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Robert Benham

Ansley Boyd Barton

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ALTERNATIVE DISPUTE RESOLUTION: ANCIENT MODELS PROVIDE MODERN INSPIRATION

Robert Benham[†]
Ansley Boyd Barton[††]

INTRODUCTION

There is a widespread belief in American society that the legal system is being crushed beneath a body of litigation. Despite the lively debate within the legal community as to whether the litigation explosion is a myth, there is no denying the public perception that the institution of law is in crisis.[1]

Society's love-hate relationship with lawyers is timeless. Our own state has a stunning history of deep suspicion of the legal profession. The Trustees for the Colony of Georgia forbade the importation of slaves, rum, and "that pest and scourge of mankind called lawyers."[2] The oft-quoted adage, "the first thing we do, let's kill all the lawyers,"[3] is constantly and gleefully quoted out of context.[4]

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† Robert Benham is Chief Justice of the Georgia Supreme Court.

†† Ansley Boyd Barton is Director of the Supreme Court's Georgia Office of Dispute Resolution. The authors gratefully acknowledge research assistance provided by Jennifer Boyens, Deputy Director, and Dorothy Snyder of the Georgia Office of Dispute Resolution.

1. *See* Marc Galanter, *The Day After the Litigation Explosion*, 46 MD. L. REV. 3 (1986); Benjamin R. Ciriletti, *Comments on Galanter*, 46 MD. L. REV. 40 (1986).

2. E. MERTON COULTER, GEORGIA: A SHORT HISTORY 74 (1960).

3. WILLIAM SHAKESPEARE, THE SECOND PART OF KING HENRY THE SIXTH, act 4, sc. 2.

4. In a footnote to his dissent in *Walters v. National Ass'n of Radiation Survivors*,

Although disapproval of the legal profession is by no means a recent phenomenon, what is new is the extent of society's disillusionment with the ability of the courts to deal with modern problems. Ironically, this disillusionment comes at a time when society is leaving more and more of its problems upon the court's doorstep. "[L]aw seems to pour into gaps where social life offers no other form of control."[5] Swollen dockets reflect the degree to which advances in science and technology are outpacing the development of ethical standards in these fields. The tragic increase in criminal filings tracks the proliferation of social ills. Buffeted by the pace and complexity of modern life, people are getting "meaner." At the same time, institutions such as the family and the church may no longer shelter the individual against the vicissitudes of life.

As courts struggle valiantly to resolve disputes ranging from the most complex case of genetic engineering or intellectual property to the most mundane nuisance of a barking dog, the law sags under the recent phenomenon of regulations and rules run amuck. Litigiousness, working in tandem with lawyers' tendency to anticipate every possible eventuality, turns the most beneficent laws into breeding grounds for rampant regulation. There is a growing realization that the courts cannot deal with litigation spawned by advances in technology and, at the same time, fill the void left as the institutions of church and family are weakened by modern life.

In a period of apparent crisis, it should be reassuring that the courts are assuming a leadership role in finding new ways to handle disputes and lawyers are looking for ways to develop skills in their traditional roles as counselors and problem solvers. Law, along with medicine and theology, should be considered a healing profession.[6] Incorporating ancient methods of dispute resolution could bring a healing dimension to our system of justice, which is built upon the protection of individual rights. An examination of ancient Japanese, Polynesian, and African methods of dispute resolution provides a useful model for

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Justice John Paul Stevens wrote: "As a careful reading of [the] text will reveal, Shakespeare insightfully realized that disposing of lawyers is a step in the direction of a totalitarian form of government." 473 U.S. 305, 371 n.24 (1985) (Stevens, J., dissenting).

5. THE SOCIAL ORGANIZATION OF LAW 7 (Donald Black & Maureen Mileski eds., 1973).

6. Warren E. Burger, *The State of Justice*, 70 A.B.A. J., Apr. 1984, at 62, 66.

understanding the present state and future evolution of alternative dispute resolution, both in Georgia and across the United States.

I. ANCIENT MODELS OF DISPUTE RESOLUTION AS A SOURCE OF COMMUNITY HARMONY

Our modern fascination with "progress" and our Darwinian-based faith in human perfection may blind us to the wisdom found in practices of societies we consider more "primitive." As civilization advances and the frontiers recede, the prosperity that commerce brings is generally reflected in sophisticated laws. The more informal methods of dispute resolution are considered outmoded. Indeed, our elaborate legal structure is often cited as a testament to the degree to which our civilization has developed.

It is instructive and humbling to consider the models of dispute resolution in the so-called "primitive" societies and to recognize in these models the origins of the alternatives to litigation that we now consider on the cutting edge. While we may readily recognize the ancient roots of mediation and arbitration, elements of evaluative processes such as non-binding arbitration, summary jury trial, mini trial, and case evaluation are also found in the ancient forms of dispute resolution.[7]

American democracy, which is grounded in the political thought of the eighteenth century Enlightenment, drew heavily upon the teachings of Rousseau and Locke; the individual is sovereign and bestows sovereignty upon the State.[8] The American belief in the sovereignty of the individual was strengthened by the Protestant conviction that the individual has direct access to God.[9] The national experience of adventurous individuals and families conquering the wilderness of America's frontier also added to American idealism.[10] Emphasis upon the individual created a culture in which individual rights are jealously guarded. Many resources of our judicial system are devoted to the protection of these rights.[11]

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7. See Appendix A to this Article for definitions from the Georgia Supreme Court ADR Rules.

8. ALEXIS DE TOQUEVILLE, DEMOCRACY IN AMERICA 280 (Phillips Bradley ed., Vintage Books 1990) (1945).

9. *Id.*

10. *Id.*

11. *Id.*

On the other hand, in cultures that emphasize the community rather than the individual, the goal of dispute resolution may be harmony rather than the protection and vindication of individual rights. At a time in American history when we increasingly suffer from a lack of harmony and community, elements of these ancient forms of dispute resolution are particularly relevant.

A. Japanese Dispute Resolution

The modern Japanese legal system continues an ancient tradition that favors conciliation rather than adjudication.[12] Just as the American preference for litigation that was observed by Alexis de Toqueville in his *Democracy in America*[13] in the 1830s probably arose from the American ethic of individualism, the Japanese legal system reflects ancient Japanese values.[14] As early as 604 A.D., the *Constitution in Seventeen Articles*, the first known national codification of legal principles, set forth the principle: "Concord is to be honored, and discord to be averted."[15] The *Constitution in Seventeen Articles* reflected the Buddhist and Confucian values of Chinese culture.[16]

Commitment to the values imported from Chinese culture was an important factor in Japanese resistance to the influence of Western traders and Christian missionaries who had arrived in Japan by the 1500s.[17] A Portuguese vessel, blown off course, landed in 1543 off the shore of southern Kyushu, one of the four main islands of the Japanese archipelago.[18] Soon afterward, Portuguese merchants opened trade with Japan.[19] St. Francis Xavier, a founder of the Jesuit Order, arrived in Japan in 1549 and began a Christian mission among the Japanese.[20] Although they initially welcomed the missionaries, Japan's rulers became fearful that the Christian influence might diminish the

12. Lynn Berat, *The Role of Conciliation in the Japanese Legal System*, 8 AM. U. J. INT'L L. & POL'Y 125, 125 (1992); *see also* MIKISO HANE, PREMODERN JAPAN: A HISTORICAL SURVEY (1991); KODANSHA ENCYCLOPEDIA OF JAPAN *Conflict Resolution* 350-52 (1983).
13. DE TOQUEVILLE, *supra* note 8.
14. *Id.*
15. Berat, *supra* note 12, at 126.
16. *Id.*
17. *Id.* at 129.
18. HANE, *supra* note 12, at 122.
19. *Id.*
20. *Id.* at 123.

unquestioned loyalty of the people to their masters.[21] In 1587, Christianity was banned by the overlord Hideyoshi, but the ban was not rigorously enforced.[22] Indeed, the Franciscans, who entered Japan from the Philippines in 1593, were warmly received.[23]

By the time of the Tokugawa Period (1600-1867), significant contact with the West and with Christianity occurred.[24] The Tokugawa rulers, reacting against this influence, promoted a period of isolation that lasted until the mid-nineteenth century.[25] In 1614, Christianity was again banned by Ieyasu, who succeeded Hideyoshi as overlord of Japan.[26] Persecution of missionaries and converts reached a climax in the Shimabara Rebellion of 1637-1638.[27]

The Shimabara Rebellion resulted in severe restrictions on contact with the outside world.[28] Not only were missionaries banned, but foreign merchants were also excluded.[29] Eventually, foreign merchants were prohibited from entering most ports and Japanese ships were not permitted to depart.[30]

The Tokugawa Period lasted for two and one-half centuries and was characterized by military rule, political peace, and social stability.[31] Japan existed as a closed and isolated society that barred not only foreign trade and commerce, but also foreign ideas and cultural influences.[32] The populace was organized into a hierarchy divided into seven classes.[33] There was little movement between classes, and the hierarchical structure was reinforced by the Japanese legal system.[34] Rights developed on a class basis rather than an individual basis.[35] Only a limited number of claims could be brought to a court under the

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21. *Id.* at 124.
22. *Id.*
23. *Id.* at 125.
24. *Id.* at 128.
25. *Id.*
26. *Id.* at 126.
27. *Id.* at 127.
28. *Id.*
29. *Id.*
30. *Id.* at 128.
31. *Id.*
32. *Id.*
33. Berat, *supra* note 12, at 130.
34. *Id.*
35. *Id.*

Tokugawa judicial system.[36] While disputes concerning land and water were most likely to receive the attention of the courts,[37] disputes involving interpersonal relationships, whether feudal or familial in nature, were seldom heard by the courts.[38]

As fathers in Japanese society were held accountable for the actions of other family members, fathers held family members responsible for maintaining peace among themselves and avoiding discord and conflict.[39] This vicarious liability reinforced the notion of group identity and the paramount importance of harmony within all classes of the social hierarchy.[40]

The social order was fortified by a deep sense of loyalty to the group—a Confucian contribution to the Japanese social structure.[41] Within the Confucian value system, loyalty provided the path into the state of *jen*—a state of individual compassion.[42] Dispute resolution was characterized by a search for solutions that promoted the state of *jen* as well as harmony between people.[43] Given the religious and societal emphasis upon harmony and the limited access to the courts for individual disputes, conciliation was the natural approach for resolving the disputes of individuals.

In the 1890s, the judiciary was reorganized following the "opening of Japan" by the West, ending the long period of Japanese isolation.[44] Although a constitution and a code based on Western models were adopted in the 1890s, the traditional use of conciliation prevalent during the Tokugawa Regime continued.[45] By 1922, formal conciliation procedures were in place.[46] The new constitution, promulgated in 1946 and effective in 1947, vested sovereignty in the Japanese people and dramatically curtailed the power of the Emperor.[47] For the first time the people of Japan were given individual rights.[48]

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36. *Id.*
37. *Id.* at 133.
38. *Id.*
39. HANE, *supra* note 12, at 194.
40. *Id.* at 203.
41. Berat, *supra* note 12, at 132.
42. *Id.*
43. *Id.*
44. *Id.* at 137.
45. *Id.* at 140.
46. *Id.* at 141.
47. *Id.* at 144-45.
48. *Id.* at 145.

As a result of American presence in occupied Japan, the principles of Western jurisprudence were incorporated into the Japanese judicial structure.[49] However, conciliation remains the preferred method for resolving disputes in modern Japan.[50] The Japanese work to prevent the development of disputes in business and government by employing such techniques as an assiduous search for consensus.[51] The courts use mediation and conciliation to encourage the settlement of cases because the Japanese abhor the polarization that lawsuits can produce.[52] Scholars have shown that the Japanese people use the courts as a last resort for the resolution of private disputes.[53] Among the many factors that underlie the continued preference for conciliation in Japan, perhaps the most important influence is the Confucian ideal of a natural human hierarchy, as opposed to the Western ideal of the sovereign individual.[54]

B. Mediation in Polynesian Culture

Ho'oponopono, a form of mediation, is an ancient part of Polynesian culture.[55] The Polynesians most likely came from Central Asia, arriving in Hawaii between 100-750 A.D.[56] These people had a deep sense of community, valued family relationships, and held their priests and elders in high esteem.[57] Having no written language, they enjoyed a rich oral tradition that is reflected in the *ho'oponopono*.[58]

The Polynesians were expert sailors and navigators.[59] The word *ho'oponopono*, which means disentangling, is a metaphor based on the important uses of rope in sailing.[60] Originally utilized in intra-family disputes, *ho'oponopono* became increasingly prevalent in the resolution of interpersonal

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49. *Id.*
50. *Id.* at 151.
51. *Id.* at 152.
52. *Id.* at 150.
53. *Id.*
54. *Id.*
55. James A. Wall, Jr. & Ronda Roberts Callister, *Ho'oponopono: Some Lessons from Hawaiian Mediation,* 11 NEGOTIATION J. 45, 46 (Jan. 1995).
56. *Id.*
57. *Id.*
58. *Id.* at 47.
59. *Id.*
60. *Id.*

problems.[61] Currently, it is used in Hawaii to devise restitution plans and set penalties for repeat criminal offenders.[62]

The twelve steps of *ho'oponopono* resemble the stages of mediation used in the United States today.[63] The *ho'oponopono* steps are an interesting mixture of the spiritual and the practical.[64] In step one, the parties to the dispute are called together by a person of high status within the family or community who knows both of the parties.[65] Step two is an opening prayer.

Steps three through six are procedural in nature, with the leader playing the dominant role.[66] During these steps, the problem is stated, the parties are allowed to speak, the parties are questioned by the leader, and there is discussion channeled through the leader.[67] Storytelling by the parties, clarification through questions from the mediator, and discussion channeled through the mediator are common to modern practice and are steps familiar to mediators trained in the United States today.[68] Step six is a period of silence that serves to cool the emotions of the disputants while drawing upon the combined "force" of those present to create a common resolution.[69]

Step seven is a confession to God of wrongdoing and an acknowledgment that forgiveness is necessary when guilt and conflict disrupt.[70] This step serves the important function of catharsis. Although the confession is not a formal part of mediation as practiced in the United States today, the apology that often occurs during the mediation serves the powerful

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61. *Id.*
62. *Id.*
63. *Id.* at 51-52. Although the elements of the mediation process as practiced in the United States are fairly well established, there is no unanimity among scholars and trainers as to the number of "stages" or "steps" in the classic form of mediation. For example, the model taught by the Georgia Office of Dispute Resolution has six steps, while a model used by the American Arbitration Association has four stages. For an excellent discussion of the mediation process as described in twelve stages, see CHRISTOPHER W. MOORE, THE MEDIATION PROCESS: PRACTICAL STRATEGIES FOR RESOLVING CONFLICT 32-33 (1986).
64. Wall & Callister, *supra* note 55, at 48.
65. *Id.* at 58, tbl. 1.
66. *Id.*
67. *Id.*
68. *Id.* at 51.
69. *Id.* at 48, 50.
70. *Id.* at 48-49.

function of acknowledging the hurt felt by the other, allowing for the possibility of healing.[71]

Steps eight, nine, and ten are interactive among the parties.[72] In step eight, restitution is given immediately or a plan of restriction is developed.[73] This step reflects the importance of making amends as quickly as possible.[74] This was particularly important in a culture with no written language at the time the process developed.[75] In the absence of a written language, the written agreement, which is the desired conclusion of a mediation today, would not be possible.[76] Step nine involves attention to each layer of the conflict. This step is often referred to as "peeling the onion."[77] During this stage, the earlier steps are repeated as necessary to examine the underlying causes of the conflict.[78] Step ten emphasizes mutual forgiveness.[79] This is somewhat analogous to the balanced agreement that is the goal of a mediation today.[80] In a balanced agreement, both parties must be obligated even if the obligation is only the acceptance of a proffered apology.[81]

Steps eleven and twelve involve a closing prayer and a form of thanksgiving involving food.[82] Interestingly enough, alcohol was not allowed during this thanksgiving.[83] The two closing steps, the opening prayer, the silence of step six, the plea for forgiveness of step seven, the attention to all levels of the dispute at step nine, and the mutual forgiveness of step ten are directly related to community, reconciliation, and healing.[84] These steps would perhaps add a dimension of healing to the more directive form of mediation that is practiced in our own culture.[85]

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71. For a fascinating discussion of the power of "recognition" or an empathetic understanding of the other party's viewpoint in mediation, see generally ROBERT A. BARUCH BUSH & JOSEPH P. FOLGER, THE PROMISE OF MEDIATION: RESPONDING TO CONFLICT THROUGH EMPOWERMENT AND RECOGNITION (1995).
72. Wall & Callister, *supra* note 55, at 50.
73. *Id.* at 50-51.
74. *Id.* at 50.
75. *Id.*
76. *Id.*
77. *Id.*
78. *Id.*
79. *Id.* at 51.
80. *Id.* at 52.
81. *Id.*
82. *Id.* at 51.
83. *Id.*
84. *Id.* at 49.
85. *Id.* at 52. In the directive form of mediation, as opposed to the problem-solving

C. *The African Kpelle* "Moot"

Another interesting informal form of dispute resolution is the *moot* or *house palaver* found among the Kpelle of Liberia.[86] An anthropologist who conducted field studies on Liberian informal dispute resolution methods in 1957 and 1958 argues that "[t]he genius of the *moot* lies in the fact that it is based on a covert application of the principles of psychoanalytic theory which underlie psychotherapy."[87]

Among the Kpelle of Liberia, disputes are settled formally in official and unofficial courts of town chiefs or quarter elders, or informally in associational groupings such as church councils or in *moots*.[88] Because the formal court hearings are coercive in nature, they do not provide the best forum for cases involving ongoing relationships. The *moot*, on the other hand, is an informal airing of grievances that takes place in the home of the complainant before an ad hoc group of kinsmen and neighbors.[89] The dispute handled in this fashion is generally a domestic grievance.[90] The complainant chooses the mediator, typically a kinsman of some stature.[91] Like the *ho'oponopono*, the *moot* begins with a prayer and ends with a feast.[92] Unlike the *ho'oponopono*, however, the feasting is accompanied by alcoholic beverages as a tribute paid by the losing party to the mediator and the assembly.[93]

The opening blessings are chanted with rhythmic responses by the assembly, serving to unite the group in common action.[94] In describing the problem, the complainant speaks first, followed by the accused (or respondent).[95] The statement of either party may

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or transformative forms, the mediator takes a very active role in directing the parties toward a resolution. For a discussion of this mediation style, see James J. Alfini, *Trashing, Bashing, and Hashing it Out: Is This the End of "Good Mediation"?*, 19 FLA. ST. U. L. REV. 47, 66-75 (1991).

86. James L. Gibbs, Jr., *The Kpelle Moot: A Therapeutic Model for the Informal Settlement of Disputes*, 33 AFR., J. INT'L. AFR. INST. 1 (Jan. 1963).

87. *Id.*

88. *Id.* at 2.

89. *Id.* at 3.

90. *Id.*

91. *Id.*

92. *Id.*

93. *Id.*

94. *Id.*

95. *Id.*

be subject to interruption by the other party.[96] All those present may then question disputants and witnesses.[97] At the end of this discussion, the mediator interprets the consensus of the assembly as to fault.[98] The person found at fault apologizes by giving gifts to the wronged party.[99] These gifts, representing both restitution and apology, are never so large as to cause the giver to experience renewed resentment against the recipient.[100] In an important aspect of the resolution, the recipient also gives token gifts, which serve to acknowledge and accept the apology.[101] Following the exchange of gifts, the beer or rum presented to the mediator and assembled group is consumed.[102] The elder pronounces blessings, gives thanks for restored harmony, and asks that all parties continue to live in harmony.[103] The *moot* is more aligned with arbitration than with mediation because there is in some sense an adjudication of the controversy. However, since the wrongdoer has the option of refusing the decision of the *moot*, the process may be considered more evaluative than adjudicative.

II. ALTERNATIVE DISPUTE RESOLUTION IN THE UNITED STATES TODAY

In the United States today, some believe that our focus upon individual rights has become myopic. In *The Death of Common Sense,* author Philip Howard suggests that when the law is used as a sword rather than as a shield, the resulting rules and regulations can make it impossible for the law to work as intended.[104] His book is filled with examples of regulations that thwart the intention of even the most beneficial laws.[105]

The principle that every wrong has a remedy has created a belief that every injustice should be remedied by the court system. A more realistic goal would purport to address every

96. *Id.*
97. *Id.*
98. *Id.* at 4.
99. *Id.*
100. *Id.* at 5.
101. *Id.* at 4.
102. *Id.*
103. *Id.*
104. PHILIP K. HOWARD, THE DEATH OF COMMON SENSE: HOW LAW IS SUFFOCATING AMERICA 167 (1994).
105. *Id.* An interesting example of regulation run amok was the removal of student art from the walls of a Long Island elementary school as a violation of the state fire code. *Id.* at 6.

injustice in the appropriate forum. While the courtroom is one of the best forums man has created for the protection of individual rights, very little in the way of reconciliation and healing can occur there.[106] Further, the "day in court" does not necessarily provide the disputants with the sense of being thoroughly heard.

For some injustices, the proper forum may be one in which parties can be thoroughly heard and healing can begin. Incorporating the ancient means of dispute resolution discussed above may bring into our own dispute resolution system a welcome dimension of reconciliation. Many courts are experimenting with or have already institutionalized the use of alternative dispute resolution (ADR) processes.[107]

During the last two decades, as the courts have grown increasingly crowded and expensive, business contracts have become more likely to include mandatory arbitration or mediation clauses. Thus, parties are more likely to choose a private forum for dispute resolution. Both state and federal courts are diverting cases into non-binding processes with increasing frequency.

Several developments on the federal level have made the use of ADR processes more common in federal courts and agencies. The Civil Justice Reform Act of 1990 provides that ADR techniques must be included in the plans of each federal judicial district to reduce delay in the federal courts.[108] In 1991, President George H. W. Bush issued an executive order requiring that executive branch agencies explore settlement possibilities and consider

106. Robert A. Baruch Bush, *Efficiency and Protection, or Empowerment and Recognition?: The Mediator's Role and Ethical Standards in Mediation,* 41 FLA. L. REV. 253 (1989).

107. ADR is an umbrella term for all the various alternatives to litigation employed by both the courts and parties who settle disputes in a private forum. Although mediation and binding arbitration have long been accepted and are familiar to Americans through their use in labor negotiations, the construction industry, and sports, the creativity that is the hallmark of ADR has in the last twenty-five or thirty years spawned other processes designed to evaluate disputes. The processes of non-binding arbitration, mini trial, summary jury trial, and early neutral evaluation are used to "jump start" settlement discussion with an awareness brought about by a "reality check." It would be safe to say that the possibilities for creative new ways to settle disputes are limited only by the outer reaches of human imagination. For a brief history of the growth of ADR in the past three decades, see STEPHEN B. GOLDBERG, ET AL., DISPUTE RESOLUTION: NEGOTIATION, MEDIATION, AND OTHER PROCESSES 6-9 (2d ed. 1992).

108. Civil Justice Reform Act, 28 U.S.C. 471 (1990).

ADR before filing suit.[109] The Administrative Dispute Resolution Act of 1990 requires that federal agencies consider ADR methods in rulemaking in the context of adjudications, license and permit issuance and revocation, and contract administration.[110]

In a relatively short amount of time, the use of ADR processes in American courts has increased to the extent that this once unusual process is now commonplace.[111] The reliance upon ADR processes as a case diversion technique is so well accepted that in recent court futures conferences held throughout the country, ADR was universally hailed as the most important tool available to courts as they enter the next century.[112]

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109. Exec. Order No. 12778, 3 C.F.R. 359 (1991), *reprinted in* 28 U.S.C. 519 (1995).

110. Pub. L. No. 101-522, 104 Stat. 2736 (1990).

111. In its *Report on Trends in State Courts* of June 1992, the National Center for State Courts reported that in 1990 filings in state courts for the first time topped 100 million. NATIONAL CENTER FOR STATE COURTS, REPORT ON TRENDS IN STATE COURTS, at 3 (June 1992). The National Center also reported that while caseloads increase, court budgets remain stationary or are shrinking. In response to this overload, many courts have institutionalized ADR processes in the court system. *Id.* All fifty states have some court-related programs. *Id.* Some statistics from the ABA Section on Dispute Resolution indicate that ADR is becoming an integral part of the way we resolve disputes in this country. In 1978, two law schools offered courses on ADR. By 1991, 164 law schools offered courses on ADR. All Georgia's accredited law schools offer courses that familiarize students with ADR processes. Georgia is the twelfth state to add an ADR section to its state bar association. Telephone Interview with Pru Kestner, ABA Standing Committee on Dispute Resolution (1992).

112. Georgia, along with many other states, received a grant from the State Justice Institute to convene a conference on the future of Georgia's courts. In 1991, a group of judges, lawyers, legislators, court administrators, and others began a review of Georgia's court system. The Court Futures Vanguard consisted of ten task force groups. A final report was issued in 1992. ADR was the common thread in the discussions of all the Georgia task force groups. The executive summary of the final report states: "Vanguard members felt that the use of alternative dispute resolution mechanisms, such as mediation or arbitration, can provide creative solutions to legal problems and offer more promise than any other suggested reform for reducing judicial caseloads." JUSTICE IN THE NEXT MILLENNIUM: REPORT OF THE COURT FUTURES VANGUARD, at 3 (Feb. 1993). Whether the discussion involved court structure, court automation, court finance, or any other facet of the effort to develop a better court system for Georgia, ADR was discussed as an integral part of the courts of the future.

Many other states have convened conferences on court futures. Without exception, the reports recommend that ADR processes be included in the courts of the 21st century. In its report, the New Hampshire Supreme Court Long-Range Planning Task Force recommended that: (1) no contested marital case other than cases involving allegations of violence be docketed for final hearing until the parties have attended at least one informational meeting with a mediator; (2) arbitration should be expanded as a court-annexed procedure; and (3) a standing committee on ADR should be established by the supreme court. REPORT OF THE NEW HAMPSHIRE SUPREME COURT

III. THE USE OF ADR PROCESSES IN GEORGIA COURTS[113]

A. *The Work of the Joint Commission on ADR and the Georgia Supreme Court ADR Rules*

The Georgia Constitution of 1983 requires that the judicial branch of government provide "speedy, efficient, and inexpensive resolution of disputes and prosecutions."[114] Pursuant to this constitutional mandate, in September 1990, the Supreme Court of Georgia created the Joint Commission on ADR (Joint Commission) under the joint leadership of the Chief Justice of the Supreme Court of Georgia and the President of the State Bar of Georgia.[115] The members of the Joint Commission were appointed by then Chief Justice Harold Clarke and State Bar President Evans Plowden.[116]

The supreme court directed that the Joint Commission explore the feasibility of using court-annexed ADR processes, particularly mediation and non-binding arbitration, to complement existing dispute resolution methods.[117] The supreme court ordered the Joint Commission to gather information, implement experimental pilot programs, and draw up recommendations for a statewide, comprehensive ADR system.[118]

LONG-RANGE PLANNING TASK FORCE: AS NEW HAMPSHIRE APPROACHES THE TWENTY-FIRST CENTURY, at 22-25 (1990).

A report by a Michigan commission states: "Perhaps the least controversial of all predictions about how the provision of justice will be different in the 21st Century is the forecast for increasing use of alternative dispute resolution techniques." MICHIGAN'S COURTS IN THE 21ST CENTURY: A REPORT TO THE LEGISLATURE, GOVERNOR, AND SUPREME COURT, at 31 (1990).

A report of the Massachusetts Chief Justice's Commission found: "In 2020 justice in Massachusetts will be much transformed yet much the same. Its sameness will derive from adherence to principles (freedom, fairness, and due process) that have secured the foundations of justice in Massachusetts for 300 years. Its transformation will come in significant part from the greater use of alternative dispute resolution (ADR) processes, still consistent with those fundamental principles, yet as varied and different as necessary to fit the types of disputes 30 years hence." CHIEF JUSTICE'S COMMISSION ON THE FUTURE OF THE COURTS, REPORT OF THE TASK FORCE ON ALTERNATIVE PATHS TO JUSTICE, at 1 (1992).

113. The material in this section was originally developed by Ms. Barton for use in various presentations. It has been revised for this Article.

114. GA. CONST. art. VI, § 9, ¶ 1 (1983).

115. GA. CT. & BAR R. 7.1-1 (1993).

116. *Id.*

117. *Id.*

118. *Id.*

Funding for the Joint Commission's work was provided by the State Bar of Georgia, the Georgia Civil Justice Foundation, the National Institute for Dispute Resolution, and the Georgia Bar Foundation. In 1991, 1992, 1993, and 1994, the Georgia Bar Foundation was the primary source of dispute resolution funding and provided grants to the Joint Commission on ADR and its successor, the Georgia Commission on Dispute Resolution.

In September 1992, following a study of the impact of ADR processes nationwide and an analysis of information gathered within the state, the Joint Commission presented recommendations to the Georgia Supreme Court. These recommendations provided for the creation of a statewide, comprehensive ADR program that would allow the incorporation of ADR processes into Georgia's existing judicial system.[119] Before final adoption, a draft of these recommendations was widely circulated for comment by the bench, bar, private providers of ADR, and others. In October 1992, the supreme court adopted rules reflecting the recommendations that apply to both court-annexed and court-referred programs.[120] The supreme court rules give every trial court in Georgia the discretion to employ ADR processes.[121] However, no court is required to employ ADR processes.[122] The rules were most recently amended in February 1995.[123] Additionally, the Georgia Supreme Court has delegated responsibility for establishing qualifications for neutrals to the Georgia Commission on Dispute Resolution.[124]

1. Authority[125]

Many states have set up a committee or task force to study the establishment of a statewide ADR plan.[126] States vary, however, as to the authority used to implement ADR programs. In some states, a comprehensive system is established by legislative

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119. *Id.*
120. *Id.* at 7.1-1 to -10.
121. *Id.* at 7.1-3.
122. *Id.* at 7.1-1.
123. *Id.*
124. *Id.* at 7.1-2.
125. For a thorough discussion of all aspects of court-connected ADR, see generally ELIZABETH PLAPINGER & MARGARET SHAW, COURT ADR: ELEMENTS OF PROGRAM DESIGN (1992).
126. *See id.*

authority.[127] In other states, the authority comes from the rule-making power of the courts.[128] In Georgia, the Joint Commission recommended that the Georgia Supreme Court implement comprehensive statewide ADR through use of its rule-making powers under the 1983 Georgia Constitution.[129]

2. Central Organization

To provide permanent oversight for the development of court-annexed ADR processes across the state, the supreme court created the Georgia Commission on Dispute Resolution and appointed its members.[130] The Georgia Commission on Dispute Resolution (Commission) is the successor to the Joint Commission on ADR, the original study commission. The Commission is charged with the following duties and responsibilities: (1) to administer a statewide comprehensive ADR program; (2) to oversee the development and ensure the quality of all court-annexed or court-referred ADR programs; (3) to approve court programs; (4) to develop guidelines for court-annexed or court-referred programs; (5) to develop criteria for training and qualifications of neutrals; (6) to establish standards of conduct for neutrals; and (7) to establish and register with the Georgia Secretary of State a nonprofit organization, the Georgia Commission on Dispute Resolution, Inc.[131]

The Georgia Office of Dispute Resolution, created by the Georgia Supreme Court, is responsible to the Commission and ultimately to the court.[132] The Office of Dispute Resolution staffs the Commission and is charged with implementing the Commission's policies.[133] Responsibilities of the Office of Dispute Resolution include: (1) to serve as a resource for ADR education and research; (2) to provide technical assistance to new and existing court-annexed and court-referred programs at no charge; (3) to develop the capability of providing training to neutrals in courts throughout the state at no charge; (4) to

127. NATIONAL INSTITUTE FOR DISPUTE RESOLUTION, COMPENDIUM OF STATE COURT RESOURCE MATERIALS, at 14 (1995).
128. *Id.*
129. GA. CT. & BAR R. 7.1-1 (1993).
130. *Id.* at 7.1-2.
131. *Id.*
132. *Id.* at 7.1-3.
133. *Id.*

implement the Commission's policies regarding qualification of neutrals and quality of programs; (5) to register neutrals and, if necessary, remove neutrals from registration; and (6) to collect statistics from court-annexed and court-referred programs to monitor the effectiveness of various programs.[134]

3. *Funding*

Court-annexed and court-referred ADR programs are funded in a variety of ways across the United States.[135] Some jurisdictions charge user fees, while courts' budgets provide funding in other states.[136] Other states depend upon legislative appropriations or local government funding.[137] Still other states use a filing fee surcharge to fund ADR programs.[138] Some of those states that use a filing fee surcharge apply this surcharge statewide.[139] The fee is administered by a central office that provides these funds through grants to local programs.[140] Such funding plans have certain advantages: they provide a mechanism for overcoming the financial disadvantage of less populous counties by allocating funds in an equitable manner and offer the potential for statewide oversight and quality control.[141] These plans, however, usually provide for less choice at the local level.

Georgia's filing fee plan, which provides that funds are collected and administered locally, allows for more local autonomy than the centralized plans described above.[142] Significantly, Georgia's funding scheme has no impact upon litigants in counties that do not implement ADR programs. On April 27, 1993, Governor Zell Miller signed into law the Georgia Court-annexed Alternative Dispute Resolution Act,[143] which provides for a filing fee surcharge on civil cases.[144] The funding mechanism set forth in the statute is available to any court that

134. *Id.*
135. PLAPINGER & SHAW, *supra* note 125, at 46.
136. *Id.*
137. *Id.*
138. *Id.* at 47.
139. *Id.*
140. *Id.*
141. *Id.*
142. O.C.G.A. § 15-23-1 (1993).
143. *Id.*
144. *Id.* § 15-23-7.

has developed a program meeting the standards of the Georgia Supreme Court's Uniform Rule for ADR Programs.[145]

A sum not to exceed five dollars in addition to all other legal costs may be charged and collected in each civil action or case filed in superior, state, probate, and magistrate courts.[146] The amount to be collected in each case is fixed by the chief judge of the superior court,[147] and the fund is administered locally by a board of trustees.[148] Because no court is required to implement an ADR program, litigants in counties without such programs are not affected by the filing fee surcharge. Courts in a judicial administrative district may pool their resources to administer joint programs by circuit, district, or any combination that would foster an efficient use of available resources.[149]

Under guidelines promulgated by the Georgia Commission on Dispute Resolution, a court may set an hourly rate for the parties to compensate the efforts of nonvolunteer neutrals.[150] Such costs will be predicated upon the complexity of the litigation, the skill level required of the neutral, and the litigants' ability to pay.[151] Other guidelines promulgated by the Commission allow a court to set a user's fee for ADR processes.[152]

While the supreme court and the Commission are convinced that the use of ADR processes will enhance the quality of justice in Georgia, the court and the Commission are also committed to the voluntary introduction of programs into courts that wish to use them. The Commission and the Office of Dispute Resolution are further committed to assisting courts in building programs that will meet the needs of litigants. The filing fee surcharge legislation provides an important source of funds to accomplish this goal.

B. ADR Programs in Georgia Courts

ADR programs in Georgia demonstrate the effectiveness of mediation, case evaluation, and non-binding arbitration.[153]

145. *Id.* § 15-23-10.
146. *Id.*
147. *Id.*
148. *Id.* § 15-23-3.
149. *Id.* § 15-23-12.
150. *Id.* § 15-23-11(a).
151. *Id.*
152. *Id.* § 15-23-11(b).
153. For a list of Georgia ADR programs, see Appendix B to this Article.

Pursuant to the supreme court rules, any trial court has the option of using an ADR process as part of its justice system. The courts have a great deal of flexibility in creating programs that will meet their particular needs. Among the choices available are: (1) what processes will be used; (2) whether party participation is voluntary or mandatory; (3) whether neutrals will be selected from a small, closely monitored cadre or a roster that offers parties a wide choice; (4) who will select neutrals; and (5) whether and how neutrals will be compensated.[154]

Although mediation is the process most frequently offered by Georgia courts, non-binding arbitration and case evaluation are offered in some jurisdictions.[155] The Commission has worked closely with most of the court programs in Georgia by providing partial funding and technical assistance. Generous grants from the Georgia Bar Foundation to the Commission from 1991 to 1994 made it possible for the Commission to grant seed money to courts for program development.

The flexibility and variety demonstrated by Georgia ADR programs is striking. The Commission has constantly encouraged experimentation and creativity within the boundaries of quality control. The programs in the Coweta Judicial Circuit, DeKalb County, the Ninth Judicial Administrative District, and Cobb County represent four very different but effective approaches to program design.

1. The Coweta Judicial Circuit

The Coweta Judicial Circuit Mediation Program began in November 1991 in LaGrange, Troup County, Georgia. The program was the direct result of the investigation by a committee of concerned citizens into mechanisms to ease the burdens of Troup County's overworked courts. The program received initial case referrals primarily from the Municipal Court of LaGrange, the State Court of Troup County, and the Magistrate Court of Troup County. The program now receives referrals from the Superior Court of Troup County and has expanded circuit wide. This program is an example of the kind of healthy program that can be built with the help and initiative of a concerned and committed community.

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154. GA. CT. & BAR R. 7.1-5 (1993).
155. *Id.*

2. The DeKalb County Multi-Door Program

DeKalb County has established a multi-door approach to dispute resolution. Parties in eligible cases are screened by the Dispute Resolution Center and appropriate candidates are then scheduled for a mandatory intake conference. During this conference, an intake specialist explores with parties and attorneys the processes available at the multi-door approach (mediation, case evaluation, early neutral evaluation, and arbitration) as well as the options of private ADR and litigation. While the intake conference is mandatory, the choice of process is left to the parties.

3. The Ninth Judicial Administrative District ADR Program

The Ninth Judicial Administrative District program currently offers mediation in fourteen counties in northeast Georgia. These counties pool money collected pursuant to filing fee legislation, supporting a district-wide mediation program administered by the Ninth Judicial Administrative District. The District plans to expand this program to offer arbitration and case evaluation as well. Many counties in this district are sparsely populated and have neither the financial resources nor the caseload to warrant a separate program. Collaboration has made mediation services available to litigants in participating counties, as most mediators are willing to serve in several counties.

4. The Cobb County Mediation Program

Cobb County has established an extensive civil mediation program. During its first year of operation, 1066 domestic and 502 general civil cases were referred to mediation. Mediators are chosen from a roster and are compensated by the parties. Mediators set their own fees according to the market rate. In most other programs, mediators are compensated at a fixed rate, either by the program or by the parties.

C. Summary

The conservation of judicial resources through utilization of court-connected ADR processes is very important. A familiar statistic is that a significant majority of all civil cases settle prior

to trial.[156] The important question in terms of resources is *when*. Early settlement through use of ADR processes can save precious judicial resources and reduce costs to litigants.[157] Even in cases that ultimately go to trial, ADR processes can streamline cases by settling some of the issues, making them less costly to try.

The saving of time and money for both the courts and the litigants is crucially important. These savings, however encouraging, do not tell the whole story. Much of the value of ADR processes is anecdotal, with value often manifested in ways that are not easily measured and that extend beyond the original purpose.[158] For instance, in LaGrange, the mediation program provides an unexpected benefit to the indigent defense program. Administrators of that program estimate that the use of mediation in criminal misdemeanor cases is responsible for a twenty-five to thirty percent decrease in the requests for appointed counsel.

Perhaps the most important intangible benefit derived from Georgia's ADR programs is the satisfaction parties expressed over and over again in evaluations. The ancient cultures that used forms of mediation in dispute resolution recognized the magic of being heard. Perhaps being truly heard is even more rare today. The participatory nature of a process in which parties craft their own agreements plays a crucial role in the satisfaction felt in resolution.

IV. EXPERIMENTS IN ADDRESSING DISPUTES PRIOR TO FILING

A. *By the Courts*

In states that experimented with mediation programs in the 1960s and 1970s, the laboratory was the community justice center.[159] The free-standing center remains the focus today in some states.[160] The center may be primarily supported by referrals from courts, but self-referrals are accepted as well. Most

156. *See generally* Bush, *supra* note 106.
157. *Id.* at 260.
158. *See generally id.*
159. NATIONAL INSTITUTE FOR DISPUTE RESOLUTION, COMMUNITY RESOLUTION MANUAL: INSIGHT AND GUIDANCE FROM TWO DECATES OF PRACTICE, at 1-2 (1991).
160. *See generally* CONFLICT RESOLUTION INSTITUTE FOR COURTS, NATIONAL INSTITUTE FOR DISPUTE RESOLUTION, COMPENDIUM OF STATE COURT RESOURCE MATERIALS (1995).

court-annexed ADR programs—those in which the program is actually housed within and administered by a court—accept only disputes in which a complaint or, in the case of a criminal misdemeanor, a warrant has been filed.

In Georgia, most court-connected ADR programs are court-annexed rather than court-referred. Thus, the ADR program is housed physically within and is closely controlled by the court. Generally, the disputes diverted to an ADR process are cases already filed with the court. Although it is clear that the greatest savings of judicial resources is realized when a given dispute never enters the court at all, there is relatively little emphasis upon diversion of cases to an ADR process before filing. Very few mediation centers in Georgia accept "walk-ins." Notable exceptions are the Justice Center of Atlanta and the Neighbor to Neighbor Justice Center in Savannah. These centers will accept cases for mediation pre-filing.

The LaGrange Mediation Center is the only Georgia court-annexed program to accept disputes pre-filing. This interesting model holds great promise in terms of creating a true diversion of cases. Not only would pre-filing diversion represent the greatest savings in judicial resources, but the possibility of settlement would be enhanced due to the proactive stance of the parties in attempting to resolve the dispute at the earliest time before resorting to the courts.[161]

A species of pre-filing diversion that should be tried, at least in large urban courts, is the citizen intake aspect of the Multi-Door Division of the Superior Court of the District of Columbia.[162] The superior court's intake involves a sophisticated approach to referral for citizens who come to the courthouse with a dispute or problem that may be handled more effectively by a social service agency.[163] Just as the problem-solving aspect of lawyering should receive more attention during the education of

161. The Neighborhood Justice Center in Tallahassee, Florida, has a broad vision for its program of diverting disputes from the courts. Chief Judge Phil Padovano of the Second Judicial Circuit says, "I have a vision of this center running day and night." Ann Morrow, *Love Thy Neighbor: The Neighborhood Justice Center Gives Residents a Forum for Resolving Their Conflicts,* TALLAHASSEE MAG., Mar.-Apr. 1995, at 20-21. He envisions court-related services such as simplified dissolutions of marriages, counseling for victims of domestic violence, pro bono legal services, legal education classes, and crime watch programs as coming under the umbrella of the center. *Id.* at 20.

162. SUPERIOR COURT OF THE DISTRICT OF COLUMBIA, ALTERNATIVE DISPUTE RESOLUTION PROGRAMS, at 9 (1993).

163. *Id.* at 1.

lawyers,[164] the problem-solving potential of the judicial system should be cultivated. A citizen intake project would be one means of developing this vision of the courthouse as a source of resolution.

B. In the Commercial Setting

The cost of delay in dispute resolution has long been recognized by the construction industry, where the profit margin is such that delay of a project could be disastrous.[165] In addition to widespread use of mandatory arbitration and mediation clauses to avoid costly litigation, the industry uses innovative dispute resolution techniques such as partnering, binding on-site adjudication of disputes by neutrals chosen at the beginning of the project, and a bonus to be shared if no disputes interrupt the project.[166] These devices assure that disputes will be addressed at the earliest possible time and at the lowest level.[167]

Companies such as Brown & Root, a construction and engineering firm, avoid litigation with the implementation of in-house grievance systems.[168] In an effort to handle grievances without resorting to the court system, Brown & Root in June 1993 instituted a grievance procedure for handling workplace problems, including those involving legally protected rights.[169] Agreement to this method of dispute resolution is a condition of continued employment with Brown & Root.[170] The procedure involves an employee hotline, open-door access to anyone in the company hierarchy for complaints and grievances, and in-house

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164. *Id.* Roger Fisher suggests that the casebook method of teaching law students to "think like lawyers" may orient lawyer education toward litigation. He believes that, because of the focus on litigation, training in problem solving and other important aspects of lawyering is neglected. *Id.; see also* Roger Fisher, *Coping with Conflict: What Kind of Theory Might Help?*, 67 NOTRE DAME L. REV. 1335, 1338 (1992).

165. For an excellent discussion of the proactive approach to disputes in the construction industry, see James P. Groton, *The Newest in ADR Approaches: A Review of Some Innovative Techniques the Construction Industry Has Developed That are Transferable to Other Industries*, ALTERNATIVE DISPUTE RESOLUTION INSTITUTE (1995) (program materials).

166. *Id.* at 1-2.

167. *Id.* at 2.

168. *The Brown & Root Dispute Resolution Program* (1993) (available in Georgia State University College of Law Library).

169. *Id.* at 2.

170. *Id.* at 13.

mediation.[171] Outside arbitration or mediation under the auspices of the American Arbitration Association is available if the dispute involves legally protected rights.[172]

Other companies such as AT&T, AT&T Global Information Solutions, US WEST, BankAmerica, and Chevron take a proactive approach to problems arising with customers, suppliers, and others so that the dispute does not become a source of litigation.[173] Perhaps even more importantly, because of the premium placed on enhancing existing relationships, the source of trouble in an employment relationship is dealt with at the earliest possible time so that future disputes may be avoided entirely.[174]

C. *In Higher Education*

On July 12, 1995, the Regents of the University System of Georgia promulgated an Initiative and Policy Direction on Conflict Resolution to encourage the early resolution of disputes and grievances between students, faculty, and staff on all its thirty-four campuses. The plan will be the first system-wide dispute resolution plan for higher education in the country.

V. BEYOND DISPUTE RESOLUTION: DISPUTE PREVENTION AND HEALING

A. *Peer Mediation*

In 1978, there were no public school mediation in projects the United States. By 1988, approximately two hundred public schools were introducing students to the use of mediation for disputes. By 1991, this number had grown to more than two thousand public school mediation projects. The phenomenal growth of peer mediation is in part a response to dismay felt by teachers, parents, students, and policy makers because of the surge of violence in our schools.[175] The peer mediation movement can be traced to four separate initiatives in the 1970s: a Quaker teaching project in the New York City schools; the

171. *Id.* at 3-12.
172. *Id.* at 11.
173. *See* Todd B. Carver & Albert A. Vondra, *Alternative Dispute Resolution: Why It Doesn't Work and Why It Does*, HARV. BUS. REV., May-June 1994, at 120, 124.
174. *Id.*
175. Jennifer P. Maxwell, *Mediation in the Schools: Self-Regulation, Self-Esteem, and Self-Discipline*, 7 MEDIATION Q. 149 (1989).

Carter administration's funding of neighborhood justice centers, including Atlanta's Neighborhood Justice Center (now the Justice Center of Atlanta); and two educational organizations, Educators for Social Responsibility (ESR) and the National Association for Mediation in Education (NAME).[176]

Peer mediation projects are generally introduced after students are exposed to principles of nonviolent conflict resolution as part of the curriculum. Specially trained student mediators assist disputants in crafting a resolution to conflict. Although disputes involving violence, sexual harassment, and other serious matters may not be appropriate for mediation, many disputes traditionally handled by suspensions, such as disputes between friends, fights on the school grounds, problems with bullies, and other interpersonal conflicts, can be more effectively handled through mediation. Mediation has the capacity to teach rather than simply punish. "The process of mediation provides a structure, not only for participatory decision making . . ., but also for teaching communication, listening, and problem-solving skills—the basic skills that foster self-regulation and self-esteem in an individual."[177]

Thus, even at the most fundamental level, "educated" individuals should have the ability to regulate themselves and to make wise decisions and choices in their lives. The potential of mediation for nurturing the individual's development of life skills through mediation is vast.

B. Victim-Offender Mediation

One of the most interesting experiments in the use of mediation for restorative justice is between victim and offender.[178] Since the first victim-offender program began in 1978, recognition of the value of the mediation process in this setting has grown.[179] Today, roughly 150 victim-offender

176. *Id.* at 149-50.
177. *Id.* at 152.
178. *See* Mark S. Umbreit, *Mediation of Victim Offender Conflict,* 1988 MO. J. DISP. RESOL. 85 (1988); Henry J. Reske, *Victim-Offender Mediation Catching On,* A.B.A. J., Feb. 1995, at 14; Mark S. Umbreit, *Helping Victims: Minnesota Mediation Center Produces Positive Results,* CORRECTIONS TODAY, Aug. 1991, at 192; Mark S. Umbreit, *Restorative Justice: Having Offenders Meet with Their Victims Offers Benefits for Both Parties,* CORRECTIONS TODAY, July 1991, at 164.
179. Mark S. Umbreit, *Mediation of Victim Offender Conflict,* 1988 MO. J. DISP. RESOL. 85 (1988).

programs have emerged in the United States, and programs are developing in France, Germany, England, and Norway as well.[180]

The use of victim-offender mediation is a recognition that the criminal justice system often does not address the crime victim's needs. By directly confronting the offender with the injury the offender has caused, the victim may be able to put aside some of the anger and hurt caused by the crime. Mediation also allows the offender to see the victim as a real person and to recognize the victim's injury. The mediation takes place with the consent of both parties. Typically, any agreement reached has no bearing on the punishment of the offender, although the terms of a workable restitution plan may be developed in the mediation.

CONCLUSION

American society today is plagued by division along racial, gender, and class lines. The wisdom of the ancient societies in cherishing a sense of community provides a powerful lesson for us at a time of deep suspicion and isolation. We need to look beyond retribution and vindication to a restorative justice that not only rights the wrongs, but heals the wounds. It is certain that the first step must be an end to posturing and a commitment to honest communication as well as the recognition of both the differences and the kinship that we share as a society.

180. Mark S. Umbreit, *Restorative Justice: Having Offenders Meet with Their Victims Offer Benefits for Both Parties*, CORRECTIONS TODAY, July 1991, at 165.

APPENDIX A

Georgia Supreme Court ADR Rules: Definitions

The term Alternative Dispute Resolution (ADR) refers to any method other than litigation for resolution of disputes. A definition of some common ADR terms follows.

Neutral. The term "neutral" as used in these rules refers to an impartial person who facilitates discussions and dispute resolution between disputants in mediation, case evaluation or early neutral evaluation, and arbitration, or who presides over a summary jury trial or mini trial. Thus, mediators, case evaluators, and arbitrators are all classified as "neutrals."

Mediation. Mediation is a process in which a neutral facilitates settlement discussions between parties. The neutral has no authority to make a decision or impose a settlement upon the parties. The neutral attempts to focus the attention of the parties upon their needs and interests rather than upon rights and positions. Although in court-annexed or court-referred mediation programs the parties may be ordered to attend a mediation session, any settlement is entirely voluntary. In the absence of settlement the parties lose none of their rights to a jury trial.

Arbitration. Arbitration differs from mediation in that an arbitrator or panel of arbitrators renders a decision after hearing an abbreviated version of the evidence. In non-binding arbitration, either party may demand a trial within a specified period. The essential difference between mediation and arbitration is that arbitration is a form of adjudication, whereas mediation is not.

Case Evaluation or Early Neutral Evaluation. Case evaluation or early neutral evaluation is a process in which a lawyer with expertise in the subject matter of the litigation acts as a neutral evaluator of the case. Each side presents a summary of its legal theories and evidence. The evaluator assesses the strength of each side's case and assists the parties in narrowing the legal and factual issues in the case. This conference occurs early in the discovery process and is designed to "streamline" discovery and other pretrial aspects of the case. The early neutral evaluation of the case may also provide a basis for settlement discussions.

Multi-door courthouse. The multi-door courthouse is a concept rather than a process. It is based on the premise that the justice system should make a wide range of dispute resolution processes available to disputants. In practice, skilled intake workers direct

disputants to the most appropriate process or series of processes, considering such factors as the relationship of the parties, the amount in controversy, anticipated length of trial, number of parties, and type of relief sought. Mediation, arbitration, case evaluation or early neutral evaluation, summary jury trial, mini trial, and various combinations of these ADR processes would all be available in the multi-door courthouse.

Summary jury trial. The summary jury trial is a non-binding abbreviated trial by mock jurors chosen from the jury pool. A judge or magistrate presides. Principals with authority to settle the case attend. The advisory jury verdict which results is intended to provide the starting point for settlement negotiations.

Mini trial. The mini trial is similar to the summary jury trial in that it is an abbreviated trial usually presided over by a neutral. Attorneys present their best case to party representatives with authority to settle. Generally, no decision is announced by the neutral. After the hearing, the party representatives begin settlement negotiations, perhaps calling on the neutral for an opinion as to how a court might decide the case.

Settlement week. During a settlement week there is a moratorium on litigation. Mediation is the ADR process most often used during settlement week. Appropriate cases are selected by the court and submitted to mediation. Lawyers and others who have undergone mediation training often act as volunteer mediators for these cases.

APPENDIX B

ADR Court Programs in Georgia

Chatham County: Referrals to the Neighbor to Neighbor Mediation Center
Clayton County: Juvenile Court Mediation Program
Cobb County: Superior Court Mediation Program
Cobb County: Juvenile Court Mediation Program
Cobb County: Magistrate Court Mediation Program
Conasauga Circuit: Mediation Program
Cordele Circuit: Mediation Program
Coweta Circuit: Mediation Program
DeKalb County: Multi-Door Program
Douglas County: Mediation Program
Dougherty County: Non-Binding Arbitration Program
Dublin Circuit: Mediation Program
Fulton County: In-House Domestic Relations Mediation Program and Non-Binding Arbitration Program and Referrals to the Justice Center of Atlanta, Inc.
Griffin Circuit: Mediation Program
Gwinnett County: Mediation Program
Houston County: Juvenile Court Mediation Program
Newton County: Juvenile Court Mediation Program
Ninth Judicial Administrative District: Mediation Program Serving Fourteen Counties
Northern Circuit: Mediation Program
Southern Judicial Circuit: Mediation Program
Third Judicial Administrative District: Mediation Program
Western Circuit: Mediation Program