderness bill. He submitted an aggressive wilderness bill “too large for Idaho Senator James McClure to swallow.” The maneuver blocked the passage of anything.); *see also id.* at 58–59 (noting how an anticipated “trace race,” involving mountain bikes, kayaks, and hang gliders, to take place during a planned summer festival in a small town in Montana was cancelled when the possibility of a lawsuit was raised).

⁸⁵ *Id.* at 92–94 (This is an example of voters using the power of the vote unselfishly; a ballot referendum was held regarding regulation of the dairy industry by the Milk Control Board. Even though the voters could vote to lower the milk price, the voters chose not to lower the price because of the adverse effect on many “mom and pop” businesses.); *See also id.* at 111–13 (This exemplifies choosing mediation over a public hearing: a community organization requested a grant from the city council for a community solar greenhouse, which would be attached to a laundromat to provide the necessary heat and operating funds. Other laundromat owners are opposed because of the diversion of business from their laundromats to the new laundromat. The parties agree to mediation, which settles the dispute without leaving either side bitter or unwilling to trust each other in the future.); *id.* at 114 (Here parties are agreeing to discuss a dispute without a mediator: a paper mill requests permission to dump into a river; a newly formed environmental group is opposed. The parties agree to meet, and, remarkably, jointly present a plan to the administrative agency. By recognizing their ability to be the decision makers, the groups formed a sense of trust and reliability.).

DISPUTING TOGETHER

disruptions, our system of litigation developed as an alternative to the blood feud and other chaotic devices deemed intolerable in a civilized society. Litigation averts the direct physical clash of adversaries by channeling disputants into a stylized process that removes the battle from the principals and into an arena of abstraction, in which the chief combatants are attorneys. Disputes are resolved through the application of abstract principles of law to the facts at hand, not through a reconciliation of the disputants' interests. Jeffersonian engagement is averted through the employment of Madisonian machinery in which roles are assigned, discourse is channeled, and a result—deemed acceptable more due to conformity to process than to substantive satisfaction—eventually emerges.

1. *Litigation as Affirmation of Community*

Professor Etzioni has observed that “societies are continuously subject to *centrifugal forces* that exacerbate the need to maintain order . . . and to *centripetal forces* that increase the need to protect autonomy.”⁸⁶ In the context of conflict resolution, litigation is characteristically viewed (especially by communitarians) as a centrifugal force through which individuals move heaven and earth to assert their rights and vindicate their egos.⁸⁷ But litigation may be viewed as a centripetal force in at least two respects. First, resort to litigation for the assertion of individual rights (to claim, in effect, what is rightfully one's own) involves an affirmation of community, a willingness to have the community's standards (as reflected by its laws) applied to one's dispute, through the procedures adopted and the judges appointed by the community.⁸⁸ “Trust that the sovereign's interests are in harmony with one's own is the basis of all government,” says Bruce Frohnen. “We require government only because we tend to favor our own cause too much when we are involved in any altercation.”⁸⁹ Second, when we elect litigation, we cede a degree of our

⁸⁶ ETZIONI, GOLDEN RULE, *supra* note 7, at 46.

⁸⁷ See GLENDON, RIGHTS TALK, *supra* note 5, at 173–75.

⁸⁸ The writer Ralph Ellison saw the same contradiction in jazz:

There is . . . a cruel contradiction implicit in the art form itself, for true jazz is an art of individual assertion within and against the group. Each true jazz moment (as distinct from the uninspired commercial performance) springs from a contest in which each artist challenges all the rest; each solo flight, or improvisation, represents (like the successive canvasses of a painter) a definition of his identity as individual, as member of the collectivity and as a link in the chain of tradition.

Ralph Ellison, *The Charlie Christian Story*, in THE COLLECTED ESSAYS OF RALPH ELLISON 266, 267 (John F. Callahan ed., 1995).

⁸⁹ FROHNEN, *supra* note 69, at 32. Kemmis suggests a less inspiring view of this

autonomy in the interest of community cohesion, whether due to recognition that the peace of the community must be respected (and that we can no longer resort to the blood feud) or due to enlightened self-interest, realizing that resort to the courts is likely to be more effective than self-help. In effect, we throw ourselves at the mercy of our peers, trusting in the community's judgment, through its legal standards and our fellow citizens employed to enforce them.⁹⁰

Litigation provides each citizen the opportunity to pursue justice before one or more neutral decisionmakers, with procedural protections designed principally to insure fairness.⁹¹ When carried to the extreme, however, litigation can serve as the ultimate manifestation of a self-absorbed preoccupation with individual rights to the derogation of community interests and needs, or what Professor Mary Ann Glendon calls an overemphasis on "rights talk."⁹² "Our rights talk," says Glendon, "in its absoluteness, promotes unrealistic expectations, heightens social conflict, and inhibits dialogue that might lead toward consensus, accommodation, or at least discovery of common ground."⁹³ The very seating arrangement of the American courtroom—with the litigants and their counsel facing the bench, not each other—illustrates the type of discourse to be expected: detached, formal, and stylized—not direct, casual or

mechanism, in which the very process of public decision making and the procedure of zealously advocating one's cause to a neutral third party produce a situation where all parties end up frustrating and blocking each other so that no party ultimately benefits. KEMMIS, *supra* note 81, at 53. "Public decision makers are . . . constitutionally encumbered by the responsibility to hear. But the duty to hear does not extend beyond the decision maker: those who testify are not encumbered by any such responsibility. Their role, in our system, is to make the strongest possible case for their particular interests." *Id.*

⁹⁰ The use of the jury, rather than an elite group of professional decision-makers, to make critical determinations may also be viewed as an expression of faith in the community. A contrast is provided by the eighteenth- and nineteenth-century preference of elites for dueling "because it avoided using social inferiors sitting in judgment." Douglas H. Yarn, *The Attorney as Duelist's Friend: Lessons from the Code Duello*, 51 CASE W. RES. L. REV. 69, 84 (2000). Perhaps the private trial—in which parties avoid the public court system by purchasing private adjudication services—is the modern counterpart to that phenomenon.

⁹¹ The Federal Rules of Civil Procedure are to "be construed and administered to secure the just, speedy and inexpensive determination of every action." FED. R. CIV. P. 1.

⁹² GLENDON, RIGHTS TALK, *supra* note 5, at 14.

⁹³ *Id.* William H. Simon, describing the Positivist model of advocacy, describes this phenomenon as follows:

The rules will describe for each citizen a private sphere of autonomy. Within this sphere, he need not account to anyone for his actions. So long as he remains within his sphere, he need not fear coercion by the sovereign. The sovereign's enforcement of the rules against the other citizens will insure that they do not trespass within his sphere.

Simon, *supra* note 47, at 40.

colloquial.⁹⁴ The formality of the system maintains decorum and channels the discussion into that which is deemed legally relevant and admissible, and is designed to minimize engagement between the parties. Thus, while serving as a mechanism for the pacific resolution of disputes, litigation can be a device that separates disputants from one another (again, note the Madisonian construct), rather than bringing them together (the Jeffersonian ideal).⁹⁵

Nevertheless, much as the Constitution serves as a legal framework on which collaborative processes can be built, the litigation machinery serves as the engine that allows more collaborative dispute resolution processes to move forward. Historian Garry Wills has suggested that for Madison, the Constitution was only the starting point for later collective discussion and compromise.⁹⁶ In like manner, the litigation process may serve as a starting point for constructive discussion and growth through collaborative processes such as negotiation and mediation. Without the ultimate recourse to the litigation machinery, many parties would be unwilling to explore more collaborative forms of dispute resolution.⁹⁷ It is, for better or worse, the availability of a leviathan that can force reluctant parties into the courtroom, make a decision and then make it stick (through judicial enforcement mechanisms) that forces parties to consider other process choices that may be more suitable to the occasion. Some forced unions ripen into happy marriages.⁹⁸

⁹⁴ Likewise, the etiquette of the courtroom, in which attorneys address the bench, the witness, or the jury – but not each other – reinforces the idea of a forum in which the clash of principles is played out in steps to be measured by a third party, not dealt with through direct discourse and accommodation among adversaries. If the give-and-take of mediation and other consensual processes resemble improvisational jazz, then courtroom litigation resembles, at its best, a classical minuet.

⁹⁵ I must admit to some reluctance to label the idea of engagement “Jeffersonian,” given Jefferson’s avowed distrust of cities and espousal of agrarian society. Bellah et al., *supra* note 5, at 30. Then again, the man seemed to enjoy his time in Paris. See Library of Congr., Thomas Jefferson: Genius of Liberty 40–50 (2000).

⁹⁶ FROHNEN, *supra* note 69, at 88–93.

⁹⁷ Describing the success of mediation of special education and landlord-tenant disputes, Judge Harry Edwards has noted, “[I]n both of these examples however, the option of *ultimate* resort to adjudication is essential. It is only because handicapped children have a statutory right to education that parent-school mediation is successful. It is only because tenants have procedural rights that landlords will bargain at all.” Harry T. Edwards, *Alternative Dispute Resolution: Panacea or Anathema?*, 99 HARV. L. REV. 668, 682 (1986).

⁹⁸ Sometimes, however, the procedural mechanisms of litigation can be manipulated to alter and even warp a negotiated result. Defendants sometimes settle weak claims for “nuisance value” simply to rid themselves of the expenses of litigation; plaintiffs settle at an amount substantially discounted from the anticipated value of their claims (even taking the possibility of an adverse judgment into account) because they cannot afford the risk or delay

2. *The Therapeutic Value of Litigation*

Employed properly, litigation can have a therapeutic effect on the community.⁹⁹ Some litigation, like the landmark *Brown v. Board of Education*¹⁰⁰ case, can alter the community's rules, standards and mores for the better.¹⁰¹ Most cases have neither the importance nor the wide-ranging effect of *Brown*, but retain great meaning and prominence in the lives of those most directly involved. In such cases, recourse to a neutral who will ultimately render an enforceable, final decision can have a cathartic effect on the parties, even the losing parties.¹⁰² Even where the results are disappointing or seemingly irrational, litigation is what we might call "process protected"; that is, losing participants can be reconciled to the result so long as they have had an opportunity to be heard and the appropriate or "due" process has been followed.¹⁰³

that is the luxury of a repeat player such as an insurance company. Often, settlements "are determined by formulae or 'rules of thumb,'" with little or no participation by disputants in the process. See Hensler, *supra* note 25, at 166. Disputes involving one-time encounters (and minimal investment in social capital), rather than ongoing relationships, are most prone to this distortion.

⁹⁹ There are those who belittle the importance of this effect. See, e.g., Mark Lenz, *Bin Laden and the Courts (Letter to the Editor)*, NEW YORKER, Oct. 15, 2001, at 14 ("Lawsuits aren't therapy, though, or shouldn't be. To value them that way distorts both the suits and the system.").

¹⁰⁰ *Brown v. Bd. of Educ.* 347 U.S. 483 (1954).

¹⁰¹ In an article otherwise notable for its misunderstanding of consensual dispute resolution processes, Professor Owen Fiss quite properly observed:

To conceive of the civil lawsuit in public terms as America does might be unique. I am willing to assume that no other country . . . has a case like *Brown v. Board of Education* in which the judicial power is used to eradicate the caste structure. I am willing to assume that no other country conceives of law and uses law in quite the way we do. But this should be a source of pride rather than shame.

Owen M. Fiss, *Against Settlement*, 93 YALE L.J. 1073, 1089 (1984).

¹⁰² When I served on an administrative appeals panel, I wrote my opinions primarily for the benefit of the losing party. Most judges with whom I have discussed this approach have agreed: justice requires that the losing party is entitled, in the very least, to an explanation as to why she has come out on the short end.

¹⁰³ Popular frustration with the litigation process is often a consequence of situations in which rules of evidence or procedural niceties are allowed to obscure the underlying issues; *i.e.*, where the parties have been denied the opportunity to give "voice" to their problems. William Simon, in the context of a critique of Positivism, has described the problem as follows:

The establishment of this second [procedural] body of rules has a curious consequence. The substantive rules reflect the basic purpose of the system, the securing of order in the social world. The procedural rules are designed to deal with a technical problem. Once

DISPUTING TOGETHER

To be sure, communities, large and small, can be drained by litigation. Few institutions emerge unscathed from an internal power struggle that is fully processed by the courts, and communities that have been the focus of major school busing disputes or adjudicated zoning battles often require years to mend their wounds. But the devices supplanted by litigation—the blood feud, street clashes, and mob rule—were far more draining and disruptive to community. That is why medieval rulers insisted on some kind of trial system in lieu of the blood feud. Resort to the courts, as grueling and disruptive as it may be, is an affirmation of the community's rules, mores, and its very legitimacy. The American system of litigation had its antecedent in the efforts of early Norman kings to legitimize their rule through the establishment of courts with the ultimate power to adjudicate disputes throughout England, and thereby establish a common law for the entire realm.¹⁰⁴ The system thereby fashioned, and of which we are the beneficiaries today, produces a stylized joust,¹⁰⁵ in which established rules of procedure govern but in which (we are told) substance ultimately matters.¹⁰⁶ That this system is often mimicked in private processes

the system is set into motion, however, the procedural rules play the more fundamental role. Order depends on the citizens' compliance with the substantive rules, and compliance depends on the application of sanctions by the sovereign. The application of sanctions is governed by procedural rules. The key to the system is the operation of the sovereign, and the ultimate test of the legitimacy of any of the sovereign's acts is procedural. For the citizen, this means that compliance with the substantive law does not guarantee immunity from state sanctions. Nor does liability necessarily follow from violations of the substantive rules. The procedural rules legitimate results which may be substantively wrong. Having repudiated personal notions of justice at the outset of its system, Positivism ends by refusing to guarantee the citizen even the legal justice defined by the substantive law. All the citizen can count on is a day in court.

Simon, *supra* note 47, at 43–44.

¹⁰⁴ REMBAR, *supra* note 42, at 26. Rembar's book describing the development of the American system of justice is written primarily for a lay readership, which is altogether appropriate: acceptance of community norms for disputing must come from the public at large, not just the legal community.

¹⁰⁵ Some commentators are (with some justification) critical of the artificial nature of the roles lawyers are forced to play in this system. See, e.g., SHAFFER & COCHRAN, *supra* note 27; Simon, *supra* note 47. But there is a societal benefit to forcing people to behave in a civilized manner while confronting one another regarding serious and presumably heartfelt differences.

¹⁰⁶ For a more cynical view of the role of substance and procedure in litigation, see generally GLENDON, NATION, *supra* note 35, and in particular her observation, "Though lawyers did not invent procedure, they have become its high priests and protectors." *Id.* at 105. See also Simon, *supra* note 47, at 44 (suggesting that procedure has come to eclipse substance in litigation).

employed by trade groups and religious groups¹⁰⁷ and even by for-profit organizations selling privatized adjudication services¹⁰⁸ may be seen not as a rejection of the adjudicative process, but rather as a tribute to its resiliency.¹⁰⁹

3. *The Need for Cooperation in Litigation*

Of course resort to the courts does not grant license for mayhem. To the contrary, courts and the attendant rules of procedure and professional conduct were established as centripetal forces to keep matters in orbit, lest they fly off into space. Litigation may be combat, but it is orderly combat, involving rules of engagement. These rules require a degree of collaboration, even among adversaries.¹¹⁰ Lawyers possess a special privilege to represent others in litigation because they are presumed to be knowledgeable about the rules of engagement and are removed from the fray, and thereby deemed more capable than their clients of engaging in the type of collaboration necessary for the process to go forward.¹¹¹ This collaboration ideally involves two or more

¹⁰⁷ See generally *supra* notes 54–60 and accompanying text.

¹⁰⁸ *E.g.*, the American Arbitration Association, CPR Institute for Dispute Resolution, and JAMS/Endispute (private organizations offering adjudication services). LEONARD L. RISKIN & JAMES E. WESTBROOK, *DISPUTE RESOLUTION AND LAWYERS* 504 (2d ed. 1997).

¹⁰⁹ The desire for an authoritative neutral decision-maker is illustrated by a trivial incident in which I was involved in college. Three of us, officers of our student-run college radio station, were taking a break in the snack bar when I accidentally spilled a milkshake on another officer's lap. We both immediately turned to the station manager (who out-ranked both of us in the station's hierarchy) to determine responsibility for the cleaning bill. He correctly noted what my subsequently acquired lawyer's vocabulary would describe as a lack of jurisdiction over the subject matter.

¹¹⁰ See, *e.g.*, FED. R. CIV. P. 26 (providing for broad-ranging discovery), especially subdivision (a) (requiring certain disclosures without a written discovery request) and subdivision (e) (requiring supplementation of disclosures and responses); FED. R. CIV. P. 37(a)(2)(B) (requiring that parties confer or attempt to confer to secure discovery without court action); FED. R. CIV. P. 16 (providing for pre-trial conferences). Many local rules of court require cooperation among counsel, *e.g.*, U.S. DIST. CT. FOR M. D. OF PA. R. OF CT., R. 16.3(a) (requiring attorneys to file joint case management statement); R. 16.3(b) (requiring attorneys to confer for purpose of entering into agreements regarding subjects referred to in FED. R. CIV. P. 16).

¹¹¹ Judge Alvin Rubin has observed:

The monopoly on the practice of law does not arise from the presumed advantages of an attorney's education or social status: it stems from the concept that, as professionals, lawyers serve society's interests by participating in the process of achieving the just termination of disputes. That an adversary system is the basic means to this end does not crown it with supreme value. It is means, not end.

Alvin B. Rubin, *A Causerie on Lawyers' Ethics in Negotiation*, 35 LA. L. REV. 557, 589 (1975).

members of the bar who have received similar schooling in the mores of the profession and continue to be immersed in bar-related activities. Brother and sister lawyers, though adversaries in litigation, speak a common language, follow a common set of rules (as to both procedure and professional conduct), attend the same meetings, dine at the same table. The bonding social capital thereby generated enables them to jointly encounter and resolve the many small difficulties encountered in the course of litigation: the scheduling of depositions, the exchange of documents, the justified extensions of time, the obstructions posed by archaic or bureaucratic court procedures. Cooperation regarding the “little things” not only makes life a little more pleasant, it creates strands of social capital that enable attorneys to explore potential agreement regarding the “big things”: *i.e.*, the underlying dispute. Effective attorneys thereby use the bonding social capital of the profession to build bridging social capital between their clients.¹¹²

In the absence of this cooperation, litigation would be a small hell. Alas, it sometimes is. All too often, litigator conduct more closely resembles armed combat than civilized discourse.¹¹³ Excessive gamesmanship and incivility can turn an otherwise genteel process into a caricature that loses sight of the substantive legal principles designed to advance underlying societal values.¹¹⁴ Ironically, lawyers often experience the greatest tension and animosity in their practice not when they are called upon to argue matters of substance before an impartial referee, but when they are required to collaborate with one another without supervision regarding seemingly trivial procedural matters: the scheduling of depositions, the exchange of documents, the array of nagging

¹¹² Empirical studies have indicated a predominance of lawyers perceived to be “cooperative,” along with the perception that cooperative lawyers are more effective negotiators than “competitive” lawyers. GERALD R. WILLIAMS, *LEGAL NEGOTIATION AND SETTLEMENT* 48–52 (1983).

¹¹³ More collaborative dispute resolution processes can fall prey to similar problems: parties may lie or behave abusively during negotiation; advocates may try to manipulate a mediator; disputants may try any number of ploys to obtain an edge, rather than a mutually satisfying result. *See, e.g.*, Michael Meltsner & Philip G. Schrag, *Negotiating Tactics for Legal Services Lawyers*, 7 *CLEARINGHOUSE REV.* 259, 259–63 (1973).

¹¹⁴ Professor Glendon comments,

Now that lawyers are beginning to say that they want to run their ‘business as a business,’ many seem to suppose that they are exempt from ordinary decent behavior What seems to have gotten lost somewhere is Lincoln’s down-to-earth, unpretentious attitude toward decency in business, rooted in the . . . understanding that any business, including law, thrives best on cooperation and honesty.

GLENDON, NATION, *supra* note 35, at 82.

details that are necessary components of a case or transaction.¹¹⁵ Trained to represent the client zealously, lawyers (especially young lawyers) forget the constraints that make the practice of law possible, and assume that they should be combative all the time. Unsupervised lawyers often behave like schoolchildren when the teacher is not watching, rather than like mature tennis players “calling their own.”¹¹⁶ To those who regard character as “what you do when nobody else is watching,”¹¹⁷ the decline in lawyer behavior outside the direct scrutiny of the courts should be of particular concern. After all, it is our unsupervised behavior that is the best test of our ethics, communitarian or otherwise.

It is unnecessary to catalogue the myriad complaints, significant and petty, regarding lawyers’ disputing behavior. What is disturbing from a communitarian standpoint is the all-too-frequent failure of lawyers to demonstrate how to disagree without being disagreeable—and thereby preserve community despite the existence of conflict.¹¹⁸ Why does this occur? I think there are at least two dynamics at work:

First: When disputants employ an adjudicative model of conflict resolution, they forfeit their autonomy with respect to the ultimate decision-making. A device chosen to assert one’s ego (as communitarians critical of litigation might describe it) ironically requires loss of control to others: lawyers who put the device in motion, judges and juries who make the ultimate decisions. The frustration stemming from loss of control often leads disputants to try to rig the

¹¹⁵ John J. Curtin, Jr., *Litigation and Litigators: Where Are We Headed?*, LITIG., Fall 1998, at 49–50.

¹¹⁶ Tennis star John McEnroe, known for his caustic objections to referees’ line calls, had a reputation for giving his opponent the benefit of the doubt on line calls during unsupervised matches. Frank Deford, *So, Why Can’t You Smile?*, SPORTS ILLUSTRATED, June 25, 1984, at 70, 74. A fierce competitor, McEnroe nevertheless appreciated the fact that unsupervised play was the time when the community of tennis players could least afford excessive partisanship. Centripetal forces (*i.e.*, the officials) could keep him in check on Wimbledon’s Centre Court. It was the unsupervised play, in which most of us hackers regularly engage, that required self-restraint.

¹¹⁷ “Character is what you are in the dark.” Dwight Moody, American evangelist (1837–1899). ROBERT ANDREWS, *THE CONCISE COLUMBIA DICTIONARY OF QUOTATIONS* 42 (1992). “The measure of a man’s real character is what he would do if he knew he would never be found out.” Lord Macaulay, English historian (1800–1859). *Id.*

¹¹⁸ One of the few redeeming aspects of the post-election imbroglio between Messrs. Bush and Gore in 2000 was the civilized conduct of their attorneys in the courtroom. Peter Aronson, *Inside the Winning Side*, NAT. L.J., Jan. 8, 2001, at A1; Georgene M. Vairo, *Bush v. Gore*, NAT. L.J., Feb. 12, 2001, at A16. Their shortcomings outside the courtroom, however, were another matter. The failure of the Bush and Gore legal teams—including two former secretaries of state—to engage in meaningful discussion so as to terminate the controversy with a minimum of harm to the polity borders on the tragic.

DISPUTING TOGETHER

game, tilt the playing field, and place their thumbs on the scales of justice. Lawyers, under a professional obligation to zealously represent their clients¹¹⁹ and under economic pressure to do their clients' bidding, follow suit. Litigation becomes not a device to obtain a fair, impartial determination of a dispute, but a tool to browbeat others into submission. Discovery is used not to obtain information necessary for a fair trial and reasonable assessment of one's case; instead it is used to harass and burden one's opponent. A jury is seen not as a group of citizens from whom one might obtain a fair and unbiased decision; instead, a jury trial is perceived as an opportunity to pack the tribunal with people whose perceived biases might be most favorable to one's cause. The disputants do not really want a fair and unbiased decision; they want to win, sometimes at all costs. And lawyers are viewed as their champions, responsible not for fair play, but for victory.

Second: In a way, it is not surprising that a contest based on principle and ordered rules of conduct can sometimes deteriorate into an ugly clash of unbridled emotions and egos. Lawyers told to serve as their clients' champions can easily convince themselves of the justness of their clients' causes¹²⁰ and the utter depravity of any party or advocate who comes in their way.¹²¹ Months of

¹¹⁹ See MODEL RULES OF PROF'L CONDUCT R. 1.3, cmt. 1 (1998) ("A lawyer should act with commitment and dedication to the interests of the client and with zeal in advocacy upon the client's behalf."); MODEL CODE OF PROF'L RESPONSIBILITY Canon 7 (1997) ("A Lawyer Should Represent a Client Zealously Within the Bounds of the Law.").

¹²⁰ "In general, people have great difficulty divorcing themselves from their idiosyncratic role sufficiently to take an objective view of disputes in which they are involved." Richard Birke & Craig R. Fox, *Psychological Principles in Negotiating Civil Settlements*, 4 HARV. NEGOT. L. REV. 1, 14 (1999). "Even when negotiators possess complete and shared information, they tend to assess the strength of their case in a self-interested (or "egocentric") manner." *Id.* "In one study, participants were randomly assigned to roles in a negotiation simulation involving a wage dispute between labor and management." *Id.* (citing Leigh Thompson & George Loewenstein, *Egocentric Interpretations of Fairness and Interpersonal Conflict*, 51 ORG. BEHAV. & HUM. DECISION PROC. 176 (1992)).

Both groups were given identical background information and asked to negotiate under the threat that a costly strike would occur if they failed to reach an agreement. Prior to negotiating, both groups were asked what they thought was a fair wage from the vantage point of a neutral third party. Despite the fact that both groups had been provided identical information, participants tended to be biased in a self-interested direction; that is, they tended to think a neutral third party would favor their side.

Id. at 14–15.

¹²¹ Simon observes: "The client's own ends are reduced to crude pretexts for the standard partisan approach the lawyer takes on behalf of all his clients. The lawyer maneuvers the client into a role defined in terms of a formal, undifferentiated

petty encounters with a counterpart who may very well view it as her function to thwart the adversary at every turn can build into genuine hostility. The rules of engagement are often blurred; it is sometimes difficult to distinguish an honest request for accommodation from a dilatory tactic, or to differentiate between a genuine need for information and abusive discovery. And a willingness to view one's adversary as evil—fueled by pre-existing antagonism between the clients whose causes the lawyers have adopted as their own—disposes lawyers to view one another's conduct in the worst light possible.¹²² The problem is exacerbated by the growing size and diversity of the profession, a healthy development in most respects, but also one that reduces the opportunities for informal encounters between professional adversaries.¹²³ This erosion of bonding social capital renders attorneys less able to build bridging social capital where it might do their clients the most good.¹²⁴

The transformation of legal practice has played a significant role in this decline in behavior and the concomitant decline in social capital. Others have previously commented on the decline in stability of social networks with the increase in one-time-only encounters among lawyers.¹²⁵ With less intimacy in

hostility . . . which results from the other lawyer's partisanship." Simon, *supra* note 47, at 125.

¹²² Lawyers, like their clients, may engage in reactive devaluation—a tendency to regard proposals offered by one's adversary less favorably. See Birke & Fox, *supra* note 120, at 48–49; Robert H. Mnookin, *Why Negotiations Fail: An Exploration of Barriers to the Resolution of Conflict*, 8 OHIO ST. J. ON DISP. RESOL. 235, 246–47 (1993); Lee Ross & Constance Stillinger, *Barriers to Conflict Resolution*, 7 NEGOTIATION J. 389, 394–95 (1991).

¹²³ Professor Glendon very perceptively notes:

Today's lawyers wander in an increasingly impersonal, bureaucratized legal world, where neither honesty-based nor loyalty-based systems seem to be operating very well. The families, communities, neighborhoods, and schools that once served as seedbeds and anchors for personal and professional virtues are themselves in considerable disarray. Clients, whether corporate or individual, are in the grip of the same maladies. New recruits to today's profession often have no solid base of old world, old Wasp, or any other culture to fall back on—and no coherent professional culture to embrace. Emancipated from the old ways, they soldier on, with few examples, sketchy guidance, and little reinforcement. In such circumstances, is it remarkable that short-term self-interest often prevails?

GLENDON, NATION, *supra* note 35, at 83.

¹²⁴ Our earlier observations regarding the value of dense social networks are particularly appropriate with respect to the legal profession. See *supra* note 67 and accompanying text.

¹²⁵ See, e.g., Ronald J. Gilson & Robert H. Mnookin, *Disputing Through Agents: Cooperation and Conflict Between Lawyers in Litigation*, 94 COLUM. L. REV. 509 at 537–41 (1994). Empirical evidence is buttressed by anecdotal evidence. A friend and former student of mine who is a partner in a large Philadelphia law firm recently commented to me about the mores of litigators in New York and Philadelphia as compared to those in Scranton and

DISPUTING TOGETHER

the profession, “lawyers worry less about their own reputation for honesty, and knowing this, they . . . trust one another less and cooperate less.”¹²⁶ A decline in informal interaction—at bar meetings,¹²⁷ community social events, and the numerous civic activities which Putnam has documented and in which lawyers have historically played a vital role—leaves lawyers with fewer and fewer strands of social capital to draw upon. Increasingly, lawyers view one another not as brothers and sisters jointly involved in a noble calling, but simply as adversaries and competitors scrambling for the same dollar.

There is every reason for the legal profession to resist the exclusionary guild practices that were prevalent a century ago. But there is value in bonds forged through shared knowledge, common training, accepted norms of behavior, and respect for the law, societal institutions, and one another. In recent years, lawyers have made deliberate efforts to build bonding social capital within the profession. The American Inns of Court serve as perhaps the most prominent example of this phenomenon. Through the Inns, judges, trial lawyers and law students convene on a monthly basis to dine, converse informally, and participate in a presentation (often humorous) involving some aspect of litigation practice or ethics.¹²⁸ This predominantly social ritual can have

Reading. Simply put, you are less inclined to be rude to someone you are likely to encounter in a subsequent transaction or, for that matter, at your child’s soccer game or piano recital.

¹²⁶ PUTNAM, *supra* note 3, at 147 (citing Gilson & Mnookin, *supra* note 125). Compare, e.g., the behavior in the diamond industry, with its tight bonding social capital. See *supra* notes 53–56 and accompanying text.

¹²⁷ Many of the organized activities of the bar associations themselves have, as a collateral but significant benefit, the forging of bonds between attorneys who at times may confront one another across a courtroom or negotiating table. Unfortunately, these activities have experienced a Putnamesque decline in participation by younger lawyers, pressed by their law firms’ demand for more billable hours and juicier bottom lines. Senior partners who bemoan the decline in civility in their profession had best consider how a more benign regard for the activities of their associates might have a positive effect on the profession’s bonding social capital.

¹²⁸ “The mission of the American Inns of Court is to foster excellence in professionalism, ethics, civility, and legal skills for judges, lawyers, academicians, and students of the law in order to perfect the quality, availability and efficiency of justice in the United States.” American Inns of Court Foundation, General Information: Mission and Goals, at <http://www.innsocourt.org/> (last viewed, Sept. 29, 2002).

The goals of the American Inns of Court include:

To facilitate the exchange of ideas, experiences, and ongoing education among members of American Inns of Court, thereby maintaining an institutional forum where judges, lawyers, academicians, and students of law, working together, may pursue the highest goals of the legal profession.

To shape a culture of excellence in American jurisprudence by promoting a national

salutary effect, and the deliberate use of judges as team leaders (the practice in many Inns) reinforces the relationship between bonding social capital and professionalism. The Red Mass, revived by Roman Catholic lawyers in many communities, involves a reaffirmation of the profession's commitment to public service and its spiritual underpinnings.¹²⁹ Lest anyone suspect that the Red Mass involves a clandestine conspiracy of lawyers espousing a single faith, most such events involve efforts to include lawyers and judges of all faiths, without diluting the essential ritual that makes the ceremony meaningful to Catholics.¹³⁰ Activities of bar associations have a similar salutary effect that transcends the specific tasks undertaken by their various committees and organs. Most anything that places one in contact with another lawyer outside the context of a contested case or transaction allows one to view that lawyer in a more appreciative light and build social capital that will soften the conflict inherent in the case or transaction, almost certainly procedurally and perhaps substantively.

Litigation is rarely fun for the disputants. Judge Learned Hand's oft-repeated statement, "I must say that, as a litigant, I should dread a lawsuit beyond almost anything else short of sickness and death"¹³¹ remains as true today as when he uttered it many decades ago. But lawyers, by fighting hard but fair, can nevertheless use litigation as a means to build social capital and to model for their clients and others a form of disputing that gives substance to our society's underlying values. Litigation can thereby knit together community even as it serves as the ultimate expression of individual rights and interests in a free society.

commitment to civility, ethics, advocacy skills, and professionalism in the practice of law, by communicating these ideals to the nation and the world, and by transmitting these values from one generation to the next.

Id.

129

The Red Mass is a centuries-old tradition, a prayer whereby the guidance and blessing of the Holy Spirit are invoked upon the work of justice in society. As a universal prayer, the Red Mass has been attended by monarchs, by the judges and justices of the highest courts, by legislators at all levels, by diplomats, professors of the law, and by legal professionals, regardless of their religious background and political ideologies.

Program for Red Mass, Saint Patrick Cathedral, Harrisburg, Pennsylvania, Oct. 2, 2001.

¹³⁰ I once received an invitation to a Red Mass issued by several area judges, among others. That, I thought, involved too great an overlap of church and state; lawyers might have obtained the impression that they were being summoned to attend a religious ceremony. Subsequent invitations in my locality have been more sensitive to this issue. Judges visibly participate in the ceremony (originally designed primarily for the benefit of the judiciary), but do not "take attendance."

¹³¹ Warren Burger, *Isn't There a Better Way?* Annual Report on the State of the Judiciary at the Midyear Meeting of the American Bar Association (Jan. 24, 1982), in 68 A.B.A. J. 274, 275 (1982).

B. Arbitration: When Is a Choice not a Choice?

As an adjudicative process, arbitration shares many of the characteristics of traditional courtroom litigation. One of its important *distinguishing* characteristics, for purposes of our discussion, is the manner in which participants enter the process. For the most part, parties to arbitration engage in the process by agreement, entered into either before or after the dispute arose. There are at least two communitarian implications of this: (1) the parties have deliberately chosen to avoid the public court system; and (2) the parties have affirmatively chosen a process with characteristics of their own design. Therefore, if we see the submission of disputes to the public court system as an affirmation of community, should we regard arbitration as the opposite?

In some sense, we might. Often parties opt for arbitration, or its close cousin, the private trial, out of a sense that all is not well with the public court system.¹³² The parties may wish to avoid the queuing costs, evidentiary burdens, and other expenses of the public court system. They may prefer privacy to a public trial and record. They may desire greater control over selection of the decision-maker and the rules under which the dispute will be adjudicated, refusing to default to the rules of the state-sponsored system. They may distrust juries, preferring a decision rendered by a professional, perhaps one with specialized expertise. Sometimes these preferences reflect an aversion to the public system of dispute resolution, and an effort to “privatize” justice.¹³³ But at least as often, these preferences are peculiar to the circumstances of the underlying dispute or relationship between the parties. And none of them go to the substantive rules applied by the courts or the fundamental legitimacy of the public court system. While the standard of review of arbitral awards is narrow, arbitrators generally are expected to apply the same substantive legal rules used by the courts.¹³⁴ And parties to arbitration ultimately utilize the courts as their enforcement mechanism once an award is rendered.¹³⁵ Thus, arbitration may be seen as an alternative forum with simplified procedures and greater party control over the ground rules, but which remains part and parcel of the same

¹³² See GOLDBERG ET AL., *supra* note 43, at 234; RISKIN & WESTBROOK, *supra* note 108, at 570–72.

¹³³ RISKIN & WESTBROOK, *supra* note 108, at 570–72.

¹³⁴ “[T]he streamlined procedures of arbitration do not entail any consequential restriction on substantive rights [T]here is no reason to assume at the outset that arbitrators will not follow the law” *Shearson/American Express, Inc. v. McMahon*, 482 U.S. 220, 232 (1987).

¹³⁵ Federal Arbitration Act, 9 U.S.C. § 9 (1994); UNIF. ARBITRATION ACT § 8(b), 11, 7 U.L.A. 1 (1997).

overall system and is subject to the same fundamental mores as the public courts.¹³⁶

Furthermore, arbitration may be the choice of micro-communities seeking to maintain their internal equilibrium. As discussed previously, trade groups, employers and unions, and religious organizations often use a form of arbitration to maintain order within their own houses without the public display, time consumption, and disruption of full-blown litigation.¹³⁷ This choice is not so much a rejection of the larger community's institutions as it is a means of affirming the smaller community and maintaining its equilibrium so that it may function more effectively within the larger community.¹³⁸ A desire not to launder one's linen publicly may, in fact, suggest a sensitivity to the proper role of public institutions designed to adjudicate those conflicts that spill over the lines that define smaller groupings.

There is, however, an insidious side to arbitration as a conflict resolution process "choice": in many instances, it is not really a choice at all. During the past twenty years, employers, brokerage firms, and other corporations have been inserting arbitration provisions into agreements with employees and customers as a matter of course. The enforceability of these agreements has been upheld by the courts, in cases ranging from allegations of breach of warranty to claims of

¹³⁶ "Adjudication we may define as a social process of decision which assures to the affected party a particular form or participation, that of presenting proofs and arguments for a decision in his favor." Lon L. Fuller, *Collective Bargaining and the Arbitrator*, 1963 WIS. L. REV. 3, 19. In this sense, arbitration and courtroom litigation have much in common.

¹³⁷ See *supra* notes 53–58 and accompanying text.

¹³⁸ A classic example is provided by the National War Labor Board (NWLB), established during World War II "to prevent interruptions of any work that contributed to the effective prosecution of the war, to avoid all strikes and lockouts, and to make sure that all disputes were settled by peaceful means." Symposium, *An Oral History of the National War Labor Board and Critical Issues in the Development of Modern Grievance Arbitration*, 39 CASE W. RES. L. REV. 501, 522 (1988–89). The NWLB reflected a policy that the private parties in a labor dispute were best able to settle their grievances with a minimum of government intervention. *Id.* at 510–11. This policy preference, in combination with the volume of cases subject to the jurisdiction of the NWLB, set the stage for final and binding grievance arbitration becoming the principal means for parties to settle grievance disputes. *Id.* at 511–13.

The rise of the labor movement following World War II and the enactment of the Taft-Hartley Act "led to the creation of a federal common law of labor arbitration that inspired judicial enforcement of both agreements to arbitrate and most arbitration awards." *Id.* at 534. Observers state that "[p]erhaps the Board's most important contribution to modern labor arbitration was the development of a body of experienced arbitrators, many of whom remained active after the War." *Id.* at 534–35. The National Academy of Arbitrators, founded in 1947, "helped to institutionalize the practice of labor arbitration and to build up a cadre of experienced arbitrators generally acceptable to both unions and employers." *Id.* at 535.

illegal discrimination.¹³⁹ Were these truly matters of choice, many a thoughtful consumer or employee might opt for contractual terms providing for an informal, less costly process like arbitration over a formal, costly jury trial.¹⁴⁰ But more often, the consumer or employee becomes aware of these fine print provisions only after the dispute arises.¹⁴¹ And rather than finding herself in a forum constructed by the participants or their representatives (as in labor grievance or trade association arbitration), the employee or customer more often than not finds herself in unfamiliar surroundings contrived by the employer or corporation, sometimes in conjunction with a “neutral” eager for repeat business. Such “arbitration by ambush” or “adhesion arbitration” (as one of my students described these arrangements) lacks the “buy-in” characteristics of other arbitration systems we have described. Rather than helping to build micro-communities, these arrangements force participants out of the socially accepted court system and into a system not truly of their own choosing. The trappings of due process are present, but it is doubtful that many participants feel as if they have had the fair bite at the apple to which they had been told they were entitled since grade school.¹⁴²

¹³⁹ *E.g.*, *Green Tree Fin. Corp.-Ala. v. Randolph*, 531 U.S. 79 (2000) (Truth in Lending claim); *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991) (age discrimination claim); *Shearson/American Express, Inc. v. McMahon*, 482 U.S. 220 (1987) (securities and RICO claims); *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth Inc.*, 473 U.S. 614 (1985) (antitrust claim). In addition, Congress has endorsed arbitration in the Civil Rights Act of 1991, 42 U.S.C. § 1981 (1994), and the Americans With Disabilities Act, 42 U.S.C. § 12212 (1995).

¹⁴⁰ For an economic argument in favor of such provisions, see Christopher R. Drahozal, “*Unfair*” *Arbitration Clauses*, 2001 U. ILL. L. REV. 695, 741–46. Others have argued that if arbitration is indeed attractive to consumers and employees, they would agree to it after the dispute arises, and there is no need to compel them into arbitration based on a pre-dispute arbitration provision. See, *e.g.*, Jean R. Sternlight, *Steps Need to be Taken to Prevent Unfairness to Employees, Consumers*, DISP. RESOL. MAG., Fall 1998, at 5, 7. But this argument ignores the potential cost reductions that might be produced by pre-dispute arbitration provisions incorporated into all like transactions.

¹⁴¹ An example of this is “arbitration in a box,” in which a consumer opens a carton containing a product (*e.g.*, a computer), and lying somewhere in the packing material, instructions and promotional material is an agreement to the effect that the consumer has, by accepting the product, agreed to arbitrate any and all claims involving the product.

¹⁴² Courts have refused to uphold some of the more one-sided provisions of these arbitration agreements. See, *e.g.*, *Hooters of Am., Inc. v. Phillips*, 173 F.3d 933, 938–39 (4th Cir. 1999) (mechanism for selecting arbitrators one-sided); *Cole v. Burns Int’l Sec. Servs.*, 105 F.3d 1465, 1480–81 (D.C. Cir. 1997) (arbitration fee too high); *Armendariz v. Found. Health Psychcare Servs., Inc.*, 6 P.3d 669, 691–94 (Cal. 2000) (clause allowed one party, but not the other, to go to court); *Keystone, Inc. v. Triad Sys. Corp.*, 971 P.2d 1240, 1245–46 (Mont. 1998) (location of arbitration too distant); see Drahozal, *supra* note 140, at 697–98,

Our ideal construct of arbitration is further compromised in another way. Businesses are increasingly inserting arbitration clauses into commercial agreements, based on a general sense that they are better off avoiding the burden and expense of traditional litigation.¹⁴³ But too often the clauses are little more than boilerplate, with scant thought given to the types of choices that allow the parties to tailor arbitration to their unique circumstances.¹⁴⁴ In these instances, it seems that the parties have not so much opted *into* arbitration as they have opted *out* of traditional courtroom litigation. A little thought as to motivation could go a long way here. Might the parties prefer arbitration so that they can preserve an ongoing relationship? Might they prefer a decision-maker who is familiar with the practices of their trade, perhaps a community “insider”? Is speed or finality important? Is a legally correct decision imperative, or is it merely important that the parties obtain a decision and get on with their business? Might a party somehow lose face in the community by making a concession that would nevertheless be acceptable if imposed by an arbitrator? By addressing these issues in their arbitration provisions, the parties (or at least their counsel) might be forced to consider which aspects of their relationship they deem important, and examine their underlying values. They might thereby build a stronger relationship, whether or not they ever avail themselves of the chosen conflict resolution mechanism. And if conflict forces them into such a mechanism, they will proceed with the knowledge that it has been tailored to address those aspects of the relationship they consider important, and to emphasize the underlying values (including community norms) they hold most dear.

From a communitarian standpoint, the advantage of arbitration lies in the consciousness of the choice. A knowing, deliberate selection of process is more

715–20 (collecting and discussing cases). Partially in response to this, some of the leading arbitration institutions have taken steps to insure the fairness of arbitrations they administer. See, e.g., AMERICAN ARBITRATION ASSOCIATION, CONSUMER DUE PROCESS PROTOCOL (Apr. 17, 1998), available at <http://www.adr.org/JAMS>, POLICY ON EMPLOYMENT ARBITRATION, MINIMUM STANDARDS OF PROCEDURAL FAIRNESS (rev. Sept. 10, 2002), at http://www.jamsadr.com/employmentArb_min_stds.asp (last visited Feb. 23, 2002). It appears that the arbitration community has engaged in some self-policing.

¹⁴³ This phenomenon is most prominent in international commercial agreements, where concern about potentially biased national courts and enforceability of judgments makes arbitration “the generally accepted private legal process applicable to transnational business disputes.” Yves Dezalay & Bryant Garth, *Merchants of Law as Moral Entrepreneurs: Constructing International Justice from the Competition for Transnational Business Disputes*, 29 LAW & SOC’Y REV. 27, 59 (1995).

¹⁴⁴ See GOLDBERG ET AL., *supra* note 44, at 241. Ironically, it is in the “adhesion arbitration” situation where arbitration clauses most often depart from boilerplate, with provisions circumscribing the selection of arbitrators, locating the arbitration on the drafter’s home turf, or even giving the drafter alone the option to litigate in court. Drahozal, *supra* note 140, at 715–20; cf. *supra* note 132.

likely to foster community than a process that is either thrust upon the parties or accepted with no more than a shrug of the shoulder. Conscious choice implies commitment—in this case, a commitment to walk a chosen path together, even while engaged in conflict. Conflict is a burden, to be sure, but the knowing embrace of a process is more likely to transform a dispute into an opportunity for growth rather than an affliction to be endured.

C. Mediation: Taking Responsibility

At least two aspects of mediation (and its unassisted cousin, negotiation) distinguish that process from adjudicative processes for purposes of communitarian analysis. First, while the adjudicative processes include elements of collaboration, mediation is inherently a collaborative process. As Leonard Riskin has said, “[m]ediation highlights the interconnectedness of human beings.”¹⁴⁵ The engagement involved in most mediation presents more opportunities for the creation of social capital. Secondly, as adjudicative processes, both the public trial process and arbitration have in common the placement of ultimate responsibility for decision-making on a third party who is not directly involved in the dispute. Negotiated and mediated settlements, in contrast, require that the disputants take responsibility for the ultimate outcome. While these characteristics create opportunities for community building, they also pose special challenges from a communitarian perspective.

1. Challenges Stemming from the Inherently Collaborative Nature of Mediation

The collaborative nature of mediation suggests a “friendlier” process that, under ideal circumstances, should promote an atmosphere more conducive to community building than the adversarial, “winner-take-all” nature of adjudicative processes. A process in which the disputants work together to produce a mutually acceptable outcome should, ideally, be easier on the psyche; the paradigm is that of several people congregating around a circular table, exchanging ideas and solving problems together, rather than exchanging glares across an emotionally charged courtroom.¹⁴⁶ The process can be inherently

¹⁴⁵ Leonard L. Riskin, *Mediation and Lawyers*, 43 OHIO ST. L.J. 29, 58 (1982).

¹⁴⁶ Speaking more generally about perceptions of alternative dispute resolution (ADR), Professor Judith Resnik has noted, “ADR is perceived to be friendly, flexible and nicer than the uncivil exchanges that characterize litigation Conversation and cooperation replace conflict; informality empowers.” Judith Resnik, *Many Doors? Closing Doors? Alternative Dispute Resolution and Adjudication*, 10 OHIO ST. J. ON DISP. RESOL. 211, 246, 249 (1995).

fulfilling, and can provide the parties with the tools to resolve future problems, develop relationships, and build social capital.¹⁴⁷

But collaboration can be hard work. Just as the Jeffersonian concept of citizen engagement is more difficult to master than the Madisonian blocking function, so too is a process that requires parties to collaborate with one another, make difficult choices, and take responsibility for the result. In particular:

- Mediation ideally involves direct communication. The parties (and, if they are present, their lawyers) are seated at the same table, and are expected to look at each other, face-to-face.¹⁴⁸ Whereas in the courtroom, direct communication between the parties, and even their attorneys, is discouraged; in mediation this form of engagement is encouraged, and usually is considered integral to the process.¹⁴⁹ While a lawyer, another advocate or even the mediator herself might provide support and protection, ideally the parties engage in the process first-hand, hiding behind neither a formal procedure nor a champion.¹⁵⁰ This can be an extremely difficult experience, particularly if one believes to have been wronged or unjustly accused of wrongdoing by the other

¹⁴⁷ Mediated and negotiated settlements might also be “manifestations of a single cultural value: the preference for private ordering over public control.” Samuel R. Gross & Kent D. Syverud, *Don't Try: Civil Jury Verdicts in a System Geared to Settlement*, 44 UCLA L. REV. 1, 4 (1996). To the extent this cultural preference indicates a distaste for government control over our lives (as distinguished from a rejection of legal norms), it may be seen as consistent with the anti-authoritarian aspects of communitarianism.

¹⁴⁸ “Settlement is a process of reconciliation in which the anger of broken relationships is to be confronted rather than avoided, and in which healing demands not a truce but confrontation.” Andrew W. McThenia & Thomas L. Shaffer, *For Reconciliation*, 94 YALE L.J. 1660, 1664 (1985).

¹⁴⁹ This engagement tends to be less of a factor when the parties remain in separate caucuses for most of the process, with the mediator engaging in shuttle diplomacy. This technique is most prevalent in labor mediation, which is rather odd, in that labor mediation ideally would provide an excellent opportunity for the parties to build social capital that will be mutually beneficial in the course of their working relationship.

¹⁵⁰ Admittedly, mediation does not always proceed in this manner. Sometimes the parties do little or no speaking for themselves, leaving it to their lawyers to do the talking. And in some instances, most of the mediation proceeds with the parties and their counsel sitting in separate rooms, with the mediator engaging in shuttle diplomacy. See Welsh, *Making Deals*, *supra* note 12, at 810–11. It is my experience that where the parties and their counsel are given the choice, they often gravitate toward this style of mediation, and the mediator (despite training to the contrary) often accedes to the parties' preference. Why? In part, because the mediator may wish to defer to the disputants' judgment, citing a desire for self-determination. But it is also easier to proceed this way: easier for the parties to endure, easier for the mediator to manage. Sometimes it is even easier to arrive at a settlement, superficial as it may be. But disputes that are mediated in this manner, while often settled, are rarely resolved.

party.¹⁵¹

- The confrontation inherent in mediation is not only physical; it is mental. The mutual accommodation sought in mediation requires that one cease to demonize the other party and overcome cognitive dissonance¹⁵² so as to give credence to a view of the world that may be inconsistent with the scheme of the world that one has previously adopted. This often requires a level of receptivity, maturity and self-awareness not easily arrived at.¹⁵³

¹⁵¹ In some instances, this direct confrontation is considered so difficult as to be abusive. Spousal abuse is a leading example; in fact, mediation is usually discouraged in family disputes where serious abuse is suspected. See Trina Grillo, *The Mediation Alternative: Process Dangers for Women*, 100 YALE L.J. 1545, 1584 (1991); see also Penelope Eileen Bryan, *Reclaiming Professionalism: The Lawyer's Role in Divorce Mediation*, 28 FAM. L.Q. 177, 203–04 (1994) (“Abusive relationships pose severe problems of power imbalance during mediation . . . When [risk aversion, guilt at initiating the divorce, low self-esteem, low expectations, depression, and passivity] are coupled with the gripping terror experienced by many battered spouses in the presence of their tormentors, mediation clearly is inappropriate.”). *But cf.* Joshua D. Rosenberg, *In Defense of Mediation*, 33 ARIZ. L. REV. 467 (1991) (defending use of mediation in family disputes).

While victim/offender reconciliation programs have enjoyed significant success, such programs do not subject crime victims to the mediation process without their express and informed consent. See Kent Roach, *Four Models of the Criminal Process*, 89 J. CRIM. L. & CRIMINOLOGY 671, 710 (1999).

¹⁵²

[Cognitive dissonance is a theory] of attitude change that assumes a person behaves in a way which will maximize the internal consistency of his or her cognitive system and that groups also strive to maximize the internal consistency of their interpersonal relations The core of the theory is deceptively simple: two cognitive elements (thoughts, attitude, beliefs) are said to be in a dissonant relation, if the obverse of one would follow from the other. Because dissonance is psychologically uncomfortable, its existence will motivate a person to reduce it and achieve consonance. Further, when dissonance is present, a person will actively avoid situations and information that would be likely to increase it.

THE ENCYCLOPEDIA OF PSYCHOLOGY 93 (Rom Harré et al. eds., 1983) (citing LEON FESTINGER, A THEORY OF COGNITIVE DISSONANCE (1957)). For a criticism of the theory of cognitive dissonance, see CHAPANIS, N. & L. CHAPANIS, *Cognitive Dissonance: Five Years Later*, 61 PSYCHOL. BUL. 1–22 (1964). For discussion regarding the mental dissonance that occurs when a lawyer attempts to serve as both advocate and settlement counsel, see Douglas H. Yarn, *supra* note 90, at 77–78; William F. Coyne, Jr., *The Case for Settlement Counsel*, 14 OHIO ST. J. ON DISP. RESOL. 367, 369 (1999); Gary Mendelsohn, Note, *Lawyers as Negotiators*, 1 HARV. NEGOT. L. REV. 139 (1996). For a discussion of the roots of this problem in the training of lawyers, see Derek C. Bok, *A Flawed System of Law Practice and Training*, 33 J. LEGAL EDUC. 570, 582–83 (1983).

¹⁵³ Lawyer/mediator Gary Gill-Austern writes:

Mediation requires that the parties perform the hard work of reconciling interests. Unlike war (which determines who is stronger) or litigation (which determines who is right, or more precisely, whose position is in conformity with legal norms), mediation requires a mutual accommodation of interests.¹⁵⁴ One rarely has one's interests accommodated without revealing them, and this, too, can be difficult, because revealing one's true interests makes one vulnerable to exploitation.¹⁵⁵ And one may be especially reluctant to reveal those interests to someone who is viewed as an adversary.¹⁵⁶

It is therefore not surprising that the paradigm of mediation as a collaborative process has undergone small and large compromises, such as the employment of lawyers as primary spokespersons, extensive use of private caucuses in lieu of joint sessions, and resort to distributive bargaining tactics.¹⁵⁷ While the "lawyerization" of mediation is one explanation of this phenomenon,¹⁵⁸ the social anxiety sometimes produced by direct confrontation

Participation in mediation is threatening. It is the threat of being in charge of one's life; the threat of considering the possibility of being fully conscious—fully conscious of breaches that cannot be repaired, harms that one has committed and likely will continue to perpetrate, recognition of what "is" and what cannot be massaged or cosmetically covered up. Mediation is a call to genuineness. We touch it, we live in it occasionally at best, oftentimes reluctantly, but having touched it, there is never regret. That parties and their lawyers want evaluation underscores the threat that participation in mediation presents to people. It is a tough act, this idea of being an adult.

Gary L. Gill-Austern, *Faithful*, 2000 J. DISP. RES. 343, 350.

¹⁵⁴ This process is more difficult for the neutral as well. President Bill Clinton described his efforts to mediate peace in the Middle East as the hardest work he had ever done. President's Remarks on Departure for Okinawa, Japan, and an Exchange with Reporters in Thurmont, Maryland, 36 WKLY. COMPILATION OF PRESIDENTIAL DOCUMENTS 1655 (July 20, 2000). And on a far less global scale, I have found work as a mediator far more difficult than work as an arbitrator, in terms of both process management and resolution of substantive issues.

¹⁵⁵ DAVID A. LAX & JAMES K. SEBENIUS, *THE MANAGER AS NEGOTIATOR: BARGAINING FOR COOPERATION AND COMPETITIVE GAIN* 29–35 (1986).

¹⁵⁶ This is where the private caucus can be especially useful in mediation. A party can reveal underlying interests to the mediator (who can thereby explore options that serve these interests) without at least initially revealing those interests to the other party. Of course, this requires that the party trust the mediator, which may not occur instantly.

¹⁵⁷ Welsh, *Making Deals*, *supra* note 12, at 799–805, 809–16. Worse still, in some instances, disputants and their lawyers use mediation to "smoke the other side out," drag out litigation, increase opponents' costs, and wear down the opposition, with little intention of settling the dispute. See John Lande, *Using Dispute System Design Methods as an Alternative to Good Faith Requirements in Court Mediation Programs*, UCLA L. REV. (forthcoming 2002).

¹⁵⁸ *Id.*; see also UNIFORM MEDIATION ACT (2001) §§ 4–7 (creating ornate system of mediation privileges and exceptions), § 10 (establishing right to an attorney or other

with one's adversary must also play a role in this behavior.¹⁵⁹ No wonder parties to mediation often go through the motions, participating in mediation in form, but continuing to speak through proxies, removing to different rooms, and failing to shift from positional bargaining to a focus on underlying interests. They participate, but they do not engage.¹⁶⁰ Frequently, they reach *settlement* (often because the alternatives are regarded as worse), but not *resolution* of their underlying problems.¹⁶¹ To employ Putnam's metaphor, they go to the public bowling alley, but then insist on bowling alone. Very few strands of social capital are woven through such a process.

2. *Challenges Stemming From Party Responsibility for the Ultimate Outcome*

A process in which the outcome is consensual, that is, one that is imposed on the parties by the parties themselves, should normally be preferred to one in which the outcome is imposed by an external agency, such as a court.¹⁶² People usually are better equipped to order their lives and resolve problems on their own accord, in conformity to their own standards and the understanding that they uniquely possess regarding their own circumstances, rather than resorting

representative); Craig A. McEwen et al., *Bring in the Lawyers: Challenging the Dominant Approaches to Ensuring Fairness in Divorce Mediation*, 79 MINN. L. REV. 1317 (1995) (advocating participation of lawyers in divorce mediation sessions).

159

Social anxiety is anxiety resulting from the prospect or presence of interpersonal evaluation in real or imagined social settings. . . . [A]nxiety refers to a cognitive-affective response characterized by physiological arousal (indicative of sympathetic nervous system activation) and apprehension regarding a potentially negative outcome that the individual perceives as impending. Thus, social anxiety is defined here as a *subjective* experience of nervousness and dread. . . . There is, of course, no doubt that episodes of social anxiety are often accompanied by particular patterns of overt behavior . . . [w]hen socially anxious, people often speak less, engage in less eye contact with others, appear nervous, withdraw from the encounter, and so on.

MARK R. LEARY, *Social Anxiety*, in *REVIEW OF PERSONALITY AND SOCIAL PSYCHOLOGY* 97, 98–100 (Ladd Wheeler ed., 1982).

¹⁶⁰ See Hensler, *supra* note 25, at 164–65.

¹⁶¹ *Id.* at 166–71.

¹⁶² Note that arbitration has aspects of both types of process. While the outcome is imposed by someone outside the dispute, it is an agency of the parties' own choosing, applying procedural rules (and sometimes substantive rules) of the parties' own making.

to legal machinery.¹⁶³ The courts ideally should be regarded as default mechanisms to be employed only where the parties themselves cannot find a better way.¹⁶⁴ But the employment of judicial machinery does allow the parties to escape responsibility and to blame a “bad” result on an outside agency.¹⁶⁵

¹⁶³ Professor Carrie Menkel-Meadow has tried to catalogue the ways in which settlement may (at least in some cases) be preferable to a court-imposed outcome. Among them:

Settlements that are in fact consensual represent the goals of democratic and party-initiated legal regimes by allowing the parties themselves to choose processes and outcomes Settlements permit a broader range of possible solutions that may be more responsive to both party and system needs [C]ompromise may . . . represent a moral commitment to equality, precision in justice, accommodation, and peaceful coexistence of conflicting interests Settlements may be based on important nonlegal principles or interests, which may, in any given case, be as important or more important to the parties than “legal” considerations. Laws made in the aggregate may not always be appropriate in particular cases Settlement processes may be more humanely “real,” democratic, participatory, and cathartic than more formalized processes, permitting in their best moments, transformative and educational opportunities for parties in dispute as well as for others [S]ome settlement processes may . . . provide both more and better (not just legally relevant) information for problem-solving

Carrie Menkel-Meadow, *Whose Dispute is it Anyway?: A Philosophical and Democratic Defense of Settlement (in Some Cases)*, 83 GEO. L.J. 2663, 2692 (1995).

¹⁶⁴ McThenia and Shaffer go so far as to suggest that the courts play, at most, a marginal role in dispensing justice:

Justice is not usually something people get from the government. And courts . . . are not the only or even the most important places that dispense justice Justice is not the will of the stronger; it is not efficiency in government; it is not the reduction of violence: justice is what we discover—you and I, Socrates said—when we walk together, listen together, and even love one another, in our curiosity about what justice is and where justice comes from.

McThenia & Shaffer, *supra* note 58, at 1664–65.

¹⁶⁵ Again, arbitration allows this, but subjects the parties to the reminder that the outside agency was of their own choosing. Statutorily mandated arbitration (most often employed in the context of public sector labor disputes) allows the parties to blame the outcome on the neutral and the process on the legislature. *See, e.g.*, CONN. GEN. STAT. ANN. § 5-276a (West 1998) (interest arbitration for certain state employees); IOWA CODE ANN. § 20.22 (West 2001) (interest arbitration for certain public employees); 43 PA. CONS. STAT. ANN. § 217.4 (West 1992) (interest arbitration for police and firefighters).

In a study of practice under the New Jersey interest arbitration statute, Richard Lester ‘guesstimates’ that one half to two thirds of conventional arbitrations in New Jersey in the year 1987 were in effect agreed-upon awards disguised as contested awards, and that one fifth to one eighth of final offer arbitration awards fell in this category.

Scott Buchheit, *Interest Arbitration*, in ARBITRATION 1990: NEW PERSPECTIVES ON OLD ISSUES 171, 176 (Gladys W. Gruenberg ed., 1991) (citing Richard A. Lester, *Analysis of Experience Under New Jersey’s Flexible Arbitration System*, ARB. J., June 1989, at 14, 20).

DISPUTING TOGETHER

Consensual dispute resolution processes like negotiation and mediation require that the disputants assume responsibility for the result and the hard choices that must be made along the way. In particular:

- Mediation requires that the parties make difficult choices. It is the rare instance in which all interests can be perfectly accommodated. Far more prevalent is the dispute that requires compromise. The parties must have the maturity to accept the idea of compromise and must be able to make judgments regarding the soundness of the proposed compromise. It is not always easy to discern whether a particular compromise is a prudent accommodation or an unfair capitulation.
- Consensual dispute resolution processes require that the parties ultimately make a decision and take responsibility for the result, not delegate it to a neutral decision-maker upon whom they can cast blame. This may be particularly difficult in organizations, such as corporations, in which managers seek comfort in appearing not to have made unpopular decisions or be responsible for imperfect outcomes. Because most members of the organization will not have participated first-hand in the discussions leading to the decision, they may not fully appreciate its prudence, and the decision is therefore likely to be unpopular. And because mediation almost invariably means compromise, the outcome is likely to be imperfect. For some managers, the unwillingness to take responsibility means the more “comfortable” default to an adjudicative process. Disputes involving individuals are also subject to this phenomenon, as some people may not wish to come to grips with hard choices and take responsibility for the direction of their lives. Better to play the victim and blame the course of events on someone else: a demonized adversary, a biased court, an ill-informed arbitrator. But (as suggested at the beginning of this section), “not to decide is to decide.”¹⁶⁶ The “non-decision” to default to an adjudicative process (and allow an outsider to control one’s destiny) is itself one with consequences for which one ought to take responsibility. But because a decision to litigate is considered within the norm of American disputing behavior, and because of the diffusion of responsibility in many

“If his guesstimate is correct, many awards are in reality settlements between the parties, but for which the arbitrator is asked to bear responsibility.” *Id.*

¹⁶⁶ Harvey Cox, *from* Laurence J. Peter, *PETER’S QUOTATIONS* 297 (1977). Or, in words taken from a more contemporary source,

*“If you choose not to decide
You still have made a choice.”*

Rush, *Freewill*, on *PERMANENT WAVES* (Uni/Mercury Records 1980).

organizations, few are held to account for the result.¹⁶⁷ Thus the expenditure of vast sums on litigation goes unchecked and unquestioned.¹⁶⁸

Of course, the fact that mediation allows people to be governed by their own decisions should be considered an asset, notwithstanding the difficulties it might entail. Mediation enhances autonomy, and therefore has the virtue of giving people control over their own lives. But the type of autonomy ideally enhanced by mediation is not the selfish form of autonomy in which the disputant's own interests are pursued to the exclusion of all other considerations.¹⁶⁹ Rather, it is the type of autonomy that requires one to take into account the rights and interests of others. It is a *responsible* form of autonomy that embraces the fact that one lives not as an independent unit in a land of strangers, but as a member of a community, with interwoven networks of responsibility. In that sense, mediation serves communitarian ends not advanced through litigation, where responsibility for the interests of others is ceded to the tribunal.¹⁷⁰

3. *Interest-Based Mediation: Empowerment and Recognition Versus Self-Absorption*

The emphasis on interests in facilitative mediation¹⁷¹ may create special

¹⁶⁷ The fragmentation of responsibility within law firms representing parties in conflict further contributes to the inability of disputants to recognize alternatives to a litigated outcome. Associates often interpret their responsibilities narrowly (taking a deposition, researching a brief, or readying a case for trial); partners assigning these responsibilities often assume that the associate has taken charge of the day-to-day work; neither takes on a periodic reassessment of options, nor does either take a pro-active stance regarding alternative processes.

¹⁶⁸ There is healthy indication that this is less and less the case with respect to the disputing behavior of American corporations. See David Hechler, *ADR Finds True Believers*, NAT'L L.J., July 2, 2001, at A1 (describing efforts of Philadelphia Electric Company general counsel James W. Durham and others to institutionalize alternative methods of dispute resolution in their companies).

¹⁶⁹ For a discussion of the type of self-centered autonomy that "treat[s] others as means and not as ends," see SHAFFER & COCHRAN, *supra* note 27, at 18.

¹⁷⁰ See KEMMIS, *supra* note 81, at 53.

¹⁷¹ Professor Leonard L. Riskin has suggested a continuum of mediator orientations based on whether the mediator is more facilitative or evaluative. The facilitative mediator helps promote communication between the parties, helps them to understand their interests, and helps them to develop proposals. The evaluative mediator is more likely to predict litigated outcomes and propose terms of agreement. Leonard L. Riskin, *Understanding Mediators' Orientations, Strategies, and Techniques: A Grid for the Perplexed*, 1 HARV. NEGOT. L. REV. 7 (1996). Professor Riskin's continuum has generated a great deal of

challenges from a communitarian perspective. The interests-based paradigm suggests that the mediator should encourage the parties to reveal their underlying interests (either in joint session or through private caucus); with those interests on the table, the mediator can then help the parties explore options that will satisfy the interests of all.¹⁷² At times, such exploration will reveal interests that are overlapping, or at least interests that can be reconciled, allowing for value creation and win-win solutions.

The oft-repeated allegory is that of two sisters fighting over an orange. Their father, attempting to emulate the wisdom of Solomon, proposes to cut the orange in half. Their mother fortunately intervenes and asks the sisters why they want the orange. She learns that one sister wants to use the peel for icing on a cake, and the other wants to extract juice from the orange. The win-win solution is so obvious as to not require explanation.¹⁷³

A nice story, to be sure. The problem with this allegory is that it overpromises the benefits of mediation, creating in the parties unrealistic expectations regarding the mediator's "magic" and unrealistic assumptions regarding their own need to compromise.¹⁷⁴ In this regard, mediators may have become victims of our own self-promotion. Having touted an interest-based

comment and debate regarding mediators' orientations and techniques. *See, e.g.*, Symposium, 24 FLA. ST. U. L. REV. 839 (1997) (series of articles on mediator orientations).

¹⁷² The philosophy underlying this methodology is best described in ROGER FISHER & WILLIAM URY, *GETTING TO YES: NEGOTIATING AGREEMENT WITHOUT GIVING IN* 75–76 (Bruce Patton ed., 1981), and has been hailed by many (including this author) as a means of pursuing "principled negotiation." *Id.* at xii–xiii. *See, e.g.*, Ackerman, *supra* note 5, at 686–89. I have explained earlier how parties may be less reluctant to reveal their underlying interests in private caucus with a neutral, rather than in joint session with the opposing party. *See supra* note 156.

¹⁷³ The fable of the two sisters and the orange has been repeated so often that its origin is difficult to trace. My beleaguered research assistant attributes it to Robert House. *See* Deborah M. Kolb, *The Love for Three Oranges or: What Did We Miss About Ms. Follett in the Library?*, 11 NEGOTIATION J. 339, 339 (1995) (noting that Robert House originated the tale of the two sisters and the orange. ROBERT HOUSE, *EXPERIENCES IN MANAGEMENT AND ORGANIZATIONAL BEHAVIOR* 130–33 (1982)).

¹⁷⁴ In over fifteen years as a mediator (and the father of two beautiful, strong-willed daughters), I have yet to meet the two sisters with the orange. I have met disputing parties with the maturity to recognize that they might have to give up something in order to acquire or retain something of equal or greater importance. I have also encountered disputants and (less often) lawyers who expect me to conjure up a magic formula to create additional value and thereby obviate their need to compromise.

It is possible that I have indeed met these sisters, but have failed to recognize them. But I have sometimes identified seemingly reconcilable interests, only to be told that, for some reason or other, the win-win solution was more apparent than real.

process spawning win-win solutions, we are sometimes stymied when the parties and their counsel expect us to deliver a solution that requires no compromise on their part.¹⁷⁵

But while mediation presents opportunities to create value, enlarge the "pie," and build win-win solutions, almost every mediated solution involves an element of compromise. We hold out false hope, and encourage dependency and immaturity, when we imply that mediation will relieve people of all responsibility for hard choices and, in some instances, sacrifice. From a communitarian perspective, the true promise of mediation, as suggested in Baruch Bush's and Joseph Folger's book by the same name, involves a process of empowerment and recognition that shifts disputants from weakness and dependency to strength, from self-absorption to responsiveness.¹⁷⁶

Parties encouraged (by mediators or lawyers) to keep their interests paramount might misconstrue the process, fixate on their narrow interests alone, and thereby engage in self-indulgence, to the exclusion of values important to community. Sometimes it is contrary to one's interests to honor the terms of a contract, compensate another for injury, or do any number of honorable things important to others or the community at large. Sometimes principles other than the service of personal interests are important.¹⁷⁷ Yet an over-emphasis on the disputants' respective interests may encourage parties to think of mediation as a device that will serve those interests alone, neglecting broad-based values and the compromises that allow a community to function.

¹⁷⁵ I must confess to having once taken part in a panel presentation at a bar meeting, entitled "Mediation: No Compromise Necessary." Whom were we kidding?

¹⁷⁶ BUSH & FOLGER, *supra* note 11, at 84-94. Taylor describes this phenomenon in a political context:

[T]he very definition of a republican regime as classically understood requires an ontology different from atomism, and which falls outside atomism-infected common sense. It requires that we probe the relations of identity and community, and distinguish the different possibilities, in particular, the possible place of we-identities against merely convergent I-identities, and the consequent role of the common as against convergent goods.

Charles Taylor, *Cross Purposes: The Liberal-Communitarian Debate*, in LIBERALISM AND THE MORAL LIFE 170 (Nancy L. Rosenblum ed., 1989).

¹⁷⁷ Insistence on the right to attend integrated schools must have been a source of much discomfort to Louise Brown and her parents. Had they and their lawyers looked only at their short-term interests (or even at those interests together with those of their adversaries), they might not have pursued the remedy that caused a social revolution, to the betterment of the community at large.

The integration focus of *Brown v. Board* and related cases has been criticized, however, as failing to adequately advance educational goals. See Bell, *supra* note 75 (questioning whether civil rights lawyers advanced their own litigation interests at the expense of their clients' educational goals).

DISPUTING TOGETHER

This is where elements of transformative mediation may be put to good use. The transformative philosophy emphasizes the importance of *empowerment* and *recognition* during the course of the mediation process.¹⁷⁸ The empowerment element of transformative mediation does not encourage individuals to obtain power to pursue selfish ends. Rather, it encourages them to take control over their lives, shed dependency and self-absorption, and exercise responsibility over their decisions and actions. The goal of empowerment ultimately requires individuals to behave as mature human beings, as responsible participants in the community. Recognition, in turn, requires individuals to understand that others have legitimate interests that cannot be ignored, and that must be addressed in order for relationships to thrive. Rather than viewing “successful” mediation as the magical outcome produced by the fortuitous overlap of selfish interests, the transformative model requires that the parties recognize the legitimate interests of others and accept responsibility for hard choices; in other words, it requires that they view themselves as co-participants in an organic community.¹⁷⁹

We might part company with Professors Bush and Folger when they suggest that “empowerment and recognition—the transformative dimensions of mediation—[may] matter as much or more than settlement.”¹⁸⁰ Most parties enter into (and pay for) mediation primarily because it is likely to bring about the resolution of their disputes. But this does not mean that transformative elements cannot be applied to facilitative or even evaluative mediation to good effect for the parties’ relationship and the social capital thereby developed.

This view recognizes the difference between supplicants and citizens. It treats disputants not as children trying to have their cake and eat it too, but as responsible members of a community. It is the difference between politicians who ask, “Are you better off now than you were four years ago?”¹⁸¹ and those who implore us to “ask not what your country can do for you, but what you can do for your country.”¹⁸² But it is an attitude that requires maturity and responsibility, and a world view broader than self-indulgence. It is a view that

¹⁷⁸ BUSH & FOLGER, *supra* note 11, at 2. Bush and Folger define *empowerment* as “the restoration to individuals of a sense of their own value and strength and their own capacity to handle life’s problems.” *Id.* *Recognition* is defined as “the evocation in individuals of acknowledgment and empathy for the situation and problems of others.” *Id.*

¹⁷⁹ A mature view of community consists not of each sister walking off with that portion of the orange that will serve her needs alone; it consists of the two sisters sharing the orange, each compromising her interests for the sake of the whole.

¹⁸⁰ BUSH & FOLGER, *supra* note 11, at 4.

¹⁸¹ Standard stump speech of almost any incumbent American politician, circa 1980–2000.

¹⁸² John F. Kennedy, President’s Inaugural Address, 1961 PUB. PAPERS 1, 3 (Jan. 20, 1961).

requires cultivation, because while it is consistent with our more altruistic instincts, these instincts require nourishment every bit as much as the instinct for self-maximization.

Where and how is that view to be cultivated? People do not glide seamlessly into dispute resolution processes. Sometimes community institutions, such as religious organizations or community-based mediation centers, may be available to encourage people along a collaborative path. But in our diverse and largely secular society, people are at least as likely to turn to lawyers for guidance and assistance when they are in conflict.¹⁸³

I have previously discussed the role that lawyers' relationships with one another may play in the building of social capital. A discussion of the interaction between lawyer and client, and its implication for process choices, is now in order.

V. LAWYERS, CLIENTS, AND PROCESS CHOICES

"You take people as far as they will go, not as far as you would like them to go."

— Jeanette Rankin¹⁸⁴

It is plain from the foregoing discussion that the extent to which communitarian ends are served through conflict resolution depends not only on choice of process, but also on the manner in which the process is conducted *and* the manner in which the disputants conduct themselves in the process. Given the role of lawyers in transforming raw disputes into process, it is appropriate to inquire about the role of legal counsel in the making of these choices and in the ensuing conduct.¹⁸⁵ It is a simple answer to say that by the time a disputant reaches a lawyer's office, she has already determined to address the dispute through conventional litigation, and that for a lawyer to redirect the client toward an alternative process is a usurpation of client autonomy. But in most

¹⁸³ Almost two centuries ago, Alexis de Tocqueville commented on the role of law as a common denominator and the pervasive influence of lawyers in American society. See ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA*, 215, 251–57 (Harvey C. Mansfield & Delba Winthrop eds. trans., Univ. of Chicago Press 2000). "In America there are neither nobles nor men of letters, and the people distrust the rich. Lawyers therefore form the superior political class and the most intellectual portion of society." *Id.* at 256. For a modern update on this view, see generally GLENDON, *NATION*, *supra* note 35.

¹⁸⁴ See Jeanette Rankin, *Women's Voices: Quotations by Women*, at <http://womenshistory.about.com/library/qu/blqurank.htm> (last visited Aug. 13, 2002).

¹⁸⁵ "The lawyer's formal and practical monopoly over access to the institutions of authoritative dispute resolution gives him a large measure of power over the client." Simon, *supra* note 47, at 116.

instances, the would-be client, including even the fairly sophisticated client, has at best a hazy notion as to (1) whether there are any legal remedies for the situation; (2) what those remedies might be; (3) how they might best be pursued; (4) whether there exist any other remedies obtainable through non-judicial means; and (5) how they might best be pursued.¹⁸⁶ With respect to each of these issues, the answers provided by the attorney or, more appropriately, the answers reached jointly by the attorney and client together, are critical.

There is no single way in which a lawyer and client might do this. Thomas L. Shaffer and Robert F. Cochran, Jr. have suggested four approaches to moral choices in legal representation.¹⁸⁷ The first of these approaches views the lawyer as “godfather,” a paternalistic approach in which “[t]he . . . lawyer seeks the client’s financial benefit, without regard to harm caused to other people and without serious concern for the client’s relationships—or even what the client really wants.”¹⁸⁸ When the lawyer adopts this role, she eliminates the possibility that the client may have more communitarian instincts. William H. Simon has said that under this model of advocacy, the lawyer acts “unilaterally in terms of the imputed ends of [client] selfishness.”¹⁸⁹ The lawyer (having failed to fully assess client values and objectives) may thereby take action contrary to her client’s values, and perhaps contrary to her own.

Shaffer and Cochran’s second model is that of lawyer as “hired gun.”¹⁹⁰ Under this approach, client autonomy is valued to the detriment of all other values; “[t]he lawyer’s job is to *empower* the client, not to question the client’s morality.”¹⁹¹ Depending upon one’s view, this model of representation may be

¹⁸⁶ Some commentators have suggested a predisposition among lawyers to steer clients toward a litigation remedy. *See, e.g.,* Carrie Menkel-Meadow, *The Transformation of Disputes by Lawyers: What the Dispute Paradigm Does and Does Not Tell Us*, 1985 J. DISP. RESOL. 25, 33; Riskin, *supra* note 145, at 43–48.

¹⁸⁷ SHAFFER & COCHRAN, *supra* note 27, at 3–4.

¹⁸⁸ *Id.* at 8.

¹⁸⁹ Simon, *supra* note 47, at 56.

¹⁹⁰ *See generally* SHAFFER & COCHRAN, *supra* note 27.

¹⁹¹ *Id.* at 16. The traditional apologia for this view is taken from Scottish barrister Lord Brougham:

[A]n advocate, in the discharge of his duty, knows but one person in all the world, and that person is his client. To save that client by all means and expedients, and at all hazards and costs to other persons, and, amongst them, to himself, is his first and only duty; and in performing this duty he must not regard the alarm, the torments, the destruction which he may bring upon others.

MONROE H. FREEDMAN, UNDERSTANDING LAWYERS’ ETHICS 65–66 (1990) (quoting TRIAL OF QUEEN CAROLINE 3 (James Cockcroft & Co. 1874)).

More contemporary advocates for this viewpoint include Professors Monroe Freedman

seen as enlightened (because it promotes self-actualization)¹⁹² or not (because it promotes self-serving choices).¹⁹³ Shaffer and Cochran argue that claims of neutrality on the part of client-centered counselors “fail to recognize that lawyer and client moral values are often developed in and as a result of the lawyer-client relationship.”¹⁹⁴ Perhaps all too often, the lawyer equates the client’s self-actualization with client selfishness; to the extent there is any discussion of client values, the discussion is steered toward selfish ends, without exploration of other, more communitarian values.

Certainly there are instances in which clients really do want this type of representation. Some people indeed wish to push their interests to the maximum allowed. That is one reason they hire lawyers; they hope that their lawyers will be contentious on their behalf, whether or not they like being contentious themselves.¹⁹⁵ But too often lawyers adopt an unspoken assumption that this alone is the reason the lawyer has been hired.¹⁹⁶ As a result, a mutual default of

and Charles Fried. See, e.g., *id.* and Charles Fried, *The Lawyer as Friend: The Moral Foundation of the Lawyer-Client Relation*, 85 YALE L.J. 1060, 1073 (1976). In fairness to Professors Freedman and Fried, both gentlemen would appear to advocate moral counseling of the client, but thereafter continued advocacy even where the client rejects such moral counsel. SHAFFER & COCHRAN, *supra* note 27, at 25.

¹⁹² SHAFFER & COCHRAN, *supra* note 27, at 19 (quoting ROBERT M. BASTRESS & JOSEPH D. HARBAUGH, INTERVIEWING, COUNSELING, AND NEGOTIATING: SKILLS FOR EFFECTIVE REPRESENTATION 28 (1990)).

¹⁹³ *Id.* at 21. In a mediation context, this type of advocacy leads to the problems that arise when the parties become fixated on their self-interest to the exclusion of everything else. See *supra* notes 173–82 and accompanying text.

¹⁹⁴ SHAFFER & COCHRAN, *supra* note 27, at 22.

¹⁹⁵ An Oakland, California lawyer reports:

I was working as a volunteer at Legal Aid. A client came in reporting a dispute with his neighbor. In the client’s presence, I phoned the neighbor. After a long conversation, I was able to settle the matter. I was very pleased with myself. When I hung up, I looked across the desk to see my client fuming. “What’s wrong?” I asked. He replied, “I didn’t want you to be nice to him.”

Eugene Brott, quoted in *ABA Journal E Report*, Oct. 4, 2002.

¹⁹⁶ Professor Douglas Yarn has suggested a very different presumption: that a good lawyer should function as a good second in a duel.

In dueling, bad seconds were potentially lethal, but good seconds could avoid injury and reconcile the disputants. In the contemporary context, it is not the court’s judgment or order that brings ruin, but the attorneys [sic]. In legal disputes, bad attorneys can cause the client to incur considerable costs, win or lose, but good attorneys reduce the risks and cost of litigation and facilitate settlement.

Yarn, *supra* note 90, at 113.

responsibility occurs, and the lawyer ends up behaving in a manner neither she nor her client would embrace in the conduct of her own affairs.¹⁹⁷

Shaffer and Cochran's third approach is that of the lawyer as "guru." Here, the lawyer is willing to make moral choices for the client. While the results may be seen as more benign, the approach is nevertheless seen as objectionable because it elevates the lawyer's moral viewpoint over that of the client.¹⁹⁸ Thus, the ideal of client autonomy, prized among advocates of mediation and other dispute resolution alternatives,¹⁹⁹ is compromised. Similarly compromised is the goal of client engagement and growth. The client, rather than performing as a knowing participant in a communitarian enterprise, becomes an instrument of the lawyer's moral agenda. In this sense, the lawyer as guru is only slightly less objectionable than the lawyer as godfather.

Shaffer and Cochran's final model is that of the lawyer as "friend." In this model, the lawyer serves as the client's partner in a moral inquiry in pursuit of goodness. The lawyer helps the client to be a better person; "the lawyer and client . . . deal with moral issues that arise in representation in the way that friends deal with moral issues."²⁰⁰ This is the model favored by the authors, and there is much to commend it. But I am neither so optimistic regarding the opportunities for lawyers to engage in moral dialogue with their clients nor so assured of my own morality (or skill) to think that I can make my client a better person through my representation. I think that at best, lawyers can help and

¹⁹⁷ This phenomenon was vividly portrayed in a sequence from a recent motion picture documentary, *Startup.com*. See *STARTUP.COM* (Pennebaker Hegedus Films & Noujaim Films 2001). Tom, one of the two principal officers of a startup company, govworks, has been asked to take a vacation in order to ease his way out of the company. *Id.* He informs his partner that his lawyer has advised him not to take a vacation or to leave the office. *Id.* His partner responds: "Well, I wish we weren't on this path. I understand you're following counsel and you're doing what you need to do . . . and so, you know I would do the same thing." *Id.*

Later on, Tom replies: "Please, please don't take my change in attitude as anything personal. I still honestly have as first and foremost in my mind the interest of govworks [the company], but not to the exclusion of doing what my own legal counsel suggests I should do." *Id.*

¹⁹⁸ Shaffer and Cochran's most prominent example of this approach is that of Atticus Finch, the semi-fictitious character in the Harper Lee novel, *To Kill a Mockingbird*. SHAFER & COCHRAN, *supra* note 27, at 32–33. That this is seen as objectionable may surprise an entire generation of lawyers (myself included) who grew up with Finch as their ideal and inspiration.

¹⁹⁹ See, e.g., JAY FOLBERG & ALISON TAYLOR, *MEDIATION: A COMPREHENSIVE GUIDE TO RESOLVING CONFLICTS WITHOUT LITIGATION* 33–35 (1984); Welsh, *Thinning Vision*, *supra* note 12, at 15–16.

²⁰⁰ SHAFER & COCHRAN, *supra* note 27, at 45.

encourage their clients to act on their own best instincts.²⁰¹ And the best opportunities to do this occur most often when lawyer and client are discussing, as they must, the legitimate objectives of the client, the various dispute resolution process choices available, the manner in which the chosen process is to be carried out, and the manner in which they shall conduct themselves in the process.²⁰²

What is critical here is that the discussion occurs at all. Consider, for example, the decision to have a dispute adjudicated, rather than resolved through a more collaborative process like negotiation or mediation. People elect adjudicative processes for a variety of reasons: they want a legally “correct” decision; they want to hold their adversary accountable, whether or not she is ultimately found liable; they want relief that only a court can provide; they cannot psychologically accommodate the engagement required by a more collaborative process. All of these may be legitimate reasons, and my purpose is not to suggest that a choice of adjudication over a more collaborative mechanism is necessarily wrong. What I *will* argue is that it should be a *conscious* choice (rather than simply a default due to lack of discussion) and one that takes into account as many considerations as the disputant might ultimately find relevant. One would hope that among those considerations would be the welfare of others, including that of the adversary and the community at large, to the extent it is potentially impacted by the dispute.²⁰³ Given the understandable

²⁰¹ Gerald Williams has espoused a similar view in the context of the negotiation process:

The negotiation process . . . is not intended for lawyers to impose our values upon our clients, but for us to help contain and channel our clients’ energies in appropriate ways until they have had enough time to see their own situations more clearly and to discover for themselves what steps they may be willing to make.

Gerald R. Williams, *Negotiation as a Healing Process*, 1996 J. DISP. RESOL. 1, 51.

²⁰² See Robert F. Cochran, Jr., *Must Lawyers Tell Clients About ADR?*, ARB. J., June 1993, at 8, 8.

²⁰³ An emerging ethic of community oriented lawyering presents a “holistic” approach in which the lawyer tries to reach beyond the immediate client’s “presenting problem” to deal with underlying problems based in the community. Roger Conner, *Community Oriented Lawyering: An Emerging Approach to Legal Practice*, NAT’L INST. JUST. J., Jan. 2000, at 26, 27. Some examples:

- In Baltimore, a public interest law firm represents neighborhood organizations in low income areas, initiating civil actions to close crack houses, helping incorporate neighborhood groups and helping them develop comprehensive strategies, and fashioning new causes of action to address the problem of abandoned properties. *Id.* at 30.
- Major law firms in New York City, Washington D.C., and Los Angeles take on entire neighborhoods as *pro bono* projects, helping them to close crack houses and open neighborhood centers, and using novel strategies to stop gang intimidation.

self-absorption of disputants at times of crisis, it should not be surprising if the client does not raise this consideration herself. It is not inappropriate, however, for the lawyer to raise it.²⁰⁴

Certainly lawyer attitudes regarding conflict must play at least a subtle role in process choices.²⁰⁵ Much of the popular criticism of lawyers stems from a perception that lawyers place a higher value on assertiveness than empathy.²⁰⁶ It is naïve to believe that such an attitude (particularly on the part of someone with substantial persuasive powers) would have no bearing on client choices.²⁰⁷ At the very least, lawyers must be conscious of their own attitudes toward conflict, lest they (as godfather or guru) supplant client autonomy. Recognizing that neither lawyer nor client can (or, in the case of the client, should) fully suppress her own attitude toward conflict, they should engage in open discussion of these attitudes and their consequences for the dispute at hand. The appropriate process choice is likely to be found at the intersection of these attitudes, the client's underlying values, and the remedies legally available. By engaging the client in a full and frank discussion regarding process choices and their consequences, the lawyer prepares the client for the type of engagement conducive to the

Id. at 27–28, 30.

- The Metropolitan Defender Service in Portland, Oregon, invests precious resources on addiction and education specialists, to reduce recidivism and make clients truly better off, rather than recycling them through the criminal system. *Id.* at 30–31.

²⁰⁴ Model Rule 2.1 states: “In representing a client, a lawyer shall exercise independent professional judgment and render candid advice. In rendering advice, a lawyer may refer not only to law but to other considerations such as moral, economic, social and political factors, that may be relevant to the client’s situation.” MODEL RULES OF PROF’L CONDUCT R. 2.1 (2002). Comment 2 elaborates (ever so slightly): “Although a lawyer is not a moral advisor as such [note the departure from the Shaffer/Cochran “lawyer as friend” model], moral and ethical considerations impinge upon most legal questions and may decisively influence how the law will be applied.” *Id.* cmt. 2.

For a discussion of how this “moral discourse” might be shaped, see SHAFFER & COCHRAN, *supra* note 27, at 113–34.

²⁰⁵ If, for example, a lawyer felt greater comfort asserting a position in the formal setting of a courtroom (or even one more step removed, through the filing of pleadings) than by engaging in the empathic listening characteristic of mediation, it is hard to believe that that lawyer would not gravitate toward litigation, client preferences notwithstanding. Other, less competitive lawyers might too readily compromise a claim rather than engage in adversarial disputing.

²⁰⁶ See, e.g., JESS M. BRALLIER, *LAWYERS AND OTHER REPTILES* (1992) (collecting quotes and jokes about lawyers). For a brief discussion of the role of empathy and assertiveness in process choices, see *supra* note 78.

²⁰⁷ Practicing lawyers have told me that I am naïve to think that law firms’ interests in their own financial well-being have little or no bearing on process choices. As obvious as this may be to some, it is nevertheless a matter of grave concern.

building of social capital.

Once a process choice is made, much work remains to be done. As we have seen above, dispute resolution processes do not play themselves out on their own. Adjudicative processes require the marshalling of evidence and argument; more collaborative processes require genuine effort for the parties to reach accord, and authentic engagement to build social capital. But is process alone enough? Or must there be accord not only regarding the process to be employed, but as to substantive values as well, if community is to be built through conflict resolution? It is to that issue that we turn as we conclude our discussion.

VI. CONCLUSION: IS PROCESS ALONE ENOUGH?

*"It is by the light of reason that we interpret the signposts and make out the landmarks along our way."*²⁰⁸

— Thomas Merton

Throughout this article, I have suggested that proper employment of process to resolve conflict can have a salutary effect on community. But it is fair to ask whether process alone is enough. Can the maintenance of civil discourse—whether through principled use of adjudicatory processes or the engagement characteristic of more consensual processes—build community in the absence of common substantive values? My tentative conclusion is that it cannot. Process can provide for civil discourse, and thereby can create an atmosphere conducive to the building of community. It can serve as a tool. But shared substantive values must remain the bricks and mortar of community.²⁰⁹ Amitai Etzioni writes:

The needed good order will be served by restoration of the civil (or civic) society that many have called for recently, and is of merit in its own right, but by itself will not suffice to provide the kind of order a good society requires. "Civic order" is used to mean that people are civil to one another (that they do not demonize their opponents, are willing to compromise, conduct reasoned rather than impassioned discussions) and/or that a society should maintain a fabric of mediating institutions to protect individuals from the government.

²⁰⁸ Bartleby.com, at <http://www.bartleby.com/66/89/39389.html> (last visited Oct. 1, 2002).

²⁰⁹ A cautionary note: Efforts at conciliation should not be abandoned because the absence of common values is too readily presumed. See, e.g., Michelle LeBaron & Nike Carstarphen, *Finding Common Ground on Abortion*, in THE CONSENSUS BUILDING HANDBOOK 1031, 1033–34 (Lawrence Susskind et al. eds., 1999) (describing conciliation effort involving pro-life and pro-choice advocates).

Or—that the government should heed the citizens’ preferences. I agree that the civic order is part of the good order, but it is far too thin a concept; the civic order is often defined mainly in terms of procedure, limited to the political arena, or otherwise devoid of substantive values, as distinct from the concepts of good around which the social order of good societies is centered.²¹⁰

Process can force people together. The compulsory process of the civil courts, for example, can place people in the same room long enough to adjudicate their disputes to a formal disposition. Likewise, even in the absence of a mutual recognition of shared values, a skillful mediator can help warring parties construct an agreement, a truce of sorts. But we should not confuse such an agreement with the building of social capital.²¹¹ The notes will be played, but they will not necessarily produce music. The musical metaphor may be particularly appropriate. Jazz trumpeter Wynton Marsalis, an artist skilled in interpreting America’s “most important indigenous art form,”²¹² has said:

Today you go in to make a modern recording . . . [and they have] all this technology. The bass plays first, then the drums come in later, then they track the trumpet, then the singer comes in, then they ship the tape somewhere . . . none of the musicians have played together. You can’t play jazz music that way. In order for you to play jazz, you’ve got to listen to them. The music forces you at all times to address what other people are thinking and for you to interact with them with empathy and to deal with the process of working things out . . . That’s how our music really could teach what the meaning of American democracy is.²¹³

At times of conflict, formal process can contain disruption. It can maintain equilibrium. But process alone cannot build community. Even more collaborative processes, like mediation, will build no more than a superficial, temporary truce unless the process is managed to allow the parties to discover a common bond that is deeper than process alone.²¹⁴ Often that bond will be

²¹⁰ ETZIONI, GOLDEN RULE, *supra* note 7, at 14.

²¹¹ Likewise, while the intervention of skilled outsiders may move the process along, the sustained commitment of community members is critical to the maintenance of social capital. See, e.g., Susan L. Podziba, *The Chelsea Charter Consensus Process*, in THE CONSENSUS BUILDING HANDBOOK 743, 764–65 (Lawrence Susskind et al. eds., 1999).

²¹² Ralph Ellison, *Homage to Duke Ellington on His Birthday*, in THE COLLECTED ESSAYS OF RALPH ELLISON 676, 677 (John F. Callahan ed., 1995).

²¹³ Wynton Marsalis, in JAZZ —A FILM BY KEN BURNS: EPISODE TEN—A MASTERPIECE BY MIDNIGHT (Florentine Films 2000).

²¹⁴ For a contrary view, we might look to Brian Palmer, a character study in *Habits of the Heart*. BELLAH ET AL., *supra* note 5, at 3–8. To Brian, “[i]t is through communication that

found in shared experience—a shared history through which disputants recognize in each other common elements of the human condition.²¹⁵ At its best, a dispute resolution process will help people to discover their common history and unearth commonly-held values. Often (all too often, it seems) shared experience will be in the form of shared pain.²¹⁶ In the end, social capital is the product not of spontaneous combustion, but of history, experience, and effort.

And what remains of process? Process is important, as is technique. One must learn the fingering of a trumpet in order to make music. But there must be something of substance underlying the process; something to touch the soul after one admires the technique. Going through the motions and participating in dispute resolution processes without real engagement will produce notes, but not music. A pluralistic society, like a good jazz ensemble, requires the recognition and appreciation of differences, and the *will* to work and play together. Marsalis describes it in the following manner:

In American life . . . we have all of these different agendas; we—have conflict all the time and we’re attempting to achieve harmony through conflict. It seems strange to say that—but it’s like an argument that you have with the intent to work something out, not an argument that you have with the intent to argue.²¹⁷

And that’s what jazz music is—[we] . . . have musicians, and they’re all standing on the bandstand, each one has their personality and their agenda. Invariably they’re going to play something that you would not play, so you have to learn when to say a little something, when to get out of the way. So you have that question of the integrity, the intent, the will to play together—that’s what jazz music is. So you have your self, your individual expression, and then

people have a chance to resolve their differences, since there is no larger moral ideal in terms of which conflicts can be resolved . . . [For Brian,] [s]olving conflicts becomes a matter of technical problem solving, not moral decision.” *Id.* at 7. This view has been described by Judge Harry Edwards as “the broken telephone” theory of dispute resolution. Edwards, *supra* note 97, at 678–79.

²¹⁵ The Kalahari Bushmen described by William Ury are so successful at containing disputes because their community has been built through a series of bonds based on hundreds of years of shared experience. Ury describes “the pervasive habits of cooperation, sharing, and reciprocity” characteristic of such small-scale nomadic societies. URY, *supra* note 60, at 39.

²¹⁶ Shortly after the terrorist attacks of September 11, 2001, President George W. Bush observed, “Beyond all differences of race or creed, we are one country, mourning together and facing danger together. Deep in the American character, there is honor, and it is stronger than cynicism. Many have discovered again that even in tragedy—especially in tragedy—God is near.” President’s State of the Union Address, 2002 U.S.C.C.A.N. D3, D10 (Jan. 29, 2002).

²¹⁷ Marsalis, *supra* note 213.

DISPUTING TOGETHER

you have how you negotiate that expression in the context of that group and it's exactly like democracy.²¹⁸

The ultimate promise for dispute resolution is that it can harness and nurture the *will* to play together so that society is more than the sum total of disparate notes, but rather a cohesive—albeit sometimes discordant—tune.²¹⁹ There often exists a natural reluctance for people to engage one another, especially when engagement involves somebody new or different. But once we engage in a common enterprise—a football team, a jazz ensemble, a community playground project—differences practically cease to be a factor. We develop a common history that enables us to work, play and speak together.

This article is rife with comments about what people *should* do to foster a more communitarian society.²²⁰ The language is hortatory because we cannot legislate communitarian attitudes and conduct any more than we can legislate jazz. Efforts to compel civic-mindedness have always ended in failure, if not outright repression.²²¹ Social capital can be orchestrated, but it cannot be fabricated. Flags appeared all over America after September 11, 2001 as a spontaneous outpouring of patriotism, not as the consequence of an imperial decree. Just as the multiculturalism of American society, combined with free institutions, created an atmosphere conducive to jazz, so may we, through the processes of conflict resolution, create an atmosphere conducive to those expressions of community inherent in our nature.

²¹⁸*Id.*

²¹⁹ Sometimes a discord sounds just right—as listeners of George Gershwin, Charlie Parker, and Marsalis will attest. That jazz—America's defining music, and one of its great gifts to the world—thrives on elements of discord demonstrates that conflict is always with us, but that the proper management of discord can produce something of value and, at times, great art.

²²⁰ To those who would say that this article is also rife with an optimism bordering on naiveté, I plead guilty, but would suggest, as others have, that with the events of September 11, 2001 the age of postmodern cynicism has come to an end. *See supra* note 213.

²²¹ Devices more conducive to communitarianism are demonstrated by the Kalahari Bushmen described by Professor Ury. When persistently asked whether they had headmen, one of them responded, “[o]f course we have headmen! In fact, we are all headmen. Each one of us is headman over himself!” URY, *supra* note 61, at 4.

