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# Suppose It's Not True: Challenging Mediation Ideology

*Deborah R. Hensler*

## I. INTRODUCTION

Across the country, people who file lawsuits are being diverted from adjudication to mediation. Whereas once mediation was seen as the preferred means of resolving family disputes (especially those involving child custody), now it is mandated for a broad range of civil disputes. Whereas once citizens were called upon to volunteer as mediators in community justice centers outside the courts, now mediation is a line of business for lawyers whose customers are sent to them by the courts. Whereas once dispute resolution theorists called on courts to provide a variety of procedural *choices* for civil disputants, now courts *order* litigants to mediate and sanction them when they refuse to do so.

A decade ago, decision-makers justified mandating mediation of lawsuits for money damages on the grounds that mediation would save courts and litigants time and money. Now that empirical evidence to support this claim has failed to materialize,<sup>1</sup> decision-makers justify mandating mediation on the grounds that litigants prefer it to traditional litigation. *Suppose that's not true. Suppose it's the other way around—suppose, in fact, litigants in disputes over money damages prefer adversarial litigation with the chance of adjudication to mediation under court auspices.* The idea that litigants might prefer adversarial processes with the opportunity to adjudicate civil disputes to less adversarial consensual processes may startle judges and legislators who have enthusiastically embraced mediation. But it is consistent with the observation that *voluntary* court mediation programs rarely attract significant numbers of civil damage lawsuits. Moreover, the idea that litigants might prefer adversarial litigation and adjudication is consistent with a long line of social psychological research on individuals' evaluations of different dispute resolution procedures.

Where did the idea that Americans who bring their disputes to court prefer mediation to adversary process and adjudication come from? How can empirical research on dispute resolution help us assess this claim? What would a system of dispute resolution based on *litigants'* preferences -- rather than lawyers' self-interest or judges' beliefs about their appropriate role -- look like?

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1. Deborah Hensler, *In Search of "Good Mediation": Rhetoric, Practice and Empiricism*, in *Handbook of Justice Research in Law* 231 (Joseph Sanders & Lee Hamilton eds., Kluwer Academic/Plenum 2001).

## II. THE IDEA OF A PREFERENCE FOR MEDIATION<sup>2</sup>

At the outset, I want to make clear that I am not questioning the appeal of mediation in many circumstances.<sup>3</sup> For example, when relatives, friends or neighbors cannot see their own way out of a conflict they may benefit from getting the help of a mediator in sorting things out, rather than escalating the conflict or letting it simmer. Such disputes rarely end up in court, but when they do, it is not untoward for a court to *suggest* that the disputants attempt to mediate outside of court, rather than litigate. I also do not question the appeal of mediation in public policy disputes involving large numbers of stakeholders with diverse interests. These disputes are inherently political, and they are more likely to result in outcomes that provide at least something of value to each stakeholder when they are negotiated -- with the assistance of mediators, if necessary -- than when they are thrown to the courts for adjudication. I applaud efforts to mediate intractable group-based conflicts, where the alternative to talk is violence. I do not question the wisdom of courts providing mediation -- or even insisting on it -- in family custody disputes, where there is a public policy interest in helping divorcing parents maintain a sufficiently positive relationship to enable them to care adequately for their children. I do, however, think courts should take more responsibility than they have to date for determining whether the programs they mandate actually improve outcomes for children.

Most courts' civil calendars, however, do not comprise large numbers of public policy disputes, intractable group-based disputes or quarrels between family members and neighbors, and family law cases often are assigned to a separate court calendar. Civil calendars do contain large numbers of disputes between strangers (e.g. victims and perpetrators of accidents) and other people whose relationships are not intimate (e.g. employers and employees, business firms and consumers). My focus is the expansion of court-mandated mediation to these disputes, for which the traditional remedy is monetary compensation. It is this expansion of court-mandated mediation that appears to be responsible for most of the growth of mediation in the legal arena in the past decade. And it is this expansion of court-mandated mediation that appears to be responsible for reshaping how judges view the role of the courts.<sup>4</sup>

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2. There is a substantial literature on procedural preferences in non-U.S. cultures, and a smaller but significant literature comparing preferences across cultures. My focus is on the preferences of Americans who bring civil suits for money damages.

3. I also am not arguing against *negotiating* civil legal disputes. For the purposes of this paper, I assume that courts order litigants to mediation when bilateral bargaining has failed.

4. Those who are accustomed to judges urging mediation upon them may be surprised to learn that many judges embraced mediation reluctantly. The idea of expanding mediation to the courts was first promoted by ADR enthusiasts in the legal academy (most notably Frank Sander), and later by corporate counsel, under the banner of the Civil Justice Reform Task Force and such organizations as the American Corporate Counsel Association and the Center for Public Resources. Most judges and courts came late to the party.

The notion that civil litigants with money damage disputes prefer mediation to adversarial litigation and adjudication is so ingrained in contemporary legal culture that it is rarely questioned. One source of this notion may be the intuition that humans generally prefer peace to war, harmony to conflict. That humans *ought* to strive for such goals is a central tenet of many religions. But the evidence that humans' preferences for harmony over conflict and cooperation over contest vary dramatically depending on social, cultural and personal circumstances is all around us.<sup>5 6</sup> For eons, political theorists focused on conflict and competition in human affairs. Contemporary American academicians' engagement with conflict resolution and conflict prevention theories has its roots in the post- World War II efforts of a small group of social psychologists to redirect attention to the potential for cooperation in human interaction. Their efforts were likely spurred by contemplation of the consequences of the century's two world wars, the nuclear arms race, battles for national independence and racial and ethnic struggles within nations. The social psychologists were primarily interested in group conflict and the effects of personal differences and culture on conflict behavior. The notion that their theories and empirical results might apply to legal disputes came later.

Another possible source of the notion that Americans with civil money damage disputes prefer mediation to litigation and adjudication are surveys of litigant satisfaction with their court experiences. The idea that one ought to ask litigants what they think of their experiences in court was itself a product of the alternative dispute resolution (ADR) movement. Initially, many lawyers and judges were concerned that substituting alternative procedures for traditional litigation and adjudication of civil money disputes might have negative consequences for litigants.<sup>7</sup> Litigant satisfaction surveys conducted after people had experienced an ADR procedure were the primary tools that courts used to assess consequences, and generally they found that litigants surveyed were more "satisfied" than "dissatisfied." But knowing that litigants are "satisfied" with mediation tells us little about preferences for mediation

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5. I write as the United States struggles to understand the motivations for the September 11 attacks on the World Trade Center and the Pentagon. While these events underline the importance of the quest for peace, they sadly support the claim that there are circumstances in which people choose conflict over peace for what they believe are justifiable reasons.

6. There is a long line of psychological research investigating the relative contributions of personality and situational variables to conflict resolution preferences. The empirical results are mixed, leaving some theorists to argue that conflict resolution preferences are determined by the circumstances of conflict, while others argue that people exhibit consistent personality linked preferences across conflict domains. For a discussion of the literature and additional data, see Robert Sternberg & Lawrence Soriano, *Styles of Conflict Resolution*, 47 J. Pers. & Soc. Psychol. 115 (1984).

7. For example, in some jurisdictions, judges opposed the introduction of court-mandated non-binding arbitration. See Deborah Hensler, Albert Lipson & Elizabeth Rolph, *Judicial Arbitration in California* 9 (RAND 1981). The American Bar Association was initially skeptical of the value of alternative dispute resolution. It was not until 1993 that the ABA formally recognized the Section on Alternative Dispute Resolution. Prior to that, ABA members who were interested in ADR were relegated to standing committees and the like.

-- litigants might be even *more* satisfied with a different procedure if it were offered to them.<sup>89</sup>

The idea that Americans *should* prefer mediation to litigation and adjudication may have received a boost from the decades long tort reform campaign by the business community, which sometimes is framed as a critique of litigiousness and other times as a critique of lawyers. To disputants, mediation's harmony ideology offers an alternative to litigiousness, which often is portrayed as the rigid and overweening pursuit of individual rights to the exclusion of other social goals. To lawyers, mediation practice offers an opportunity to abandon the role of troublemaker for the role of problem-solver. However, the legitimacy of anti-litigation arguments for court-mandated mediation is undercut by extensive empirical evidence demonstrating that the litigation explosion is largely mythical, and that most Americans never consider claiming when they are injured and only rarely pursue rights claims. Similarly, while opinion survey data suggest that many Americans agree that lawyers often put their own interests above the public's or their clients,' they also suggest that Americans value their ability to find lawyers to represent them when they have been injured or wronged. In any event, neither statistical data about claiming rates nor public opinion surveys about lawyers lead directly to the conclusion that left to their own devices most Americans would prefer mediation to adversarial litigation and adjudication.

Finally, judges and lawyers themselves may be important sources of the notion that litigants prefer mediation to litigation and adjudication. Curiously, judges and litigators, who devote significant portions of their time to preparing for and (with ever decreasing frequency) participating in trials, assume that most other people abhor the process. "Isn't there a better way?" Chief Justice Warren Burger asked twenty years ago -- a way to resolve civil disputes that would be faster, cheaper and that would minimize "the emotional stress [that is] inescapable in the litigation process."<sup>10</sup> There have been few attempts to investigate this common assumption. But one of the few studies that actually inquired about civil litigants' attitudes towards their trial experiences found that these lay persons felt that they understood the trial process and were able to participate in it, and that their trial provided a dignified and careful procedure for resolving their disputes.<sup>11</sup> While this study did not provide evidence that lay-persons prefer trial to mediation, it does raise questions

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8. More generally, since satisfaction is a subjective variable that cannot (currently) be measured physically, satisfaction ratings are only meaningful in a comparative context -- e.g. satisfaction with the President's performance over time, satisfaction with one laundry product, compared to another.

9. Additionally, studies of preferences for mediation over bargaining may be interpreted as showing a general preference for mediation. Disputants may view mediation positively because it permits compromise without losing face or because it helps to maintain an emotionally "cool" interaction. However, such preferences tell us nothing about the choice between consensual processes and adversarial adjudication.

10. Warren Burger, *Isn't There a Better Way?*, 68 ABA J. 274 (1982). The Chief Justice did not specify what aspects of the litigation process were emotionally stressful, but urged consideration of "nonjudicial routes." *Id.* at 275.

11. E. Allan Lind et al., *The Perception of Justice: Tort Litigants' Views of Trial, Court-Annexed Arbitration, and Judicial Settlement Conferences* 74 (RAND 1989).

about the assumption that civil litigants' reactions to trial are overwhelmingly negative.

In sum, on closer look, the notion that Americans who believe they have a legal claim prefer to resolve such claims through mediation rather than adversarial litigation and adjudication seems to be based on questionable assumptions and debatable extrapolations from other social conflict contexts.

### III. WHAT EMPIRICAL STUDIES TELL US ABOUT PROCEDURAL PREFERENCES

Luckily, if we want to understand legal disputants' procedural preferences we do not have to rely solely on our sometimes-flawed intuitions.<sup>12</sup> For more than twenty-five years, social psychologists have been investigating people's procedural choices and assessments across a wide variety of conflict situations, including legal disputes. What has come to be called "procedural justice" research began in a laboratory about twenty-five years ago when social psychologist John Thibaut and lawyer Laurens Walker teamed up to study individual preferences for different forms of dispute resolution.<sup>13</sup> Thibaut and Walker initially focused on preferences for different forms of adjudication. Using conventional psychological experimentation methods and student research subjects, they investigated whether individuals preferred a U.S.-style adversarial trial process or an inquisitorial trial process similar to that used in many European courts for deciding criminal cases.<sup>14</sup> In this, as well as many subsequent studies, Thibaut and Walker measured preferences by comparing subjects' ratings of satisfaction and fairness across procedures to which they randomly assigned the subjects.<sup>15</sup> In some instances, the researchers gave the experimental subjects information about a dispute and their role in the dispute, and then asked them to rate the procedure to which they were assigned. In other instances, the researchers gave the subjects facts about a dispute and assigned them to a role, asked the subjects to participate in simulated dispute resolution procedures

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12. That people's social intuitions are often incorrect has been demonstrated in a long line of social psychological research. See Lee Ross, *Naive Realism: Implications for Social Conflict and Misunderstanding*, in *Values and Knowledge* (T. Brown, E. Reed & E. Turiel eds., Erlbaum Assoc. 1997).

13. Most of the publications that derive from this research were co-authored by Thibaut and Walker and their students. By convention, the research is usually attributed to the former, even when they do not appear as lead authors. I follow this convention.

14. Laurens Walker, Stephen LaTour, E. Allan Lind, & John Thibaut, *Reactions of Participants and Observers to Modes of Adjudication*, 4 J. App. Soc. Psychol. 295 (1974). In the experimental manipulation, the adversarial procedure allowed student subjects who were playing the role of criminal defendants to choose their attorneys (played by law students), who then presented evidence on their behalf to a "judge." In the inquisitorial procedure, a single attorney was assigned to present both prosecutorial and defense evidence to the "judge." *Id.* at 300.

15. In some instances, however, Thibaut and Walker's students presented subjects with multiple procedures, asked them to rate *each* procedure, and compared ratings. This approach has some technical weaknesses, but because it requires fewer subjects than the approach described in the text it is less expensive and easier to carry out.

to which they were randomly assigned, and then asked them to rate the procedure in which they had participated.<sup>16</sup>

Thibaut and Walker found that subjects who were assigned the roles of defendants in a criminal case were more satisfied with the adversarial trial procedure, which the subjects perceived as fairer than a more inquisitorial trial procedure.<sup>17</sup> This finding held true whether the “defendants” were judged innocent or guilty in the simulated procedure. Thibaut and Walker interpreted their results as indicating that individuals preferred procedures that allowed them to control the process (i.e. through adversarial presentation of evidence) to procedures in which process control was ceded to a third-party (as in an inquisitorial trial procedure).<sup>18</sup>

In follow-up research, Thibaut and Walker and their associates broadened their investigation to include preferences regarding decision (i.e. outcome) control and civil legal disputes.<sup>19</sup> In this line of research, subjects were told that they either controlled the presentation of evidence or not, and that they either controlled the ultimate decision or not. The researchers combined different levels of procedural and outcome control, thereby creating five procedural options. In their research reports, the researchers termed these procedural options bilateral bargaining (i.e. negotiation without third party intervention), mediation, the moot, arbitration, and autocratic decision-making -- terms which were carried forward in subsequent research -- but the experimental subjects themselves were not given these descriptors.

As is frequently true in conversations about dispute resolution procedures, the researchers did not (seemingly) pay a great deal of attention to the terminology they chose to describe the procedures. But they did include descriptions of the procedures in their research reports. Based on these descriptions, what the researchers termed “mediation” most resembled non-binding arbitration of the type mandated by many

16. In these early studies, the researchers ignored possible differences in *ex ante* and *ex post* preferences. Later research found differences in these preferences. See e.g. Tom Tyler, Yuen Huo, & E. Allan Lind, *The Two Psychologies of Conflict Resolution: Differing Antecedents of Pre-Experience Choices and Post-Experience Evaluations*, 2 *Group Processes & Intergroup Rel.* 99 (1999).

17. The researchers noted that the results might have reflected cultural expectations of American students whose observations of adjudication (e.g. through the media) would likely have been limited to adversarial proceedings. But they cited unpublished data from a French study that found similar preferences for adversarial procedure among Parisian students to controvert the cultural hypothesis. Thibaut & Walker, *supra* n. 14, at 309. Later procedural justice research has found remarkably little variation in results across cultures. See e.g. E. Allan Lind, Bonnie Erickson, Nehemia Friedland, & Michael Dickenberger, *Reactions to Procedural Models for Adjudicative Conflict Resolution: A Cross-National Study*, 22 *J. Conflict Res.* 318, 322 (1978); E. Allan Lind, Tom Tyler & Yuen Huo, *Procedural Context and Culture: Variation in the Antecedents of Procedural Justice Judgments*, 73 *J. Pers. & Soc. Psychol.* 767 (1997).

18. Increasing controversy over civil discovery in the 1970s seems to have played a role in shaping Thibaut and Walker’s research. See e.g. E. Allan Lind, John Thibaut & Laurens Walker, *Discovery and Presentation of Evidence in Adversary and Nonadversary Proceedings*, 71 *Mich. L. Rev.* 1129 (1973); John Thibaut, Laurens Walker & E. Allan Lind, *Adversary Presentation and Bias in Legal Decisionmaking*, 86 *Harv. L. Rev.* 386 (1972); Jon Thibaut, Laurens Walker, Stephen LaTour & Pauline Houlden, *Procedural Justice as Fairness*, 26 *Stan. L. Rev.* 1245 (1974).

19. See e.g. Pauline Houlden, Stephen LaTour, Laurens Walker and John Thibaut, *Preferences for Modes of Dispute Resolution as a Function of Process and Decision Control*, 14 *J. Exper. Soc. Psychol.* 13 (1978).

courts during the 1980s: the parties (with or without the help of lawyers) presented the evidence that supported their side of the dispute, a neutral third party heard the evidence -- but did not discuss it with the disputants -- and then rendered an *advisory* non-binding opinion. The third party did not caucus with the parties or otherwise test their willingness to accept alternate resolutions of the dispute, nor did he attempt to identify the parties' interests so as to facilitate an integrative resolution. In other words, the procedure looked neither like evaluative mediation, nor like facilitative mediation (and there was certainly nothing transformative about it).<sup>20</sup> What the researchers termed "arbitration" was identical to the process they described as mediation, except for the fact that the third party neutral rendered a binding decision.<sup>21</sup> The researchers discovered that while individuals preferred procedures that allowed them to maintain process control, within the set of procedures that offered such control, subjects preferred procedures that ceded decision-making power to a neutral third party. Subjects tended to view such procedures as fairer than procedures offering other combinations of process and decision control. The researchers reasoned that these preferences reflected the subjects' belief that controlling the process accorded them the best opportunity to present evidence favoring their position, while ceding control over the outcome offered the best opportunity to resolve the conflict with an outcome that reflected the relative weight of the evidence on each participant's side.<sup>22</sup>

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20. Actually, in these experiments the third party was a confederate of the researcher who simply followed a script, listening first to the evidence presented by the parties and then rendering a pre-determined and randomly assigned advisory decision. My point is that the process simulated in these experiments looked little like mediation as practiced today, either in its evaluative form or in its facilitative form.

Not all procedural justice researchers have described mediation to subjects as outlined in the text. For example, in studies exploring differences in procedural preference across cultures, Leung and colleagues described mediation as a process in which a third party appointed by the court provides the disputants with "guidance and suggestions" as they try to reach a "mutually acceptable solution through negotiation and bargaining." See Kwok Leung, *Some Determinants of Reactions to Procedural Models for Conflict Resolution: A Cross-Cultural Study*, 53 J. Pers. & Soc. Psychol. 898 (1987). Using a simulated dispute arising out of a traffic accident, Leung asked subjects in the U.S. and Hong Kong to choose among four procedures: bargaining, mediation, inquisitorial adjudication and adversarial adjudication. Hong Kong subjects strongly preferred mediation to all other procedures, but they preferred adversary adjudication to bi-lateral bargaining. Americans favored mediation and adversary adjudication equally and strongly preferred both to inquisitorial adjudication or bargaining. Subjects in both cultures viewed adjudication as the fairest procedure. *Id.* at 903. See also Kwok Leung et al., *Effects of Cultural Femininity on Preference for Methods of Conflict Processing: A Cross-Cultural Study*, 26 J. Exper. Soc. Psychol. 373 (1990).

21. The "moot" required the parties and a third party all to agree on an outcome after parties presented evidence. In the autocratic procedure, a third party collected all the evidence and made the decision. Houlden et al., *supra* n. 19, at 14. It is difficult to think of any analogue to the moot in the domestic U.S. legal system, but there are examples of processes that require consensus in the international sphere. For example, the World Trade Association formally requires that all participants in its trade rounds agree to decisions. In practice, however, more powerful countries dominate the process. Richard H. Steinberg, *In the Shadow of Law or Power? Consensus-Based Bargaining and Outcomes in the GATT/WTO*, 56(2) Intern. Org. \_\_ (forthcoming Spring 2002).

22. Houlden et al., *supra* n. 19, at 16-17.



In several of their studies, Thibaut and Walker asked some subjects to play the role of observers, rather than disputants. They found that people observing different dispute resolution processes shared the preferences of people playing the role of disputants for adversarial adjudication.

Perhaps the most startling finding of procedural justice research for legal experts was the discovery that, contrary to what many judges and lawyers believe,<sup>23</sup> people's assessments of dispute resolution processes and outcomes are not wholly dependent upon each other.<sup>24</sup> Specifically, experimental subjects' perceptions of the fairness of dispute resolution procedures depended on procedural characteristics, *not* on whether they won or lost their case or were satisfied with its outcome. People were most satisfied with dispute resolution procedures when they believed the process was fair *and* that it produced a fair outcome. But people were also reasonably satisfied (although less so than in the former case) with procedures that they perceived to rely on fair processes when those procedures yielded an outcome that was unfavorable to them.<sup>25</sup> Most importantly, for legal regimes based on a rule of law, people accorded legitimacy to -- and were willing to comply with the outcomes of -- dispute resolution procedures when the outcomes were unfavorable to them, as long as they viewed the processes used as fair.

Writing soon after the 1976 Pound Conference that ushered in the new ADR era in the courts, Thibaut and Walker interpreted their research results as a refutation of claims made by some at that Conference that the adversary nature of the American legal system was contrary to disputants' interests. The researchers also rejected the notion that the path towards legal reform lay in the direction of more consensual processes. In a 1979 article that summarized their previous work and presented new data that confirmed and extended those results, they wrote:

[P]ublic dissatisfaction with the courts indeed can be reduced, as Pound believed, by alterations in court procedures; contrary to Pound's belief, however, adoption of nonadversary procedures would diminish rather than enhance public esteem for the legal process.<sup>26</sup>

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23. My assessment of judges' and lawyers' beliefs is based on the reaction of numerous professional legal audiences to my discussion of the results of procedural justice research.

24. Technically, researchers found that evaluations of procedure and evaluations of outcomes comprised two distinct factors in a principal components factor analysis. See e.g. Laurens Walker, Stephen LaTour, E. Allan Lind & John Thibaut, *Reactions of Participants and Observers to Modes of Adjudication*, 4 J. of App. Soc. Psychol. 295 (1974); Laurens Walker, E. Allan Lind & John Thibaut, *The Relation Between Procedural and Distributive Justice*, 65 Va. L. Rev. 1401 (1979); E. Allan Lind et al., *Procedure and Outcome Effects on Reactions to Adjudicated Resolution of Conflicts of Interest*, 39 J. Pers. & Soc. Psych. 643 (1980).

25. This finding has been confirmed by numerous studies. While studies have found that the importance of procedural fairness varies across situations, in legal disputes perceived procedural fairness shapes disputants' satisfaction with their experiences as well as their views of the justice system. When the stakes are high, parties care even *more* about procedural fairness. See Tom Tyler, *The Psychology of Disputant Concerns in Mediation*, 3 Negot. J. 367, 369 (1987).

26. Walker, Lind & Thibaut, *supra* n. 24, at 1420.

Thibaut and Walker's defense of adversarialism did not go unchallenged. The leading early critique of Thibaut and Walker's work by Hayden and Anderson argued that Thibaut and Walker's experimental studies failed to capture the contextual factors that characterize real disputes and artificially limited people's procedural choices. Outside the experimental laboratory, Hayden and Anderson argued, people would reveal different preferences.<sup>27</sup> In a recent challenge to fairness-based policy arguments, Steven Shavell and Louis Kaplow have echoed some of Hayden and Anderson's methodological criticisms.<sup>28</sup> However, over the past twenty years, a long line of studies of real world disputes have demonstrated conclusively that Thibaut and Walker's fundamental insight -- that people's judgments about dispute resolution procedures derive primarily from their perceptions of procedural fairness rather than perceptions of outcome favorability -- is not just an artifact of experimental conditions.<sup>29,30</sup>

One of these "real world studies," conducted while Lind and I were at RAND,<sup>31</sup> compared tort litigants' evaluations of three common court-based procedures: trial, judicial settlement conferences, and court-annexed arbitration.<sup>32</sup> Consistent with the

27. See e.g. Robert Hayden & Jill Anderson, *On the Evaluation of Procedural Systems in Laboratory Experiments: A Critique of Thibaut and Walker*, 3 L. & Hum. Behav. 21 (1979). Hayden and Anderson also argued that Thibaut and Walker's results reflected cultural predispositions of the American experimental subjects. This criticism has been explored and largely negated by further research. See *supra* text accompanying n. 17. In addition, Hayden and Anderson argued that Thibaut and Walker's experimental simulations of adversarial and inquisitorial systems were not faithful to real world trial procedures in the U.S. and Europe. Because my arguments in this article generally do not pertain to the choice between inquisitorial and adversarial trials, I have not pursued this point. For early critical analysis of Thibaut and Walker's work, see William Austin et al., *Effect of Mode of Adjudication, Presence of Defense Counsel, and Favorability of Verdict on Observers' Evaluation of a Criminal Trial*, 11 J. App. Soc. Psychol. 281 (1981).

28. Louis Kaplow & Steven Shavell, *Fairness vs. Welfare*, 114 Harv. L. Rev. 961 (2001).

29. For a review of this research, see Tom Tyler & E. Allan Lind, *Procedural Justice*, in *Handbook of Justice Research in Law* 65 (Joseph Sanders & V. Lee Hamilton eds., Kluwer/Plenum 2001).

30. Hayden and Anderson also warned policymakers against designing dispute resolution procedures to match disputants' preferences as revealed in Thibaut and Walker's studies. Those studies, they noted, failed to measure the monetary and non-monetary costs of adversary systems, including the distortion of facts that may result from an adversarial pursuit of dispute resolution, the subordination of disputants' interests to those of their lawyer-advocates, and the impairment of pre-existing relationships between disputants. *Id.* See Hayden & Anderson *supra* n. 27, at 32-33. Hayden and Anderson's concerns about assuring disputant control over the dispute resolution process and maintaining relationships among disputants presage the concerns of ADR proponents. However, the third cost that they attach to following Thibaut and Walker's recommendations -- distortion of fact-finding -- has generally been ignored by ADR proponents, some of whom argue that disputants should adopt a problem-solving orientation to dispute resolution that does not depend on the factual basis of the dispute.

31. See Lind *supra* n. 11; E. Allan Lind et al., *In the Eye of the Beholder: Tort Litigants' Evaluations of their Experiences in the Civil Justice System*, 24 L. & Society Rev. 953 (1990).

32. We conducted thirty minute telephone interviews with plaintiffs and defendants in tort cases that had been resolved in the preceding twelve months in three mid-Atlantic region suburban courts. In one court, if litigants could not negotiate a settlement of their case, it would be tried; in a second, non-binding arbitration was a pre-condition for securing a place on the trial calendar; in the third, judicial settlement conferences were required one month prior to the trial date. In the first court, litigants could

experimental research conducted in laboratories, we found that litigants' satisfaction with the dispute resolution system and the court was strongly dependent on perceived procedural fairness. Regardless of how their cases were resolved, litigants felt more positive about the system when they believed the process had been fair. (Litigants who were satisfied with the outcome *and* believed the process was fair were the most satisfied.) Perceptions of procedural fairness were highest for trial and non-binding arbitration and lowest for judicial settlement conferences. Multivariate analysis of factors explaining perceptions of procedural fairness showed that the most important factors were litigants' perceived control over the process and their perceptions that the process was careful, thorough and unbiased<sup>33</sup> and that they were treated in a dignified fashion.

Process characteristics that have received a good deal of attention in the dispute resolution literature, such as perceived formality versus informality and perceived privacy were unrelated to perceptions of procedural fairness.

The study contradicted some of the conventional wisdom about civil dispute resolution. For example, litigants *liked* trials. Trial litigants gave the highest ratings of comprehensibility to the process, followed by litigants whose cases were arbitrated and those whose cases were assigned to judicial settlement conferences. Defendants were as comfortable when their cases were tried as when they were arbitrated, although plaintiffs were more comfortable with arbitration. Defendants were particularly pleased to be given an opportunity to vindicate themselves publicly at trial (even when they lost their cases). From the perspective of litigants, trials and arbitration seemed equally dignified. Litigants whose cases were tried gave somewhat higher ratings of formality to the process than litigants whose cases were arbitrated, but the degree of formality did not appear to be important to them, as long as the decision-makers seemed to proceed with care.

In contrast, litigants had rather negative perceptions of the fairness of judicial settlement conferences, from which they were almost always excluded. Sitting outside the judge's chambers, they wondered what was going on behind closed doors, and sometimes distrusted their lawyers' descriptions of the proceedings. Not surprisingly, they were more distrustful about these descriptions when they had less trust in their attorney overall. In this jurisdiction (as in many others at the time), judicial settlement conferences offered no opportunity to the litigant to be heard and no opportunity to judge how much attention the judge was giving to one side relative

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reach trial within six months of the case being declared ready by the attorneys, meaning that trial was a viable alternative to settlement (at least with regard to timing). In the second, trial was also available within a short period of time, but arbitration had long been mandated as a more expeditious way to hear the case. Brief hearings were held in small jury deliberation rooms in the courthouse before panels of three arbitrators, who subsequently delivered their decision in writing, without offering findings of fact or legal rulings. The third court had fairly serious congestion problems, meaning that it could take up to three years to reach trial. But judicial settlement conferences were scheduled for a month before trial, so parties who could not reach settlement were assured of a courtroom shortly thereafter. To control for selectivity effects, we contrasted each procedure with its most common alternative, bilateral bargaining.

33. This perception was related in turn to litigants' belief that third party decision-makers were unbiased and paid equal attention to all parties.

to the other. There was little evidence that the litigant was regarded as an important member of the society -- or even an important participant in the dispute! Importantly, the fact that litigants were excluded from the process did not prevent them from making judgments about the likely fairness of what was going on behind closed doors.

At the same time as Thibaut and Walker and their students were exploring preferences for different dispute resolution procedures, another group of researchers -- seemingly working quite separately -- were investigating the conditions for successful third party intervention in disputes. These researchers sought ways to help disputants avoid impasse and maximize joint gains from negotiation. Using experimental methods similar to Thibaut and Walker's, researchers such as Jeffrey Rubin examined the effects of timing and mode of intervention on the likelihood of disputants' reaching resolution, the time required to reach resolution and the quality of outcomes.<sup>34</sup> One of the key findings of this line of research was that the effectiveness of intervention depended on the intensity of conflict: when disputants' interests were directly antagonistic and when disputants saw themselves as competitors, intervention was often counter-productive.<sup>35</sup>

Thibaut and Walker had speculated the preferences for adversarial adjudication they had observed might reflect people's intuition that bargaining and non-authoritative third party intervention (e.g. mediation) would prove fruitless in high intensity conflicts, where parties' interests are directly at odds with each other. Rubin and colleagues' findings were consistent with this intuition. Many of the cases Thibaut and Walker used in their laboratory experiments appeared to exemplify high intensity conflicts. Some wondered whether civil litigants whose disputes centered on money damages -- arguably, lower intensity conflicts -- would prefer non-adversarial modes of dispute resolution that left control over outcomes in their hands over adversarial adjudication. To explore this question, Heuer and Penrod designed an experiment that compared preferences for different procedures (as defined by Thibaut and Walker) in high and low intensity conflicts (as defined by Rubin and colleagues). Heuer and Penrod asked their subjects to rate the various procedures for "fairness," "pleasantness," "timeliness" and "advantageousness." Contrary to their hypotheses, they found that subjects in high *and* low intensity conflicts preferred adversarial adjudication to other procedural options.<sup>36</sup> Heuer and Penrod also

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34. For a review of this early social psychological research on bargaining and third party intervention see Jeffrey Rubin, *Experimental Research on Third-Party Intervention in Conflict: Toward Some Generalizations*, 87 Psychol. Bull. 379 (1980).

35. Jean Hiltrop & Jeffrey Rubin, *Effects of Intervention Mode and Conflict of Interest on Dispute Resolution*, 42 J. Pers. & Soc. Psychol. 665 (1982).

36. Larry Heuer & Steven Penrod, *Procedural Preference as a Function of Conflict Intensity*, 51 J. Pers. & Soc. Psychol. 700, 704 (1986). Heuer and Penrod used a criminal law conflict in their experiment and varied whether the conflict allowed for plea-bargaining or not. To further sharpen the distinction between conflict circumstances, they manipulated subjects' motivational orientation (competitive vs. cooperative), time pressure (high vs. low) and strength of position (strong v. weak).

confirmed the previous findings that perceived process fairness was the best predictor of what they termed procedural “desirability.”<sup>37</sup>

Critics of procedural justice research have argued that it is difficult, if not impossible, to draw any strong inferences from the experimental literature. The simulations are diverse, ranging from criminal and civil legal disputes to organizational decision-making to interpersonal conflicts to collaborative tasks whose “conflict” dimension is questionable. The procedural options that researchers have offered subjects differ in kind and in description, the variables the researchers measure are different and the same conceptual variables are measured differently. My discussion has focused on studies that found that people prefer adjudication to mediation, but some experimental research has found that subjects prefer mediation to arbitration (adjudication).<sup>38</sup> Taken as a whole, however, I do not think that the empirical work to date provides strong support for the notion that civil disputants prefer mediation to adversarial litigation and adjudication.

Looking back from the perspective of the ADR movement’s success in transforming the U.S. courts, early procedural justice research findings on legal disputants’ preferences for adversarial adjudication are highly provocative. But, ironically, by the mid-1980s, just as judges and lawyers were becoming more interested in the use of consensual processes in court and more questioning of the value of adversarial process and adjudication, procedural justice researchers turned their attention to other questions. For the past fifteen years, procedural justice scholars led by Allan Lind and Tom Tyler have documented the importance of procedural fairness perceptions to individuals’ evaluations of and reactions to social interactions ranging broadly beyond the courts. Their research has consistently found that process matters to people, and it is the perceived fairness of processes that matters most.

Lind and Tyler and colleagues have proposed several competing hypotheses to explain why people care as much as they do about procedural fairness:

- (1) *The “voice” hypothesis.* According to this hypothesis, disputants prefer procedures that offer them an opportunity to *voice* their needs and opinions and perceive such procedures as fairer than others because they believe that having a

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37. *Id.* at 707. In a second experiment Heuer and Penrod compared three conflict circumstances: a non-negotiable dispute, a zero-sum negotiable dispute and an “integrative” dispute that provided an opportunity for an interest-based settlement. At the same time, they substituted a non-legal conflict-producing task for the criminal law dispute they used in the first experiment. To me the differences between the two conflict simulations seem so sharp that they render the comparison between the two experiments highly questionable.

38. For a review of this literature, see Robert Peirce, Dean Pruitt & Sally Cazja, *Complainant-Respondent Differences in Procedural Choice*, 4 *Intl. J. of Conflict Mgt.* 199 (1993). The authors note that these experimental results are consistent with earlier anthropological research on preferences for consensual processes in many cultures and suggest that may be because both lines of research focus on interpersonal and intra-community conflict.

greater opportunity for voice enhances the likelihood of obtaining a satisfactory dispute outcome.<sup>39</sup>

- (2) *The "group values" or "relational" hypothesis.* Disputants prefer procedures that indicate that they are in good standing with their social group and see fair procedures as a sign of respect. (Lind has sometimes termed this the "dignitary values" hypothesis.)
- (3) *The "fairness heuristic" hypothesis.* People fear that they may be exploited by the social group or authoritative decision-makers but lack the information or ability to assess whether such exploitation is occurring. As a mental shortcut or *heuristic* for determining whether or not they should be concerned about such exploitation, they rely on their evaluations of the fairness of the process.<sup>40</sup>

The "voice" hypothesis derives directly from Thibaut and Walker's original research, which pointed to the importance of control over process and suggested to Thibaut and Walker that individuals have an instrumental interest in process control -- that is, individuals care about process because they believe it shapes outcome. This hypothesis was disputed by later findings that suggest individuals care about process *even when they have direct control over the outcome* -- that is, when they are able to reject the outcome of a dispute resolution procedure (as in mediation).<sup>41</sup> Moreover in one of the more peculiar (and most troubling) results of procedural justice research, Lind and associates found that individuals preferred procedures that permitted them to voice their opinions *even when they were told that their opinions would have no effect at all on the outcome*.<sup>42</sup> Tyler dubbed such preferences "value expressive effects."<sup>43</sup>

Lind and Tyler developed the "relational" or "dignitary values" hypothesis as a substitute for the voice hypothesis. If individuals' concern about process was not driven solely or primarily by a desire to ensure a favorable outcome, Lind and Tyler reasoned that it might instead be a result of a more fundamental concern about their standing in society. According "due process" to individuals is equivalent to recognizing their status as members in good standing of their social group, which has a value to people that is independent of any effect process might have on outcomes.

39. See e.g. E. A. Lind, R. Kanfer & C. Early, *Voice, Control and Procedural Justice*, 59 *J. Pers. & Soc. Psychol.* 952 (1990).

40. The justice heuristic hypothesis is consistent with laboratory research that suggests that when individuals are given information for assessing the fairness of outcomes prior to a procedure, they use that information, rather than process information, as a basis for assessing the fairness of the ultimate outcomes. K. Van de Bos, R. Vermunt & H.A.M. Wilke, *Procedural and Distributive Justice: what is fair depends more on what comes first than on what comes next*, 72 *J. Pers. & Soc. Psychol.* 95 (1997).

41. Tyler & Lind, *supra* n. 29, at 75.

42. Lind, Kanfer & Early, *supra* n. 39, at 957-58.

43. Tyler, *supra* n. 25, at 370.

More recently, Lind has returned to a more instrumental explanation of individuals' concern about process. His explanation draws on the work of cognitive scientists who have found individuals frequently use intellectual shortcuts or *heuristics* to make judgments that would otherwise require unreasonable or unattainable factual investigations. In many instances, Lind argues, individuals have no basis for assessing the fairness or appropriateness of dispute outcomes. Hence, they use process characteristics -- which they are comfortable assessing for themselves -- as a pragmatic basis -- a heuristic -- for assessing the outcome and deciding whether to comply with it.<sup>44</sup> The justice heuristic hypothesis is consistent with laboratory research suggests that when individuals are given information for assessing the fairness of outcomes prior to a procedure, they use that information, rather than process information, as a basis for assessing the fairness of the ultimate outcomes.<sup>45</sup>

Taken together, the results of several decades of procedural justice research validate the concerns about process values that have animated the ADR movement. My question is whether legislators' and judges' choice of mediation as the procedure that most gratifies these concerns is well grounded. When I look to the findings of the first generation of procedural justice scholars, I see little to support this choice. Thibaut & Walker's early studies found that subjects playing the roles of legal disputants preferred adversarial adjudication to procedures that ceded control over process to neutral third parties (e.g. inquisitorial trials) and to procedures that left control over outcomes in the hands of parties (e.g. mediation). The RAND study found that real-world civil litigants accorded higher procedural fairness to non-binding arbitration and trial than to judicial settlement conferences. Some experimental studies that found people prefer mediation to binding and advisory adjudication under some circumstances turn out to have used descriptions of mediation that look more like non-binding arbitration than like mediation as practiced by evaluative or facilitative mediators. When researchers describe mediation in a way that more resembles contemporary evaluative mediation, research subjects choose adjudication and mediation over other procedures, with similar frequencies.

The implications of more recent research focusing on *why* perceived procedural fairness matters for choices between dispute resolution procedures is more ambiguous. Whether people care about procedural fairness because it has value in and of itself, or because it signals something about their social status or because it is perceived to provide information about the fairness of the dispute outcome seems uncertain to me. Perhaps, procedural fairness matters to people for *all* these reasons, or for one reason rather than another in some circumstances but not in others. For now, I read this more recent procedural justice literature as telling us that public policymakers should care about procedural fairness and about the procedural characteristics that are linked to perceived fairness.

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44. E. Allan Lind et al., *Individual and Corporate Dispute Resolution Using Procedural Fairness as a Decision Heuristic*, 38 *Admin. Sci. Quart.* 224, 225 (1993).

45. See Van de Bos et al., *supra* n. 40, at 99, 102.

What are these factors? The research to date has not thoroughly explored this question. But some of the factors that emerge from the RAND study as important to perceptions of procedural fairness are: (1) lack of bias, defined as a neutral's even-handedness in listening and paying attention to each side's evidence; (2) thoroughness, defined as the amount of attention given to the facts of the dispute; and (3) "dignitary values," defined as the degree of care neutrals accord the process. Participation does not seem to be valued explicitly by litigants. But implicitly participation matters because litigants' ability to assess the other qualities of the procedures that they care about is critically dependent on their observing the process.<sup>46</sup>

A consistent finding across studies is that litigants want a chance to "tell their side of the story" -- that is, to present their versions of the facts underlying the dispute. Some ADR proponents have cited this finding in arguing for dispute resolution procedures, including mediation, that permit litigants to voice their concerns -- which practitioners sometimes term "venting." But as I have discussed, RAND found that litigants' assessment of procedural fairness was not based on whether they had an opportunity to participate in the process (e.g. vent), but rather on their perceptions of the carefulness and neutrality of the third party and the dignity of the process. These findings suggest that civil litigants do not simply want to *tell* their stories but also want to be *heard*.

I think the RAND study, as well as the early research by Thibaut and Walker, which emphasized the treatment of evidence, suggest also that people want neutral third parties to resolve their disputes *on the basis of the facts*. Thibaut and Walker's research, and that of their followers', did not inquire into people's preferences with regard to the normative basis on which these facts should be judged. The question of whether (and when) people prefer dispute resolution based on public legal norms to dispute resolution based on ad hoc privately negotiated norms unfortunately has not been subjected to much investigation to date. This seems like a grievous lack to me, because the assumption that people prefer treating disputes as problems to be solved, rather than as conflicts to be resolved according to publicly adopted norms, is central to mediation ideology. But I read Sally Merry and Susan Silbey's research on why Americans take disputes to court as suggesting that at least through the mid-1980s litigants expected legal disputes to be resolved on the basis of public norms -- that is what they thought "justice" was about.<sup>47</sup> Moreover, I think the legitimacy that people accord the courts -- which is essential to a rule of law -- is dependent on the courts offering the opportunity to resolve disputes on the basis of facts and law, using fair, thorough, and dignified procedures, to all who seek it.

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46. Lind et al., *supra* n. 11, at 61-67; Lind et al., *supra* n. 31, at 972-73.

47. Sally Merry and Susan Silbey argued similarly a number of years ago. Based on interviews with urban residents who brought civil disputes to court, they concluded: "[At the point a lawsuit is filed] the grievant wants vindication, protection of his or her rights (as he or she perceives them) an advocate to help in the battle, or a third party who will uncover the 'truth' and declare the other party wrong." Sally Merry & Susan Silbey, *What Do Plaintiffs Want? Reexamining the Concept of Dispute*, 151 *Just. Sys. J.* 151 (1984). See also Sally Engle Merry, *Getting Justice and Getting Even: Legal Consciousness Among Working-Class Americans* (U. of Chicago Press 1990).



## IV. RETHINKING COURT ADR

In their enthusiasm for helping people resolve their disputes in a less conflict-oriented fashion, I worry that courts may erode their legitimacy. In most trial courts today, there are few trials. In many trial courts, parties are required to mediate; in a growing number of appellate courts, litigants are urged to do likewise. Anecdotal evidence suggests that in order to persuade parties to accept a settlement many mediators paint trials in the most negative light possible. Even in jurisdictions and cases in which trials could be had relatively quickly and relatively efficiently -- and notwithstanding evidence that ordinary litigants can understand trials and may not find them particularly emotionally taxing -- litigants are told that they should avoid trial at all costs. Lawyers who fear the risk of a negative outcome may join mediators in urging this view of the public adjudication process upon their clients. Some judges also have joined in the chorus of anti-trial rhetoric, urging upon the parties and the public a view of adjudication that dismisses the importance of fact- and law-based dispute resolution.<sup>48</sup> I think we need to think harder about what we are giving up in the effort to persuade people to choose conciliation over litigation, we need to think more carefully about what constitutes fair alternative dispute resolution procedures, and we need to rethink the role of fact- and law-based dispute resolution in the courts.

What would a court ADR program that accorded greater legitimacy to fair, thorough and dignified fact- and law-based dispute resolution look like? First, it would be a program that assumed that some civil lawsuits disputes need and ought to be tried, because there is a legitimate dispute in these cases on the facts or law, because a dispute resolution system based on negotiation requires *some* adjudication to provide the "shadow of the law" that is necessary for efficient bargaining, and because there are values associated with public trials that are important to some litigants. In short, it would not regard trial as a "failure" of the legal system. This means that sufficient resources would have to be allocated by legislative bodies to enable courts to try cases reasonably quickly after they were filed, and judges would need to manage efficiently pretrial and trial processes so that the costs of the process were not so enormous as to make trial effectively inaccessible. Judges and lawyers would have to join in persuading legislatures of the importance of providing adequate resources to courts. Unfortunately, contemporary dispute resolution rhetoric seems to have persuaded legislatures instead that mediation is a panacea for increased demands on court resources.

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48. See e.g. *Neary v. Regents of the U. of California*, 10 Cal. Rptr. 2d 859, 864-65 (Cal. 1992) (The primary purpose of the public judiciary is 'to afford a forum for the settlement of litigable matters between disputing parties.' [citation omitted] We do not resolve abstract legal issues, even when requested to do so. We resolve real disputes between real people. This function does not undermine our integrity or demean our function. By providing a forum for the peaceful resolution of citizens' disputes, we provide a cornerstone for ordered liberty in a democratic society . . . . The Court of Appeal's concern for the integrity of trial court judgments is flawed . . . . The notion that such judgment is a statement of 'legal truth' places too much emphasis on the result of litigation rather than its purpose . . . . The paramount purpose of litigation is to resolve disputes.");

Second, a court ADR program that saw its primary role as providing fact- and law-based dispute resolution would look to lawyers, not mediators, to resolve most lawsuits before trial. It would be the responsibility of lawyers -- not mediators -- to help their clients understand their underlying interests and to choose among the range of options available for resolving disputes both outside and in court. When lawyers and their clients chose litigation, it would be the responsibility of lawyers -- not mediators -- to make realistic assessments of the strength of their cases, to perform accurate cost-benefit analyses of their litigation options and to advise their clients accordingly. The measure of success of dispute resolution training in law school would be that more lawyers could more effectively advise their clients on when litigation is and is not appropriate, and when they chose litigation, that more of these lawyers could negotiate effectively resolution of legal disputes in the shadow of the law. Dispute resolution programs would celebrate the lawyers who did not need mediation to achieve good outcomes for their clients, rather than the lawyers who took every case to mediation.

Third, a court ADR program that accorded greater legitimacy to fair, thorough and dignified process and fact- and law-based dispute resolution would offer lawyers who were unable to achieve resolution in bilateral negotiation and parties who wanted an opportunity for a hearing a variety of dispute resolution options *focusing on the facts and law pertaining to their dispute*. These options would include evaluative mediation, non-binding arbitration, early neutral evaluation (ENE), summary jury trial -- even old-fashioned judicial settlement conferences -- as well as bench and jury trials. The options would *not* include pure interest-based mediation in which neutrals urge parties to set aside the facts and legal issues pertaining to their disputes and focus instead on their underlying interests in order to achieve an integrative outcome and to preserve relationships. Nor would the options include transformative mediation, in which neutrals encourage parties to set aside their dispute and focus instead on better understanding themselves and opposing parties and more effectively communicating their needs and perspectives to each other.<sup>49</sup>

I oppose courts incorporating pure interest-based mediation in their ADR programs because the inquiry into interests carries the potential for mediators to veer from a neutral stance or to appear to be veering away from neutrality, in the absence of the discipline provided by legal norms. Notwithstanding the potential value of this process to some litigants in some circumstances, I think court officers engage in such inquiry at the risk of losing their neutrality or *appearing* to lose it. I am also skeptical about the notion that a generalist mediator who spends only a brief time with parties and their attorneys could accurately discern their "true" interests. Lawyers who wish

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49. As a practical matter, lawyers and parties sometimes may identify integrative components of legal dispute resolution as a result of mediation. See Dwight Golann, *Is Legal Mediation Really a Repair Process? Or a Separation?*, 19 *Altern. to High Costs of Litig.* 171 (2001). There may also be "transformative" moments during the mediation process. I am not arguing against the possibility of integrative solutions and transformation in court ADR processes. Rather, I am arguing that it is inappropriate for courts to educate citizens to believe that these are the primary goals of a public justice system, and to direct the court's energies towards achieving these goals rather than fact- and law-based dispute resolution.

assistance in interest-based negotiation should seek out private facilitative mediators outside the courts, and these mediators should compete in a free market for such business, rather than using the courts to build and maintain their businesses.

I oppose courts incorporating pure transformative mediation in their ADR programs because I do not believe self-realization and self-empowerment are appropriate goals for a public justice system. Parties who wish assistance in self-empowerment and in honing their communication skills should seek out professionals who are trained to provide this assistance; professionals who will more likely be found within the therapeutic community than in the bar.

I recognize that my views run counter to the notion of courts as “comprehensive dispute resolution centers.” It may be in the interest for government to subsidize such centers. However, I think by transforming *courts* into dispute resolution centers where facts and law need not matter we run the risk of finding ourselves without an institution that has the political legitimacy to make fact- and law-based decisions when we need them.

Among the procedures that I think it is appropriate for courts to provide, none would be accorded more legitimacy or more support by the courts, and private practitioners who served as neutrals would receive the same hourly fees, regardless of the process. Courts would give parties accurate descriptions of the options, focusing on the differing opportunities they offer for parties to participate and to obtain a third party opinion on the proper outcome of the dispute, as well as their possible cost consequences. Evaluative mediation would invite the participation of parties and provide an opportunity for parties to present their versions of the facts of the dispute, as well as to observe their lawyers interact with the mediator and opposing counsel and parties. Evaluative mediators would abjure arguments to settle based on a “parade of horrors” pertaining to trial, and settlement techniques that depend on “wearing down” parties’ resistance to settling. The purpose of evaluative mediation would be to overcome cognitive barriers to negotiation that prevent parties and their agents from perceiving that there is a mutually acceptable convergence of their positions. Early neutral evaluation would not be merely another opportunity for a settlement conference, but -- as originally envisaged by the trial court in the Northern District of California -- an occasion for an expert neutral to meet with parties and their lawyers to assist in identifying the factual and legal issues upon which the dispute turns, and developing a pretrial plan that focuses on resolving these issues. Judicial settlement conferences would include litigants, rather than leaving them to sit on benches in the court corridor, wondering what is happening in the judge’s chambers.

Courts would take responsibility for the quality of neutrals and the quality of all dispute resolution processes. Practitioners who wished to offer their services to court ADR programs would accept the courts’ authority to review their credentials as mediators, arbitrators, etc. and to impose quality control standards, including maintaining disciplinary processes. Courts would inform parties of such standards and processes, to enhance their confidence in the fairness of the courts’ procedures. Mediators and other practitioners who felt that such constraints were unacceptable could compete for business on the open market outside the court. Additional fees that

might be associated with court-offered procedures would be established by law or rule, after public debate.

Courts would not require parties to participate in any of these dispute resolution processes and would make certain that parties understand that they have a right to bypass all ADR procedures and to take their disputes to trial (subject to ordinary summary judgment and dismissal rulings). The value of dispute resolution procedures would be judged by whether lawyers and parties chose to use them, not by whether they achieved a specified settlement rate -- nor whether they produced a stream of business for entrepreneurial lawyer-neutrals and retired judges. In sum, court ADR programs would honor Professor Frank Sander's original vision of the multi-door courthouse<sup>50</sup> rather than hustling litigants out the courthouse door and leaving them subject to the vagaries of the private dispute resolution market. And, over time, we would learn what procedures litigants actually prefer under different circumstances.

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50. Frank Sander, *Varieties of Dispute Processing, Address Before the National Conference on the Causes of Popular Dissatisfaction with the Administration of Justice*, 70 F.R.D. 79, 111 (1976) (Pound Conference, Apr. 7-9, 1976).

