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Bingham: Bingham: Why Suppose - Let's Find Out

# Why Suppose? Let's Find Out: A Public Policy Research Program on Dispute Resolution

*Lisa B. Bingham\**

## I. INTRODUCTION

In her thoughtful and provocative essay, Professor Hensler addresses indirectly one element of an emerging policy problem for the field of dispute resolution: unequal control over the design of a dispute system. Essentially, courts are imposing a dispute system design consisting of mandatory, pre-trial mediation on parties who may be unwilling. Professor Hensler urges a return to the original vision of the multi-door courthouse, in which courts offer parties the choice among various forms of alternative or appropriate dispute resolution (ADR), all of which she argues should be thorough, fact- and law-based, and dignified. The alternatives available should range from evaluative mediation, early neutral evaluation, non-binding arbitration, summary jury trials, and if these are unacceptable or fail, to judicial settlement conferences and bench or jury trials. In this vision, courts would still impose a dispute system design on the parties, but it would be a different one. It would consist of voluntary use in a court setting of a limited number of dispute resolution choices, pointedly excluding both facilitative interest-based or transformative models of mediation. Nothing in this design would limit party choice regarding dispute resolution outside the court setting. To the extent that Professor Hensler's proposal would put some control over dispute system design back in the hands of the parties who use dispute resolution in a court setting, it is a move in the right direction.

However, the emerging policy problem of control over dispute system design is broader than the courts. It encompasses the systematic privatization of justice through the use of adhesive binding arbitration clauses in employment and commercial transactions.<sup>1</sup> It encompasses the unregulated design of a system for

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\* Keller-Runden Professor of Public Service and Director, Indiana Conflict Resolution Institute, Indiana University School of Public and Environmental Affairs, Bloomington, Indiana. A previous version of this paper was presented at the Quinnipiac-Yale Workshop on Dispute Resolution on Jan. 30, 2001. I am grateful to the participants in that workshop and to Professors Jennifer Gerarda Brown, Ian Ayres, Harry Mazadoorian, Edwin Greenebaum and Leonard Riskin for their helpful comments on that draft. Douglas Shontz and Charles Salter, both candidates for the Juris Doctor at Indiana University School of Law, provided able research assistance. The Indiana Conflict Resolution Institute gratefully acknowledges general support for its work from the William and Flora Hewlett Foundation. The opinions expressed here are those of the author.

1. Martin H. Malin & Robert F. Ladenson, *Privatizing Justice: A Jurisprudential Perspective on Labor and Employment Arbitration from the Steelworkers Trilogy to Gilmer*, 44 *Hastings L.J.* 1187 (1993); Richard C. Reuben, *Public Justice: Toward a State Action Theory of Alternate Dispute Resolution*, 85 *Cal. L. Rev.* 577, 579 (1997).

addressing conflict by one of the interested parties that for all practical purposes denies access to the courts to the other party. Seen in this broader context, mandatory, court-supervised mediation may be the lesser of many possible evils. The judiciary is after all a branch of government acting pursuant to legislative authorization and funding and subject to policy oversight through the democratic process. The judiciary is not an interested party. While the courts are publicly accountable, there is no immediate democratic check or balance on the design of dispute resolution programs by employers and other institutional players.

Professor Hensler's article is an example of a policy critique that courts ought to give serious consideration, as part of a larger complex of issues in dispute resolution that cry out for systematic public policy analysis. She has previously called for more comprehensive work evaluating court-based dispute resolution programs, citing field research done during the 1970s and 1980s by the RAND Institute for Civil Justice, the Federal Judicial Center, the National Center for State Courts and others, and lamenting the decline of an open debate on the merits of various program designs.<sup>2</sup> She observed there that her own review of the empirical literature on dispute resolution in courts revealed that most programs used evaluative not facilitative mediation.<sup>3</sup>

In this commentary, I suggest that we can get a broader picture of the research agenda to address these policy issues by refining our notions of self-determination. In addition to self-determination over process and outcome in the individual case, we need to start examining who has control over design of the dispute system as a whole. First, this commentary addresses the difference between self-determination at the case level and self-determination in dispute system design and how these two separate dimensions of self-determination can help us distinguish among different uses of mediation and arbitration. Second, using this framework, I attempt to review some of the field research on mediation and relate it to Professor Hensler's essay. This includes work in labor relations that finds disputants rate mediation more highly than arbitration in terms of judgments of procedural justice and work in employment mediation showing that both facilitative and transformative models can provide disputants with a useful alternative to traditional administrative adjudication. Finally, this commentary proposes that the judiciary build data collection into its information systems to facilitate more field research on how different ADR dispute system designs function in a court setting.

I conclude that Professor Hensler's commentary emphasizes our continuing need for better data on how mediation functions in the field. Courts have been experimenting blind in dispute system design. What field data we have largely addresses evaluative not facilitative mediation, and yet these studies indicate evaluative mediation has not produced what proponents hoped it would in the way of measurable differences in court efficiency and time to disposition. If the courts are going to impose a new and different dispute system design on the parties, why

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2. Deborah R. Hensler, *ADR Research at the Crossroads*, 2000 J. Dis. Res. 71 (2000).

3. *Id.* at 76 n. 23.

exclude facilitative mediation? Instead of supposing it's not true, why don't we find out?

## II. SELF-DETERMINATION WITHIN A SINGLE CASE CONTRASTED WITH SELF-DETERMINATION IN DISPUTE SYSTEM DESIGN

The Model Standards of Conduct for Mediators provide in several sections for party "self-determination." They suggest that mediation is based on the principle of self-determination, that mediators must have qualifications necessary to satisfy the reasonable expectations of the parties, that mediators must conduct the process in a manner consistent with party self-determination, and that they have a duty to improve the practice of mediation.<sup>4</sup> These standards do not define self-determination, nor do they distinguish between self-determination at the case level and self-determination in system design. I use self-determination at the case level to refer to a single set of disputing parties in conflict within a given dispute resolution process, that is, once the parties enter into a single mediation case or a single arbitration case. Self-determination at this level refers to their experience of control over both process and outcome in a single dispute.

Self-determination in dispute system design refers to control over the structure of a process or set of processes to handle a series of disputes. There is an established and growing literature on dispute system design that focuses primarily on a dispute resolution program within an organization, not the courts.<sup>5</sup> Most of these discussions

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4. American Arbitration Association, American Bar Association Dispute Resolution Section & Litigation Section, and Society of Professionals in Dispute Resolution, *Model Standards of Conduct for Mediators* <<http://www.abanet.org/ftp/pub/dispute/modstan.txt>> (accessed Jan. 10, 2001). They provide in relevant part:

I. Self-Determination: A Mediator Shall Recognize that Mediation is Based on the Principle of Self-Determination by the Parties.

IV. Competence: A Mediator Shall Mediate Only when the Mediator has the Necessary Qualifications to Satisfy the Reasonable Expectations of the Parties.

VI. Quality of the Process: A Mediator Shall Conduct the Mediation Fairly, Diligently, and in a Manner Consistent with the Principle of Self-Determination by the Parties.

IX. Obligations to the Mediation Process: Mediators have a duty to improve the practice of mediation.

*Id.*

5. Catherine A. Costantino & Christina Sickles Merchant, *Designing Conflict Management Systems: A Guide to Creating Productive and Healthy Organizations* (Jossey-Bass 1996); William Ury, Jeanne Brett & Stephen Goldberg, *Getting Disputes Resolved: Designing Systems to Handle Conflict* (Jossey-Bass 1988); Corinne Bendersky, *Culture: The Missing Link in Dispute Systems Design*, 14 *Negot. J.* 307 (1998) (advocating the need to tailor dispute system with company culture and examine similarities between explicit/policy-driven dispute resolution and implicit methods of dispute resolution); Cathy A. Costantino, *Using Interest-Based Techniques to Design Conflict Management Systems*, 12 *Negot. J.* 207 (1996) (advocating use of "interest-based" design in which the designer acts to facilitate design by working with all of the stakeholders). Early work by Ury, Brett and Goldberg took the collectively bargained grievance procedure as a model of a dispute system, and experimented with innovations including grievance mediation, or the use of mediation for labor grievances after filing but before they reached binding arbitration. The literature discusses issues such as providing multiple points of access

assume that the sponsoring company, organization or agency will make the ultimate choices about the final dispute system design. Since the leading professional organizations approved Model Ethical Standards at a time when courts had already implemented mandatory mediation programs, it is reasonable to conclude that the drafters had in mind self-determination as to outcome at the individual case level. In mandatory court-annexed programs, the legislatures and the courts effectively make dispute system design choices for the parties before the parties use mediation for a given case. The legislatures authorized courts to mandate mediation and the courts are exercising that power.<sup>6</sup>

A number of leading scholars have helped us develop a better understanding of what self-determination might mean at the case level.<sup>7</sup> Scholars are distinguishing between self-determination as to process and as to the outcome of that process.<sup>8</sup> The debate regarding transformative, facilitative, and evaluative mediation usually addresses this aspect of the concept of self-determination.<sup>9</sup> The debate concerns how a mediator should perform services within a given case. Should the mediator attempt

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to the system, including loop-backs from impasse to negotiation, arranging steps in a sequence from interest-based to rights-based processes, and structuring the system to move from lower cost to higher cost processes. Dispute system designers advocate soliciting input from the potential users of the process through focus groups and stakeholder participation mechanisms. There is literature on the value of an ombudsperson's office, and an emerging movement toward integrated conflict management systems for all the various grievance or dispute resolution processes available within an organization.

6. For a discussion of the Florida rules, see generally John Lande, *How Will Lawyering and Mediation Practices Transform Each Other?*, 24 Fla. St. U. L. Rev. 839 (1997) (arguing for high quality consent by parties, including explicit consideration of parties' goals and interests, explicit identification of plausible options, parties' explicit choice of options for consideration, careful consideration of options, mediators restraint in pressuring parties to select particular options, limitation on use of time pressure, and confirmation of consent, all in light of evolving "litimmediation" culture in which mediators view lawyers, not parties, as clients). See also C. H. Crowne, *The Alternative Dispute Resolution Act of 1998: Implementing a New Paradigm of Justice*, 76 N.Y.U. L. Rev. 1768 (2001).

7. Jennifer Gerarda Brown, *Ethics in Environmental ADR: An Overview of Issues and Some Overarching Questions*, 34 Val. U. L. Rev. 403 (2000) (advocating intervention by mediator to insure greater self-determination by parties, in context of environmental disputes); Robert A. Baruch Bush, "What do We Need a Mediator for?": *Mediation's "Value-Added" for Negotiators*, 12 Ohio St. J. on Dis. Res. 1, 6 (1996) (arguing "evidence shows clearly that disputants place great value on the degree and quality of participation" in mediation and that mediators should place less emphasis on evaluation and more on "empowering" the disputants in the process); Nancy A. Welsh, *The Thinning Vision of Self-Determination in Court-Connected Mediation: The Inevitable Price of Institutionalization?*, 6 Harv. Negot. L. Rev. 1, 6 (2001) (emphasizing need to "clarify the meaning of 'self-determination' and to develop effective mechanisms to protect it," because of the "institutionalization of court-connected mediation").

8. Welsh, *supra* n. 7, at 7 (containing extensive discussion of self-determination as to the mediation process and advocating a protection by making the outcome of settlement subject to a cooling off period).

9. Leonard L. Riskin, *Understanding Mediators' Orientations, Strategies, and Techniques: A Grid for the Perplexed*, 1 Harv. Negot. L. Rev. 7 (1996) (proposing a grid for understanding mediation practice with two dimensions of mediator role from facilitative to evaluative and scope of mediated issues from broad to narrow); Carrie Menkel-Meadow, *The Many Ways of Mediation*, 11 Negot. J. 217 (1995) (reviewing recent literature regarding different methods of mediation); Robert A. Baruch Bush, *A Study of Ethical Dilemmas and Policy Implications*, 1994 J. Dis. Res. 1, 6 (1994) (proposing mediator standards of practice that focus on "categories of ethical dilemmas").

to engender empowerment and recognition among the parties?<sup>10</sup> Should mediators adopt a variety of techniques based on the level at which the conflict lives?<sup>11</sup> Does the mediator usurp party self-determination when she gives an opinion regarding the likely outcome of a case in court?<sup>12</sup> Recent commentary regarding the role of counsel in mediation also tends to focus on the case level of analysis. These discussions concern concepts such as mediation advocacy<sup>13</sup> and the changing nature of mediation as experienced within a given case when courts create private markets by mandating that parties represented by counsel participate in the process.<sup>14</sup>

Relatively little commentary discusses self-determination in the area of dispute system design. Increasingly, commentators advocate requiring that counsel inform clients regarding alternative or appropriate dispute resolution generally, and the different kinds of processes in particular.<sup>15</sup> This provides an opportunity for party self-determination in dispute system design, if only the design of a process for a single case. Scholars advocate fully informed consent by clients; this requires that lawyers and their clients understand the difference between mediation and arbitration, and the differences among various models of mediation.<sup>16</sup> However, there is often an unstated assumption that the client is represented by counsel, and has a choice in how to design an ADR process for her case. Many disputants act pro se. The most controversial new systems give employee or consumer disputants no choices in ADR system design, and may even prohibit representation by counsel.<sup>17</sup>

In parallel to this commentary is the increasingly heated discussion among arbitration scholars regarding the legitimacy of adhesive arbitration clauses, or

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10. Robert A. Baruch Bush & Joseph P. Folger, *The Promise of Mediation: Responding to Conflict Through Empowerment and Recognition* 81 (Jossey-Bass 1994).

11. Bernard Mayer, *The Dynamics of Conflict Resolution* 97 (Jossey-Bass 2000).

12. Robert A. Baruch Bush, *A Study of Ethical Dilemmas and Policy Implications*, 1994 J. Dis. Res. 1, 9 (1994) (survey of Florida mediators found the dilemma "reported more often than any other" was preserving self-determination when "tempted to give the parties a solution" or "tempted to oppose a solution formulated by the parties").

13. See e.g. Jean R. Sternlight, *Lawyers' Representation of Clients in Mediation: Using Economics and Psychology to Structure Advocacy in a Nonadversarial Setting*, 14 Ohio St. J. on Dis. Res. 269, 292 (1999) (arguing that while lawyers need to modify their method of advocacy for mediation, adversarial behavior should not be abandoned and lawyers should consult with clients on division of responsibilities for mediation to overcome "economic, psychological, or strategic barriers to an appropriate settlement"); Peter Robinson, *Contending With Wolves in Sheep's Clothing: A Cautiously Cooperative Approach to Mediation Advocacy*, 50 Baylor L. Rev. 963, 964 (1998) (discussing competitive and cooperative techniques for mediation advocacy, need for "balanced and flexible approach to mediation," and need to make "conscious strategic decisions" in determining advocacy method).

14. Lande, *supra* n. 6 (asserting the increased use of court-mandated mediation will increase the number of lawyers who specialize in mediation and increase the amount of advocacy used in mediation).

15. Elizabeth Plapinger & Donna Stienstra, *ADR and Settlement in the Federal District Courts: A Sourcebook for Judges and Lawyers* 8 (D.C. Fed. Jud. Ctr. & CPR Inst. for Dis. Res. 1996).

16. Edwin H. Greenebaum, *On Teaching Mediation*, 1999 J. Dis. Res. 115 (1999) (discussing models of mediation and roles of mediators in context of clinical education in mediation).

17. Mei L. Bickner, Christine Ver Ploeg & Charles Feigenbaum, *Developments in Employment Arbitration: Analysis of a New Survey of Employment Arbitration Programs*, 52 Dis. Res. J. 8 (1997).

“mandatory arbitration.”<sup>18</sup> The current state of the law is that the stronger contracting party may require that the weaker contracting party participate in arbitration of any disputes arising out of the contract through an adhesive clause, provided that clause meets the standards for enforcing a contract in that jurisdiction. These standards include defenses such as duress, unconscionability, fraud, and, to a limited extent, public policy.<sup>19</sup> In this context, if the weaker party proceeds with the economic relationship (employment, health care treatment, purchase of consumer goods and services), the weaker party is deemed to have consented to the clause. The entire economic relationship is presented as a take it or leave it offer; dispute system design is part of this larger whole of the relationship. This is consent as a legal concept.<sup>20</sup>

A variety of disgruntled litigants would assert forcefully that it is not voluntary consent or self-determination as a subjective, psychological concept.<sup>21</sup> In this

18. See e.g. Jean R. Sternlight, *As Mandatory Binding Arbitration Meets the Class Action, Will the Class Action Survive?*, 42 Wm. & Mary L. Rev. 1 (2000); Colin P. Johnson, *Has Arbitration Become a Wolf in Sheep's Clothing? A Comment Exploring the Incompatibility Between Pre-Dispute Mandatory Binding Arbitration Agreements in Employment Contracts and Statutorily Created Rights*, 23 Hamline L. Rev. 511 (2000); Michael Z. Green, *Debunking the Myth of Employer Advantage from Using Mandatory Arbitration for Discrimination Claims*, 31 Rutgers L.J. 399 (2000); Harry T. Edwards, *Where are We Heading with Mandatory Arbitration of Statutory Claims in Employment?*, 16 Ga. St. U. L. Rev. 293 (1999); Beth E. Sullivan, *The High Cost of Efficiency: Mandatory Arbitration in the Securities Industry*, 26 Fordham Urb. L.J. 311 (1999); Christine Stegehuis, *Mandatory Arbitration and the Medical Malpractice Plaintiff*, 27 Colo. Law. 77 (May 1998); Richard E. Speidel, *Consumer Arbitration of Statutory Claims: Has Pre-Dispute (Mandatory) Arbitration Outlived its Welcome?*, 40 Ariz. L. Rev. 1069 (1998); John P. Roberts, *Mandatory Arbitration by Financial Institutions*, 50 Consumer Fin. L.Q. Rep. 365 (1996); Anne Brafford, *Arbitration Clauses in Consumer Contracts of Adhesion: Fair Play or Trap for the Weak and Unwary?*, 21 J. Corp. L. 331 (1996); Heidi M. Hellekson, Student Author, *Taking the "Alternative" Out of the Dispute Resolution of Title VII Claims: The Implications of a Mandatory Enforcement Scheme of Arbitration Agreements Arising Out of Employment Contracts*, 70 N.D. L. Rev. 435 (1994); Michael Z. Green, *Preempting Justice Through Binding Arbitration of Future Disputes: Mere Adhesion Contracts or a Trap for the Unwary Consumer?*, 5 Loy. Consumer L. Rep. 112 (1993).

19. See e.g. Stephen J. Ware, *Employment Arbitration and Voluntary Consent*, 25 Hofstra L. Rev. 83 (1996) (arguing that all standard contract defenses should apply in disputes over voluntary consent to adhesive arbitration clauses, focusing in particular on duress); Sharona Hoffman, *Mandatory Arbitration: Alternative Dispute Resolution or Coercive Dispute Suppression?*, 17 Berkeley J. Empl. & Lab. L. 131, 149 (1996) (suggesting that in addition to duress and unconscionability, a public policy defense can be used in situations “where Congress or a state legislature has created statutory rights benefiting one party, which arguably limit the ability to arbitrate disputes relating to those rights”).

20. See Ware, *supra* n. 19. See also Samuel Estreicher, *Predispute Agreements to Arbitrate Statutory Employment Claims*, 72 N.Y.U. L. Rev. 1344, 1358 (1997) (Estreicher argues that “arbitration clauses should be invalidated if they fail to satisfy general principles of contract law, in the absence of other circumstances indicating that the employee understood what he was waiving. But to go further and insist that these clauses will be upheld only if they satisfy some vague test for ‘voluntariness’ is problematic.”).

21. See e.g. Maura Dolan, *State High Court Limits Companies' Use of Arbitration*, L.A. Times (Los Angeles, CA) A1 (Aug. 25, 2000); Mary Williams Walsh, *Court Considers if Employer Can Force Pledge Not to Sue*, N.Y. Times (New York, NY) A1 (Nov. 3, 2000); Jenny Strasburg, *Workers Fight Lawsuit Waiver; Justices Will Decide Whether Employers Can Force Mandatory Arbitration on Hires*, San Francisco Examiner (San Francisco, CA) C1 (May 31, 2000); Jenny Strasburg, *Proceeding Under Fire; Consumers, Employees Face Take-It-Or-Leave-It Contracts*, San Francisco Examiner (San Francisco, CA) B1 (Apr. 30, 2000); Davan Maharaj, *Arbitration Clauses Upheld in State Court*, L.A. Times (Los Angeles, CA) A19 (Sept. 15, 1999); David Segal, *Short-Circuiting the Courts; An Overburdened Legal System Has Turned Mediation Into Big Business*, Wash. Post (Washington, D.C.)

context, it is clear that at least one party and their counsel have no control over dispute system design, or at least no control after the parties have entered into the economic relationship. The economically more powerful party has already made all the design choices in adopting the arbitration plan. Some scholars argue that arbitration should not be called appropriate or alternative dispute resolution (ADR) at all in these contexts.<sup>22</sup> The argument of Professor Fiss against settlement is most forceful here, because the disputants who might be motivated to make new law or set precedent are contractually disabled from doing so.<sup>23</sup>

This debate illustrates the tension between self-determination as an underlying core value of ADR and the notion of legal consent as an historical reality. Distinguishing between self-determination at the case level and self-determination in system design can foster a more productive discussion of this tension. Table 1 is an effort to illustrate the different dimensions of self-determination in ADR.

Table 1. Self-determination at the case level and in dispute system design.

|  | <i>Self-determination in Individual Case</i>                              |                                      |
|--|---|--------------------------------------|
|  | <i>Parties Control Outcome</i>  | <i>Third Party Controls Outcome</i>  |
| <i>Self-determination in System Design</i> | A.  | D.                                   |
| <u>Both/All Parties</u>                    | Ad hoc mediation  | Ad hoc arbitration                   |
|  | Ad hoc non-binding evaluative processes                                   | Labor arbitration                    |
|  |   | Negotiated binding processes         |
| <u>One Party</u>                           | B.  | E.                                   |
|  | Mandatory or voluntary mediation  | Adhesive binding arbitration         |
|  | Mandatory or voluntary non-binding processes                              |                                      |
| <u>Third Party</u>                         | C.  | F.                                   |
|  | Court-annexed mediation or non-binding processes (mandatory or voluntary) | Court or Administrative adjudication |
|  | Public sector labor mediation   | Legislated binding arbitration       |

F12 (Oct. 7, 1996).

22. Jean R. Sternlight, *Is Binding Arbitration a Form of ADR?: An Argument that the Term "ADR" Has Begun to Outlive Its Usefulness*, 2000 J. Dis. Res. 97 (2000).

23. Owen M. Fiss, *Against Settlement*, 93 Yale L.J. 1073 (1984).



This table contains six different cells. The three cells that form the left hand column include the subject of interest in this symposium. More specifically, they all address different levels of self-determination in dispute system design in mediation among other non-binding processes in which parties retain control over, or self-determination as to, the outcome at the case level. These are arm's length negotiated use of mediation, adhesive mediation structured by one party, and court connected mediation and non-binding ADR. These are addressed in more detail in part III. The three cells that form the right hand column all address different levels of self-determination in various forms of binding arbitration, an ADR process in which the parties cede control over the outcome to a third party who issues a binding decision subject to limited judicial review. These include arm's length negotiated use of binding arbitration, adhesive binding arbitration imposed by a stronger contracting party on the weaker, and arbitration imposed by an authoritative third party such as the legislature or judiciary. These are outside the scope of this commentary and the subject of a future paper.<sup>24</sup>

### III. THE EMPIRICAL RESEARCH ON DISPUTE RESOLUTION: A DIFFERENT VIEW

Professor Hensler reviews a body of research on how disputants view and evaluate different systems for addressing conflict. Procedural justice researchers have found that disputants value voice or participation, control over a process, respectful and dignified treatment, and a neutral or impartial third party in processes for resolving conflict.<sup>25</sup> Many procedural justice studies are experiments using social psychological models to test the perceptions of student subjects. While this is important and useful work, there is other work on mediation relevant to the policy question of whether courts should limit their dispute system designs to voluntary, evaluative mediation and other non-binding adjudicatory forms of dispute resolution. In this section, I review selected findings about how mediation programs function in the field and how they are perceived in different settings. These findings are organized by disputant self-determination as to dispute system design. This research is not limited to the use of dispute resolution in a court setting, but neither is procedural justice research using experimental methods. Scholars are continuing to learn about how mediation programs function in different settings. We can take lessons from one setting and explore how these apply to others. There are other ways to view the emerging research on dispute resolution processes.

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24. Lisa B. Bingham, *Self-determination in Dispute System Design and Employment Arbitration*, 56 U. Miami L. Rev. \_\_ (forthcoming Summer 2002).

25. Tom R. Tyler, *Citizen Discontent with Legal Procedures: A Social Science Perspective on Civil Procedure Reform*, 45 Am. J. of Comp. Law 871, 877-83 (1997).

### *A. Complete Disputant Self-determination Over Dispute System Design and Outcome: Arm's Length Negotiated Ad Hoc Use of Mediation*

Self-determination in dispute system is greatest when the parties must together agree on the time, place, scope, and nature of the process as well as the mediation model, the neutral, and any relevant rules or provider. In any form of mediation, parties retain self-determination as to the ultimate outcome of the process. Thus, when the parties on a case by case basis negotiate at arm's length an agreement to use mediation or any non-binding process, they have both determined the overall system design, and have retained the power to determine the outcome at the case level. Examples of full disputant control over dispute system design include the run of the mill contract, personal injury, or other civil litigation where parties mutually agree on an ad hoc basis to use some non-binding process outside of a court setting. It is likely that where the disputants have high self-determination in dispute system design and can control the choice of mediation model, they will be equally satisfied with whatever model they choose.<sup>26</sup> Control over the choice is key. This might explain the tendency for most assessments of mediation in a variety of contexts and programs to produce similarly high participant satisfaction rates.<sup>27</sup>

Into this category would fall most of the voluntary rules for members of the CPR Institute and signatories to its various pledges to use ADR.<sup>28</sup> These are large corporate repeat players<sup>29</sup> with sophisticated counsel who mutually agree to use mediation, early neutral evaluation, fact-finding, mini-trials, and non-binding arbitration to resolve commercial disputes.<sup>30</sup> Interestingly, there have been a number

26. Ombuds programs present an interesting hybrid. Generally, the ombuds office itself is a dispute resolution system designed by one party (e.g., the employer, agency, or corporate entity). However, depending on the form that design takes, it may put back in the hands of the individual disputant the power to select a particular dispute resolution process. In other words, it may simply serve as a mechanism through which an employee or consumer may negotiate with the employer or corporate entity over how to design the process for their particular case. It is fair to categorize such a program as high in self-determination for system design. However, ombuds offices vary widely in their structure and organization. They may simply operate as a referral system for the appropriate grievance procedure. Such a system would be low in self-determination at the system design level. It is therefore difficult to generalize about these programs.

27. Jeanne M. Brett, Zoe I. Barsness & Stephen B. Goldberg, *The Effectiveness of Mediation: An Independent Analysis of Cases Handled by Four Major Service Providers*, 12 *Negot. J.* 259 (1996) (finding higher rates of satisfaction with mediation than arbitration in surveys of disputants and their lawyers across four major third party service providers).

28. CPR Institute for Dispute Resolution, *CPR Rules for Non-Administered Arbitration* <<http://www.cpradr.org/>> (accessed May 6, 2002). See also CPR Institute for Dispute Resolution, *Draft Principles for ADR Provider Organizations* <<http://www.cpradr.org/>> (accessed May 6, 2002). See also *id.* at *Corporate ADR Pledge, Law Firm ADR Pledge*.

29. See Marc Galanter, *Why the "Haves" Come Out Ahead: Speculations on the Limits of Legal Change*, 9 *L. & Society Rev.* 95 (1974); Carrie Menkel-Meadow, *Do the "Haves" Come out ahead in Alternative Judicial Systems?: Repeat Players in ADR*, 15 *Ohio St. J. on Dis. Res.* 19 (1999).

30. Margaret L. Shaw, CLE Presentation, *Alternative Dispute Resolution (ADR): How to Use it to Your Advantage! Designing and Implementing In-House Dispute Resolution Programs*, SD70 ALI-ABA 447 (New York, NY 1999) (describing increased use of alternative dispute resolution by large companies, providing summary of advantages, and describing success stories of some companies).

of studies recently on how these disputants view different forms of dispute resolution. Professors Lipsky and Seeber conducted a survey of Fortune 1000 employers and found that they had a strong preference for mediation over more fact- and law-based forms of dispute resolution such as arbitration.<sup>31</sup>

This category would also include grievance mediation in a collective bargaining context, in which labor and management agree to use mediation at a step prior to binding arbitration of grievances. Early research found that both union and management representatives were satisfied with the operation of a grievance mediation program in the coal industry.<sup>32</sup> However, the process has not been as widely adopted as might have been expected.<sup>33</sup> Mediation in this context has been described as “peek-a-boo arbitration,” which means that it is a more evaluative model of mediation in which the third party predicts the outcome of binding grievance arbitration over the dispute.<sup>34</sup>

One study has used a procedural justice framework to compare disputants’ perceptions of grievance mediation and binding arbitration in labor relations.<sup>35</sup> Researchers conducted telephone interviews with 158 coal miners, 69 of which experienced grievance mediation and 89 of which had their grievances arbitrated. Miners who participated in grievance mediation reported higher satisfaction on measures of procedural justice, control over outcome and third party fairness than did miners who participated in grievance arbitration. Researchers found that “disputants value the opportunity to control the outcome and to help develop and negotiate that outcome,”<sup>36</sup> and that this may “explain why mediation, in which disputants have both of these opportunities, is preferred to arbitration, where they do not.”<sup>37</sup> Grievance arbitration is analogous to the fact- and law-based non-binding arbitration process in a court setting. Nevertheless, mediation participants rated their mediators more highly in fairness than arbitration participants rated their arbitrators.

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31. David B. Lipsky & Ronald L. Seeber, *In Search of Control: The Corporate Embrace of ADR*, 1 U. Pa. J. Lab. & Emp. L. 133 (1998) (describing survey of corporate counsel indicating use of alternative dispute resolution will continue to grow and stronger preference for mediation); David B. Lipsky & Ronald L. Seeber, *The Appropriate Resolution of Corporate Disputes: A Report on the Growing Use of ADR by U.S. Corporations* (Cornell/PERC Inst. on Conflict Res. 1998); David B. Lipsky & Ronald L. Seeber, *Patterns of ADR Use in Corporate Disputes*, 54 Dis. Res. J. 66 (1999).

32. Jeanne M. Brett & Stephen B. Goldberg, *Grievance Mediation in the Coal Industry: A Field Experiment*, 37 Indus. & Lab. Rel. Rev. 49 (1983).

33. See Peter Feuille, *Why Does Grievance Mediation Resolve Grievances?*, 8 Negot. J. 131 (1992); Peter Feuille & Deborah M. Kolb, *Waiting in the Wings: Mediation's Role in Grievance Resolution*, 10 Negot. J. 249 (1994). One unanswered question is whether the availability of a fast and cheap arbitration alternative, in which the parties get a quick peek at the merits, has a chilling effect on settlement negotiations. Does it ultimately lead to a higher grievance appeal rate? This might explain management unwillingness to adopt grievance mediation. Would there be a different result if the grievance mediator used facilitative, rather than evaluative, mediation? This would be interesting and useful research.

34. Peter Feuille, *Grievance Mediation in Employment Dispute Resolution and Worker Rights in the Changing Workplace* 187 (Adrienne E. Eaton & Jeffrey Keefe eds., Indus. Rel. Research Assoc. 1999).

35. Debra L. Shapiro & Jeanne M. Brett, *Comparing Three Processes Underlying Judgments of Procedural Justice: A Field Study of Mediation and Arbitration*, 65 J. Pers. & Soc. Psychol. 1167 (1993).

36. *Id.* at 1176.

37. *Id.*

The authors speculate that disputants might find advisory arbitration preferable to binding arbitration because it leaves control over outcome in their hands, but they conclude that “[b]oth of these procedures, however, may be less preferable than mediation because neither provides disputants with both outcome control and the opportunity to develop the outcome.”<sup>38</sup>

Similarly, researchers conducted a study of disputants and their lawyers’ experiences in both voluntary (i.e. negotiated ad hoc, cell A) and mandatory (i.e. court or judge ordered, cell C) mediation and arbitration cases.<sup>39</sup> These included civil actions for personal injury, property damage, contract, construction, environment and other cases. They found that survey respondents rated mediation more highly in procedural justice judgments of process and neutral, outcome and implementation, and the effect of participation in the process on the relationship between the disputants. The explanation was that disputants were giving mediation higher marks than arbitration in terms of voice, control over the outcome, and fair treatment by the third party.<sup>40</sup> In sum, there is a body of field research using a procedural justice framework that finds disputants prefer mediation to the more fact- and law-based alternative of arbitration, at least in the context where both parties have control over dispute system design.

### *B. One-Party Self-Determination in System Design and Self-Determination as to Outcome: Adhesive Mediation Plans*

This cell involves processes where only one of the disputing parties has self-determination in system design; however, at the case level, both parties have self-determination as to outcome. Examples include employer-designed dispute resolution plans that provide aggrieved parties with an option to use mediation, early neutral evaluation, or non-binding peer panels to resolve conflict.<sup>41</sup> In these employment dispute resolution programs, the employer decides all aspects of dispute system design unilaterally, without negotiation. These decisions include what forms of ADR will be available to the employee and what due process or procedural protections the employee will have (such as the right to counsel or reasonable discovery). The employer may unilaterally select and compensate the mediator or other third party. However, the third party has no power to impose an outcome on the parties.

Early procedural justice research by Thibaut and Walker uses an example from this cell.<sup>42</sup> In their chapter about choice of a procedure, they conduct an experiment using a hypothetical involving the Planning Director (PD) and two subordinates, the

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38. *Id.*

39. Brett, Barsness & Goldberg, *supra* n. 27, at 265.

40. *Id.* at 263.

41. *E.g.*, William L. Bedman, *From Litigation to ADR: Brown and Root's Experience*, 50 *Dis. Res. J.* 8 (1995) (this system culminates in binding arbitration, but very few cases go that far).

42. John W. Thibaut & Laurens Walker, *Procedural Justice: A Psychological Analysis* (L. Erlbaum Assoc. 1975).

Creative Directors (CDs), all from a single advertising agency. The conflict concerns differing proposals for an advertisement. The subjects in the experiment expressed preferences about different procedures the Planning Director might use to make the choice. Notably, none of the choices correspond to facilitative mediation. The choices include autocratic decision-making (CDs present preferences, PD decides), arbitration (CDs present preferences, explain and support their choices, PD decides), moot (CDs present, explain and support preferences, all three must discuss and agree on the choice), mediation (same except that the PD makes a suggestion and the CDs must decide on choice), and bargaining (CDs discuss and agree and PD plays no role). The experiment assumes the employee through its PD has control over the choice among these various dispute system designs. Mediation as defined in this experiment most closely resembles evaluative mediation. The most popular method was arbitration, followed by the moot and mediation. Significantly, the least popular were autocratic decision-making and bilateral bargaining. This research suggests that disputants prefer an alternative to negotiating on their own. Most commentators agree that the great majority of all lawsuits settle; the question is how, why and when.<sup>43</sup>

We have a growing body of data about programs in cell B of Table 1. It includes the majority of federal agency-designed dispute resolution programs under the Administrative Dispute Resolution Act of 1990 and 1996.<sup>44</sup> Under this statute, the federal government may not impose binding arbitration on an unwilling party, and thus, most of the programs involve mediation. The majority of these programs deal with employment or procurement disputes to which the agency is a party.<sup>45</sup> The Air Force has reported favorable results from its programs in both employment and procurement.<sup>46</sup> The employment program reports a seventy percent resolution rate, and the procurement program a ninety-three percent resolution rate.<sup>47</sup>

There is also a growing body of research on the United States Postal Service's (USPS) use of mediation. This research provides evidence that facilitative and transformative mediation models can provide disputants with a form of justice they find sufficiently satisfying that they choose not to pursue their dispute to administrative adjudication. In other words, they elect mediation over a more fact- and law-based approach to resolving the conflict. The USPS REDRESS® program<sup>48</sup> provides mediation for equal employment opportunity (EEO) disputes, specifically, those arising out of a claim of discrimination under federal law. The USPS Law Department designed the program as part of a settlement of a class action lawsuit

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43. For a critical review of this truism, reducing from about ninety percent to about two-thirds the proportion of all civil litigation that settles, see Marc Galanter & Mia Cahill, "Most Cases Settle": *Judicial Promotion and Regulation of Settlements*, 46 Stan. L. Rev. 1339 (1994).

44. 5 U.S.C. §§ 571-584 (1994).

45. Lisa B. Bingham & Charles R. Wise, *The Administrative Dispute Resolution Act of 1990: How Do We Evaluate Its Success?*, 6 J. of Pub. Admin. Res. & Theory 383 (1996).

46. Jeffrey M. Senger, *Turning the Ship of State*, 2000 J. Dis. Res. 79, 86 (2000).

47. *Id.* (citing the Interagency Alternative Dispute Resolution Working Group Report to the President (2000) <<http://www.adr.gov/presi-report.htm>> (accessed May 3, 2002)).

48. REDRESS® stands for Resolve Employment Disputes, Reach Equitable Solutions Swiftly.

alleging race discrimination in USPS facilities in the Florida Panhandle. The Law Department conducted focus groups as part of its initial design process, but did not negotiate over the specifics of the program. The pilot program used voluntary, facilitative mediation. The key system design features that continue to be part of the program are that mediation is voluntary for the EEO complainant, but mandatory for the supervisor respondent, who represents the USPS as an organizational entity. Both parties are entitled to bring any representative they choose to the table. The supervisor respondent must have settlement authority, or be in immediate telephone contact during the process with someone else in the organization authorized to approve the settlement. Mediation occurs during work hours, is confidential, and generally occurs within two to three weeks of a request.

From the initial inception of the facilitative mediation pilot in 1994 to the present, the USPS has worked with Indiana University to evaluate the program. The evaluation initially used procedural justice as its theoretical frame, following in the tradition of evaluations of court-annexed dispute resolution programs. An early study revealed that both employees and supervisors were highly satisfied using various procedural justice measures of process and mediator performance; generally, over ninety percent of employees and supervisors who responded were either satisfied or highly satisfied with the process and mediators.<sup>49</sup> Moreover, there was no statistically significant difference in their levels of satisfaction in an index of process satisfaction, and an index of mediator satisfaction. There was a slight, but statistically significant difference in satisfaction with outcome, which ranged between sixty and seventy percent; supervisors reported higher satisfaction than employees. In a replication of the experimental research on procedural justice, analysis showed that satisfaction with various aspects of the process contributed significantly to satisfaction with the mediation outcome. An interview study revealed that supervisors believed, with some justification, that they were improving their conflict management skills through the experience of mediation; specifically, they were becoming better listeners.<sup>50</sup> It is significant that the model of mediation here was facilitative, not evaluative. Even though one party had self-determination in system design, self-determination at the case level as to outcome was high; disputants reported high satisfaction with control over the process and mediator fairness based on their experience at the case level.<sup>51</sup>

After a period of experimentation, the USPS chose the transformative mediation model espoused by Professors Bush and Folger for national implementation.<sup>52</sup> Under the transformative model, settlement is not the mediator's goal. Instead, mediators practice in such a way as to foster empowerment of the parties. If this is successful, mediation may result in opportunities for recognition, in which a party

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49. Lisa B. Bingham, *Mediating Employment Disputes: Perceptions of REDRESS® at the United States Postal Service*, 17 Rev. Pub. Pers. Admin. 20 (1997).

50. Jonathon F. Anderson & Lisa B. Bingham, *Upstream Effects From Mediation of Workplace Disputes: Some Preliminary Evidence from the U.S.P.S.*, 48 Lab. L.J. 601 (1997).

51. Bingham, *supra* n. 24.

52. Bush & Folger, *supra* n.10.

reaches a better understanding of the perspective, views, motives, goals or actions of the other participant. This may result in settlement. This model does not permit the mediator to evaluate the case's merits. The mediator should not give any assessment of the likely outcome in court or specific proposals for settlement. All choices regarding the process, ideas for settlement, and the outcome of mediation are in the hands of the parties. This model of mediation is not therapy. Instead, it is essentially participant-designed mediation.<sup>53</sup> Not only is this model as far from the evaluative end of Professor Riskin's grid as possible, in condemning mediator directiveness in any form its proponents may argue it moves off the grid entirely. The USPS goal for this system is to afford the maximum participant self-determination at the case level. However, the USPS made the overall choice of this system, and designed it. Thus, one party had self-determination in dispute system design.

Even in a thought experiment, it is easy to see how design choices would make a difference in how the system functions within an organization setting. For example, the USPS chose a transformative model, arguably beyond the most facilitative end of Professor Riskin's continuum, so far from the evaluative end of the range that settlement is explicitly not a goal of the process. However, let us assume for a moment that it had chosen instead an evaluative model of mediation, the kind of assisted settlement negotiation prevalent in many court-mandated programs. In this evaluative model, a court-appointed mediator or retired judge would argue persuasively with both parties that settlement is in their better mutual interest. Let us assume for the sake of argument that the mediator is a subject matter expert who can value a case accurately, and arm-twist the parties until they see the case the same way she does.

Imagine how an evaluative mediation model would function systemically if the USPS had implemented it. The entire system design would be determined by one of the largest civilian employers in the world, an employer with over 800,000 employees, and against which 20,000 to 25,000 informal EEO complaints are filed each year. The USPS has created the mediator roster, trained the mediators, assigned particular mediators to particular cases, and assumed all the costs of the program, including compensation for the mediators. In the national model, the mediators are outside contractors, not USPS employees. Historically, the USPS prevails in ninety to ninety-five percent of all EEO complaints filed against it, meaning that it either wins on the merits or disputants withdraw or fail to pursue their complaints. All of the above is true as to the actual transformative model implemented, but for purposes of this thought experiment, we must assume one critical design difference: that the USPS chose an evaluative mediation model. This would mean that in ninety to ninety-five percent of these evaluative mediation sessions, the mediator would be telling employees that they have no case or that they will probably not prevail on the merits. If the evaluative mediator also has a narrow focus, he or she will steer the parties away from discussing issues unless they are directly related to a legal cause

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53. I thank Professor Ian Ayres for this observation.

of action. Issues concerning the relationship between employee and supervisor would be off the table, unless they addressed a bona fide legal claim.

A program with this system design would probably fail. It would never win the confidence of EEO complainants. As the mediators advised complainants they have no case, the first employees would come back to the workroom floor complaining that the mediator spent all her time explaining why management was right, and that the mediator was biased. Soon no one would bother to use the system. Because ninety to ninety-five percent of the time, mediators would tell employees their complaints have no legal merit, the overall function of the system would likely have the appearance of structural bias. This would occur even though the mediators were scrupulously impartial and in reality utterly fair.

The program is voluntary for complainants. Hence, if it looks biased, regardless of its fair reality, employees probably would not use it. If no one uses it, the program cannot have any effect on dispute processing efficiency. In this organizational context, an evaluative model would not achieve the USPS's stated goals, which were to foster better communication between employees and supervisors and to build conflict management skills in the workforce. Given USPS control over dispute system design, and its goals, the simplest way to avoid the appearance of systemic bias was to choose a mediation model in which the mediator was simply forbidden from giving an opinion regarding the merits of the claim.<sup>54</sup>

In another example of how system design choices can in a reasonably foreseeable fashion affect system outcomes, some agencies are setting settlement rate goals for their mediators, for example, a minimum settlement rate of seventy to eighty percent. If the agency presses the mediators for settlement, the mediators will more likely than not press the parties. In contrast, the USPS set a goal not for the mediators, but for the program and its USPS administrators; it asked administrators nationally to try to get voluntary participation up to a rate of at least seventy percent of all EEO complainants. The most recently reported participation rate was seventy-four percent.<sup>55</sup> This goal achieves program implementation; it does not interfere with the self-determination of the parties at the case level over the outcome. There are many ways in which an organization can exercise sole control over system design, but leave a broad area of self-determination for the parties at the case level.

The REDRESS® procedural justice data is similar to that produced by the facilitative pilot program.<sup>56</sup> Moreover, these results are consistent with others'

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54. The USPS REDRESS® Program has won national awards for excellence from the U.S. Office of Personnel Management, the National Academy of Civil Trial Mediators, and the CPR Institute.

55. Kevin Hagan, Presentation, *Presentation at the Society for Professionals in Dispute Resolution/CRENet Conference* (Albuquerque, N.M., Sept. 15, 2000)

56. Yuseok Moon & Lisa Bingham, Presentation, *Transformative Mediation at Work: Employee and Supervisor Perceptions* (St. Louis, MO, June 20, 2000). The USPS experiment is now a permanent program that is generating longitudinal data. The USPS continues to use procedural justice measures at the case level as a form of program quality control. A national exit survey database organized by zip code now contains over 62,000 surveys. While there is slight variation from region to region, the general pattern (employees and supervisors reporting high and comparable rates of satisfaction with the process and the mediators) has stood the test of national implementation. Ninety percent or higher of the employees and supervisors report they are satisfied or highly satisfied with various aspects of the process



findings about mediation in other program contexts. Some researchers have argued that mediation model does not appear to make a difference in participant satisfaction.<sup>57</sup> However, the procedural justice literature has shown that satisfaction with the outcome and its fairness is partly a function of the degree of self-determination participants believe they have within the process as measured by their experience of control over the process and the impartiality of the neutral. In both the USPS facilitative pilot and transformative national mediation models, the participants had low self-determination over system design, but high self-determination within the individual mediation case. Moreover, both used outside neutral mediators.<sup>58</sup>

During its period of experimentation (1995 to 1997), the USPS allowed some regions to implement an 'inside-neutral' model of mediation. In an 'inside-neutral' model, employees of the organization are trained as mediators. In other words, instead of using a variety of outside contractors hired on a case by case basis, in a few regions the USPS used as mediators one or more of its own employees. Generally, these were employees who specialized in administering the EEO complaint process. This model was in place for over a year, and then all regions transitioned to the national, outside neutral model, using independent contractors trained in transformative mediation practice under the supervision of Professors Robert A. Baruch Bush and Joseph Folger.

This afforded a natural field experiment and allowed a direct comparison of participant judgments in the two models. Participants reported higher satisfaction with the outside neutral model than the inside model, and they reported that the rate of full or partial resolution of the dispute was substantially higher in the outside model than the inside model.<sup>59</sup> Specifically, seventy-five percent of the outside model participants reported full or partial settlement of their dispute, while only fifty-six percent of the inside model participants did so in the inside neutral model. This was true despite case selection bias in the inside model designed to produce settlements by identifying cases perceived as easier to resolve. Those who participated in the inside model were statistically significantly less satisfied with the

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and mediator performance. Sixty to seventy percent of employees and supervisors report they are satisfied or highly satisfied with the outcome. The program maintains a consistent voluntary complainant participation rate of from seventy to seventy-five percent.

57. Brett, Barsness & Goldberg, *supra* n. 27.

58. Given these structural similarities, it is not surprising that the overall satisfaction results are comparable on indices comprised of the traditional procedural justice measures of participation, control over process, fairness of process, impartiality of mediator, and fairness of mediator, and so forth. However, future research needs to explore the more subtle differences that participants experience in the two models, and how these relate to participants' perceptions.

59. Lisa B. Bingham, Gregory Chesmore, Yuseok Moon, & Lisa Marie Napoli, *Mediating Employment Disputes at the United States Postal Service: A Comparison of In-house and Outside Neutral Mediators*, 22 Rev. Pub. Pers. Admin. 5 (2000). It is important to remember that the inside and outside models existed sequentially, not simultaneously. Employees never had a choice between the two. In each instance, they had a choice between the traditional EEO complaint process and mediation of some form. Had the participants been given a choice between inside and outside mediators, the results may well have been different.

fairness of the process, the impartiality and fairness of their mediators, and the skill and performance of their mediators.

These results are best understood in the context of USPS control over system design. Participants made less favorable judgments regarding the inside mediators, probably because they were USPS employees, and therefore they appeared to be more within USPS control than outside neutrals. Hence, they were viewed as less impartial and less fair. This conclusion is supported by the fact that there was no significant difference in participants' reported satisfaction with control over the process within the mediation case. At the case level, self-determination and control was high, because once inside a mediation case, it was up to the participants to choose how the process would proceed and conclude. However, in system design, and specifically the design choice to use USPS employees as neutrals, self-determination was low.

Another design choice the USPS made was to allow employees to bring any representative they chose with them to mediation. Employees bring lawyers, union or association representatives, co-workers, family members, or friends, and some choose not to bring any representative at all, but rather, to appear pro se. A study of the pattern of settlement and satisfaction associated with different categories of representatives found that complainants are most satisfied and settle most often with either no representative or a union or association representative, and least satisfied when they have a lawyer.<sup>60</sup> In general, they report lower levels of satisfaction with their participation in the process when they have a lawyer. Most likely, the cases in which legal counsel agree to represent a participant are stronger on the merits and more complex, and this accounts both for lower settlement rates and satisfaction. However, the finding regarding participation in the process can best be understood in relation to self-determination at the case level. Disputants inevitably cede some control over what happens in mediation to their lawyers if they retain counsel. It is interesting that the same thing does not appear to happen with union or association representatives.

The USPS outside neutral model using transformative mediators has been fully implemented nationwide for more than two fiscal years. It took an eighteen-month period to roll the program out nationally (January 1998 to July 1999). In longitudinal studies, evaluators are examining the relationship of full implementation to complaint filing rates. In the first study of its kind, researchers found a statistically significant drop in formal EEO complaints correlated with the date of full implementation of the mediation program.<sup>61</sup> Over time, the drop has been dramatic,

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60. Lisa B. Bingham, Kiwhan Kim & Susan Summers Raines, *Exploring the Role of Representation in Employment Mediation at the U.S.P.S.*, 17 Ohio St. J. on Dis. Res. 341 (2002).

61. Lisa B. Bingham & Mikaela Cristina Novac, *Mediation's Impact on Formal Discrimination Complaint Filing: Before and After the REDRESS® Program at the United States Postal Service*, 21 Rev. Pub. Pers. Admin. 308-331 (2001). The study used a multiple regression to explore formal EEO filing rates as a function of geographic region, type of office, employee census, informal EEO complaint filing rates, fiscal year, accounting period, and date of full mediation program implementation. Data consisted of reports for each accounting period (there are thirteen accounting periods in each fiscal year) for each of 101 geographic regions for each of over five fiscal years encompassing the period before and

from a high of over 14,000 formal EEO complaints in 1997-98 before implementation, to a low of about 10,350 formal EEO complaints at present. This finding is evidence that cases are getting resolved in mediation that previously would have gone to the formal EEO complaint step of the process. This means that mediation is successfully addressing conflict at an earlier point in its development. Since formal complaints involve transaction costs in the form of investigations and discovery, this study is the first step in a cost-benefit analysis of the program.

This result is only possible because over seventy-four percent of eligible employees are choosing voluntarily to use this mediation process for their EEO complaints. Had the USPS made a different design choice, for example, had it chosen an evaluative model, it is doubtful the program would have produced this systemic result. There is a substantial limitation on all the USPS research in that none of the studies systematically compare the experience of mediation participants to that of participants in the traditional EEO administrative process, which culminates in an adversarial, adjudicatory hearing. However, people are voting with their feet. They are both voluntarily choosing to use mediation and either reaching a settlement or declining to pursue their EEO complaint to administrative adjudication.

This illustrates the point that even in this category, where one party has control over system design, there is a continuum of self-determination at the case level. This continuum is reflected in part in the Riskin grid's dimension of facilitative to evaluative, and forms the substance of the ongoing debate among scholars as to what constitutes mediation as contrasted with early neutral evaluation. Practitioners of the transformative model might well argue that the Riskin grid does not capture what they do, because it is off the scale on the facilitative end and qualitatively different from practice as described in his article.<sup>62</sup> However, the notion of a continuum is useful and parallels party control over process at the case level.

The longitudinal research on the USPS gives us more information about how dispute resolution functions in an organizational setting than we have for many similar programs in the court setting. There are significant differences between dispute resolution in the context of an ongoing employment relationship and civil litigation for money damages in a terminated or non-existent relationship. However, a dispute system design for the courts must take into account the full spectrum of its docket. Some proportion of that docket will include employment disputes, family

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after implementation.

62. For example, in the USPS model, the mediators do not prescribe ground rules, determine an agenda, identify issues, initiate caucuses, suggest deals, or assess the strength of parties' legal positions. Instead, all of these aspects of the process are put back in the hands of the parties, and the mediators follow where the parties lead. *See generally*, Baruch Bush & Folger, *supra* n. 10; Robert A. Baruch Bush & Joseph P. Folger, *Transformative Mediation and Third-Party Intervention: Ten Hallmarks of a Transformative Approach to Practice*, 13 *Mediation Q.* 263 (1996); Tina Nabatchi & Lisa B. Bingham, *Transformative Mediation in the USPS REDRESS® Program: Observations of ADR Specialists*, 18 *Hofstra Lab. & Emp. L.J.* 399 (2001) (finding strong correspondence between what USPS mediation program administrators described as fostering empowerment and recognition and what Bush and Folger describe as the ten hallmarks of transformative practice).

disputes, and disputes between parties to long-term business relationships. What might we learn about different models of mediation in a controlled study of that part of a court's docket? Professor Hensler suggests that facilitative and transformative mediation models have no place in a court-connected program. The vast majority of court programs already use evaluative mediation, and have not produced the desired results. We should not rule out other dispute system designs for the court without some data on how they function in that setting.

*C. Third Party Control Over Dispute System Design,  
But Disputant Self-Determination as to Outcome:  
Court-Connected Non-binding Dispute Resolution*

This cell involves some of the processes regarding which Professor Hensler has expressed concern. A third party, such as the court, mandates that the disputants participate in a non-binding process such as mediation as a condition of access to a bench or jury trial. Other examples include mandatory labor mediation in public sector labor relations, in which the legislature has determined the public interest is served by requiring disputing parties to participate in non-binding dispute resolution. Non-binding dispute resolution, variously termed conciliation or mediation, is mandatory in a number of international treaties on the environment and trade. This cell would also include the long history of judicial settlement conferences, in which a judge attempts to convince the parties it is possible and perhaps in their best interests for them to reach a negotiated settlement in lieu of pursuing litigation to trial. With all these examples, the third party has made all the dispute system design choices and imposed a process on both parties who may be unwilling participants, but the parties themselves retain control over their destiny. During this phase of the procedure, the third party will not impose an outcome.

Making dispute resolution voluntary and not mandatory would place self-determination over choice of process, an aspect of dispute system design, back in the hands of the parties. Courts could accomplish this with something as simple and effective as an opt-out program. Studies have shown that opt-out programs produce participation levels comparable to mandatory programs.<sup>63</sup> One study recommended an opt-out program as a solution to the problem of neither disputant requesting ADR for fear of looking weak.<sup>64</sup>

However, a design for court-connected ADR that would exclude certain forms of mediation raises many questions. Is our knowledge of how mediation functions in a court setting sufficient to make this call now, without further experimentation? There are a number of studies examining the effect of court-designed and

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63. Plapinger & Stienstra, *supra* n. 15, at 7 n. 7 (observing that participation rates in three of the four voluntary courts with opt-out procedures are similar to participation rates in courts with presumptively mandatory referral).

64. Joshua D. Rosenberg & H. Jay Folberg, *Alternative Dispute Resolution: An Empirical Analysis*, 46 Stan. L. Rev. 1487 (1994) (finding two-thirds of those assigned to early neutral evaluation satisfied with the process and believing it worth the resources devoted to it).

implemented ADR programs on judicial case processing. As Professor Hensler reports, often these studies usually fail to find that ADR has an impact on court efficiency.<sup>65</sup> However, this is true of ADR generally, including the more fact- and law-based processes of arbitration and early neutral evaluation.<sup>66</sup> In the federal courts, several districts have ended mandatory non-binding arbitration programs in favor of programs incorporating mediation,<sup>67</sup> and the vast majority of federal court ADR programs have mediation as a component; more have mediation than arbitration.<sup>68</sup>

In response to the question what do parties want from their system of justice, Professor Tyler, a leading procedural justice theorist and researcher, responds:

People's attitudes [about legal authorities and their decisions] are also important because, to the extent possible, legal decisions should be based on a consensus of the parties to the dispute about what is just. People should be able to willingly embrace the solutions reached in legal proceedings. They should want to accept those solutions. In other words, justice does not flow only from the interpretation of legal doctrines by legal scholars, judges, and/or philosophers, who tell people what is a just solution to their problems. It also develops from the concerns, needs, and values of the people who bring their problems to the legal system. In this sense, the parties to a dispute own the dispute and should be involved in its resolution. While the legal system and society more generally have legitimate interests in the interactions of citizens, those interests do not preclude concern about the values of the disputants.<sup>69</sup>

In his review of procedural justice research, Professor Tyler also notes that disputants' concerns change as they actually deal with legal authorities. Their concerns shift from self-interest in the outcome or distributive justice, toward relational concerns and issues of participation or voice, trustworthiness, respect, and neutrality.<sup>70</sup> This suggests a research agenda. Do disputants perceive evaluative mediators to be as neutral as facilitative mediators? Once the mediator takes a

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65. For a discussion of the "RAND Report," see Deborah R. Hensler, *ADR Research at the Crossroads*, 2000 J. Dis. Res. 71, 74-76 (2000).

66. For reviews of the field research, see Tom R. Tyler, *Citizen Discontent with Legal Procedures: A Social Science Perspective on Civil Procedure Reform*, 45 Am. J. Comp. L. 871, 877-82 (1997) (observing that mediation and arbitration do not generally save time and money, but that some informal procedures are satisfactory to most of the disputants who use them). See also Marc Galanter & Mia Cahill, Symposium, "Most Cases Settle": *Judicial Promotion and Regulation of Settlements*, 46 Stan. L. Rev. 1339, 1364-71 (1994).

67. Plapinger & Stienstra, *supra* n. 15, at 7 n. 6.

68. *Id.* at 15-17.

69. Tyler, *supra* n. 66, at 874-75.

70. *Id.* at 894.

position on the merits of the case, how does that impact perceptions of neutrality and fairness? We do not know at present.

There is a body of research on judges as mediators. The leading RAND Institute of Civil Justice study compared perceptions of justice in different court-connected dispute resolution processes.<sup>71</sup> Researchers found that disputants were more satisfied with aspects of procedural justice in non-binding arbitration and trials than they were in judicial settlement conferences. The judicial settlement conferences studied often did “not involve any direct participation at all for litigants; the attorneys typically meet with a judge in chambers and undertake an informal discussion of the possibilities for and advantages of settlement.”<sup>72</sup> Researchers contrasted this process with arbitration, pointing out that a judicial settlement conference usually focuses on possibilities for compromise, not the liability or merits of the case, and that judges are free to adopt any procedure for running the conference that they choose.

Other field research on judicial mediation tells us that judges are unlike most other mediators in that they are more powerful than the disputants; they can undertake a variety of techniques including “blunt utilization of power.”<sup>73</sup> From surveys of state and federal judges, Professors Wall and Rude identified three strategies judges use in settlement conferences: the logical, aggressive and paternalistic strategies.<sup>74</sup> A survey of lawyers revealed that they believed the logical mediation strategy to be most effective; a factor analysis identified this strategy as suggesting a settlement figure after asking for lawyers’ input, evaluating or analyzing the case for one or both parties, or suggesting they split the difference.<sup>75</sup> Lawyers believed that an aggressive judicial mediation strategy was least effective; this strategy included techniques where the judge coerces parties to settle, threatens a lawyer for not settling, and penalizes a lawyer for not settling. Somewhere in between fell the paternalistic strategy, involving judges who meet with lawyers in chambers, talk to both lawyers together and separately about settlement, and call a certain figure reasonable.

Interestingly, judges did not identify a client-oriented strategy, but the independent survey of lawyers found that they highly valued this approach, which included judicial attempts to enhance attorneys’ relationship with clients, persuade clients to accept a settlement, and convince clients that they are receiving their day in court.<sup>76</sup> However, a separate survey of judges and in-depth study of one judge’s mediation cases indicated that the perceived and actual probability of settlement increased as the judge used more assertive techniques.<sup>77</sup>

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

72. *Id.* at 13.

73. James A. Wall, Jr. & Dale E. Rude, *Judicial Mediation: Techniques, Strategies, and Situational Effects*, 41 *J. of Soc. Issues* 47, 49 (1985).

74. *Id.* at 57.

75. *Id.* at 58.

76. *Id.* at 57.

77. James A. Wall, Jr. & Dale E. Rude, *The Judge as Mediator*, 76 *J. of Applied Psychol.* 54, 58 (1991).

This body of research tends to suggest that involving disputants in selecting the model of mediation used might have some benefit. Judges who engage in mediation generally do not give the parties any control over system design. They develop their own procedure for conducting judicial mediation, adopt a set of strategies and techniques, and then employ them. Judicial mediation differs from other court-connected evaluative mediation in a salient respect; the non-judge mediator lacks power over the parties. Moreover, the description of the logical strategy probably corresponds to evaluative mediation as usually practiced in a court setting. Nevertheless, it is interesting that lawyers preferred a client-centered mediation style. Is it possible we would get different results in court-connected mediation programs with a different mediation model?

Some researchers compared varieties of mediation in civil litigation cases.<sup>78</sup> They compared mediation in which the mediator focused exclusively upon interests with mediation followed by an advisory opinion or evaluation of the case.<sup>79</sup> There was no statistically significant difference in settlement rates at the table, with both varieties of mediation producing settlements about sixty percent of the time. However, there was a statistically significant difference in the number of cases that settled after mediation. For mediation with evaluation, an additional twenty percent settled after the conference, while only fourteen percent more settled after the mediation session without an evaluation. Researchers did not report comparisons in procedural justice judgments of the two forms of mediation.

As this study shows, we need more field research. Often, programs experience what one might call the inverse *Field of Dreams* effect; we build it, but they do not come.<sup>80</sup> This has caused Professor Marc Galanter to wonder whether settlement can be so great if people fail to vote with their feet.<sup>81</sup> Similarly, Professor Hensler argues for letting the parties choose in a private market outside the court setting whether these processes meet their needs, and let the fittest process or provider survive. One might be tempted to consider studies reporting the failure to use ADR as demonstrations of ADR's substantive failure. However, there is a certain disconnect in the available data from the perspective of program evaluators. No program can succeed unless it is fully implemented. Program evaluators have sometimes called this the step of making sure "there is a 'there' there."<sup>82</sup> Implementation includes publicizing and marketing a program; it includes intake and educating potential users about the process. For a program to have any impact on outcomes for courts or disputants, people must use it.<sup>83</sup> Instead of treating studies in which disputants do

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78. Jeanne M. Brett, Zoe I. Barsness & Stephen B. Goldberg, *The Effectiveness of Mediation: An Independent Analysis of Cases Handled by Four Major Service Providers*, 12 *Negot. J.* 259 (1996).

79. *Id.* at 261.

80. Rosenberg & Folberg, *supra* n. 64, at 1538 (finding that even those who report in surveys they would use early neutral evaluation again did not subsequently request it for a different case).

81. See Marc Galanter, *The Quality of Settlement*, 1988 *J. Dis. Res.* 55 (1988). See also Galanter & Cahill, *supra* n. 66.

82. My thanks to Professor Charles R. Wise, Indiana University, for this observation.

83. See generally Hensler, *supra* n. 65, at 75 (observes that the RAND study could not assess several courts because there were insufficient numbers of cases referred to or volunteered for ADR).

not use a voluntary program as evidence of dispute resolution's substantive failure to provide superior outcomes, commentators might consider non-use as evidence of a failure fully and appropriately to implement the program. We have relatively little information about what steps courts take to advertise voluntary ADR programs, how they market these programs among potential users, and what might constitute best practice in court-based ADR program implementation.<sup>84</sup>

As to mandatory mediation, and the failure to produce case processing efficiencies, on what basis do judges mandate mediation for some cases and not others? How many and which cases are sent to mediation? Is there selection bias? Are these the oldest, most complex and intractable disputes? When in the life of the case is it referred to ADR? What model do the mediators use? How much do the parties know about the mediation services they are about to receive? Do they have any choice over the mediator? Is the mediator paid for by the court or by the parties? Do we really know enough about why it is court-based ADR programs do not produce what their advocates (and critics) expect? I raise these questions not to advocate mandatory mediation, but rather to suggest that we do not yet have adequate field research to reach a conclusion about the single, best dispute system design for ADR in the courts.

The real significance of the evaluative-facilitative-transformative debate can be traced to the amount of self-determination parties have in system design and at the case level. When courts mandate mediation and then specify a neutral (even a judge), a list of neutrals, a model of certification, or a single standard of practice, they arrogate major system design choices to themselves. When mediation is forced on the parties, self-determination in system design is relatively speaking, lower than when the parties voluntarily elect to mediate their case on an ad hoc basis. Even a mandatory process can have varying systemic effects depending on the model of mediation designers choose. A mandatory court-annexed process using evaluative-narrow lawyer mediators is likely to produce outcomes quite different from a mandatory court-annexed process using facilitative-broad mediators. For example, one might count the apologies contained in settlements and see if these vary across models. The field of ADR needs to move beyond speculation about what might work best under what conditions in court and out of court. Courts and policy-makers need more field research. It is premature to prescribe a dispute system design limited to voluntary, evaluative mediation and non-binding arbitration for court-connected programs.

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84. Plapinger & Stienstra, *supra* n. 15 (review descriptions of federal court ADR programs that contain some of this information).



#### IV. A RESEARCH AGENDA: POLICY ANALYSIS AND FIELD RESEARCH ON DISPUTE RESOLUTION

Professor Hensler's critique focuses on experimental research on the use of dispute resolution in the courts. She concludes that this research suggests if the courts give them a choice, parties will vote with their feet for adjudication and its close relative arbitration instead of mediation. However, the field could benefit from more comprehensive data before it settles upon a single dispute system design for court-annexed ADR. Most of our field studies are retrospective examinations of limited samples during a limited time period. In general, courts are not collecting the data we need to determine the best dispute system design. As technology for record keeping and case management evolve, it is becoming increasingly possible to foresee a new and better basis for making our decisions about dispute system design in the courts.

Courts could in the not distant future generate much more and better data using comprehensive, electronic, routine, decentralized, longitudinal, evaluation data collection. Court administrators, judges, mediators, arbitrators, disputants, and researchers need to build consensus on a series of variables, indicators, or kinds of data that both the judiciary and the dispute resolution field would like to have for future policy making and planning. These variables or indicators would become part of a comprehensive case tracking system. The system would follow a case from birth to death, and beyond to any resurrection. It would include demographic information about the disputants, types of cases, claims and counterclaims, numbers of cases, docket and disposition dates, demands, settlements, outcomes, party representation, and information about the amount of time each state employee spends in case processing. It would capture the different ADR interventions, the point in time they took place in the life of the case, the model, the demographics of the neutral and disputants, time spent in the process, participant transaction costs, court transaction costs, participant perceptions of procedural and distributive justice, changes in relationships, substantive outcomes, durability of outcomes, and others. Even if a working group could only agree to collect a subset of all these variables and indicators, the research and management potential could be profound if courts collected the information comprehensively, electronically, routinely, in a decentralized manner, and longitudinally. The following discussion looks briefly at each of these elements.

Collecting comprehensive data is getting easier. Some states are moving toward consistent, uniform, statewide court information systems. These systems are comprehensive in the sense that they capture every court and every case. The goal should be population data, that is, data for every case. The typical dataset produced by a researcher -- sample information for a time period -- has limited utility for a court. At best, it may help answer a few specific questions at a single point in time. A well-developed system could become an ongoing management tool, a way for the court to know where it stands, where it has been, and where it is headed. Such a tool could become vital to administrators who must make decisions about resources.

Were the comprehensive system vital, the courts would accurately maintain the information.

Courts are already converting from paper to electronic information systems. The more data courts maintain in electronic format, the easier it is to alter its format, to transport the data, to organize the data to isolate specific variables, to include additional dimensions for comparison—in short, the easier it is to manipulate for purposes of evaluation.

Data collection should be routine; it should be a way of life, not something that happens every three or four years when some funding source commissions or supports a study. Courts need to use more comprehensive information systems to document their performance. If evaluation data collection becomes a routine part of docket and case management, then over time we would have much more information to determine what system designs work best.

Decentralizing data collection requires delegating the task to everyone who touches a case. Usually, a few researchers collect information retrospectively with court assistance. Instead, each of the many people who come into contact with a case would collect some information. The fewer people collecting data, the harder it is to collect lots of it. Of course, the corollary to this is: the more people collecting data, the harder it is to control its accuracy. It is increasingly possible to provide constrained data entry tools to address data accuracy. If the goal is a picture of the system as a whole, then more data, if less rich, is better than less but richer data. Properly structured databases can control how data is recorded, and properly maintained databases with decentralized stewardship of information can reduce error rates and provide feedback to researchers, program managers, neutrals, and disputants.<sup>85</sup>

The field needs longitudinal research. The problem with many evaluation projects is that they are limited in time by virtue of funding constraints. They may give us a very accurate description of what is happening in one court over the course of a year, but they do not capture the fact that all courts and dispute processing organizations are moving targets. This point-in-time data has value, but that value is limited. Because it takes so much time to do the data collection and analysis for these time limited and intensive evaluation projects, there is always a lag between the time period studied and the publication of a report. With longitudinal data collection, we can begin to look at how the target moves. Without this information, it is too soon to consider what is the best form of court-connected ADR.

## V. CONCLUSION

Professor Hensler's essay highlights important policy issues for the field of dispute resolution and its relationship to justice and the courts. The jury is still out on what dispute system design is best, fairest, wisest and most effective in a court

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85. Conversations with M. Scott Jackman, former Data Analysis Coordinator, Indiana Conflict Resolution Institute, Indiana University, Bloomington, IN (notes on file with author).

setting. Courts could duck this question, and essentially let the disputants answer it. Courts could become a mechanism for disputants to design their own system by leaving in the disputants' hands full self-determination over the choice of process, including whether to use mediation, early neutral evaluation, non-binding arbitration, or summary jury trials, and which model of practice to use, for example, evaluative, facilitative or transformative mediation. However, most courts have asserted control over dispute system design for cases that come within their jurisdiction. With that control comes the obligation to determine systematically based on the best available evidence what design is optimal. Before we choose one system design for the benefit of disputants, let's find out more about how programs work.