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## ADR: THE NEW EQUITY

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The course of justice is like the alternation of the seasons. There is the hope and inspiration of spring and the achievement and reward of summer, and there is the descent and sacrifice of autumn and the moral and intellectual destitution of winter, and the changes in our jurisprudence will come accordingly in spite of us, however much we may be the appointed instruments in their consummation.<sup>1</sup>

### I. INTRODUCTION

The proliferation of alternative dispute resolution (ADR) has transformed the administration of civil justice. As both a rival and a complement to formal adjudication, ADR presents an alternative forum for most disputes. ADR offers a system with procedural flexibility, a broad range of remedial options, and a focus on individualized justice. ADR performs convenient and useful works that cannot be done, or cannot easily be done, through formal adjudication. And in every case in which one of the various modes of ADR offers a process or reaches a result that differs materially from those of the formal courts, there is in fact a rival system. Thus, contemporary civil justice is administered by dual systems, with formal adjudication on one hand, and a constellation of ADR methods on the other.

The administration of justice through divided systems is a familiar model. For centuries the Anglo-American legal system administered justice through the systems of Law and Equity. The Law courts ensured uniformity and predictability, while courts in Equity tempered the law to the needs of the particular case. Although there was considerable tension between the two regimes, they were also symbiotic. Over time the Law courts adopted many of the best practices of Equity. Meanwhile, efforts to crystallize the jurisdiction of Equity introduced complexity and procedural technicalities that turned that system into a

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1. Douglas M. Gane, *The Birth of a New Equity*, 67 SOLIC. J. & WKLY REP. 572, 572 (1923).

*jus strictum* differing little from the Common Law. With each system looking increasingly like the other, Law and Equity were merged into a single system in a wave of reforms in the late nineteenth and early twentieth centuries. The reformers envisioned a unified procedural apparatus that would permit judges to jointly administer the substance of both law and equity. However, an important ingredient of the jurisprudence of Equity was displaced by the procedural merger: a merged system offered no recourse from the procedural apparatus itself when the unique needs of a particular case demanded a different procedure. Moreover, the substance of equity lost much of its vitality in the merged system.

The system of ADR stands in this breach created by the merger of Law and Equity. ADR offers an alternative system for relief from the hardship created by the substantive and procedural law of formal adjudication. Moreover, the freedom, elasticity, and luminance of ADR bear a striking resemblance to traditional Equity, offering relaxed rules of evidence and procedure, tailored remedies, a simpler and less legalistic structure, improved access to justice, and a casual relationship with the substantive law. Alas, the dark side of ADR is also reminiscent of Equity: unaccountability, secrecy, an inability to extend its jurisdictional reach beyond the parties immediately before it, and a certain vulnerability to capture by special interests.

The reincarnation of equity through ADR illustrates a pervasive dialectic between law and equity. Conflict between the goals of certainty and individual justice has created an ambivalent attitude in the law toward equity, to which the law is attracted by reason of the identification of equity with a general sense of justice, but which the law ultimately rejects because of the law's concern for certainty. Hence, a vibrant system of Equity mediated the strict law until it, too, became bound and confined by the channels of its own precedents and the technicalities of its own procedures. ADR emerged, in turn, as the equitable alternative. And the pattern repeats: the remarkable popularity of ADR leads inevitably, albeit ironically, to reforms that would constrain that very system.

This Article uses an equity paradigm to develop a theory of ADR and, where necessary, to guide reform. Preserving equity through ADR is important because no set of prohibitive or declaratory rules will do justice in all cases or will anticipate all situations. Because unimaginable events are inevitable, some alternative or escape from rule-bound formalism is important. Indeed, equity is a progressive force in the law. When formal adjudication cannot provide a plain, adequate, and complete remedy, the system of ADR should be flexible enough to

deliver individualized justice. The repeated exercise of that protean jurisdiction identifies systemic failures of the formal system and ultimately wields a reforming influence. The need for an autonomous system of discretionary law may be as great as or greater than ever. Thus, the Article argues that equity should make the most of the modern instrument, ADR, as it once did of the subpoena.

This Article consists of five steps. Parts II and III are largely descriptive. Part II briefly describes the emergence of ADR as a court of general civil jurisdiction. Part III calls attention to the characteristics of traditional equity that are echoed in the system of ADR.

Parts IV and V analyze the dynamic and oppositional forces of law and equity. Part IV focuses on the interplay of those forces between the traditional dual systems of Law and Equity. Part V focuses on the contemporary dual systems of formal adjudication and ADR.

Finally, Part VI is prescriptive, arguing that flexibility and discretion should prevail in ADR processes even when pragmatism may demand detail and complexity. ADR must be free of the procedural paraphernalia of certainty and predictability to perform its complementary role in the administration of justice through dual systems. Contemporary efforts to standardize and restrict the processes of ADR recognize the right problem, but propose the wrong solution. The problem is the number and significance of cases that are resolved outside of formal adjudication. The solution is not reform of the alternative system that is drawing them in, but rather reform of the formal system that is driving them away.

## II. THE DEVELOPMENT OF A SYSTEM OF ADR

There are numerous social, cultural, and practical forces that steer disputing parties away from state-sponsored adjudicatory processes.<sup>2</sup> Accordingly, some grievances never become disputes at all.<sup>3</sup> Some

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2. See generally Richard E. Miller & Austin Sarat, *Grievances, Claims, and Disputes: Assessing the Adversary Culture*, 15 LAW & SOC'Y REV. 525 (1981) (describing the range and reporting the incidence of grievances, claims, and civil legal disputes).

3. See Marc Galanter, *Reading the Landscape of Disputes: What We Know and Don't Know (And Think We Know) About Our Allegedly Contentious and Litigious Society*, 31 UCLA L. REV. 4, 5, 12–16 (1983) (suggesting that “only a small portion of troubles and injuries become disputes; [and] only a small portion of these become lawsuits;” and that formal lawsuits are more likely to settle than to litigate); Michelle M. Mello & Troyen A. Brennan, *Deterrence of Medical Errors: Theory and Evidence for Malpractice Reform*, 80 TEX. L. REV. 1595, 1609 (2002) (reporting that “HPMS data showed that only 13% of negligent injuries . . . resulted in malpractice claims”); William L.F. Felstiner, *Influences of Social Organization on Dispute Processing*, 9 LAW & SOC'Y REV. 63 (1974) (noting that persons with grievances will often avoid potential conflict).

disputes are resolved through private negotiations that lead to consensual solutions.<sup>4</sup> And some disputes are resolved in a triangulated process facilitated by a neutral third party who is not a judge.<sup>5</sup> Even among those cases that are pursued in the courts, the vast majority are resolved by means other than a judicial determination.<sup>6</sup> The many paths of extrajudicial dispute resolution have been trod for centuries, and probably always will be.<sup>7</sup>

4. See, e.g., Arthur Best & Alan R. Andreasen, *Consumer Response to Unsatisfactory Purchases: A Survey of Perceiving Defects, Voicing Complaints, and Obtaining Redress*, 11 LAW & SOC'Y REV. 701, 713–14 (1977) (finding only 3.7% voiced complaints studied reached any third party; only 16% of those brought to third parties were brought to a lawyer or court); Melvin Aron Eisenberg, *Private Ordering Through Negotiation: Dispute Settlement and Rulemaking*, 89 HARV. L. REV. 637 (1976) (exploring the relationship between negotiation and official processes).

Even when a dispute is resolved by settlement, the aggrieved may not take the additional step(s) required to be compensated. According to a fee-based service that offers to search its database of recent class action settlement funds, “more than half of those entitled to payment fail to file a claim.” Unclaimed Class Action Lawsuit Settlement Funds Search, [http://www.unclaimedassets.com/class\\_action\\_lawsuit.htm](http://www.unclaimedassets.com/class_action_lawsuit.htm) (last visited Jan. 31, 2005).

5. See generally STEPHEN B. GOLDBERG ET AL., DISPUTE RESOLUTION: NEGOTIATION, MEDIATION, AND OTHER PROCESSES 6–9 (3d ed. 1999); Jeffrey W. Stempel, *Reflections on Judicial ADR and the Multi-Door Courthouse at Twenty: Fait Accompli, Failed Overture, or Fledgling Adulthood?*, 11 OHIO ST. J. ON DISP. RESOL. 297, 309–28 (1996).

6. A federal court study shows that in 2002 the percentage of federal civil cases tried had dropped to 1.8% from 11.5% in 1962. Marc Galanter, *The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts*, 1 J. EMPIRICAL LEGAL STUD. 459 (2004). See also Stephen N. Subrin & Thomas O. Main, *The Integration of Law and Fact in an Uncharted Parallel Procedural Universe*, 79 NOTRE DAME L. REV. 1981, 2001–02 & nn. 94–96 (2004).

7. See generally JEROLD S. AUERBACH, JUSTICE WITHOUT LAW 4 (1983) (“In many and varied communities, over the entire sweep of American history, the rule of law was explicitly rejected in favor of alternative means for ordering human relations and for resolving the inevitable disputes that arose between individuals.”); ROBERT ELLICKSON, ORDER WITHOUT LAW: HOW NEIGHBORS SETTLE DISPUTES 137–40 (1991) (“[L]egal instrumentalists have tended to underappreciate the role that nonlegal systems play in achieving social order”).

State law is the Johnny-come-lately on the scene, because the State itself is a relatively recent development. When we look realistically at the way disputes are resolved currently in even the most State-saturated society, it is obvious that State dispute resolution techniques play only a backup role. From two teenagers bickering in the backyard to disputes among giant corporations, State techniques, if pertinent at all, come to the fore only if all else fails.

IAN R. MACNEIL, AMERICAN ARBITRATION LAW: REFORMATION, NATIONALIZATION, INTERNATIONALIZATION 4 (1992) (footnote omitted). See also Valerie A. Sanchez, *Back to the Future of ADR: Negotiating Justice and Human Needs*, 18 OHIO ST. J. ON DISP. RESOL. 669 (2003).

The history of arbitration, in particular, has been successfully mined. See, e.g., Paul L. Sayre, *Development of Commercial Arbitration Law*, 37 YALE L.J. 595 (1928); Earl S. Wolaver, *The Historical Background of Commercial Arbitration*, 83 U. PA. L. REV. 132, 132–34 (1934); FRANCES KELLOR, ARBITRATION AND THE LEGAL PROFESSION 3 (1952); William C. Jones, *Three Centuries of Commercial Arbitration in New York: A Brief Survey*, 1956 WASH. U. L.Q. 193; James B. Boskey, *A History of Commercial Arbitration in New Jersey*, 8 RUTGERS-CAM. L.J. 1 (1976) (tracing English and colonial roots of commercial arbitration); Bruce H. Mann, *The Formalization of Informal Law: Arbitration Before the American Revolution*, 59 N.Y.U. L. REV. 443 (1984); Katherine Van Wezel Stone, *Rustic*

Certain contours of the dispute resolution landscape changed in the 1970s, as formal adjudication faced special criticism and pressures.<sup>8</sup> Courts experienced an “explosion” of new and complex cases,<sup>9</sup> “discovery abuse” reached intolerable levels,<sup>10</sup> and an unprecedented lack of civility among lawyers delayed the resolution of cases and jeopardized the reputation of the profession.<sup>11</sup> Critics complained that ordinary citizens no longer had meaningful access to the courts;<sup>12</sup>

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*Justice: Community and Coercion Under the Federal Arbitration Act*, 77 N.C. L. REV. 931 (1999).

For some history of the mediation movement, see ROBERT A. BARUCH BUSH & JOSEPH P. FOLGER, *THE PROMISE OF MEDIATION: RESPONDING TO CONFLICT THROUGH EMPOWERMENT AND RECOGNITION* 15–32 (1994).

8. Some scholars might date the transformation to the previous decade. See JAMES ALFINI ET AL., *MEDIATION THEORY AND PRACTICE* 1 (2001) (“[M]ediation’s prominence and expanded use emerged in the United States in the late 1960’s as part of the ‘movement’ known as ‘Alternative Dispute Resolution.’ (ADR).”); but see *id.* at 12 (“As activities coalesced during the 1970s, several important efforts to improve practice and theory emerged.”).

9. John H. Barton, *Behind the Legal Explosion*, 27 STAN. L. REV. 567 (1975); Macklin Fleming, *Court Survival in the Litigation Explosion*, 54 JUDICATURE 109 (1970); Bayless Manning, *Hyperlexis: Our National Disease*, 71 NW. U. L. REV. 767 (1977); Maurice Rosenberg, *Let’s Everybody Litigate?*, 50 TEX. L. REV. 1349 (1972); Maurice Rosenberg, *Devising Procedures That Are Civil To Promote Justice That Is Civilized*, 69 MICH. L. REV. 797, 801 (1971) (referring to “glutted calendars and mobbed courtrooms; the unconscionable delays, alternating with rush-rush-rush; the mistreatment of jurors and witnesses; the excessive expense; [and] the tarnished image of justice for millions of Americans”). See generally Marc Galanter, *The Turn Against Law: The Recoil Against Expanding Accountability*, 81 TEX. L. REV. 285, 292 n.44 (2002) (claiming that the term “litigation explosion” first appeared in print in 1970 and attributing it to Justice Macklin Fleming of the California Court of Appeals); Arthur R. Miller, *The Pretrial Rush to Judgment: Are the “Litigation Explosion,” “Liability Crisis,” and Efficiency Clichés Eroding Our Day in Court and Jury Trial Commitments?*, 78 N.Y.U. L. REV. 982, 985 (2003) (“The contemporary perception of a crisis in the judicial system first became prominent in the 1970s.”); Arthur R. Miller, *The Adversary System: Dinosaur or Phoenix*, 69 MINN. L. REV. 1, 3 (1984) (discussing the “litigation explosion”); Thomas Lambros, *The Summary Jury Trial and Other Alternative Methods of Dispute Resolution: A Report to the Judicial Conference of the United States Committee on the Operation of the Jury System*, 103 F.R.D. 461, 465 (1984) (same); Gresham M. Sykes, *Cases, Courts and Congestion*, in *LAW IN CULTURE AND SOCIETY* 327, 328 (Laura Nader ed., 1969) (“Part of the difficulty in getting rid of court congestion appears to be . . . [that] it is not simply an accidental defect of the law, but is rooted in some of the legal system’s most cherished characteristics.”).

10. Wayne D. Brazil, *The Adversary Character of Civil Discovery: A Critique and Proposals for Change*, 31 VAND. L. REV. 1295 (1978); C. RONALD ELLINGTON, *A STUDY OF SANCTIONS FOR DISCOVERY ABUSE* (1979).

11. See Warren Burger, *The Necessity for Civility*, 52 F.R.D. 211 (1971); Richard Wasserstrom, *Lawyers as Professionals: Some Moral Issues*, 5 HUM. RTS. 1 (1975).

Two other reform currents may merit mention here. First, it was during this decade that prohibitions on advertising by lawyers were lifted. See generally Geoffrey C. Hazard, Russell G. Pierce & Jeffrey W. Stempel, *Why Lawyers Should be Allowed to Advertise: A Market Analysis of Legal Services*, 58 N.Y.U. L. REV. 1084 (1983). Second, the Model Code of Professional Responsibility was created in 1969 when the American Bar Association grouped and adopted nearly fifty canons from various state bar associations. See generally Jason J. Kilborn, *Who’s in Charge Here?: Putting Clients in Their Place*, 37 GA. L. REV. 1 (2002).

12. See, e.g., Laura Nader, *Disputing Without the Force of Law*, 88 YALE L.J. 998, 1001 n.16 (1979) (“Our legal system has taken too literally the ancient maxim, ‘de minimis non curat lex.’”)

business clients, too, were demanding more efficient dispute resolution alternatives.<sup>13</sup>

In April 1976, acknowledging a certain amount of “deferred maintenance” in the courts, Chief Justice Burger convened the National Conference on the Causes of Popular Dissatisfaction with the Administration of Justice.<sup>14</sup> This extraordinary event brought together three hundred conferees from the bench, bar, and academia.<sup>15</sup> The varied agendas of this crowd adumbrated dozens of problems ranging from the excesses of diversity jurisdiction and the prosecution of

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(quoting REGINALD HEBER SMITH, *JUSTICE AND THE POOR* 41 (1924)); Laura Nader & Linda R. Singer, *Law in the Future: What are the Choices? Dispute Resolution . . .*, 51 CAL. ST. B.J. 281 (1976); LAWRENCE M. FRIEDMAN, *SOME HISTORICAL ASPECTS OF LAW AND SOCIAL CHANGE IN THE UNITED STATES* (1973); Mauro Cappelletti & Bryant Garth, *Access to Justice: The Newest Wave in the Worldwide Movement to Make Rights Effective*, 27 BUFF. L. REV. 181 (1978); Russell G. Pearce, Patrick W. Shea & Jeffrey W. Stempel, *An Assessment of Alternative Strategies for Increasing Access to Legal Services*, 90 YALE L.J. 122 (1980); BARBARA A. CURRAN, *THE LEGAL NEEDS OF THE PUBLIC* (1977); *Dispute Resolution*, 88 YALE L.J. 905, 906 (1979) (bemoaning “the persistent inaccessibility of judicial relief for poor and middle-class people”).

13. See, e.g., Raymond G. Leffler, *Dispute Settlement Within Close Corporations*, 31 ARB. J. 254 (1976); Timothy S. Hardy & R. Mason Cargill, *Resolving Government Contract Disputes: Why Not Arbitrate?*, 34 FED. B.J. 1 (1975); Howard M. Haltzmann, *The Value of Arbitration and Mediation in Resolving Community and Racial Disputes Affecting Business*, 29 BUS. LAW. 1005 (1974); Laurence Silberman, *Will Lawyering Strangle Democratic Capitalism?*, REGULATION, Mar./Apr. 1978, at 15; ARBITRATION-COMMERCIAL DISPUTES, INSURANCE, AND TORT CLAIMS (A. Widiss ed., 1979); Robert F. Peckham, *A Judicial Response to the Cost of Litigation: Case Management, Two-Stage Discovery Planning and Alternative Dispute Resolution*, 37 RUTGERS L. REV. 253, 253 (1985); Deborah R. Hensler, *Our Courts, Ourselves: How the Alternative Dispute Resolution Movement is Re-Shaping Our Legal System*, 108 PENN ST. L. REV. 165, 181 (2003) (discussing the early effort of the business community in “Getting to Yes and Getting Rid of Juries”).

14. The conference adopted the precise title of Roscoe Pound’s 1906 indictment at the American Bar Association’s annual meeting in St. Paul, Minnesota. Pound had then criticized the “sporting theory of justice,” “our exaggerated contentious procedure,” and “our archaic system of courts.” Pound’s speech was a catalyst for reform efforts leading ultimately to the adoption of the Rules Enabling Act and uniform Federal Rules of Civil Procedure. See Stephen N. Subrin, *How Equity Conquered Common Law: The Federal Rules of Civil Procedure in Historical Perspective*, 135 U. PA. L. REV. 909, 945 (1987). The 1976 conference, which has come to be known as the Pound Conference, symbolically was also held in St. Paul, Minnesota. Chief Justice Burger proudly stated that the Pound Conference was addressing the “unfinished business” placed on the American Agenda by Pound’s 1906 speech. Warren E. Burger, *Preface*, in *THE POUND CONFERENCE: PERSPECTIVES ON JUSTICE IN THE FUTURE* 5, 5 (A. Leo Levin & Russell R. Wheeler eds., 1979). See generally Symposium, *The Impact of Mediation: 25 Years After the Pound Conference*, 17 OHIO ST. J. ON DISP. RESOL. 527 (2002).

15. According to the published list, approximately sixty percent of the conferees were judges or court administrators; fewer than 10% were law professors; and about fifteen percent were various representatives of the American Bar Association. Conferees hailed from forty-eight of the fifty states (and also from Puerto Rico and American Samoa). See *THE POUND CONFERENCE: PERSPECTIVES ON JUSTICE IN THE FUTURE*, *supra* note 14, Appx. C, at 355–68 (list of conferees). I fantasize that the State of Montana was purposely excluded in an effort to spite the legacy of Thomas J. Walsh, the noble senator therefrom who for nearly two decades almost single-handedly blocked the adoption of Federal Rules of Civil Procedure. See Subrin, *supra* note 14, 996–99. Alas there is probably some mundane explanation: West Virginia, too, appears to have had no representative in attendance.

victimless crimes to the right to a jury trial and the dearth of empirical research.<sup>16</sup> The conference “arous[ed] a new spirit of zeal for fundamental procedural reform” and endorsed innovation.<sup>17</sup>

Our own great hope for the Pound Conference is that it will be remembered in the year 2000 not simply as a lively colloquium of experts but as the occasion when, under the strong leadership of the Chief Justice, Twentieth Century law reform in the United States really got under way. For this reason, we invite the reader’s particular attention to the reports of the Pound Conference Follow-Up Task Force, which appear at the end of this book. The campaign for procedural improvement must be waged on many fronts, and the reports of the Task Force provide a unique and valuable map of the terrain as well as the first practical step, and a highly encouraging one, towards the attainment of Agenda 2000 A.D.<sup>18</sup>

The papers presented at the conference were published in a bound volume entitled *The Pound Conference: Perspectives on Justice in the Future*.<sup>19</sup> The book title’s upbeat and reformist tone is revealing in light of the title of the conference itself.<sup>20</sup>

Professor Frank Sander’s speech at the Pound Conference, entitled *Varieties of Dispute Processing*, envisioned “by the year 2000 not simply a court house but a Dispute Resolution Center, where the grievant would first be channelled through a screening clerk who would then direct him to the process (or sequence of processes) most appropriate to his type of case.”<sup>21</sup> Sander suggested that dispute

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16. Robert H. Bork, *Dealing With the Overload in Article III Courts*, in THE POUND CONFERENCE: PERSPECTIVES ON JUSTICE IN THE FUTURE, *supra* note 14, at 150 (advocating for the abolition of diversity jurisdiction); Simon H. Rifkind, *Are We Asking Too Much of Our Courts?*, in THE POUND CONFERENCE: PERSPECTIVES ON JUSTICE IN THE FUTURE, *supra* note 14, at 51 (inviting the legislative branch to reexamine the possibility of decriminalizing drunkenness, prostitution, and gambling); Walter Schaefer, *Is the Adversary System Working in Optimal Fashion?*, in THE POUND CONFERENCE: PERSPECTIVES ON JUSTICE IN THE FUTURE, *supra* note 14, at 171 (suggesting that trial by jury in civil cases has no contemporary justification); Laura Nader, *Commentary in THE POUND CONFERENCE: PERSPECTIVES ON JUSTICE IN THE FUTURE*, *supra* note 14, at 114 (emphasizing the absence of important data).

17. William T. Gossett et al., *Foreword to THE POUND CONFERENCE: PERSPECTIVES ON JUSTICE IN THE FUTURE*, *supra* note 14, at 7, 15. Cf. John H. Wigmore, *Roscoe Pound’s St. Paul Address of 1906: The Spark that Kindles the White Flame of Progress*, 20 J. AM. JUDICATURE SOC’Y 176, 176 (1937) (crediting Pound’s speech as “the spark that kindled the white flame of high endeavor, now spreading through the entire legal profession”).

18. Gossett et al., *supra* note 17, at 15.

19. Nader, *supra* note 16.

20. Query whether Pound’s reforms might have been more warmly embraced and more promptly enacted, had the title of his speech “Causes for Popular Dissatisfaction with the Administration of Justice” enjoyed the benefit of such handlers. See generally Wigmore, *supra* note 17. With regard to the events in the intervening decades between Pound’s speech and the legislative reform, see Subrin, *supra* note 14.

21. Frank E.A. Sander, *Varieties of Dispute Processing*, in THE POUND CONFERENCE:

resolution required a flexible and diverse panoply of processes to meet the systematic needs of entire categories of certain types of cases and also the unique circumstances presented in particular cases.<sup>22</sup> Although he did not himself then use the phrase “multi-door courthouse,” such is the frequent characterization of his ideal.<sup>23</sup> Moreover, his remarks are often credited as marking the birth of the modern ADR movement.<sup>24</sup>

The ADR movement found traction because it intertwined threads of the political left<sup>25</sup> and right,<sup>26</sup> responded to a genuine problem within

PERSPECTIVES ON JUSTICE IN THE FUTURE, *supra* note 14, at 65, 84.

22. See *id.* at 72–79 (outlining criteria for determining how particular disputes might best be resolved). See also Richard L. Abel, *A Comparative Theory of Dispute Institutions in Society*, 8 LAW & SOC’Y REV. 217 (1973).

23. See Stempel, *supra* note 5, at 331 nn.110 & 111. Professor Stempel points out that Sander used the term in a subsequent article. *Id.* (citing Frank E.A. Sander, *The Multi-door Courthouse*, NAT’L FORUM, Fall 1983, at 24).

24. See, e.g., Jean R. Sternlight, *ADR is Here: Preliminary Reflections on Where it Fits in a System of Justice*, 3 NEV. L.J. 289, 289 n.3 (2003); Developments, *The Paths of Civil Litigation*, 113 HARV. L. REV. 1851, 1853 n.9 (2000); Kimberlee K. Kovach & Lela P. Love, *Mapping Mediation: The Risks of Riskin’s Grid*, 3 HARV. NEGOT. L. REV. 71 (1998); Stempel, *supra* note 5, at 309; E. WENDY TRACHTE-HUBER & STEPHEN K. HUBER, ALTERNATIVE DISPUTE RESOLUTION: STRATEGIES FOR LAW AND BUSINESS 3–4, 29 (1996); Laura Nader, *Controlling Processes in the Practice of Law: Hierarchy and Pacification in the Movement to Re-Form Dispute Ideology*, 9 OHIO ST. J. ON DISP. RESOL. 1, 5–6 (1993); Laura Nader, *The ADR Explosion—The Implications of Rhetoric in Legal Reform*, 8 WINDSOR Y.B. ACCESS TO JUST. 269 (1988); Jethro K. Lieberman & James F. Henry, *Lessons From the Alternative Dispute Resolution Movement*, 53 U. CHI. L. REV. 424, 427 n.17 (1986).

25. See generally Ralph Nader, *Consumerism and Legal Services: The Merging of Movements*, 11 LAW & SOC’Y REV. 247, 255 (1976) (“The [legal] system must be designed to encourage the nonlegal resolution of disputes, and public participation in planning processes, as well as more traditional legal activity like litigation.”); William H. Simon, *Legal Informality and Redistributive Politics*, 19 CLEARINGHOUSE REV. 384, 384–87 (1985); Laurence H. Tribe, *Too Much Law, Too Little Justice*, ATLANTIC, July 1979, at 25; FORD FOUNDATION, *MEDIATING SOCIAL CONFLICT* 4 (1978) (third-party intervention efforts supported by Ford Foundation include mediation, arbitration, facilitation, fact-finding, and conciliation); FORD FOUNDATION, *CURRENT INTERESTS OF THE FORD FOUNDATION: 1978 AND 1979* 6–7 (“The [Ford] Foundation plans to support investigations of new ways of settling disputes that may be more equitable, cheaper, and less divisive than the adversary process.”).

26. Chief Justice Burger and others viewed ADR as a mechanism for lightening the caseload of judges. See, e.g., Warren Burger, *Isn’t There a Better Way?*, 68 A.B.A. J. 274, 276–77 (1982) (advocating private binding arbitration as “a better way to do it”); Derek Bok, *The President’s Report to the Board of Overseers of Harvard College, 1981–1982*, reprinted in N.Y. ST. B.J., Oct. 1983, at 8, and N.Y. ST. B.J., Nov. 1983, at 31; M.W. Cannon, *Contentious and Burdensome Litigation: A Need for Alternatives*, NAT’L FORUM, Fall 1983, at 10; Thomas Ehrlich, *Legal Pollution*, N.Y. TIMES MAG., Feb. 8, 1976, at 17, 21; Jarrold K. Footlick, *Too Much Law?*, NEWSWEEK, Jan. 10, 1977, at 42, 47; Manning, *supra* note 9, at 780; Rosenberg, *supra* note 9, at 1360–63; Tribe, *supra* note 25, at 25. Owen Fiss wrote that Chief Justice Burger was not “moved by love, or by a desire to find new ways to restore or preserve loving relationships, but rather by concerns of efficiency and politics. He seeks alternatives to litigation in order to reduce the caseload of the judiciary or, even more plausibly, to insulate the status quo from reform by the judiciary.” Owen M. Fiss, *Out of Eden*, 94 YALE L.J. 1669, 1670 (1985). See also Stempel, *supra* note 5, at 344 (“ADR’s biggest boosters are commercial organizations, employers, insurers, political conservatives and Republicans.”).

Another procedural reform current bears mention here. The year 1976 also brought the Court’s



the legal profession,<sup>27</sup> and resonated with a changing sociopolitical culture.<sup>28</sup> Litigants of all types had a new forum for dispute resolution,<sup>29</sup> courts had competition,<sup>30</sup> the academy had a new discipline,<sup>31</sup> and the rhetoric of peaceful problem-solving offered a

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decision in *Mathews v. Eldredge*, 424 U.S. 319 (1976), reflecting a certain diminution in the guarantees of due process. See generally Jerry L. Mashaw, *The Supreme Court's Due Process Calculus for Administrative Adjudication in Mathews v. Eldridge: Three Factors in Search of a Theory of Value*, 44 U. CHI. L. REV. 28 (1976).

27. ABA REPORT ON THE NATIONAL CONFERENCE ON MINOR DISPUTES RESOLUTION 11–12 (Frank E.A. Sander ed., 1977); Robert H. Mnookin & Lewis Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 YALE L.J. 950 (1979).

28. Alternative dispute settlement agencies have emerged, I believe, because there is, in the United States, a growing feeling of dissatisfaction with, and a more critical attitude towards, professionals, an increasing consciousness that America and Americans must recapture a sense of “community,” and a growing feeling that individuals must play a more active role in determining how their lives are to be lived. Mediation centers and similar agencies are, to a large extent, a response to these concerns.

David N. Smith, *A Warmer Way of Disputing: Mediation and Conciliation*, 26 AM. J. COMP. L. 205, 209 (1978); Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281 (1976) (examining society’s evolving expectations of courts and judges).

See generally Stephen N. Subrin, *A Traditionalist Looks at Mediation: It’s Here to Stay and Much Better Than I Thought*, 3 NEV. L.J. 196, 212 (2002/2003) (suggesting that the commonality of procedural reform movements include: “(1) obvious defects in the existing procedural systems; (2) agendas of the legal profession; (3) conservative ideology; and (4) liberal ideology”); Linda R. Singer, *A Pioneer’s Perspective: Future Looks Bright, But Challenges Include Retaining Our Core Values*, DISP. RESOL. MAG., Spring 2000, at 26–27 (“The [Pound] Conference coalesced the interests of those who focused on access and participation or voice with those who focused on costs and efficiency. Those interests have coexisted, somewhat uneasily, in the field ever since and have helped to shape the dispute resolution profession that has grown up as a result.”)

29. For example, the Center for Public Resources (CPR) was founded in 1979 with support from private foundations and memberships of in-house and firm counsel of the country’s largest companies. CPR’s mission is to promote innovation and excellence in methods of alternative dispute resolution. Approximately 4000 companies (800 parent companies, on behalf of themselves and their combined 3200 subsidiaries) have subscribed to the CPR Corporate Policy Statement on Alternatives to Litigation, obligating them to explore the use of ADR in disputes with other signers. Similarly, approximately 1,500 law firms have signed the CPR Law Firm Policy Statement on Alternatives to Litigation, committing them to counsel their clients about ADR options. See <http://www.cpradr.org/> (last visited Oct. 20, 2004).

30. Edward Brunet, *Questioning the Quality of Alternative Dispute Resolution*, 62 TUL. L. REV. 1, 47–48 (1987) (exploring the competitive aspects of the relationship between ADR and publicly financed courts).

ADR was quickly viewed as part of the solution to many categories of cases. See, e.g., Ronald L. Goldfarb & Linda R. Singer, *Redressing Prisoners’ Grievances*, 39 GEO. WASH. L. REV. 175, 314–17 (1970); Leffler, *supra* note 13, at 254; Andrew J. Nocas, *Arbitration of Medical Malpractice Claims*, 13 FORUM 254 (1977); Comment, *Nontraditional Remedies for the Settlement of Consumer Disputes*, 49 TEMP. L.Q. 385 (1976); Haltzmann, *supra* note 13; Note, *Arbitration of Attorney Fee Disputes: New Direction for Professional Responsibility*, 5 UCLA-ALASKA L. REV. 309 (1976); Hardy *supra* note 13; Matthew W. Finkin, *The Arbitration of Faculty Status Disputes in Higher Education*, 30 SMU L. REV. 389 (1976).

31. See, e.g., DEAN PRUITT & JEFFREY RUBIN, *SOCIAL CONFLICT* (1986); CHRISTOPHER W. MOORE, *THE MEDIATION PROCESS* (1986); HOWARD RAIFFA, *THE ART AND SCIENCE OF NEGOTIATION*

quixotic escape from all of that which plagued formal adjudication.<sup>32</sup> At the time of Sander's speech there already existed a broad array of proposed and experimental models of alternative dispute resolution.<sup>33</sup>

(1982); GARY BELLOW & BEA MOULTON, *THE LAWYERING PROCESS: NEGOTIATION* (1981); HARRY T. EDWARDS & JAMES J. WHITE, *THE LAWYER AS NEGOTIATOR: PROBLEMS, READINGS AND MATERIALS* (1977); ROGER FISHER & WILLIAM C. URY, *GETTING TO YES: NEGOTIATING AGREEMENT WITHOUT GIVING IN* (1981); P. H. GULLIVER, *DISPUTES AND NEGOTIATIONS: A CROSS-CULTURAL PERSPECTIVE* (1979); DEAN G. PRUITT, *NEGOTIATION BEHAVIOR* (1981); STEVEN J. BRAMS & ALAN D. TAYLOR, *FAIR DIVISION: FROM CAKE-CUTTING TO DISPUTE RESOLUTION* (1996); Carrie Menkel Meadow, Review Essay, *Legal Negotiation: A Study of Strategies in Search of a Theory*, 1983 AM. BAR FOUND. RES. J. 905 (1983).

See generally William M. Landes & Richard A. Posner, *Adjudication as a Private Good*, 8 J. LEGAL STUD. 235 (1979); E. ALLEN LIND & TOM R. TYLER, *THE SOCIAL PSYCHOLOGY OF PROCEDURAL JUSTICE* (1988); JOHN THIBAUT & LAURENS WALKER, *PROCEDURAL JUSTICE: A PSYCHOLOGICAL ANALYSIS* (1975); E. Allen Lind et al., *In the Eye of the Beholder: Tort Litigants' Evaluations of Their Experiences in the Civil Justice System*, 24 LAW & SOC'Y REV. 953 (1990); Steven Shavell, *Alternative Dispute Resolution: An Economic Analysis*, 24 J. LEGAL STUD. 1 (1995); Lee Ross, *Reactive Devaluation in Negotiation and Conflict Resolution*, in BARRIERS TO CONFLICT RESOLUTION 26, 38–42 (Kenneth Arrow et al. eds., 1999).

Even law schools, until recent years, have provided little or no training in negotiation skills. How strange! The lawyer's major revenue-producing activity is negotiating. Only very recently have such courses begun to appear on the curriculum of even the best law schools. Just this year, West Publishing Company added a casebook on the subject to its American Casebook Series: *The Lawyer as a Negotiator* by Professor Harry T. Edwards of Harvard and James J. White of Michigan (1977).

Robert Coulson, *New Dimensions in Dispute Settlement for the Lawyer*, in THE AMERICAN ARBITRATION ASSOCIATION'S WIDE WORLD OF ARBITRATION: AN ANTHOLOGY 188, 189 (Charlotte Gold & Susan Mackenzie eds., 1978); Robert B. Moberly, *Introduction: Dispute Resolution in the Law School Curriculum: Opportunities and Challenges*, 50 FLA. L. REV. 583, 585–86 (1998) (suggesting that almost all law schools offer at least one and often multiple courses in dispute resolution). Professor Michael Moffitt at the University of Oregon School of Law maintains on behalf of the American Bar Association Section of Dispute Resolution a list of the dispute resolution course offerings at all American law schools. See <http://www.law.uoregon.edu/aba/> (last visited Nov. 9, 2004).

Today, of course, there are many excellent casebooks devoted exclusively to these fields of study. See, e.g., CARRIE J. MENKEL-MEADOW ET AL., *DISPUTE RESOLUTION: BEYOND THE ADVERSARIAL MODEL* (2004); GOLDBERG ET AL., *supra* note 5; ALAN SCOTT RAU ET AL., *PROCESSES OF DISPUTE RESOLUTION: THE ROLE OF LAWYERS* (3rd ed. 2002); LEONARD L. RISKIN & JAMES E. WESTBROOK, *DISPUTE RESOLUTION AND LAWYERS* 2 (2d ed. abr. 1998); TRACHTE-HUBER & HUBER, *supra* note 24.

32. See, e.g., Nancy H. Rogers & Craig A. McEwen, *Employing the Law to Increase the Use of Mediation and to Encourage Direct and Early Negotiations*, 13 OHIO ST. J. ON DISP. RESOL. 831, 834–39 (1998) (arguing that increased use of mediation may elevate legal practice); see also Frances E. McGovern, *Beyond Efficiency: A Bevy of ADR Justifications (An Unfootnoted Summary)*, DISP. RESOL. MAG., Summer 1997, at 12, 13; cf. GABRIEL A. ALMOND & SIDNEY VERBA, *THE CIVIC CULTURE: POLITICAL ATTITUDES AND DEMOCRACY IN FIVE NATIONS* 1–10 (1965) (arguing that cultural factors shape political institutions).

33. See Frank E.A. Sander, *The Future of ADR: The Earl F. Nelson Memorial Lecture*, 2000 J. DISP. RESOL. 3, 4 (“Obviously, we didn’t invent mediation, we didn’t invent arbitration. But, by common agreement, it was in about 1975 that the current interest in ADR began. The first period, I think, was about 1975 to 1982. I call it, ‘Let a thousand flowers bloom.’ There were many experiments . . .”). ADR mechanisms then in practice included neighborhood justice centers, rejuvenated small claims courts, arbitration, mediation, ombudsmen, and even reconceptualized state

But Sander elevated these various methods of dispute resolution from their shadowy adjunct and ancillary status to a legitimate alternative *primary* process for the resolution of certain disputes.<sup>34</sup> Charting a spectrum of available processes from formal adjudication at one end through mediation and negotiation at the other, Sander emphasized that the critical issue was determining, for a particular conflict, the “appropriate dispute resolution process.”<sup>35</sup>

Notwithstanding a vocal and persistent chorus of disquietude,<sup>36</sup> ADR has expanded to become somewhat of a court of general civil jurisdiction.<sup>37</sup> No longer a niche product for certain commercial and

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and federal agencies. See Daniel McGillis, *Minor Dispute Processing: A Review of Recent Developments*, in ROMAN TOMASIC & MALCOLM FEELEY, *NEIGHBORHOOD JUSTICE: ASSESSMENT OF AN EMERGING IDEA* 60, 64 (1982) (recounting how, in the 1960s, local communities established neighborhood justice centers to provide facilitative dispute resolution services for neighbors, families, tenants, and consumers); DANIEL MCGILLIS & JOAN MULLEN, *NEIGHBORHOOD JUSTICE CENTERS: AN ANALYSIS OF POTENTIAL MODELS* (Nat'l Inst. L. Enforcement & Crim. Just. No. J-LEAA-030-76, 1977); DAVIS S. GOULD, *NAT'L INST. FOR CONSUMER JUSTICE, STAFF STUDIES ON SMALL CLAIMS COURTS* (1972) (documenting success of small claims courts); Thomas L. Eovaldi & Joan E. Gestrin, *Justice for Consumers: The Mechanisms of Redress*, 66 NW. U. L. REV. 281, 302–12 (1971) (discussing arbitration and mediation of consumer claims); Mary Gardiner Jones & Barry B. Boyer, *Improving the Quality of Justice in the Marketplace: The Need for Better Consumer Remedies*, 40 GEO. WASH. L. REV. 357 (1972) (same); Robert Wexler, *Court-Ordered Consumer Arbitration*, 28 ARB. J. 175 (1973) (same); Maurice Rosenberg & Myra Schubert, *Trial by Lawyer: Compulsory Arbitration of Small Claims in Pennsylvania*, 74 HARV. L. REV. 448 (1961) (same); Donald B. King, *The Consumer Ombudsman*, 79 COM. L.J. 355 (1974); Eric H. Steele, *Fraud, Dispute, and the Consumer: Responding to Consumer Complaints*, 123 U. PA. L. REV. 1107 (1975); David A. Rice, *Remedies, Enforcement Procedures and the Duality of Consumer Transaction Problems*, 48 B.U. L. REV. 559 (1968); NAT'L ASS'N OF ATTORNEYS GEN., COMM'N OFFICE OF ATTORNEY GEN., *STATE PROGRAMS FOR CONSUMER PROTECTION* 4–5 (1973); Rosenberg, *supra* note 9; Richard Danzig, *Toward the Creation of a Complementary, Decentralized System of Criminal Justice*, 26 STAN. L. REV. 1 (1973).

See generally TRACHTE-HUBER & HUBER, *supra* note 24 (suggesting that ADR is “not a new or even recent development,” and citing decision of King Solomon, Federal Arbitration Act of 1925, and use of arbitration and mediation to resolve trade and labor disputes). See also *supra* note 31.

34. Sander, *supra* note 21, at 80.

35. *Id.* at 84. Commentators have since adopted this appellation of the “ADR” acronym. See, e.g., Albie M. Davis & Howard Gadlin, *Mediators Gain Trust the Old-Fashioned Way—We Earn It!*, 4 NEGOT. J. 55, 62 (1988); GOLDBERG ET AL., *supra* note 5, at 6 n.\*; Janet Reno, *Lawyers as Problem-Solvers: Keynote Address to the AALS*, 49 J. LEGAL EDUC. 5, 8 (1999) (urging lawyers to engage in “appropriate dispute resolution”); RISKIN & WESTBROOK, *supra* note 31, at 51; Carrie Menkel-Meadow, *Whose Dispute Is It Anyway? A Philosophical and Democratic Defense of Settlement (in Some Cases)*, 83 GEO. L.J. 2663, 2689–90 (1995) (urging that *appropriate* should replace *alternative* in describing mediation and other nontrial dispute resolution processes). Of all the credit heaped upon Professor Sander for his 1976 speech, I find it surprising that he has not also justly received the credit for inventing the term “appropriate dispute resolution.” In any event, upon my reading of the tea leaves and the contemporary scholarship, it appears that “CDR” (“complementary dispute resolution”) will be the next label. See reference in Part V.C.

36. The bibliographies cited in *infra* n. 46 collect the relevant sources.

37. See Thomas J. Stipanowich, *Punitive Damages and the Consumerization of Arbitration*, 92 NW. U. L. REV. 1, 8 (1997) (noting that arbitration has “moved from the role of commercial court to that of a civil court of general jurisdiction”). See also Judith Resnik, *For Owen M. Fiss: Some Reflections*

labor law cases,<sup>38</sup> ADR now commands attention in all sectors of the economy<sup>39</sup> and in virtually every segment of society.<sup>40</sup>

on the *Triumph and Death of Adjudication*, 58 U. MIAMI L. REV. 173, 186 (2003) (suggesting that ADR has "creat[ed] a 'new' civil procedure").

38. See, e.g., 1 GABRIEL M. WILNER, DOMKE ON COMMERCIAL ARBITRATION § 3 (1999); Christine Lepera & Jeannie Costello, *New Areas in ADR*, in ALTERNATIVE DISPUTE RESOLUTION: WHAT THE BUSINESS LAWYER NEEDS TO KNOW 593, 610 (PLI Litig. & Admin. Practice Course Handbook Series No. H-605, 1999). Employers are attracted to ADR for its facilitation of preventive management. See, e.g., John E. Sands & Sam Margulies, *ADR in Employment Law: The Concept of Zero Litigation*, N.J. LAW., Aug./Sept. 1993, at 23, 23-24 (discussing the fit between "new" management structures and ADR in addressing employment-related conflicts).

39. In a 1997 Price Waterhouse survey of the "Fortune 1000" companies, nearly all of the 530 respondents had used some form of ADR, and ninety percent classified ADR as a "critical cost control technique." Jack M. Sabatino, *ADR as "Litigation Lite": Procedural and Evidentiary Norms Embedded Within Alternative Dispute Resolution*, 47 EMORY L.J. 1289, 1301 (1998). For a detailed report on corporate use of ADR, see David B. Lipsky & Ronald L. Seeber, *Patterns of ADR Use in Corporate Disputes*, 54 DISP. RESOL. J. 66, 66-71 (1999).

A review of recent literature indicates the expansion of ADR in antitrust, see, e.g., Howard Adler, Jr. & Richard Chernick, *The Expanding Role of ADR in Antitrust Cases*, DISP. RESOL. MAG., Winter 2003, at 34 (2003); entertainment, see, e.g., Symposium, *Alternative Dispute Resolution in the Entertainment Industry*, 4 CARDOZO ONLINE J. CONFLICT RESOL. 1 (October 23, 2002); Gerald F. Phillips, *Entertainment Industry is Accepting ADR*, 21 ENT. L. REP. 5 (1999); health care, see, e.g., Glenn Cohen, *Negotiating Death: ADR and End of Life Decision-Making I*, 9 HARV. NEGOT. L. REV. 253 (2004); Phyllis E. Bernard, *Mediating With an 800-Pound Gorilla: Medicare and ADR*, 60 WASH. & LEE. L. REV. 1417 (2003); John W. Cooley, *A Dose of ADR for the Health Care Industry*, 57 DISP. RESOL. J. 14 (2002); Bryan A. Lian, *ADR in Health Care: An Overview of the ADR Landscape*, in HEALTH CARE DISPUTE RESOLUTION MANUAL 3:1-3:43 (2000); natural resources, see, e.g., Eileen B. Vernon, *Arbitration in the Energy/Minerals Field: Customizing the Clause*, 56 DISP. RESOL. J. 48 (2001); P. Jean Baker, *ADR Assists Energy Industry Restructuring*, 54 DISP. RESOL. J. 8 (1999); intellectual property, see, e.g., Manny D. Pokotilow, *Why Alternative Dispute Resolution Should be Used for Intellectual Property Disputes*, 16 J. PROPRIETARY RTS. 17 (2004); Kevin M. Lemley, *I'll Make Him an Offer He Can't Refuse: A Proposed Model for Alternative Dispute Resolution in Intellectual Property Disputes*, 37 AKRON L. REV. 287 (2004); Scott H. Blackman & Rebecca M. McNeill, *Alternative Dispute Resolution in Commercial Intellectual Property Disputes*, 47 AM. U. L. REV. 1709, 1716 (1998) (arguing that ADR is an effective means of resolving disputes that involve "shared rights" and for which an "either/or result in which one party walks away with all the rights at issue" is ill-suited); Eugene R. Quinn, Jr., *Using Alternative Dispute Resolution to Resolve Patent Litigation: A Survey of Patent Litigators*, 3 MARQ. INTELL. PROP. L. REV. 77, 84 (1999); and telecommunications, see, e.g., Lori Tripoli, *Telecommunications Act Offers Opportunity for ADR Advocates*, INSIDE LITIG., Mar. 1997, at 3, 3 (reporting that the CPR Institute's Telecommunications Group is recommending ADR to state agencies that must implement the Telecommunications Act of 1996).

Not surprisingly, certain growth areas have proven especially controversial. See, e.g., Clyde W. Summers, *Mandatory Arbitration: Privatizing Public Rights, Compelling the Unwilling to Arbitrate*, 6 U. PA. J. LAB. & EMP. L. 685 (2004); Richard M. Alderman, *Pre-Dispute Mandatory Arbitration in Consumer Contracts: A Call for Reform*, 38 HOUS. L. REV. 1237 (2001); Sarah R. Cole, *Uniform Arbitration: "One Size Fits All" Does Not Fit*, 16 OHIO ST. J. ON DISP. RESOL. 759 (2001); Sidney Charlotte Reynolds, *Closing a Discrimination Loophole: Using Title VII's Anti-Retaliation Provision to Prevent Employers from Requiring Unlawful Arbitration Agreements as Conditions of Continued Employment*, 76 WASH. L. REV. 957 (2001); Ronald Turner, *Employment Discrimination, Labor and Employment Arbitration, and the Case Against Union Waiver of the Individual Worker's Statutory Right to a Judicial Forum*, 49 EMORY L.J. 135 (2000); Jean R. Sternlight, *Rethinking the Constitutionality of the Supreme Court's Preference for Binding Arbitration: A Fresh Assessment of Jury Trial, Separation*

ADR has clearly arrived in a big way. Many, if not most, federal and state jurisdictions include ADR methods in their court rules. Federal and state administrative agencies are increasingly relying on non-litigious methods to resolve disputes. More and more, disputants are *required* to use mediation or another form of ADR, rather than just being offered the opportunity to use it if they so desire. Today, it is clear that far more disputes in the United States are resolved through negotiation, mediation, and arbitration than through trial.<sup>41</sup>

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*of Powers, and Due Process Concerns*, 72 TUL. L. REV. 1 (1997); Michael D. Donovan & David A. Searles, *Preserving Judicial Recourse for Consumers: How to Combat Overreaching Arbitration Clauses*, 10 LOY. CONSUMER L. REV. 269 (1998); Carrie Menkel-Meadow, *Do the "Haves" Come Out Ahead in Alternative Judicial Systems? Repeat Players in ADR*, 15 OHIO ST. J. ON DISP. RESOL. 19 (1999).

40. The Better Business Bureau, for example, may be the most familiar dispute resolution program. See DONALD W. KING & KATHLEEN A. MCEVOY, A NATIONAL SURVEY OF THE COMPLAINT-HANDLING PROCEDURES USED BY CONSUMERS (1976) (Nat'l Technical Information Serv., U.S. Commerce Dep't) (finding the Better Business Bureau more familiar to consumers than nineteen of twenty-one public and private organizations; only the Post Office and the Social Security Administration were better known). Trade associations and county, city, and state-sponsored consumer affairs offices also often offer dispute resolution services. See generally Nader, *supra* note 12, at 1003–04 n.25.

The American Arbitration Association (AAA) has formed special panels from time to time to deal with particular phenomena: forming a claims resolution program at the request of the Florida Department of Insurance following the devastation of southern Florida by Hurricane Andrew in 1992; constituting a National Technology Panel in 1998 to address issues arising from the "Y2K Problem" which then loomed as a potential threat; establishing in 2000 a panel for the USA Track and Field doping arbitration program. AM. ARB. ASS'N, PUBLIC SERVICE AT THE AMERICAN BAR ASSOCIATION 8–9, 130–31, (2004), available at [www.adr.org/si.asp?id=1544](http://www.adr.org/si.asp?id=1544). Other arbitration panels of general interest may include the Tribunal Arbitral du Sport, which recently adjudicated the Olympic medal controversy between gymnasts Paul Hamm and Yang Tae Young. See CA S2004/A/704 Yang Tae Young v. Int'l Gymnastics Fed'n, at <http://www.tas-cas.org/en/pdf/young.pdf> (last visited Nov. 10, 2004).

Perhaps the largest effort at private dispute resolution was the formation of the Asbestos Claims Facility. This was an entity created with the assistance of Dean Emeritus Harry Wellington, on behalf of manufacturers of asbestos and their insurers, to facilitate prompt disputes between and among producers and insurers. See generally Harry Wellington, *Asbestos: The Private Management of a Public Problem*, 33 CLEV. ST. L. REV. 375 (1984–1985); Carrie Menkel-Meadow, *Pursuing Settlement in an Adversary Culture: A Tale of Innovation Co-Opted or "The Law of ADR"*, 19 FLA. ST. U. L. REV. 1, 14 n.56 (1991); Lieberman, *supra* note 24, at 438 (suggesting optimism at early stages of program).

For a range of other social applications of ADR, see, for example, T. Nikki Eckland, *The Safe Schools Act: Legal and ADR Responses to Violence in Schools*, 31 URB. LAW. 309, 321–22 (1999); Nathan K. DeDino, Note, *When Fences Aren't Enough: The Use of Alternative Dispute Resolution to Resolve Disputes Between Neighbors*, 18 OHIO ST. J. ON DISP. RESOL. 887 (2003); Scott E. Mollen, *Alternative Dispute Resolution of Condominium and Cooperative Conflicts*, 73 ST. JOHN'S L. REV. 75 (1999).

41. Sternlight, *supra* note 24, at 290–91 (citing Alternative Dispute Resolution Act of 1998, 28 U.S.C. §§ 651–658, 652(a) (requiring each district court to have litigants in all civil cases consider using ADR, and to provide at least one ADR process to litigants)); NANCY H. ROGERS ET AL., *MEDIATION: LAW, POLICY PRACTICE* app. B (1999 & Supp. 2000) (listing territory, state, and federal legislation on mediation); Jeffrey M. Senger, *Turning the Ship of State*, 2000 J. DISP. RESOL. 79 (listing federal agencies utilizing various ADR processes, including the U.S. Postal Service, federal Justice Department, Equal Employment Opportunity Commission, and the Air Force).

Facilitating ADR has, itself, become a cottage industry.<sup>42</sup> And in cyberspace, disputes are resolved through ADR<sup>43</sup>—even if we have yet to appreciate fully what and where cyberspace is.<sup>44</sup> The increasing incidence of transnational disputes has likewise fueled the ADR boom.<sup>45</sup>

Reference to a system of ADR could be misleading in its simplicity since there is, in fact, a constellation of different ADR mechanisms that

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Arbitration is sweeping across the American legal landscape and is fundamentally reshaping the manner in which disputes are resolved in our legal system. Simply stated, arbitration is everywhere. Virtually all American businesses and individuals with legal capacity to contract (and some who clearly lack such capacity) have entered into agreements that specify arbitration as the forum for resolving most or all disputes that might arise between the parties.

Stephen K. Huber, *The Arbitration Jurisprudence of the Fifth Circuit*, 35 TEX. TECH L. REV. 497, 498 (2004).

42. A. Leo Levin & Denise D. Colliers, *Containing the Cost of Litigation*, 37 RUTGERS L. REV. 219, 248 (1985); Sabatino, *supra* note 39, at 1301.

43. See generally Aashit Shah, *Using ADR to Resolve Online Disputes*, 10 RICH. J.L. & TECH. 25 (2004); COLIN RULE, *ONLINE DISPUTE RESOLUTION FOR BUSINESS: B2B E-COMMERCE, CONSUMER, EMPLOYMENT, INSURANCE, AND OTHER COMMERCIAL CONFLICTS* (2002); Frank A. Cona, *Focus on Cyberlaw: Application of Online Systems in Alternative Dispute Resolution*, 45 BUFF. L. REV. 975 (1997); Richard Michael Victorio, *Internet Dispute Resolution (IDR): Bringing ADR into the 21st Century*, 1 PEPP. DISP. RESOL. L.J. 279 (2001); Henry H. Perritt, Jr., *Dispute Resolution in Cyberspace: Demand for New Forms of ADR*, 15 OHIO ST. J. ON DISP. RESOL. 675 (2000); Elizabeth G. Thornburg, *Going Private: Technology, Due Process, and Internet Dispute Resolution*, 34 U.C. DAVIS L. REV. 151 (2000); Joseph W. Goodman, *The Pros and Cons of Online Dispute Resolution: An Assessment of Cyber-Mediation Websites*, 2003 DUKE L. & TECH. REV. 4 (2003).

The Center for Information Technology and Dispute Resolution (CITDR) at the University of Massachusetts supports and sustains the development of information technology applications as a means for better understanding and managing conflict. As part of this effort they maintain a list of profit and nonprofit ADR projects and ventures that provide online dispute resolution services. As of October 19, 2004, more than fifty projects were enumerated. See <http://www.ombuds.org/center/onlineadr.html> (last visited Oct. 19, 2004). See also <http://www.odr.info/providers.php> (last visited Oct. 19, 2004).

44. See generally Jack L. Goldsmith, *Against Cyberanarchy*, 65 U. CHI. L. REV. 1199 (1998); David R. Johnson & David Post, *Law and Borders—The Rise of Law in Cyberspace*, 48 STAN. L. REV. 1367 (1996); Paul Schiff Berman, *The Globalization of Jurisdiction*, 151 U. PA. L. REV. 311 (2002); Dan Hunter, *Cyberspace as Place and the Tragedy of the Digital Anticommons*, 91 CAL. L. REV. 439, 447–48 (2003).

45. See, e.g., YVES DEZALAY & BRYANT G. GARTH, *DEALING IN VIRTUE: INTERNATIONAL COMMERCIAL ARBITRATION AND THE CONSTRUCTION OF A TRANSNATIONAL LEGAL ORDER* 33–62 (1996); *First Global Research Facility Dedicated to ADR Launched*, 54 DISP. RESOL. J., 4, 4 (1999); Betty Southard Murphy, *ADR's Impact on International Commerce*, 48 DISP. RESOL. J. 68, 69 (1993). Because some foreign courts refuse to hear technology and Internet cases, ADR is the only recourse in these situations. See Lepera & Costello, *supra* note 38, at 600. The New York Convention has also made the enforcement of arbitration awards easier than foreign judgments. See 9 U.S.C. §§ 201–208 (2006).

The availability of ADR has significantly improved international free trade climate because ADR is more compatible with foreign biases against litigation. See generally L. Richard Freese, Jr. & Robert Sagnola, *New Challenges in International Commercial Disputes: ADR Under NAFTA*, COLO. LAW., Sept. 1997, at 61, 62.

can vary dramatically in form, substance, and purpose.<sup>46</sup> Generally speaking, however, this Article draws conclusions based on the similarity of those mechanisms rather than their differences.<sup>47</sup> The important characteristic that they share is their departure from traditional courtroom procedures.<sup>48</sup> As Professor Resnik described in a similar context, “I am interested in the interaction of two generic modes of dispute resolution, one styled ‘adjudication’ and one styled ‘alternative dispute resolution’ even as we know that both are constructs, with internal distinctions, a variety of expressions, and a good deal of overlap.”<sup>49</sup> At this initial stage of argument, then, having simply outlined the emergence of a system of ADR that is resolving and various disputes is sufficient.

### III. THE ECHOES OF EQUITY IN ADR

This Part draws attention to the characteristics of equity that inhere in the system of ADR. To be sure, comparing two regimes as protean and multi-dimensional as Equity and ADR without over-generalizing or caricaturing either, and without cherry-picking the best analogues and avoiding the complexities, can be difficult. This Part attempts to minimize those risks by focusing on abstractions of the two systems rather than on either system’s constituent parts. For the most part these abstractions also consider the systems of ADR and Equity in their pure, original forms.<sup>50</sup> The observations made in this Part are purposely

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46. See GOLDBERG ET AL., *supra* note 5, at 4–5 (offering a useful table comparing and contrasting various methods of dispute resolution, including arbitration, mediation, negotiation, private judging, neutral expert fact-finding, minitrial, ombudsman, and summary jury trial); *see also id.* at 287–94 (describing various innovative forms of arbitration, including final offer arbitration, high-low arbitration, and mediation-arbitration (“med-arb”)); *id.* at 303–04 (discussing early neutral evaluation).

For extensive bibliographies describing and evaluating the myriad processes and implications of ADR, see STEPHEN B. GOLDBERG ET AL., *DISPUTE RESOLUTION: NEGOTIATION, MEDIATION, AND OTHER PROCESSES* 691–755, 761–82 (4th ed. 2003); RAU ET AL., *supra* note 31, at 1007–18.

47. Of course one should also note that the form, substance, and processes of “formal adjudication” can also vary. Consider, for example, the differences between small claims court and the United States Supreme Court. *See* Sander, *supra* note 21, at 69–70.

48. *See generally Dispute Resolution*, *supra* note 12, at 906 (“‘Alternative dispute resolution’ is a label ascribed to an increasingly broad range of options that share few characteristics aside from their common departure from traditional courtroom procedure.”)

49. Judith Resnik, *Many Doors? Closing Doors? Alternative Dispute Resolution and Adjudication*, 10 OHIO ST. J. ON DISP. RESOL. 211, 256 (1995) (citing Lauren K. Robel, *Private Justice and the Federal Bench*, 68 IND. L. REV. 891, 895–96 (1993) (the “privatization continuum”); Marc Galanter & John Lande, *Private Courts and Public Authority*, 12 STUD. IN. L. POL. & SOC’Y 393, 399–400 (charting the “dimensions of privatization”)).

50. Moreover, mining the history of Equity relies heavily on incomplete pictures painted by secondary sources, making all conclusions somewhat tentative. *See generally* J.H. BAKER, *THE LAW’S*

uncritical, if not somewhat superficial. A more thorough analysis of the relationships between and among the systems of ADR and formal adjudication on one hand and the systems of Law and Equity on the other, follows in subsequent Parts. That later discussion also addresses the evolution and perversion of these analogous “alternative” systems.

### A. Locating a Jurisprudence

As a threshold matter, the word *equity* requires clarification. Indeed, “[a]ll writers on the subject of equity seem to start their discussions in agreement that the term is difficult to define.”<sup>51</sup> There are at least three definitions of equity and, to some extent, all three are relevant in a comparison to ADR. One popular meaning of equity invokes a collection of eternal and universal principles that captures all that which is moral, right, just, and good.<sup>52</sup> In the broadest understanding of this view, equity is ethical rather than jural.<sup>53</sup> Grounded in the precepts of the conscience, this notion of equity includes such mandates as gratitude, kindness, and charity, and thus extends well beyond the reach of positive law.<sup>54</sup>

A second, similar meaning sometimes given to equity makes equity

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TWO BODIES: SOME EVIDENTIAL PROBLEMS IN ENGLISH LEGAL HISTORY (2001).

51. William Q. de Funiak, *Origin and Nature of Equity*, 23 TUL. L. REV. 54 (1948). See also Howard L. Oleck, *Historical Nature of Equity Jurisprudence*, 20 FORDHAM L. REV. 23, 23 (1951) (“The legal term ‘equity’ is generally acknowledged to be impossible to define completely.”); Garrard Glenn & Kenneth Redden, *Equity: A Visit to the Founding Fathers*, 31 VA. L. REV. 753, 756 (1945) (“There is no definition of equity that will satisfy.”); CHARLES E. HOGG, EQUITY PRINCIPLES 3 (1900) (“[T]o attempt to define the powers and jurisdiction of a court of equity would only result in embarrassment and confusion. . .”).

52. See generally Anton-Hermann Chroust, *Aristotle’s Conception of “Equity” (Epieikeia)*, 18 NOTRE DAME L. REV. 119 (1942–1943); MAX HAMBURGER, MORALS AND LAW: THE GROWTH OF ARISTOTLE’S LEGAL THEORY (1965); NANCY SHERMAN, THE FABRIC OF CHARACTER: ARISTOTLE’S THEORY OF VIRTUE (1989).

Interestingly, this definition of equity has slowly fallen out of contemporary discourse. Compare BLACK’S LAW DICTIONARY 634 (4th ed. 1951) with BLACK’S LAW DICTIONARY 484–85 (5th ed. 1979); BLACK’S LAW DICTIONARY 540 (6th ed. 1980); BLACK’S LAW DICTIONARY 560 (7th ed. 1999); BLACK’S LAW DICTIONARY 579–80 (8th ed. 2004).

53. See generally NORMAN FETTER, HANDBOOK OF EQUITY JURISPRUDENCE 1–2 (1895); PETER C. HOFFER, THE LAW’S CONSCIENCE: EQUITABLE CONSTITUTIONALISM IN AMERICA 17–20 (1990) (recounting history of equity).

54. See Colin P. Campbell, *The Court of Equity—A Theory of its Jurisdiction*, 15 GREEN BAG 108, 110 (1903) (noting the intimacy of the relations among the basic principles of “equity, honesty, generosity, and good conscience”). See generally JOSIAH W. SMITH, A MANUAL OF EQUITY JURISPRUDENCE 3–4 (1st American Edition from the 9th London Edition 1871); 1 LAWRENCE KOHLBERG, ESSAYS ON MORAL DEVELOPMENT: THE PHILOSOPHY OF MORAL DEVELOPMENT, MORAL STAGES AND THE IDEAS OF JUSTICE (1981).



synonymous with “natural justice.”<sup>55</sup> In this view equity “is the soul and spirit of all law”<sup>56</sup>—the moral standard to which all law should conform.<sup>57</sup> In this sense equity—the “real law”<sup>58</sup>—has “a place in every rational system of jurisprudence, if not in name, at least in substance.”<sup>59</sup>

A third, technical definition of Equity (a meaning typically signified by use of the capital letter “E”) refers to that system of jurisprudence that was originally administered by the High Court of Chancery in

55. See Walter Wheeler Cook, *Equity*, in *ENCYCLOPEDIA OF THE SOCIAL SCIENCES* 582 (1931) (“The most common of the non-technical meanings of equity, one in which lawyers themselves not infrequently use the word, is as a synonym for ‘natural justice.’”); 1 JOSEPH STORY, *COMMENTARIES ON EQUITY JURISPRUDENCE* § 34 (12th ed. 1877); 1 JOHN NORTON POMEROY, *A TREATISE ON EQUITY JURISPRUDENCE* § 8 (2d ed. 1892).

56. See JEFFREY A. BRAUCH, *IS HIGHER LAW COMMON LAW? READINGS ON THE INFLUENCE OF CHRISTIAN THOUGHT IN ANGLO-AMERICAN LAW* 32–40 (1999); 3 WILLIAM BLACKSTONE, *COMMENTARIES ON THE LAWS OF ENGLAND* 429 (University of Chicago Press, 1979) (1768).

57. 1 POMEROY, *supra* note 55, § 66, at 68–70; SIR HENRY SUMNER MAINE, *ANCIENT LAW* 34 (E.P. Dutton & Co. 1910) (1861) (defining Equity as “any body of rules existing by the side of the original civil law, founded on distinct principles and claiming incidentally to supersede the civil law in virtue of a superior sanctity inherent in those principles”). See generally THOMAS HOBBES, *LEVIATHAN* 189 (J.C.A. Gaskin ed., Oxford Univ. Press 1998) (1651).

58. Joseph H. Beale, *Equity in America*, 1 *CAMBRIDGE L.J.* 21, 25 (“[T]he doctrines of equity represent the real law, and when a Court of law insists on applying its own views as against the views of equity, it is not getting at the real substantial rights of the parties.”).

59. 1 STORY, *supra* note 55, § 7, at 6 n.4 (“1 FONBLANGUE EQUITY, B. 1, § 3, p.24, note (h); PLOWDEN, *COMM.* p. 465, 466. Lord Bacon said in his Argument on the jurisdiction of the Marches, there is no law under heaven which is not supplied with equity; for summum jus summa injuria; or as some have it, summa lex summa crux. And, therefore, all nations have equity. 4 BAC. WORKS, p. 274. Plowden, in his note to his Reports, dwells much (p. 465, 466) on the nature of equity in the interpretation of statutes, saying, Ratio legis est anima legis. And it is a common maxim in the law of England, that Apices juris non sunt jura BRANCH’S MAXIMS, p. 12; CO. LITT. 304(b).”)

This definition of equity has led some to focus on the commonality of the foundational principles of the common law and equity. Thus, Blackstone says: “[T]he [common] law is the perfection of reason, it always intends to conform thereto, and that what is not reason is not law. Not that the particular reason of every rule in the law can at this distance of time be always precisely assigned; but it is sufficient that there be nothing in the rule flatly contradictory to reason, and then the law will presume it to be well founded.” 1 BLACKSTONE, *supra* note 56, at 70.

It is true that . . . human legislation ought to conform itself to and embody these jural precepts of the moral code; every legislator, whether he legislate in a Parliament or on the judicial bench, ought to find the source and material of the rules he lays down in these principles of morality; and it is certain that the progress toward a perfection of development in every municipal law consists in its gradually throwing off what is arbitrary, formal, and unjust, and its adopting instead those rules and doctrines which are in agreement with the eternal principles of right and morality. But it is no less true that until this work of legislation has been done, until the human law-giver has thus borrowed the rules of morality, and embodied them into the municipal jurisprudence by giving them a human sanction, morality is not binding upon the citizens of a state as a part of the law of that state. In every existing municipal law belonging to a civilized nation, this work of adaptation and incorporation has been performed to a greater or less degree.

1 POMEROY, *supra* note 55, § 63, at 65–67.

England.<sup>60</sup> The circularity of this definition requires a brief narration of the scope of the jurisprudence of Equity.

The system of Equity evolved from the royal prerogative of kings, as the fountainhead of justice,<sup>61</sup> to ensure that justice was administered in each case.<sup>62</sup> The chancellor, who functioned as a secretary to the king and also as the keeper of the king's seal and "conscience," administered

60. GEORGE TUCKER BISPHAM, *THE PRINCIPLES OF EQUITY: A TREATISE ON THE SYSTEM OF JUSTICE ADMINISTERED IN COURTS OF CHANCERY* 1 (11th ed. 1931) (1874) ("Equity is that system of justice which was developed in and administered by the High Court of Chancery in England in the exercise of its extraordinary jurisdiction."); Oleck, *supra* note 51, at 24 ("The description of equity as that law which was administered by the old English courts of Chancery, of course, is hardly a definition. Yet that is the customary introductory description of equity."). See also 1 POMEROY, *supra* note 55, § 67, at 70–71 (defining equity as "those doctrines and rules, primary and remedial rights and remedies, which the common law, by reason of its fixed methods and remedial system, was either unable or inadequate in the regular course of its development, to establish, enforce, and confer, and which it therefore either tacitly omitted or openly rejected"); MELVILLE M. BIGELOW, *ELEMENTS OF EQUITY* 9 (1879) ("[T]he jurisdiction of courts of chancery now extends to all civil cases proper, in good conscience and honesty, for relief or aid, as to which the procedure of the common-law courts is unsuited to give an adequate remedy, or as to which the common-law courts, when able to extend their aid, have refused to do so."); CHARLES E. PHELPS, *JURIDICAL EQUITY* 192 (1894) ("By juridical equity is meant a systematic appeal for relief from a cramped administration of defective laws to the disciplined conscience of a competent magistrate, applying to the special circumstances of defined and limited classes of civil cases the principles of natural justice, controlled in a measure as well by considerations of public policy as by established precedent and by positive provisions of law."); 1 STORY, *supra* note 55, § 25, at 18 ("Equity jurisprudence may, therefore, properly be said to be that portion of remedial justice, which is exclusively administered by a court of equity, as contradistinguished from that portion of remedial justice, which is exclusively administered by a court of common law.").

61. "As the personal dignity of the king increased and the character of his relation to his people was modified, his official powers were developed, and his function as fountain of justice became more distinctly recognized." WILLIAM STUBBS, *THE CONSTITUTIONAL HISTORY OF ENGLAND* § 72, at 27–28 (abridged ed., 1979). See also Oleck, *supra* note 51, at 33; George Burton Adams, *The Origin of English Equity*, 16 COLUM. L. REV. 87, 89 (1916); GEORGE M. TREVELYAN, *HISTORY OF ENGLAND* 91–93, 133 (1937); Campbell, *supra* note 54, at 109; Robert L. Severns, *Nineteenth Century Equity: A Study in Law Reform*, 12 CHI.-KENT L. REV. 81, 89 (1934); see Warren B. Kittle, *Courts of Law and Equity—Why They Exist and Why They Differ*, 26 W. VA. L.Q. 21, 23 (1919–1920) ("It was the firm policy of the Norman kings to concentrate all power within themselves . . ."); 1 SIR FREDERICK POLLOCK & FREDERIC WILLIAM MAITLAND, *THE HISTORY OF ENGLISH LAW* 85–87 (1895); D.M. KERLY, *AN HISTORICAL SKETCH OF THE JURISDICTION OF THE COURT OF CHANCERY* 13–14 (1890). The operative principle was that the king was the fountainhead of all justice, and in him, resided the final power to do whatever was just and righteous. See ROBERT WYNESS MILLAR, *CIVIL PROCEDURE OF THE TRIAL COURT IN HISTORICAL PERSPECTIVE* 17–19 (1952); WILLIAM F. WALSH, *OUTLINES OF THE HISTORY OF ENGLISH AND AMERICAN LAW* 69–70 (1923).

62. Until the latter part of the twelfth century, ordinary law and justice in England was governed by custom and was administered rather informally (if not crudely) by the shire courts and the courts of the hundred moots (in the time of Saxons and Danes, dating back to the seventh century) and by the county, borough, and manor courts (in the early Norman period beginning with the Norman Conquest in 1066). The forms of trial were, in large part, appeals to the supernatural. See generally 1 POLLOCK & MAITLAND, *supra* note 61, at 15–17; 1 WILLIAM SEARLE HOLDSWORTH, *A HISTORY OF ENGLISH LAW* 40 (7th ed. 1956); GEORGE L. CLARK, *PRINCIPLES OF EQUITY* 3 (1948); Adams, *supra* note 61, at 91 (discussing the king's "prerogative machinery"); Frederick Pollock, *English Law Before the Norman Conquest*, 14 L.Q. REV. 291, 297 (1898).

the king's justice by issuing, at his discretion, *brevia* or writs commanding the performance or cessation of certain acts.<sup>63</sup> The repeated issuance of writs based upon similar circumstances led to a standardization of that process, such that the chancellor's court could issue the appropriate writ whenever a complainant presented a certain pattern of facts.<sup>64</sup> These writs became the foundation of the "Common Law."<sup>65</sup> To the King's Court were added, in turn, the Court of the Exchequer, the Court of Common Pleas, and the Court of the King's Bench—all Common Law courts,<sup>66</sup> and all approachable only upon the authority of a writ issued by the Chancery.<sup>67</sup>

But the Common Law system became a hard and fast system with certain clearly defined things that it could do and with equally clearly defined things that it could not do.<sup>68</sup> The universe of writs was fixed

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63. See Adams, *supra* note 61, at 89 (discussing the new "judicial machinery" brought into England at the Norman Conquest); Glenn & Redden, *supra* note 51, at 760 ("Justice did open the door[,] of course, and it was the royal hand that was on the knob."); FREDERIC WILLIAM MAITLAND, *EQUITY AND THE FORMS OF ACTION AT COMMON LAW: TWO COURSES OF LECTURES 4–5* (A.H. Chaytor ed., 1920).

64. This development is generally credited to Henry II (Curtmantle), who reigned 1154–1189. See JOHN H. BAKER, *AN INTRODUCTION TO ENGLISH LEGAL HISTORY* 13 (4th ed. 2002); 1 POLLOCK & MAITLAND, *supra* note 61, at 138–46; WILLIAM F. WALSH, *A TREATISE ON EQUITY* 2 (1930).

65. See BAKER, *supra* note 64, at 49; WALSH, *supra* note 64, at 86–88; 1 POLLOCK & MAITLAND, *supra* note 61, at 129–30; see also JOSEPH H. KOFFLER & ALISON REPPY, *HANDBOOK OF COMMON LAW PLEADING* 18 (1969) ("Courts [were] organized to handle a series of specific cases, the decisions of which gradually developed theories of rights and liabilities. In short, our rights and liabilities as defined by Substantive Law, had their origin in and developed out of Procedural Law."). Of course, it bears emphasis that the rights that were recognized were almost exclusively property rights; there were no personal rights, political rights, civil rights as we understand them. See de Funiak, *supra* note 51, at 56.

66. Although each of these courts initially had its own proper sphere, these distinctions faded. Generally speaking, plaintiffs had a choice between the three courts, and each of them dealt with the case in the same way and by the same rules. These courts administered traditional law and statutes. The phrase "common law" was borrowed from the canonists—who used *jus commune* to denote the general law of the Catholic Church. The common law refers to that part of the law that is unenacted and non-statutory yet common to the whole land and to all Englishmen. It is contrasted with statute, local custom, and the royal prerogative. When Chancery courts developed, common law would also be contrasted with equity. See MAITLAND, *supra* note 63, at 2.

67. Oleck, *supra* note 51, at 35–36.

68. This statement requires some qualification. There is evidence that, in fact, the early "law courts" of the twelfth and thirteenth centuries enjoyed and exercised considerable discretion in the administration of what would later be called law and equity. Leonard J. Emmerglick, *A Century of the New Equity*, 23 TEX. L. REV. 244, 246 (1945); H.D. Hazeltine, *The Early History of English Equity*, in *ESSAYS IN LEGAL HISTORY* 261 (Paul Vinogradoff ed., 1913); William Searle Holdsworth, *The Relation of the Equity Administered by the Common Law Judges to the Equity Administered by the Chancellor*, 26 YALE L.J. 1, 1 (1916) (accumulating evidence that common law judges in the twelfth through fourteenth centuries "administered both law and equity"); Aaron Friedberg, *The Merger of Law and Equity*, 12 ST. JOHN'S L. REV. 317, 318 n.2 (1938) ("[D]uring the reign of Henry II, both equity and common law were administered under the same system of procedure and were quite undistinguishable from each other."). The ossification soon followed, however. See Adams, *supra* note 61, at 96. See also de Funiak, *supra* note 51, at 57 ("A growing worship of formalism and technicality also began to

and their construction by Law judges narrowly circumscribed;<sup>69</sup> precise and technical rules of pleading, procedure, and proof cabined judicial discretion within the form of action.<sup>70</sup> Even for those who could navigate the procedural minutiae successfully, the remedies available in the Law courts were often wholly inadequate.<sup>71</sup>

The ossification of the Common Law made it impossible for many petitioners to obtain writs appropriate to their peculiar problems. Without the appropriate writs, they could obtain no adequate redress from the Common Law courts.<sup>72</sup> Yet, there remained the royal

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obsess the courts of law.”).

69. For example, a provision in Magna Carta (1215) significantly diminished the scope of the royal writ in respect to titles to land. Also, the Provisions of Oxford (1258) expressly forbade the chancellor to issue any new writs “without the commandment of the King and his council who shall be present.” The Provisions were annulled five years later, but the common law courts nevertheless were transformed during the 13th century into a rigid system of formal actions. See 1 HOLDSWORTH, *supra* note 62, at 196; 2 HOLDSWORTH, *supra* note 62, at 291; MILLAR, *supra* note 61, at 18 (citing FREDERIC WILLIAM MAITLAND, *THE FORMS OF ACTION* 41 (1936); quoting 1 HOLDSWORTH, *supra* note 62, at 58–59 (“[Later], in the reign of Edward the First (1272–1307), Chancery was empowered to issue new writs . . . to deal with new situations, [but] it met resistance from the common law courts which could, and often did, throw out the writ as unlawful.”)). This coincides with the development of the common law courts into an institution that was separate from the king. See Emmerglick, *supra* note 68, at 246 (noting independence of common law courts as of the fourteenth century); William Searle Holdsworth, *The Early History of Equity*, 13 MICH. L. REV. 293, 294 (1915) (“In the latter half of the fourteenth and in the fifteenth centuries the common law tended to become a fixed and rigid system. It tended to be less closely connected with the king, and therefore less connected with, and sometimes even opposed to, the exercise of that royal discretion . . .”).

70. See Sherman Steele, *The Origin and Nature of Equity Jurisprudence*, 6 AM. L. SCH. REV. 10, 10–11 (1926) (“In accordance with its technical mode of procedure, every species of legal wrong was supposed to fit into some one of a limited number of classes; for each class an appropriate remedy was provided, obtainable only by the use of some one of a limited number of ‘forms of action.’ An action was begun by the issuance of a writ appropriate to the form of action; in time these writs became standardized, and, where the facts of a case were without precedent, no writ to cover them was found, and hence no action could be brought.”); George Palmer Garrett, *The Heel of Achilles*, 11 VA. L. REV. 30, 31 (1924) (discussing “form-mad common-lawyers”); JAMES FOSDICK BALDWIN, *THE KING’S COUNCIL IN ENGLAND DURING THE MIDDLE AGES* 61–62 (1913) (referring to the common law’s “formulaic procedure”); Holdsworth, *supra* note 68, at 22 (discussing the “complicated machinery” of the law courts).

71. See ELIAS MERWIN, *THE PRINCIPLES OF EQUITY AND EQUITY PLEADING* 17 (H.C. Merwin ed., 1896) (discussing inability of common law courts to compel the performance of duties); Kittle, *supra* note 61, at 28 (“[T]he remedies which the law courts gave were often wholly inadequate. They were as bad as no remedy at all.”).

We are thus faced with the startling view of a system of so-called jurisprudence that can interpose only after a wrong has been done and is impotent to stay the hand of the wrongdoer; which is powerless to compel men to perform their obligations and can only give damages for their nonperformance; and which cannot take of or repair the mistakes or omissions that so frequently arise in business affairs. In short, a system of jurisprudence grossly imperfect and deficient.

de Funiak, *supra* note 51, at 57 (citing MERWIN, *supra*, at 17).

72. Oleck, *supra* note 51, at 36.

prerogative;<sup>73</sup> this authority was exercised by the issuance of a writ of subpoena—a summons to appear in Chancery.<sup>74</sup> Chancery, which was under the influence of ecclesiastical chancellors who had some acquaintance with the *aequitas* of Roman law and also knowledge of canon law, ushered in the next stage of development in English law.<sup>75</sup>

The early ecclesiastical [c]hancellors thought that it was consistent with belief in a revealed Word which stressed, among other things, a golden rule, for them to translate moral and ethical rights into juridical rights, enforced by the State, through its tribunals, when it was reasonable thus to summon political sovereignty to the aid of morals, and when the violation of such ethical rights involved proprietary consequences affecting the common good.<sup>76</sup>

By the late fourteenth century, a separate Court of Chancery administered this jurisprudence.<sup>77</sup>

73. MAITLAND, *supra* note 63, at 3 (“Though these great courts of law have been established [King’s Bench, Common Pleas, etc.] there is still a reserve of justice in the king.”).

74. See generally BAKER, *supra* note 64, at 103.

75. See Willard Barbour, *Some Aspects of Fifteenth-Century Chancery*, 31 HARV. L. REV. 834, 854 (1918); Sidney Smith, *The Stage of Equity*, 11 CAN. B. REV. 308, 312 (1933); Glenn & Redden, *supra* note 51, at 760–61; Timothy Haskett, *The Medieval English Court of Chancery*, 14 LAW & HIST. REV. 245 (1996).

76. Brendan F. Brown, *Lord Hardwicke: Science of Trust Law*, 11 NOTRE DAME L. REV. 319, 321 n. 10 (1936).

77. See Steele, *supra* note 70, at 11 (“[The] practice of referring to the Chancellor all of these special appeals to the kind led to the establishment of a tribunal which by the time of Edward III (1327–1377) had become recognized as a distinct and permanent court, with its separate jurisdiction and mode of procedure and its seat at Westminster.”); Holdsworth, *supra* note 68, at 6 (describing that all cases calling for equity were “handed over to a tribunal which, in time, came to be perfectly distinct from any of the common law courts”); William F. Walsh, *Equity Prior to the Chancellor’s Court*, 17 GEO. L.J. 97, 107 (1929) (suggesting that Chancery as a court of equity was taking form “around the fourteenth century”); Adams, *supra* note 61 at 97 (dating origins of a separate system of equity to the fourteenth century); George Burton Adams, *The Continuity of English Equity*, 26 YALE L.J. 550, 556 n.17 (1917) (“The chancellor’s court had become distinct from the Council before the end of the fifteenth century.”); 1 HOLDSWORTH, *supra* note 62, at 404 (suggesting that the chancellor first made a decree on his own authority in 1474); Severns, *supra* note 61, at 96 (“It is not until the end of the fifteenth century that purely equity matters go to the chancellor alone.”); Walter E. Sparks, *The Origin, Growth and Present Scope of Equity Jurisprudence in England and the United States*, 16 W. JURIST 473, 477 (1882) (quoting the proclamation of Edward III addressed to the sheriffs of London “commanding them that, whatsoever business relating as well to the common law of our kingdom, as our special grace, cognizable before us, from henceforth to be prosecuted as followeth; viz., The common law business before the Archbishop of Canterbury, elect, our chancellor, by him to be dispatched, and the other matters grantable by our special grace be prosecuted before our special chancellor, or our well beloved clerk, the keeper of the privy seal, so that they, or one of them, transmit to us such petitions of business which, without consulting us, they cannot determine, together with their advice thereupon, without any further prosecution to be had before use for the same.”). In an effort to date the commencement of a court of chancery, it bears mention that the earliest writers of the common law, such as Bracton, Glanville, Britton, and Fleta make no reference to an equitable jurisdiction of a court of chancery. See also 10 SELDEN SOCIETY, SELECT CASES IN CHANCERY A.D. 1364 TO 1471 at xix (William Paley Baildon ed., 1896) (“It seems clear that the

To minimize its conflict with the Common Law courts, which were already ordained and established with judges and practitioners defensive of their jurisdiction,<sup>78</sup> Chancery took as the basis of its jurisdiction the maxim, *aequitas agit in personam*.<sup>79</sup>

[T]he decrees of a court of equity are to be regarded not so much as decisions affecting the property or rights in dispute as in the light of directions or commands, positive or negative, addressed to the individual party or parties. The only method for their enforcement is by process of contempt, under which the party failing to obey them is arrested and imprisoned until he yields obedience . . . .<sup>80</sup>

Thus by acting *in personam*, Chancery could administer complete relief according to conscience and the principles of natural justice, without reference to the Common Law or its courts.<sup>81</sup>

The chancellor unrolled a vast body of legal principle to which we now refer as Equity to offer relief in those cases where, because of the technicality of procedure, defective methods of proof, and other shortcomings in the Common Law, there was no “plain, adequate and complete remedy” otherwise available.<sup>82</sup> In this context, plain was the opposite of “doubtful and obscure.”<sup>83</sup> A remedy was not adequate if it “fell short of what the party was entitled to,”<sup>84</sup> and a remedy that did not “attain the full end and justice of the case” was not complete.<sup>85</sup>

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Chancellor had and exercised judicial functions of his own as early as the reign of Richard II, if not of Edward III.”). See generally JOSEPH PARKES, A HISTORY OF THE COURT OF CHANCERY (1828).

78. Smith, *supra* note 75, at 312.

79. WILLIAM Q. DE FUNIAK, HANDBOOK OF MODERN EQUITY 11–12 (Erwin N. Griswold et al. eds., 2d ed. 1956); MERWIN, *supra* note 71, §§ 130–142, at 72–79; GEORGE KEETON, INTRODUCTION TO EQUITY 87–117 (6th ed. 1965).

80. FETTER, *supra* note 53, § 12, at 29.

81. Helmut Coing, *English Equity and the Denunciatio Evangelica of the Canon Law*, 71 LAW Q. REV. 223 (1955).

82. MILLAR, *supra* note 61, at 24; 1 STORY, *supra* note 55, § 33, at 22–23; GEORGE COOPER, A TREATISE OF PLEADING ON THE EQUITY SIDE OF THE HIGH COURT OF CHANCERY 128–29 (1813); JOHN FREEMAN MITFORD, TREATISE ON THE PLEADINGS IN SUITS IN THE COURTS OF CHANCERY BY ENGLISH BILL 112, 123 (George Jeremy ed., 1980); RICHARD WOODDESON, A SYSTEMATICAL VIEW OF THE LAWS OF ENGLAND 214, 215 (T. Payne ed., 1792); MERWIN, *supra* note 71, at 17; Barbour, *supra* note 75, at 854; Severns, *supra* note 61, at 84.

83. 1 STORY, *supra* note 55, § 33, at 23 (citing *Rathbone v. Warren*, 10 Johns. 587; *King v. Baldwin*, 17 Johns. 384; *Southampton Dock Co. v. Southampton H. & P. Board*, L. R. 11 Eq. 254).

84. 1 STORY, *supra* note 55, § 33, at 23.

85. *Id.* § 33, at 23–24. “Where the remedy at law is adequate, but is involved in delay and is in several respects inconvenient and circuitous, the cause will entertain jurisdiction in equity. *Clouston v. Sherer*, 99 Mass. 209; *Webb v. Ridgely*, 3 Md. 364.” *Id.* at 24 n.1. In addition to interfering when the legal remedy was not plain, adequate or complete, Equity also interfered when the legal remedy was not “certain,” “prompt,” “full,” “practical,” “just,” “final” or “efficient.” See Thomas O. Main, *Traditional Equity and Contemporary Procedure*, 78 WASH. L. REV. 429, 451–52 nn. 136–45 (2003) (collecting cases).

Intervention was premised on the notion that justice incorporated the moral sense of the community, existing as a function not only of a community's technical rules, but also of "magisterial good sense, unhampered by rule . . . ."<sup>86</sup> It was not a usurpation on the part of Chancery for the purpose of acquiring and exercising power; rather, it was an interposition to correct gross injustice and to address circumstances that the static and rigid common law could not.<sup>87</sup> There was a strong tendency within the Law courts to sacrifice the particular to the general, and to equate justice with certainty and uniformity.<sup>88</sup> The function of Equity, then, was the correction of the Law where it was deficient by reason of its universality.<sup>89</sup> "The regimes of law and equity thus approached a given set of facts from opposite angles—invoking distinctive traditions, applying different reasoning, and pursuing separate aims."<sup>90</sup>

The exercise of defining equity invites an immediate comparison to ADR. ADR, too, is routinely noted as difficult to define.<sup>91</sup> Moreover, definitions of ADR likewise range from the elaborate and theoretical to the empirical and tautological. Among the most ambitious definitions, ADR represents a complete restructuring of the adjudicatory framework depicting a revolutionary and postmodern understanding of conflict, truth, and justice.<sup>92</sup> Yet the most common definition of ADR is a

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86. Roscoe Pound, *Justice According to Law*, 13 COLUM. L. REV. 696, 701–02 (1913).

87. Kittle, *supra* note 61, at 22.

88. The Common Law reflected the primary importance of certainty in the administration of the law. Smith, *supra* note 75, at 310. Writs and forms of action created a determinate system that reflected the influence of ancient institutions, the motives of policy, and a felt necessity for rules that regulated those circumstances commonly present in typical human confrontations. 1 POMEROY, *supra* note 55, § 66, at 68–70. The system recognized a finite number of wrongs, and permitted no deviation from the particular modes of procedure and proof.

89. See 1 STORY, *supra* note 55, at §§ 1–3 at 1–4 (discussing the original function of equity and citing to writings on the nature of equity by Aristotle, Cicero, Justinian, Bracton, Grotius, and Puffendorf).

90. See Main, *supra* note 85, at 444.

91. See also Menkel-Meadow, *supra* note 40, at 1 n.2 ("Terminology and categorization are very problematic in this field."); Jean R. Sternlight, *Is Binding Arbitration a Form of ADR?: An Argument that the Term "ADR" Has Begun to Outlive Its Usefulness*, 2000 J. DISP. RESOL. 97, 102 (noting that the practitioners of ADR range from "pin stripes" to "Birkenstocks"); see also *id.* at 110 ("We should be more self-conscious of grouping together techniques that may often merit separate analysis."). See also *supra* notes 46–48 and accompanying text. And, of course, problems with terminology can, in turn, create doctrinal and analytical challenges.

92. See generally Carrie Menkel-Meadow, *The Trouble with the Adversary System in a Post-Modern, Multi-Cultural World*, 1 J. INST. FOR STUDY LEGAL ETHICS 49, 49–53 (1996); THOMAS E. CARBONNEAU, *ALTERNATIVE DISPUTE RESOLUTION: MELTING THE LANCES AND DISMOUNTING THE STEEDS* 4 (1989); BARUCH BUSH & FOLGER, *supra* note 7, at 2 (suggesting that ADR has "a unique potential for transforming people—engendering moral growth—by helping them wrestle with difficult circumstances and bridge human differences, in the very midst of conflict."); Joel B. Eisen, *Are We*

functional one that, like Equity's reference to the jurisdiction of the Court of Chancery,<sup>93</sup> simply refers to the heterogeneous medley of discrete ADR practices.<sup>94</sup>

The systemic comparison runs still deeper. Both Equity and ADR pre-existed their respective formal counterparts.<sup>95</sup> Both matured incrementally and in reaction to those formal systems.<sup>96</sup> And the course of that maturation in both systems was determined less by a priori reasoning than by historical accident.<sup>97</sup> Courts of Equity exercised jurisdiction if, but only if, the law courts failed to provide plain,

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*Ready for Mediation in Cyberspace?*, 1998 BYU L. REV. 1305, 1322 (discussing "the transformative and reconciliatory potential of ADR"). See also *infra* notes 353–60 and accompanying text. For analogous definition of equity see *supra* notes 52–59 and accompanying text.

93. See *supra* note 60 and accompanying text. See also FREDERIC WILLIAM MAITLAND, *EQUITY AND THE FORMS OF ACTION* 19 (A.H. Chaytor ed., 1909) ("I do not think that any one has expounded or ever will expound equity as a single, consistent system, an articulate body of law. It is a collection of appendixes between which there is no very close connection."); Smith, *supra* note 75, at 315 (referring to Equity as a set of "empirical remedies"—disconnected appendices or glosses to the common law in particular areas).

94. See, e.g., Lieberman & Henry, *supra* note 24, at 425–26 ("ADR has never had a unified theory to explain what it accomplishes and how it works. . . . It is easier to point to discrete practices than to discern the entire direction of the new movement."); Douglas Yarn, *Lawyer Ethics in ADR and the Recommendations of Ethics 2000 to Revise the Model Rules of Professional Conduct: Considerations for Adoption and State Application*, 54 ARK. L. REV. 207, 217 (2001) ("[ADR] is merely a convenient, generic term encompassing a number of processes (some of which are radically different from one another) . . . commonly understood to include alternatives to the formal adversary method of trial or litigation. Thus, it includes negotiation, mediation, arbitration, and their variations."); Brunet, *supra* note 30, at 10 ("A technical definition [of ADR] would list and describe the various mechanisms now embraced as alternatives to a conventional trial . . .").

95. For a description of the ancient origins of ADR, see *supra* notes 7, 33, 58, and accompanying text, and *infra* Parts VI and V. See also Resnik, *supra* note 49, at 213 (discussing "What came first?"). The roots of equity likewise run as deep as history can dig. See generally THE COMPLETE WRITINGS OF THUCYDIDES: THE PELOPONNESIAN WAR 164–66 (Richard Crawley trans., Random House 1951); 4 THE DIALOGUES OF PLATO 305, 324–25, 443–44 (B. Jowett trans., Oxford U. Press 1953); *The Statesman, in THE DIALOGUES OF PLATO* 294a (Benjamin Jowett trans., Encyclopedia Britannica 1952); GEORGE SPENCE, *THE EQUITABLE JURISDICTION OF THE COURT OF CHANCERY* 325 (1846) (associating the royal prerogative with sovereignty itself).

96. See *infra* notes 225–309 and accompanying text, and references to Parts IV and V.

97. Alexander Holtzoff, *Equitable and Legal Rights and Remedies Under the New Federal Procedure*, 31 CAL. L. REV. 127, 130 (1942–1943) (referring to the separate systems of law and equity as "accidents of history"). See also William Twining, *Alternative to What?: Theories of Litigation, Procedure and Dispute Settlement in Anglo-American Jurisprudence: Some Neglected Classics*, 56 MOD. L. REV. 380, 380 (1993) (ADR movement was "largely pragmatic and political rather than theoretical or 'scientific.'").

See generally Menkel-Meadow, *supra* note 40, at 2 (discussing the development of a "jurisprudence" of ADR); Resnik, *supra* note 49, at 222 (discussing the evolution and history of a "law of ADR"). See also Twining, *supra* note 97, at 380 ("When a 'movement' relating to law develops in the United States, one outcome is almost invariably a massive, confusing and largely unsystematic body of literature of variable quality. The ADR movement is no exception.").



adequate, and complete relief.<sup>98</sup> Every order or rule administered in Equity was born of some emergency, to meet some new condition that was not otherwise remediable in the Common Law courts.<sup>99</sup> Similarly, alternatives to formal adjudication became necessary as that formal system “became too expensive, too slow, and too inefficient to deal with the myriad of problems it was being asked to resolve.”<sup>100</sup>

### B. Identifying Motives

A fundamental difference between the jurisdiction of Equity and the jurisdiction of ADR is who makes the determination about whether the case will be heard in the formal or, instead, the alternative system. In Equity, the chancellor made that decision and thus set the limits of its own jurisdiction.<sup>101</sup> In contrast, participation in ADR may be premised upon the mutual agreement of the parties, whether such agreement was reached before or after the dispute between them had arisen.<sup>102</sup> A court or an authoritative mandate may also order litigants to engage in some form of ADR.<sup>103</sup> But whether the choice of legislators, litigants, or judges, ADR has certain attractive characteristics that make it preferable to formal adjudication in certain cases. These characteristics invite a comparison between the systems of ADR and Equity because they demonstrate the similarity of the role that each alternative system plays in the broader context of the administration of justice through dual

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98. EDMUND H.T. SNELL, *THE PRINCIPLES OF EQUITY* 2–3 (1888); 1 WILLIAM SEARLE HOLDSWORTH, *A HISTORY OF ENGLISH LAW* 453 (3rd ed. 1922) (“To write fully of the equitable jurisdiction of the Chancellor would be to write the history of equity itself.”).

99. See 1 POMEROY, *supra* note 55, § 48, at 49 (“[E]very equitable rule which it announced, was of necessity an innovation to a greater or less extent upon the then existing common law.”); Holtzoff, *supra* note 97, at 130 (history of equity).

100. Alderman, *supra* note 39, at 1238. See also Kim Dayton, *The Myth of Alternative Dispute Resolution in the Federal Courts*, 76 IOWA L. REV. 889, 892–93 (1991) (chronicling how scholars, legislators, judges and the bar hailed “ADR as efficient and effective procedural solutions to the management problems associated with federal court civil litigation”); Eric K. Yamamoto, *Efficiency’s Threat to the Value of Accessible Courts for Minorities*, 25 HARV. C.R.-C.L. L. REV. 341, 360 (1990) (“Alternative dispute resolution is a response to criticisms of excessive litigation costs and systemic insensitivity.”). Accordingly, one might fairly conclude that ADR is resolving those cases where, in the estimation of litigants who demand ADR or the authorities that impose ADR, formal adjudication fails to provide a plain, adequate, and complete resolution of the dispute.

101. Steele, *supra* note 70, at 13 (“The process of delimiting the jurisdiction of chancery was largely one of self-determination.”); see also *supra* notes 61–67 and accompanying text.

102. See generally RAU ET AL., *supra* note 31, at 545–96; Edward F. Sherman, *Court-Mandated Alternative Dispute Resolution: What Form of Participation Should be Required?*, 46 SMU L. REV. 2079 (1993). Issues about the meaningfulness of a party’s “consent” to ADR are discussed *infra* at notes 419–35.

103. See generally GOLDBERG ET AL., *supra* note 46, at 388–415.

systems.

The subsections that follow examine the keystones of the system of ADR, and explore their medieval equitable analogues. A quote from the ADR casebook authored by Professors Riskin and Westbrook provides the organizational structure for this discussion:

Five motives, often intermingled, fire most of the current interest in alternatives to traditional litigation: 1. Saving time and money, and possibly rescuing the judicial system from an overload; 2. Having “better” processes—more open, flexible and responsive to the unique needs of the participants. . . . 3. Achieving “better” results—outcomes that serve the real needs of the participants or society; 4. Enhancing community involvement in the dispute resolution process; and 5. Broadening access to “justice.”<sup>104</sup>

As explored in the sections that follow, each of these motives echoes a theme that is characteristic of Equity.

### 1. Saving Time and Money

Rhetoric about the rampant costs and inefficiencies of formal adjudication occupies a central role in the ADR canon.<sup>105</sup>

The common perception is that judges and lawyers, the procedural rigor of justice and substantive incantations of legality, lay juries and technical experts hurt more than they help. The recourse to legal actors and proceedings is costly, emotionally debilitating, and potentially counterproductive.<sup>106</sup>

“[T]he adversary system can be a hugely inefficient means of

104. RISKIN & WESTBROOK, *supra* note 31, at 2. Another leading ADR casebook offers the following list of “justifications” for ADR: (i) “To lower court caseloads and expenses;” (ii) “To reduce the parties’ expenses and time;” (iii) “To provide speedy settlement of those disputes that were disruptive of the community or the lives of the parties’ families;” (iv) “To improve public satisfaction with the justice system;” (v) “To encourage resolutions that were suited to the parties’ needs;” (vi) “To increase voluntary compliance with resolutions;” (vii) “To restore the influence of neighborhood and community values and the cohesiveness of communities;” (viii) “To provide accessible forums to people with disputes;” and (ix) “To teach the public to try more effective processes than violence or litigation for settling disputes.” GOLDBERG ET AL., *supra* note 5, at 8. Although I opted for the Riskin & Westbrook framework for organizational purposes (finding less overlap in the enumerated factors), I also refer occasionally to the Goldberg et al. factors.

105. RISKIN & WESTBROOK, *supra* note 31, at 2 (a principal motive fueling ADR is “[s]aving time and money, and possibly rescuing the judicial system from an overload”). See also GOLDBERG ET AL., *supra* note 5, at 8 (“To lower court caseloads and expenses; To reduce the parties’ expenses and time, To provide speedy settlement of those disputes that were disruptive of the community or the lives of the parties’ families”). See also *supra* notes 25–45 and accompanying text.

106. CARBONNEAU, *supra* note 92, at 1.

uncovering facts; its relentless formalities and ceaseless opportunities for splitting hairs are time consuming and expensive.”<sup>107</sup> Naturally, these criticisms are often infused with crisis rhetoric about the litigation explosion and overburdened courts.<sup>108</sup>

By providing “a less legalistic process than litigation”<sup>109</sup> the effective use of ADR is thought to compare favorably with the acrimony, costs, and time of ordinary litigation.<sup>110</sup>

Promoters of ADR sometimes portray these techniques as offering a stark contrast to the trial process. The dichotomy is viewed as absolute. “Bring your dispute to another place,” such proponents tell us, “and avoid the burdens of our inefficient and antiquated trial system.” ADR is seen by its strongest advocates as informal and speedy; courts are viewed as rule-bound and sluggish.<sup>111</sup>

And certain anecdotal evidence is enthusiastically confirmatory: “ADR is far less expensive than litigation in resolving disputes, and that’s ultimately what litigation is all about. I think you can get to the heart of the matter a lot quicker and . . . with a lot less expense.”<sup>112</sup>

Equity, too, was “[s]imple, inexpensive and speedy in its origins.”<sup>113</sup> Litigants came to Equity to avoid the gratuitous rigor, relentless formalities, and tedious hair-splitting that epitomized formal

107. JETHRO LIEBERMAN, *THE LITIGIOUS SOCIETY* 171 (1981).

108. See *supra* notes 8–13 and accompanying text; Alvin B. Rubin et al., *Colloquy on Complex Litigation*, 1981 BYU L. REV. 741, 747 (“[I]f more is not done to reduce the expense of litigation, the legal profession will be destroyed.”); Lambros, *supra* note 9, at 465 (growing workload demands on courts “best relieved by diverting cases” to ADR techniques); Peckham, *supra* note 13, at 253; *Chief Justice Urges Greater Use of Arbitration to Relieve Courts of Litigation Burdens*, 17 THIRD BRANCH 1, 1 (1985); Miller, *supra* note 9, at 3 (discussing “litigation explosion”).

109. Stephen J. Ware, *Default Rules From Mandatory Rules: Privatizing Law Through Arbitration*, 83 MINN. L. REV. 703, 721 (1999). See also Alan S. Rau, *Resolving Disputes Over Attorney’s Fees: The Role of ADR*, 46 SMU L. REV. 2005, 2028 (1993) (there is “much less ‘lawyering’ in arbitration than in litigation”).

110. Clark Freshman, *Tweaking the Market for Autonomy: A Problem-Solving Perspective to Informed Consent in Arbitration*, 56 U. MIAMI L. REV. 909, 909 n.2 (2002). See also Maureen A. Weston, *Checks on Participant Conduct in Compulsory ADR: Reconciling the Tension in the Need for Good-Faith Participation, Autonomy, and Confidentiality*, 76 IND. L.J. 591, 592 (2001) (calling the ADR movement an “effort to avoid the delay, expense, technicality, and acrimony of traditional judicial litigation”). For a discussion of contemporary empirical data about time and cost savings, see Parts IV and V *infra* and accompanying text. In this Part III.B., however, ADR is contemplated in its pure, original form(s).

111. Sabatino, *supra* note 39, at 1291.

112. John Lande, *Getting the Faith: Why Business Lawyers and Executives Believe in Mediation*, 5 HARV. NEGOT. L. REV. 137, 177 (2000) (suggesting that this quote from the “general counsel of a major manufacturing firm” was typical in his survey).

113. Bryant Smith, *Legal Relief Against the Inadequacies of Equity*, 12 TEX. L. REV. 109, 112 (1934). A discussion of the eventual ossification of Equity procedure is reserved for *infra* Part IV.

adjudication in the common law courts.<sup>114</sup> In Equity there were no technical rules of pleading or procedure.<sup>115</sup> Indeed, animated by the juristic principles of discretion, natural justice, fairness, and good conscience, the essence of a jurisprudence of equity is somewhat inconsistent with the establishment of formal rules.<sup>116</sup> Equity's mandate to do justice demanded that it be administered swiftly and inexpensively.<sup>117</sup> Litigants did not need the representation of a pleader.<sup>118</sup> Nor were litigants required to pay a filing fee.<sup>119</sup>

The comparative advantage in "time and money" that both ADR and Equity purported to offer as alternative systems was largely a function of their "better processes" and "better results." That discussion follows immediately in subsections 2 and 3.

## 2. Procedural Flexibility

Interest in ADR is also generated by the desire for processes that can be tailored to the unique needs of a particular case.<sup>120</sup> Proponents of ADR argue that control or autonomy over issues of process may lead to a more effective and satisfying resolution of the dispute.<sup>121</sup> The ADR narrative emphasizes that rigid procedural rules can be manipulated, misused, and abused by gladiators fixated on purely adversarial solutions.<sup>122</sup> The problem, they argue, is that lawyers are taught and are

114. See *infra* notes 129–40 and accompanying text.

115. See Severns, *supra* note 61, at 89 ("No form was necessary and no strict procedure had to be followed."); Walsh, *supra* note 77, at 106 ("Relief was given without a writ. The bill [in equity] was generally in simple form, without formality, and free from the technical rules which applied to writs."); Barbour, *supra* note 75, at 854 ("Less exactness of pleading was required than by the law, and even if a bill were 'misconceived' the complaint was not out of court . . .").

116. See Roscoe Pound, *The Decadence of Equity*, 5 COLUM. L. REV. 20, 20 (1905). See generally MAITLAND, *supra* note 63, at 12–22; JOHN SALMOND, *THE FIRST PRINCIPLES OF JURISPRUDENCE* 1 (1893) (suggesting there is no body of rules for Equity); BALDWIN, *supra* note 70, at 64 (describing Equity as a court "of indefinite powers and unrestricted procedure").

117. BAKER, *supra* note 64, at 103–04.

118. Glenn & Redden, *supra* note 51, at 760 n.17.

119. *Id.*

120. RISKIN & WESTBROOK, *supra* note 31, at 2. See also GOLDBERG ET AL., *supra* note 5, at 8 ("To improve public satisfaction with the justice system . . . to increase voluntary compliance with resolutions.").

121. Freshman, *supra* note 110, at 909 (commenting that autonomy is a key value in ADR).

122. See, e.g., Douglas Yarn, *The Death of ADR: A Cautionary Tale of Isomorphism Through Institutionalization*, 108 PENN ST. L. REV. 929, 957 (2004) (referring to adjudication and ADR as "war and diplomacy," respectively (citation omitted)); Robert F. Blomquist, *Some (Mostly) Theoretical and (Very Brief) Pragmatic Observations on Environmental Alternative Dispute Resolution in America*, 34 VAL. U. L. REV. 343, 366 (2000) (discussing the relative efficiency and efficacy of ADR in contrast to "courtroom battles"); Kenneth R. Feinberg, *Resolving Mass Tort Claims: The Perspective of a Special Master*, 53 DISP. RESOL. J. 10, 12 (1998) (contrasting ADR with the typical "protracted litigation war of

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to exploit every loophole in the rules, take advantage of every one of their opponents' tactical mistakes or oversights, and stretch every legal or factual interpretation to favor their clients. The guiding premise of the entire [adversarial] system is that maintaining the integrity of rights-guarding procedures is more important than . . . enforcing the substantive law against its violators.<sup>123</sup>

The formalized means for protecting rights are tricky, divisive, and time-consuming, and can themselves become the barriers to the effective redress of grievances.<sup>124</sup> In contrast, the relative informality of ADR means that pre-trial procedures, elaborate pleading, motion practice, and discovery can be modified, streamlined, or in many cases completely eliminated to reach the merits of the dispute.<sup>125</sup> ADR is thus a procedural reform that restores the primacy of substance, casting procedure as its mere handmaiden.<sup>126</sup> Of course, formal adjudication is

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attrition"); Thomas R. McCoy, *The Sophisticated Consumer's Guide to Alternative Dispute Resolution Techniques: What You Should Expect (or Demand) From ADR Services*, 26 U. MEM. L. REV. 975, 990 (1996) ("Mediation is not a spectator sport for the parties like litigation where lawyer-champions do battle on behalf of their parties . . ."); Richard A. Williamson, *The Use of Experts Under the Amended Federal Rules of Civil Procedure, and in Alternative Dispute Resolution Forums*, PLI Order No. H4-5185 Mar.-Apr. 1994 at 414 ("Whereas litigation is war, Arbitration is a Skirmish, and Mediation, Early Neutral Evaluation and similar informal non-binding ADR process can be likened to Powwows that may lead to a lasting and satisfactory peace."). Of course whether disputants favor adversarialism is highly disputed. See, e.g., Laurens Walker et al., *The Relation Between Procedural and Distributive Justice*, 65 VA. L. REV. 1401, 1420 (1979).

123. Robert W. Gordon, *The Independence of Lawyers*, 68 B.U. L. REV. 1, 10 (1988). See also Nader & Singer, *supra* note 12, at 314-15 (1976) ("Law schools rarely teach the essential skills of negotiation and mediation; rather their concentration on the dissection of appellate court cases emphasizes the escalation of disputes rather than their prevention or early settlement. Heavy dependence on the case method, with its focus on individual problems, makes unlikely any systematic approach to resolving mass problems. The dearth of interdisciplinary study makes it difficult for lawyers to perceive alternative ways of dealing with different types of existing disputes and those likely to arise from emerging technologies.").

124. CARBONNEAU, *supra* note 92, at 1. See generally Bryant Garth, *From Civil Litigation to Private Justice: Legal Practice at War with the Profession and its Values*, 59 BROOK. L. REV. 931, 938-45 (discussing "scorched earth litigation" and "Rambo tactics" by litigators in a search of a competitive advantage in high stakes litigation); William M. Howard, *Arbitrating Employment Discrimination Claims: Do You Really Have To? Do You Really Want To?*, 43 DRAKE L. REV. 255, 289 (1994) (suggesting that many formal court actions are extended unnecessarily by lawyers who exploit or abuse judicial procedures, especially liberal rules for pretrial discovery); Geoffrey C. Hazard, Jr., *Discovery Vices and Trans-Substantive Virtues in the Federal Rules of Civil Procedure*, 137 U. PA. L. REV. 2237, 2240 (1989) ("Discovery of documents in cases involving the conduct of business or government often proceeds by a vicious game in which the respondent has every incentive to trim and cheat. Highly developed dialectical skills have evolved."). See also Lieberman & Henry, *supra* note 24, at 427.

125. Rau, *supra* note 109, at 207-28. See also Brunet, *supra* note 30, at 31-33 ("While various ADR procedures permit some exchange of information between disputants, the process is informal, ambiguous, and not administered in a managerial fashion. . . . [T]he spirit of ADR is antidiscovery.").

126. Brunet, *supra* note 30, at 31 (viewing ADR as procedural reform).

thought to have experienced a similar conversion in favor of a flexible and subservient procedural schemata.<sup>127</sup> Yet, ADR emerged as a popular alternative to many because of its “‘better’ processes—more open, flexible, and responsive to the unique needs of the participants.”<sup>128</sup>

These are familiar themes. The Law courts were notorious for their idolatry of form and forms.<sup>129</sup> Complex, unforgiving, and formulaic rules of pleading, procedure, and proof could be navigated successfully only by the “form-mad common-lawyers.”<sup>130</sup> A failure to purchase the correct writ or to comply with minor technical requirements was an incurable mistake.<sup>131</sup> The rigors of single issue pleading, too, tolerated not even the slightest misjudgment.<sup>132</sup> The entire fate of a lawsuit could turn upon the exact words that the parties uttered when they appeared before the tribunal: “The client was unthought of. . . . The right was nothing, the mode of stating, everything.”<sup>133</sup>

If a wrong action was adopted, the error was fatal to the whole proceeding, however clearly the facts of the controversy might have been brought before the proper court. . . . It was not enough that he stood

127. See Subrin, *supra* note 14.

128. RISKIN & WESTBROOK, *supra* note 31, at 2.

129. de Funiak, *supra* note 51, at 57 (“A growing worship of formalism and technicality also began to obsess the courts of law.”); Garrett, *supra* note 70, at 35 (“[T]he Common Law has brought about its own downfall by its idolatry of the forms it created.”).

130. *Id.* at 31 (discussing “form-mad common-lawyers”). See also Adams, *supra* note 61, at 96 (explaining the Law courts’ “hard and fast system”); BALDWIN, *supra* note 70, at 62 (referring to the common law’s “formulaic procedure”); 1 WILLIAM SEARLE HOLDSWORTH, A HISTORY OF ENGLISH LAW 447 (discussing the “complicated machinery” of the Law Courts).

131. KOFFLER, *supra* note 65, at 39 (“When the plaintiff petitioned the Chancellor for an Original Writ, he was under great pressure to select the right Writ for the facts of his case. . . . If he selected a Form of Writ which did not fit his case . . . he could not succeed.”).

132. The common law pleadings rules earned the dubious distinction as “the most exact, if not the most occult, of the sciences.” 2 POLLOCK & MAITLAND, *supra* note 61, at 612. There are three fundamental rules to single-issue pleading. First, after a declaration, the parties must at each stage (i) demur; (ii) plead by way of traverse; or (iii) plead by way of confession and avoidance. Second, upon a traverse, issue must be tendered. And third, the issue, when well tendered, must be accepted. Either by virtue of the first rule, a demurrer takes place which is a tender of an issue in law, or, by the joint operation of the first two rules, the tender of an issue in fact. And then, by virtue of the second and third rules, the issue so tendered, whether in fact or in law, is accepted and becomes finally complete. It is by these rules that the production of an issue is effected. See generally HENRY JOHN STEPHEN, PRINCIPLES OF PLEADING IN CIVIL ACTIONS § 136 (2d ed. 1901). Encyclopedic volumes of supplemental rules and principles ensure the production of an issue that is truly but one issue, see, e.g., *id.* §§ 137–169, 164–339, that is material, see, e.g., *id.* §§ 170–174, 340–345, and is unified, see, e.g., §§ 175–190, 346–371, and is certain, see, e.g., *id.* §§ 191–228, 372–430, and is neither obscure nor confusing, see, e.g., §§ 229–243, 431–452, and will lead to neither prolixity nor delay in pleading, see, e.g., §§ 244–249, 453–465. See also *id.* §§ 250–259, 466–481 (“Certain Miscellaneous Rules”); R. ROSS PERRY, COMMON-LAW PLEADING 231–81 (1897) (discussing the rules and mechanics of issue pleading).

133. Lord Chief Justice Coleridge, *The Law in 1847 and the Law in 1889*, 37 CONTEMP. REV. 797, 800 (1890). See also 2 POLLOCK & MAITLAND, *supra* note 61, at 559.

within the temple of justice, he must have entered through a particular door.<sup>134</sup>

This pathways-to-justice metaphor (although evocative of Sander's "multi-door courthouse"<sup>135</sup>) may be deceptively pacific. Other commentators used battle metaphors to express the stakes and the intricate terms of engagement.<sup>136</sup> By all accounts, the process was a contest of skill, and success depended upon observing the formal rules of the combat.<sup>137</sup> Here, too, lawyers and legal education were blamed for the excesses of adversarialism and formalism.<sup>138</sup>

In the Law courts, "truth was quite unable to force its way through the barriers erected against its opposite."<sup>139</sup>

The Common Law made a fetish of procedure. Obviously, this was to

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134. CHARLES HEPBURN, *THE HISTORICAL DEVELOPMENT OF CODE PLEADING IN AMERICA AND ENGLAND* 47–48 (1897).

135. Sander, *supra* note 21, at 84 ("The room directory in the lobby of such a [Dispute Resolution] Center might look as follows: Screening Clerk—Room 1; Mediation—Room 2; Arbitration—Room 3 . . ."). See generally Resnik, *supra* note 49, at 217 (discussing Sander's metaphor). See also Stempel, *supra* note 5, at 348 (discussing the importance of the procedural justice metaphors).

136. [The system of common law forms of action] contains every weapon of medieval warfare from the two handed sword to the poniard. The man who has a quarrel with his neighbor comes thither to choose his weapon. The choice is large; but he must remember that he will not be able to change weapons in the middle of the combat and also that every weapon has its proper use and may put to none other. If he selects a sword, he must observe the rules of sword-play; he must not try to use his cross-bow as a mace.

2 POLLOCK & MAITLAND, *supra* note 61, at 559. Sport metaphors are also popular. In fact, the Roscoe Pound speech that served as the rallying cry for Chief Justice Burger's Pound Conference in 1976 (the birth of the modern ADR movement) was itself a plea for equity. Roscoe Pound referred to the "sporting theory of justice" when criticizing the rigidity of common law pleading. Roscoe Pound, *The Canons of Procedural Reform*, 12 A.B.A. J. 541, 543 (1926). Arguing in 1906 for a more equity-based procedure, Pound criticized the sporting theory on the ground that it led to deciding cases "according to the rules of the game" rather than in accordance with a "search independently for truth and justice." Roscoe Pound, *The Causes of Popular Dissatisfaction with the Administration of Justice*, 40 AM. L. REV. 729, 738 (1906). For a discussion of the importance of metaphors generally, see Elizabeth G. Thornburg, *Metaphors Matter: How Images of Battle, Sports, and Sex Shape the Adversary System*, 10 WIS. WOMEN'S L.J. 225 (1995).

137. HEPBURN, *supra* note 134, at 48 ("The issue of the combat must not be determined by mere brute force—not even by the brute force of indisputable facts arrayed before the court.").

138. For a discussion of how form was the focus of both the practice and the study of the Law, see THEODORE F.T. PLUCKNETT, *A CONCISE HISTORY OF THE COMMON LAW* 380–81 (5th ed. 1956) (discussing efforts of Glanville, Bracton, and Littleton.); BAKER, *supra* note 64, at 49–52; S.F.C. MILSOM, *HISTORICAL FOUNDATIONS OF THE COMMON LAW* 59 (2d ed. 1981) (explaining that procedure dictated how the law existed and how lawyers thought); KOFFLER & REPPY, *supra* note 65, at 65 (stating that "[t]he Law was required to express itself through the Limited System of Writs and Forms of Action sanctioned by precedent"). HENRY SUMNER MAINE, *DISSERTATIONS ON EARLY LAW AND CUSTOM* 389 (1883) (noting that common lawyers could see the law "only through the envelope of its technical forms").

139. Coleridge, *supra* note 133, at 798.

put the cart before the horse. In any satisfactory system of law, procedure must always remain a means, not an end. It must always be subordinate to the purpose of the process, which is to right wrong. Glanville, and Bracton, and Littleton, and Coke forgot this. They became so interested in forms that they allowed the substance to escape.<sup>140</sup>

With neither forms of action nor technical pleading rules, Equity focused instead on the merits of the dispute.<sup>141</sup> Although “form” is not itself a pejorative,<sup>142</sup> one could fairly conclude that “law deal[t] with form, equity with substance.”<sup>143</sup> Chancery “had the power to look

140. Garrett, *supra* note 70, at 31.

141. Oleck, *supra* note 51, at 40 (“[T]he plaintiff set forth his cause in a ‘bill.’ Then the chancellor would issue a ‘subpoena,’ in the king’s name, to summon the opposing party, who could demur, enter a plea, or file an ‘answer.’”).

No form was necessary and no strict procedure had to be followed. The difference from proceedings on writs is significant. It may be said that all that was necessary was to state sufficient facts to show a reason for granting relief. Indeed it appears that if a bill did not state sufficient facts, permission was granted by the Justice to amend *viva voce*, a procedure which would not have been tolerated at Westminster.

Severns, *supra* note 61, at 89.

In the equity procedure one encounters no bewildering rules as to the name or classification of the particular suit, or, according to the nomenclature at law, “*form of action*.” When from an investigation of the law and facts, counsel has determined that the client has a good cause for equitable relief, he is saved the problem of wasting brain-sweat in deciding whether he shall sue in debt, *assumpsit*, or covenant, in trover or replevin, in trespass *vi et armis* or trespass on the case. He simply decides to file a “bill in equity.”

EDWIN B. MEADE, LILE’S EQUITY PLEADING AND PRACTICE § 94, at 59 (3d ed. 1952). See generally Main, *supra* note 85, at 457–58.

142. The science of special pleading is an excellent logic; it is admirably calculated for the purposes of analyzing a cause, of extracting, like the roots of an equation, the true points in dispute, and referring them with all imaginable distinctness to the court or jury. It is reducible to the strictest rules of pure dialectics, and tends to fix the attention, give a habit of reasoning clearly, quicken the apprehension and invigorate the understanding.

Sir William Jones’ Works. Prefatory Discourse to the Speeches of Isæus, IV. 34. (f.) IX. 50, 51 (8 vo.). See also Robinson v. Rayley, 1 Burr., at 319 (Mansfield, J.) (“[T]he substantial rules of pleading are founded in strong sense and the soundest and closest logic.”).

One of the best qualities of our medieval law was that in theory it left little or nothing at all events within the sphere of procedure, to the discretion of the justices. They themselves desired that this should be so and took care that it was or seemed to be so. They would be responsible for nothing beyond an application of iron rules.

2 POLLOCK & MAITLAND, *supra* note 61, at 561. See also *id.* (“Had they aimed at a different end, they would have ‘received’ the plausibly reasonable system of procedure which the civilians and canonists were constructing, and then the whole stream of our legal history would have been turned into a new channel. For good and ill they made their choice.”) For analogous apologies of formal adjudication, see STEPHEN LANDSMAN, THE ADVERSARY SYSTEM: A DESCRIPTION AND DEFENSE (1984); A. STRICK, INJUSTICE FOR ALL (1977); J. FRANK, COURTS ON TRIAL 80–142 (1949).

143. Edward Robeson Taylor, *The Fusion of Law and Equity*, 66 U. PA. L. REV. 19 (1917).



beyond the form to the substance and may lend his power in aid of a person wronged to see that the wrong does not go without a remedy.”<sup>144</sup> The administration of Equity presumed procedural flexibility.<sup>145</sup>

This flexibility extended, of course, to an array of remedies that were simply unavailable under the Common Law. With “practically an unlimited power of enforcement,” Equity could adapt its decree to all circumstances arising in a case, “and adjust at one stroke the various interests of all parties concerned.”<sup>146</sup> Whether requiring the specific performance of contracts, enjoining the repetition of a trespass or nuisance, appointing a receiver to prevent a defendant from destroying property that was the subject of an action, or ordering an accounting, Equity could tailor its remedies to meet the real and substantial rights of all the parties in the circumstances then presented.<sup>147</sup>

Much like the Law courts, formal adjudication is bound by the “limited remedial imagination of courts” and to binary win-lose results.<sup>148</sup>

A formalist, rule-bound institution is ill equipped to recognize what is really at stake in its conflicts with the environment. It is likely to adopt opportunistically because it lacks criteria for rational reconstruction of outmoded or inappropriate policies. . . . The idea of legality needs to be conceived more generally and to be cured of formalism.<sup>149</sup>

Proponents of ADR argue that rigid adherence to legal formulae can frame debates in a zero-sum model that obscures parties’ goals and overlooks a richer set of possible resolutions.<sup>150</sup>

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144. Severns, *supra* note 61, at 90.

145. See MAITLAND, *supra* note 93, at 12–22; JOHN SALMOND, JURISPRUDENCE 1–5 (13th ed. 1906) (suggesting that the true and original distinction between law and equity is one not between two conflicting bodies of rules, but between a system of judicial administration based on fixed rules and a competing system governed solely by judicial discretion); BALDWIN, *supra* note 70, at 64 (referring to equity as a court “of indefinite powers and unrestricted procedure”).

146. Steele, *supra* note 70, at 14.

147. See MAITLAND, *supra* note 93, at 4–7; Sidney Post Simpson, *Fifty Years of American Equity*, 50 HARV. L. REV. 171 (1936); 1 STORY, *supra* note 55, § 27, at 19; MITFORD, *supra* note 82; 1 WOODDESON, *supra* note 82, at 203–06.

148. Menkel-Meadow, *supra* note 40, at 7, 18 n.77 (“[But] of course not all judgments are binary or rigid formulations of damages and injunctions. There are “compromise verdicts,” comparative negligence considerations, and all kinds of equitable relief. There is also the more complex kin of ruling in a wide variety of law reform, institutional, and public law cases.” (citing Chayes, *supra* note 28; Theodore Eisenberg & Stephen Yeazell, *The Ordinary and Extraordinary in Institutional Litigation*, 93 HARV. L. REV. 465 (1980))). See also Hensler, *supra* note 13, at 182.

149. PHILIPPE NONET & PHILIP SELZNICK, LAW AND SOCIETY IN TRANSITION: TOWARD RESPONSIVE LAW 77, 108 (1978).

150. Resnik, *supra* note 49, at 252; RAIFFA, *supra* note 31, at 33–35; JAY FOLBERG & ALISON TAYLOR, MEDIATION: A COMPREHENSIVE GUIDE TO RESOLVING CONFLICTS WITHOUT LITIGATION 10 (1984); Lieberman & Henry, *supra* note 24, at 425, 529; Hensler, *supra* note 13, at 182.

Like Equity, ADR does not restrict the parties to discrete legal claims or preexisting legal remedies; therefore a variety of creative remedies are available:

ADR is more flexible and adapts to the specific needs and demands of the case. With ADR the parties can utilize creative remedies and a broader range of solutions. Because the courts use a relatively structured approach, the range of remedies available may be quite limited. Lawyers may be required to reframe the issues so as to fit a particular legal doctrine and, thus, may change the nature of the dispute. As a result, the court often is not able to address the real issues and tailor an appropriate remedy.<sup>151</sup>

ADR is thus especially appropriate in cases where “the nature of the dispute requires a broader range of remedies and a broader focus on the issues than the courts can provide.”<sup>152</sup> ADR can order monetary and injunctive remedies to promote certain behavior, restructure relationships, and impose outcomes beyond the legal and practical reach of courts.<sup>153</sup>

The remaining paragraphs of this subsection address particular procedural characteristics that may contribute to the popularity of ADR. One of these characteristics is the ability to keep ADR proceedings

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151. Robert B. Moberly & Judith Kilpatrick, *Introduction: The Arkansas Law Review Symposium on Alternative Dispute Resolution*, 54 ARK. L. REV. 161, 167 (2001). See also Jennie Kihnley, *Unraveling the Ivory Fabric: Institutional Obstacles to the Handling of Sexual Harassment Complaints*, 25 LAW & SOC. INQUIRY 69, 71–72 (2000) (“The parties can attain ‘extralegal justice’ due to the flexibility of ADR, which allows for a wider range of problems and remedies than litigation.” (citing Lauren B. Edelman, Howard S. Erlanger & John Lande, *Internal Dispute Resolution: The Transformation of Civil Rights in the Workplace*, 27 LAW & SOC’Y REV. 497, 503 (1993))); E. PATRICK MCDERMOTT & ARTHUR ELIOT BERKELEY, *ALTERNATIVE DISPUTE RESOLUTION IN THE WORKPLACE: CONCEPTS AND TECHNIQUES FOR HUMAN RESOURCES EXECUTIVES AND THEIR COUNSEL* (1996); EDWARD J. BERGMAN & JOHN G. BICKERMAN, *COURT-ANNEXED MEDIATION: CRITICAL PERSPECTIVES ON SELECTED STATE AND FEDERAL PROGRAMS* (1998) (suggesting that creative solutions, illustrated by remedies that few courts would grant, are the most common characteristics of successful alternative dispute resolution); Edward J. Costello, Jr., *ADR: Virtue or Vice*, 54 DISP. RESOL. J. 62, 65 (1999) (“Even in adjudicative ADR, the neutral has much broader authority to craft a remedy than a judge, so long as it has an appropriate nexus to the underlying agreement to arbitrate.”); JOSEPH ALLEGRETTI, *THE LAWYER’S CALLING* 94 (1996) (discussing creative alternative dispute resolutions, including Christian conciliation centers in which Christians can bring their disputes in order to obtain nonlegal remedies.); Edwin B. Wainscott & Douglas W. Holly, *Zlaket Rules and Alternative Dispute Resolution*, 481 PLI/LIT. 631, 638 (1993) (“Unlike litigation, ADR does not restrict the parties to discreet legal claims or pre-existing legal remedies, and therefore, a variety of creative remedies are available. The type of procedures that may be agreed upon are limited only by parties’ and their counsels’ imagination.”); Kenneth R. Feinberg, *Mediation—A Preferred Method of Dispute Resolution*, 16 PEPP. L. REV. S5, S5–S7 (1989).

152. Eve Hill, *Alternative Dispute Resolution in a Feminist Voice*, 5 OHIO ST. J. ON DISP. RESOL. 337, 340 (1990).

153. Lande, *supra* note 112, at 150. See generally *supra* note 128 and accompanying text.

private.<sup>154</sup> Unlike formal adjudication, pleadings (if any) need not be publicly filed; hearings can occur in a private conference room and are neither known nor available to the public;<sup>155</sup> there may exist no transcript; and even the decision need not be released to anyone other than the interested parties.<sup>156</sup> Confidentiality can be maintained and publicity can be avoided in cases involving trade secrets or other confidential or embarrassing information.<sup>157</sup> By way of analogy, the informality and flexibility of Equity made those proceedings similarly “private,” at least in certain respects. For example, in early Equity many proceedings were initiated not by a recorded bill, but by word of mouth.<sup>158</sup> And because there was no notion of precedent in early Equity, the reporting of Chancery proceedings was sporadic and largely unnecessary.<sup>159</sup> Moreover, Chancery “could sit anywhere, even in the

154. See Soia Mentschikoff, *Commercial Arbitration*, 61 COLUM. L. REV. 846, 849 (1961); Lisa Bernstein, *Understanding the Limits of Court-Connected ADR: A Critique of Federal Court Annexed Arbitration Programs*, 141 U. PA. L. REV. 2169, 2240–41 (1993); Jacqueline M. Nolan-Haley, *Court Mediation and the Search for Justice Through Law*, 74 WASH. U. L.Q. 47, 54 (1996); Costello, *supra* note 151; Robert F. Blomquist, *Is Environmental Alternative Dispute Resolution Working in America?*, 30 ENVTL. L. REP. 10,661, 10,666 (2000).

155. STEVEN C. BENNETT, *ARBITRATION: ESSENTIAL CONCEPTS* 7 (2002). Richard S. Bayer & Harlan S. Abrahams, *The Trouble with Arbitration*, LITIGATION, Winter 1985, at 30, 31 (“Often the room is a hotel suite sporting masonite folding tables positioned in an inverted ‘‘U.’’ There is no gavel or bailiff, no robed figure sitting above the proceeding. Rather, there are one to three businessmen, seated comfortably at the top of the ‘‘U,’’ chatting informally with the parties.”). See also Resnik, *supra* note 49, at 248–49 (discussing the ADR empowerment thesis in the context of the informality of those proceedings).

156. Ware, *supra* note 109, at 721–23.

157. See generally Blackman & McNeill, *supra* note 39, at 1722 (stating that “public disclosure of confidential trade secrets or other proprietary information can more easily be avoided in an ADR proceeding if the parties so choose”); Kevin R. Casey, *Alternative Dispute Resolution and Patent Law*, 3 FED. CIR. B.J. 1, 5 (1993) (“ADR hearings usually do not yield transcripts or written opinions in which trade secrets or other confidential information may be compromised (or in which ‘dirty linen’ of a loss is aired.)”); Judith Resnik, *Failing Faith: Adjudicatory Procedure in Decline*, 53 U. CHI. L. REV. 494, 538 (1986) (“[M]any defendants (and their attorneys) in products liability and antitrust cases . . . now seem intrigued by ADR as a means of protecting themselves from negative publicity and from outcomes they have disliked.”); Chris A. Carr & Michael R. Jencks, *The Privatization of Business and Commercial Dispute Resolution: A Misguided Policy Decision*, 88 KY. L.J. 183, 208 (2000).

158. See BAKER, *supra* note 64, at 103.

159. See Glenn & Redden, *supra* note 51, at 763 (noting that “there were no regular reports of the cases that were decided”); *Vidal v. Girard’s Exrs.*, 2 How. 127, 193 (1844) (Story, J.) (stating that equity decisions had no precedential effect because the rulings were contained in reports that were “shadowy, obscure and flickering”).

Bacon’s desire to systematize the practice of the Court of Chancery is also illustrated by his plea for equity law reports, contained in his “Proposition touching the Compiling and Amendment of the Laws of England” addressed to James I during his attorney-generalship. In it he pays a rare tribute to Coke, when he observes that but for the reports of the great chief justice “the law by this time had been almost like a ship without ballast,” and he urges the sovereign to appoint “grave and sound lawyers” to be paid

chancellor's private house."<sup>160</sup> Of course, both ADR and Equity have suffered criticism for this informality and secrecy.<sup>161</sup>

An expert decisionmaker is another component of the procedural flexibility that makes ADR attractive.<sup>162</sup> Juries are often perceived as ignorant and unpredictable factfinders.<sup>163</sup> Litigants thus may wish to avoid a jury trial in favor of a neutral, and perhaps a neutral with technical expertise.<sup>164</sup> Equity procedure is analogous because there were no juries.<sup>165</sup> The chancellor assumed the role of judge and jury, and

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reporters in the courts. This suggestion bore fruit in 1617, for on October 20th (only a few months after Bacon had assumed office), the "Ordinance for the Constitution of the Reporters of the Law" was issued, two reporters, with a salary of £100 a year each being appointed. The size of the salary, unusual in those days, may be taken as an indication of the importance that Bacon attached to law reporting.

George W. Keeton, *Bacon as a Chancery Judge*, 18 IOWA L. REV. 476, 477-78 (1933).

160. See BAKER, *supra* note 64, at 103.

161. See Brunet, *supra* note 30, at 28 (noting that "the absence of records and of written opinions make the pathology of ADR difficult"). In Equity the criticism was part of an attack on the overall arbitrariness of the system. See, e.g., JOHN SELDEN, *THE TABLE TALK* 64 (1989) ("Equity is a roguish thing. For law we have a measure . . . equity is according to the conscience of him that is Chancellor, and as that is larger or narrower, so is equity. Tis all one has if they should make the standard for the measure a Chancellor's foot."); 6 BULSTRODE WHITELOCK, *COMMONS JOURNALS* 373 (1650) ("The proceedings in Chancery are secundum arbitrium boni viri, and this arbitrium differeth as much in several men as their countenances differ. That which is right in one man's eyes is wrong in another's."); Sevens, *supra* note 61, at 82 (mocking the jurisprudence of equity as "some sort of Philosopher's Stone by which injustice is whisked into justice by the simple method of preparing a form of petition lately called a 'bill'").

162. See Joseph F. Weis, Jr., *Are Courts Obsolete?*, 67 NOTRE DAME L. REV. 1385 (1992); Stephen Meili & Tamara Packard, *Alternative Dispute Resolution in a New Healthcare System: Will it Work for Everyone?*, 10 OHIO ST. J. ON DISP. RESOL. 23 (1994); Thomas B. Metzloff, *The Unrealized Potential of Malpractice Arbitration*, 31 WAKE FOREST L. REV. 203, 208 (1996) (surveying potential benefits of arbitration).

163. JEROME FRANK, *LAW AND THE MODERN MIND* 186 (Anchor Books 1963) (1930) (stating that juries are uncertain, capricious and unpredictable); *id.* at 191 (stating that juries are ignorant and prejudicial); *id.* at 192-94 (stating that juries are poor fact-finders); *id.* at 197 (stating that juries are incapable of following complex legal rules). See generally VALERIE P. HANS & NEIL VIDMAR, *JUDGING THE JURY* (1986); STEPHEN SUBRIN, MARTHA MINOW, MARK BRODIN & THOMAS MAIN, *CIVIL PROCEDURE: DOCTRINE, PRACTICE, AND CONTEXT* 377-89 (2d ed. 2004) (collecting materials evaluating juries).

164. Deborah R. Hensler, *Science in the Court: Is there a Role for Alternative Dispute Resolution*, 54 LAW & CONTEMP. PROBS. 171, 189 (1991) (suggesting that the use of expert adjudication may be the "main appeal of private arbitration").

165. [Common law courts] proceed to the trial of contested facts by means of a jury; and the evidence is generally to be drawn, not from the parties, but from third persons, who are disinterested witnesses. But courts of equity try causes without a jury; and they address themselves to the conscience of the defendant, and require him to answer upon his oath the matters of fact stated in the bill, if they are within his knowledge; and he is compellable to give a full account of all such facts, with all their circumstances, without evasion, or equivocation; and the testimony of other witnesses also may be taken to confirm, or to refute, the facts so alleged. Indeed, every bill in equity may be said to be, in some sense, a bill of discovery, since it asks for the personal oath of the defendant, to purge himself in regard to the transactions stated in the bill.

decided both the factual and legal issues.<sup>166</sup> And to the extent that the jurisprudence of Equity was but the jurisprudence of conscience,<sup>167</sup> the chancellor, often a trained ecclesiastic, was undoubtedly an “expert.”<sup>168</sup>

The finality of a win or a loss and the avoidance of an expensive and time-consuming appellate process are other claimed advantages of the procedural flexibility of ADR.<sup>169</sup> Further, as a result of the Federal Arbitration Act, and equivalent state statutes and international treaties, arbitration awards can be even easier than traditional judgments to enforce.<sup>170</sup> Again there is an equitable analogue: in Equity, relief was enforced at once and under the threat of contempt.<sup>171</sup> Moreover, until the seventeenth century, there were no appeals from Chancery.<sup>172</sup>

Finally, part of the allure of ADR may also be that system’s ability to alter the procedure to identify a procedurally neutral site. Formal adjudication tends to locate the suit in the “home” court of one party or the other. Because both sides have the same home court instinct, in certain circumstances the only neutral forum on which they may agree is ADR.<sup>173</sup> This issue often arises in international disputes, where ADR is especially popular.<sup>174</sup> Here the analogy from Equity is imperfect. Equity courts “could sit anywhere,”<sup>175</sup> but we have no reason to believe that the Chancellor opted for a neutral site.

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It may readily be perceived, how very important this process of discovery may be, when we consider how great the mass of human transactions is, in which there are no other witnesses, or persons, having knowledge thereof, except the parties themselves.

1 STORY, *supra* note 55, § 31, at 21.

166. *Id.*

167. *See supra* notes 61–67 and accompanying text.

168. *See supra* notes 73–76 and accompanying text.

169. *Casey, supra* note 157, at 5; *Ware, supra* note 109, at 722–23.

170. *Id.*

171. *BAKER, supra* note 64, at 104 (“[D]efendants could not easily evade this new and powerful justice; for contumacy they could be imprisoned, or their property sequestered.”).

172. Mary Sarah Bilder, *The Origin of the Appeal in America*, 48 HASTINGS L.J. 913, 935–36 (1997) (noting that “in 1675, the House of Lords accepted jurisdiction over ‘appeals in equity’ from Chancery”). *See also* JULIUS GOEBEL, HISTORY OF THE SUPREME COURT OF THE UNITED STATES: ANTECEDENTS AND BEGINNINGS TO 1801, at 26 (1971) (suggesting that the colonial appeal could not “have been in imitation of the English Chancery appeal, for this was still, so to speak, in vetre sa mere when the first American enactments were put on the books”). *See generally* Benjamin Goldman, *The Scope of Review and Requests for Rulings in Equity Suits*, 23 B.U. L. REV. 66 (1943). *Cf.* Bilder, *supra*, at 927 (explaining a horizontal system of mutual review by peer courts).

173. *See* Lucy V. Katz, *Enforcing an ADR Clause—Are Good Intentions All You Have?*, 26 AM. BUS. L.J. 575, 581 (1988).

174. *See supra* note 45. *See also* Andrew Sagartz, Note, *Resolution of International Commercial Disputes: Surmounting Barriers of Culture Without Going to Court*, 13 OHIO ST. J. ON DISP. RESOL. 675 (1998).

175. *See BAKER, supra* note 64, at 103.

### 3. Substantive Flexibility

In formal adjudication, the judge is obliged, of course, to follow the substantive law.<sup>176</sup> Although the substantive law undoubtedly casts its “shadow” on ADR processes,<sup>177</sup> we may be skeptical of the significance of shadows.<sup>178</sup> In the more voluntary and less structured forms of ADR, such as mediation, where the ultimate authority belongs to the participants themselves, the parties (perhaps with the benefit of a third party facilitator) can fashion a unique solution that will work for them without being strictly governed by precedent.<sup>179</sup> Thus, mediators “do not ‘judge’; they aid the parties in ending a dispute.”<sup>180</sup> ADR is attractive to some, then, because of the system’s promise of “better” results that serve “the real needs of the participants or society.”<sup>181</sup> These results may or may not “follow the law,” and it arguably does not matter because of the parties’ voluntary acquiescence to the resolution.

In those forms of ADR that more closely resemble formal adjudication, such as binding arbitration, ADR’s relationship with the substantive law becomes much more nuanced. On one hand, judges regard arbitration clauses as “forum selection clause[s],”<sup>182</sup> and hold that “[b]y agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute.”<sup>183</sup> Put another way,

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176. See generally Ruggero J. Aldisert, *Precedent: What It Is and What It Isn’t; When Do We Kiss It and When Do We Kill It?*, 17 PEPP. L. REV. 605 (1990); RUGGERO J. ALDISERT, *THE JUDICIAL PROCESS* 313–75 (2d ed. 1996); 1 BLACKSTONE, *supra* note 56, at 69–70; BENJAMIN N. CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* 19–21 (1921); Roscoe Pound, *Remarks On Status of the Rule of Judicial Precedent*, 14 U. CIN. L. REV. 324, 328–32 (1940).

177. See Mnookin, *supra* note 27.

178. PLATO, REPUBLIC 514A–521C (referencing Plato’s famous allegory about the prisoners in the cave). See generally Thomas O. Main, “An Overwhelming Question” About Non-Formal Procedure, 3 NEV. L.J. 388, 397–98 (Winter 2002/2003).

179. FOLBERG & TAYLOR, *supra* note 150, at 10.

180. Brunet, *supra* note 30, at 26.

181. RISKIN & WESTRBOOK, *supra* note 31, at 2. See also GOLDBERG ET AL., *supra* note 5, at 8 (“To encourage resolutions that were suited to the parties’ needs; . . . To restore the influence of neighborhood and community values and the cohesiveness of communities.”).

182. See Lee H. Rosenthal, *ADR: One Judge’s Perspective on Procedure as Contract*, 80 NOTRE DAME L. REV. 669, 672 (2005).

183. The Court conceives of arbitration clauses as forum-selection clauses, but not as choice-of-law clauses. In the Court’s view then, an arbitration clause specifies the procedural law to be used in resolving a dispute, but not the substantive law to be used. With respect to substantive law, *Mitsubishi* indicates that arbitrators must apply the same substantive law a court would apply. Similarly, in *Shearson/American Express, Inc. v. McMahon* [482 U.S. 220 (1987)], the Court held that claims under the Securities Exchange Act were arbitrable because “although judicial scrutiny of arbitration awards necessarily is limited, such review is sufficient to ensure that arbitrators comply with the requirements of the statute.” [*Id.* at 232.] The Court often says that “[b]y agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights

courts insist that arbitrators “follow the law.”<sup>184</sup> Yet on the other hand, we also anticipate, if not desire a certain amount of deviation from the law in arbitration:

Soia Mentschikoff’s seminal survey of arbitrators found that eighty percent of the studied commercial arbitrators “thought that they ought to reach their decisions within the context of the principles of substantive rules of law, but almost ninety percent believed that they were free to ignore these rules whenever they thought that more just decisions would be reached by so doing.” A more recent survey of construction arbitrators found that twenty-eight percent of surveyed arbitrators reported that they do not always follow the law in formulating their awards. And among labor arbitrators, the “orthodox” position is that arbitrators should adhere to the collective bargaining agreement and “ignore the law.” The widespread belief among arbitrators that they are under no duty to apply the law is consistent with standard expectations about arbitration because “we do not . . . expect that an arbitrator will decide a case the way a judge does. We do not expect that he will necessarily ‘follow the law’—or indeed apply or develop any body of general rules as a guide to his decision.” Even courts have explicitly acknowledged that arbitrators often do not apply the law.<sup>185</sup>

The right to vacate an arbitration decision is very limited.<sup>186</sup> Mere

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afforded by the statute.” [*Id.* at 229.]

Ware, *supra* note 109, at 717–18 (citations in original). See also Michael A. Scodro, Note, *Arbitrating Novel Legal Questions: A Recommendation for Reform*, 105 YALE L.J. 1927, 1946 (1996) (noting that the Supreme Court’s view that arbitration does not alter substantive rights “is in keeping with the courts’ expectation that arbitrators will follow applicable legal rulings . . .”).

184. Shearson/American Exp., Inc. v. McMahon, 482 U.S. 220, 232 (1987) (“[T]here is no reason to assume at the outset that arbitrators will not follow the law. . . .”) (citing Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 636–37 & n.19 (1985)); George Watts & Son, Inc. v. Tiffany & Co., 248 F.3d 577 (7th Cir. 2001) (“[T]he arbitrator is bound to follow the law in the absence of a valid and legal agreement not to do so.”); Montes v. Shearson Lehman Bros., Inc., 128 F.3d 1456, 1459–60 (11th Cir. 1997) (“When a claim arises under specific laws . . . the arbitrators are bound to follow those laws in the absence of a valid and legal agreement not to do so. As the Supreme Court has stated ‘[b]y agreeing to arbitrate a statutory claim, a party does not forego the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial forum.’” (quoting Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 26 (1991))).

185. Ware, *supra* note 109, at 719–20 (citing Mentschikoff, *supra* note 154, at 851, 867 (footnotes omitted)); Dean B. Thomson, *Arbitration Theory and Practice: A Survey of AAA Construction Arbitrators*, 23 HOFSTRA L. REV. 137, 154–55 (1994); RAU ET AL., *supra* note 31, at 636; IV IAN MACNEIL, RICHARD E. SPEIDEL & THOMAS J. STIPANOWICH, FEDERAL ARBITRATION LAW § 40.5.2.4, at 40:47 (1996); Harry T. Edwards, *Arbitration of Employment Discrimination Cases: An Empirical Study*, in PROCEEDINGS OF THE TWENTY-EIGHT ANNUAL MEETING OF THE NATIONAL ACADEMY OF ARBITRATORS 59 (1975); Patricia A. Greenfield, *How Do Arbitrators Treat External Law?*, 45 INDUS. & LAB. REL. REV. 683, 688 (1992); Edward Brunet, *Arbitration and Constitutional Rights*, 71 N.C. L. REV. 81, 85 (1992) (“The weight of authority permits an arbitrator to ‘do justice as he sees it’ and fashion an award that embodies the individual justice required by a given set of facts.”)

186. The Federal Arbitration Act provides:

factual error, and even legal error, typically do not suffice to upset an award.<sup>187</sup> Under the Federal Arbitration Act, an arbitrator's determination is enforced absent a showing of "manifest disregard" of the law.<sup>188</sup> After all, the earliest definition of an "arbitration" is "a deciding, according to one's will or pleasure; uncontrolled or absolute decision."<sup>189</sup> Contemporary decisions of arbitrators are thought to be

(a) In any of the following cases the United States court in and for the district wherein the award was made may make an order vacating the award upon the application of any party to the arbitration—

- (1) where the award was procured by corruption, fraud, or undue means;
- (2) where there was evident partiality or corruption in the arbitrators, or either of them;
- (3) where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced; or
- (4) where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made. . . .

9 U.S.C. § 10(a).

187. The conventional wisdom is that successful challenges to arbitration awards are rare. Thirty years ago one commentator could write that in the overwhelming majority of that miniscule portion which are appealed, only an infinitesimal few have ever been vacated. In more recent years, the amount of "litigious wrangling" over the enforcement of awards—and thus the number of successful challenges—has unquestionably increased, so as to make that something of an overstatement. Nonetheless the essential point about judicial deference to arbitral awards still appears to be valid.

RAU ET AL., *supra* note 31, at 731; *accord* IV MACNEIL ET. AL, *supra* note 185, § 40.1.4, at 40:13 ("Over the years, the courts have taken a fairly uniform approach to awards: Awards should be confirmed and enforced as is unless there is clear evidence of a gross impropriety.").

188. *Wilko v. Swan*, 34 U.S. 427, 436–37 (1953). *See also* Brunet, *supra* note 30, at 28 n. 136 (citing *Stroh Container Co. v. Delphi Indus., Inc.*, 783 F.2d 743, 750 (8th Cir. 1986) (refusing to vacate arbitral award in case where "arbitrators' decision does not clearly delineate the law applied, nor expound the reasoning and analysis used"); *Sobel v. Hertz, Warner & Co.*, 469 F.2d 1211, 1214–16 (2d Cir. 1972) (carefully distinguishing between mistaken constructions of law and manifest disregard of the law); *Swift Indus., Inc. v. Botany Indus., Inc.*, 466 F.2d 1125, 1131 (3d Cir. 1972) ("[A]rbitrator's decision must be upheld unless it is 'completely irrational.'" (quoting *Lentine v. Fundaro*, 29 N.Y.2d 382 (1972))); *Sidarma Societa Italiana Di Armamento Spa., Venice v. Holt Marine Indus., Inc.*, 515 F. Supp. 1302, 1308–09 (S.D.N.Y.) (requiring difficult to prove deliberate or intentional disregard of the law in order to come within manifest disregard review), *aff'd*, 681 F.2d 802 (2d Cir. 1981).

Some courts will reverse arbitrators' awards for straying outside the law. For example, the Third Circuit recently refused to enforce an arbitrator's award that "comported with the arbitrator's view of fairness," rather than drawing its essence from the applicable collective bargaining agreement. *CITGO Asphalt Refining Co. v. Paper, Allied-Industrial, Chemical, and Energy Workers Intl. Union Local No. 2-991*, 385 F.3d 809 (3d Cir. 2004). *See also infra* notes 361–97

189. 1 OXFORD ENGLISH DICTIONARY 426 (1971) (quoting the "obsolete" definition). The contemporary definition is also telling: "The settlement of a dispute or question at issue by one to whom the conflicting parties agree to refer their claims in order to obtain an *equitable* decision." *Id.* (emphasis added). In Black's Law Dictionary, the reference to a substantive baseline is conspicuously absent. *See* BLACK'S LAW DICTIONARY 112 (8th ed. 2004) ("A method of dispute resolution involving one or more neutral third parties who are usually agreed to by the disputing parties and whose decision is binding."). Note the use of the word "arbitration" in Professor Pomeroy's admonition about the dangers of an



informed by the arbitrator's "experience, knowledge of the customs of the trade and fair and good sense for *equitable* relief."<sup>190</sup>

An ADR neutral thus may facilitate or impose a resolution that is not consistent with controlling principles of substantive law. ADR does not undermine those principles, however. The decision of an ADR neutral does not extend beyond the parties before it, because the neutral's findings and conclusions have no precedential effect.<sup>191</sup> This ability to act *in personam*, as it were, is both liberating and limiting.<sup>192</sup> The ADR neutral enjoys considerable leeway to reach a just result without making "bad law" in "hard cases."<sup>193</sup> Yet the neutral is powerless to effect the kind of broad social change that could be useful in some circumstances.<sup>194</sup>

The occasional need to depart from the strict law likewise animated the development of the system of Equity. And through nuance or noble lie, Equity managed both to follow the law and to depart from it. On one hand, Equity stood in the shadow of the Law.<sup>195</sup> One of the most famous maxims of Equity was *æquitas sequitur legem*, or Equity follows

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unprincipled jurisprudence of Equity:

An accurate conception of equity is indispensable to the due administration of justice. If a certain theory of its nature, which now prevails to some extent, should become universal, it would soon destroy all sense of certainty and security which the citizen has, and should have, in respect to the existence and maintenance of his juridical rights. . . . It needs no argument to show that if this notion should become universally accepted as the true definition of equity, every decision would be a virtual *arbitration*, and all certainty in legal rules and security of legal rights would be lost.

1 POMEROY, *supra* note 55, § 43, at 44 (emphasis added).

190. Ware, *supra* note 109, at 721 n.83 (emphasis added) (citing 1 GABRIEL M. WILNER, DOMKE ON COMMERCIAL ARBITRATION § 25.01, at 391 (rev. ed. 1995)). For an analogous description of Equity, see *supra* notes 82–90 and accompanying text. See also Campbell, *supra* note 54, at 111 (noting that equity can "recognize and enforce principles which actually govern society in general, whether embodied in the so-called rules of law or not").

191. William M. Landes & Richard A. Posner, *Adjudication as a Private Good*, 8 J. LEGAL STUD. 235, 248 (1979); Marc Galanter, *Why the "Haves" Come Out Ahead: Speculations on the Limits of Legal Change*, 9 LAW & SOC'Y REV. 95 (1974); Owen Fiss, *Against Settlement*, 93 YALE L.J. 1073 (1984); Menkel-Meadow, *supra* note 35, at 2680; Rex R. Perschbacher & Debra Lyn Bassett, *The End of Law*, 84 B.U. L. REV. 1, 60 (2004) (stating that ADR procedures "occur out of public view and result in agreements that have no precedential value").

192. For a discussion of the *in personam* exercise of Equity jurisdiction see *supra* notes 184–86 and accompanying text.

193. See generally Northern Sec. Co. v. United States, 193 U.S. 197, 400–01 (1904) (Holmes, J., dissenting) ("Great cases like hard cases make bad law.").

194. See, e.g., Donald J. Friedman & Michael D. Broaddus, *Computer Contract Disputes in the 1990s: Choosing ADR or Litigation*, 5 J. PROPRIETARY RTS. 2, 6 (1993).

195. A shadow is a common metaphor for the law's effect in ADR. See Mnookin & Kornhauser, *supra* note 27.

the Law.<sup>196</sup> Yet, on the other hand, the very purpose of a separate system was to correct or to mitigate injustices caused by the rigor of the Common Law.<sup>197</sup>

196. See MERWIN, *supra* note 71, at 60–64. See also CHRISTOPHER ST. GERMAN, DOCTOR AND STUDENT 97 (T.F.T. Plucknett & J.L. Barton eds., Selden Society 1974) (Equity “followeth the law in all particular cases where right and Justice requireth.”); Melvin M. Johnson, Jr., *The Spirit of Equity*, 16 B.U. L. REV. 345, 346 (1936) (recognizing a maxim that “equity acts according to established rules”).

Commentators disagree about the extent to which Equity interfered with the Common Law or abated its rigors. Sir William Blackstone, citing instances where Equity did not interfere, concludes therefrom that Equity had no such power. His language is:

[I]t is said that it is the business of a court of equity in England to abate the rigor of the common law. But no such power is contended for. Hard was the case of the bond-creditor, whose debtor devised away his real estate; rigorous and unjust the rule, which put the devisee in a better condition than the heir: yet a court of equity had no power to interfere. Hard is the common law still subsisting that land devised or descending to the heir should not be liable to simple contract debts of the ancestor or deviser, although the money was laid out in the purchase of the very land; and that the father shall never immediately succeed as heir to the real estate of the son: but a court of equity can give no relief, though in both these instances the artificial reason of the law, arising from feudal principles, has long since ceased.

3 BLACKSTONE, *supra* note 56, at 430.

Professor Pomeroy’s caustic response to Blackstone:

The statement in this quotation that “equity had no power to interfere,” is merely a gratuitous assumption; it certainly had the same *power* to interfere which it possessed and exercised in the case of an obligor who had paid the debt secured by his bond but had neglected to take a release. The most that can be truthful said is, that “equity did not interfere.” Blackstone, being purely a common law, had little knowledge of equity, and his authority concerning its principles and jurisdiction was never great. . . . This is one example among many of Blackstone’s utter inability to comprehend the real spirit and workings of the English law. That equity did to a large extent interfere with and prevent the practical operation of legal rules, and did thus furnish to suitors a corrective of the harshness and injustice of the common law, history and the very existing system incontestably show; and that the chancellors, from motives of policy or otherwise, refrained from exercising their reformatory function in certain instances, is not, in the face of the historical facts, any argument against the existence of the power.

1 POMEROY, *supra* note 55, § 54, at 55–56, 55 n.1. Justice Story wrote of the varying interpretations of this maxim:

It may mean that equity adopts and follows the rules of law in all cases, to which those rules may, in terms, be applicable; or it may mean, that equity, in dealing with cases of an equitable nature, adopts and follows the analogies furnished by the rules of law. Now, the maxim is true in both of these senses, as applied to different cases and different circumstances. It is universally true in neither sense; or rather, it is not of universal application.

STORY, *supra* note 55, § 64, at 54 (footnotes omitted). See also FETTER, *supra* note 53, § 15, at 33 (“[The maxim’s] chief use has been stated to be the anticipation of a hasty generalization on the part of the student that equity wantonly disregards the provisions of the common and statute law.”).

197. The chancellor had “the right and the power, in fact, to do as he likes, whatever hard law and still harder practice may dictate.” SEVERNS, *supra* note 61, at 89. Sir Henry Maine wrote that equity is an “instrumentality by which the adaptation of the law to social wants is carried on.” MAINE, *supra* note

The root of Equity was the idea that the law should be administered fairly, not mechanically, and the rigors of the Common Law were thus subject to the equitable principles of conscience, equity, good faith, and honesty.<sup>198</sup> Equity appears in many cases as little more than a canon for the interpretation of the rules of law.<sup>199</sup> In other cases, Chancery used equity to render a verdict that compromised the Law, or “split the baby.”<sup>200</sup> And in still other cases, Equity could be invoked to ignore or “correct” the Law.<sup>201</sup>

Like ADR, Equity did not claim to override the law. By acting *in personam*, Equity could compel a person to perform a duty without directly challenging or altering the defendant’s property rights and without regard to any contrary judgment rendered in the Law courts.<sup>202</sup>

“Equity” does not intend to set aside what is right and just, nor does it try to pass judgment on a “strict Common Law rule” by claiming that the latter was not well made. It merely states that, in the interest of a truly effective and fair Administration of Justice, the “strict Common Law” is not to be observed in some particular instance.<sup>203</sup>

Moreover, Equity’s decision had no precedential effect even in Equity, much less in Law.<sup>204</sup> ADR thus mimics this liberation and limitation in the exercise of the jurisdiction of Equity.<sup>205</sup>

Finally, both Equity and ADR recognize certain limits to their equitable competency. Equity did not correct all injustices. In fact,

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57, at 23.

198. See 1 POMEROY, *supra* note 55, § 385, at 524 (“[I]t is undeniable that courts of equity do not recognize and protect the equitable rights of litigant parties, unless such rights are, in pursuance of the settled juridical notions of morality, based upon conscience and good faith.”); “Bona Fides,” *Equity Imported into Common Law*, 69 SOLIC. J. & WKLY. REP. 339, 339 (Feb. 14, 1925) (recognizing an “imaginary residuum of equitable principles, to secure redress of legal abuses”).

199. See J.L. Barton, *Equity in the Medieval Common Law*, in EQUITY IN THE WORLD’S LEGAL SYSTEMS: A COMPARATIVE STUDY 139, 141–42 (Ralph A. Newman ed., 1973).

200. [T]here are many cases in which a simple judgment for either party, without qualifications or conditions, or peculiar arrangements, will not do entire justice *ex æquo et bono* to either party. Some modifications of the rights of both parties may be required; some restraints on one side, or on the other, or perhaps on both sides; some adjustments involving reciprocal obligations, or duties; some compensatory, or preliminary, or concurrent proceedings to fix, control, or equalize rights; some qualifications or conditions, present or future, temporary or permanent, to be annexed to the exercise of rights, or the redress of injuries.

1 STORY, *supra* note 55, § 27, at 19.

201. FONBLANQUE ON EQUITY (b. 1, c. 1, § 3) (“For no man can be obliged to anything contrary to the law of nature; and indeed, no man in his senses can be presumed willing to oblige another to it.”).

202. SNELL, *supra* note 98, at 40–43; MERWIN, *supra* note 71, at 72–79.

203. Anton Hermann Chroust, *The “Common Good” and the Problem of “Equity” in the Philosophy of Law of St. Thomas Aquinas*, 18 NOTRE DAME L. REV. 114, 117 (1942–1943)

204. See *infra* note 288 and accompanying text.

205. SNELL, *supra* note 98, at 40–43; MERWIN, *supra* note 71, 72–79.

Equity left untouched, in full force and operation, a great number of legal rules that were certainly as harsh, unjust, and unconscientious as any of those that it did confront.<sup>206</sup> In a similar manner, the ADR movement has not suggested that every legal dispute has a non-judicial solution. Indeed, the ADR literature recognizes that some types of cases are not suited to resolution outside the courtroom including, in particular, cases in which the plaintiff seeks a declaration of law.<sup>207</sup>

#### 4. The Reflection and Reinforcement of Community Norms

Another motive fueling interest in ADR is that system's ability to enhance "community involvement in the dispute resolution process."<sup>208</sup> This involvement takes two forms. First, ADR empowers neighborhoods to resolve disputes that are not cognizable in or are otherwise ignored by formal dispute resolution systems.<sup>209</sup> Second, ADR incorporates local values and norms into the decision-making calculus.<sup>210</sup> These values and norms tend to emphasize compromise, reconciliation, and fairness.<sup>211</sup> Thus, while formal adjudication can be "a fight unto death in which irreparable harm (economic, psychological, and spiritual) is done to parties," ADR respects "compromise and

206. 1 POMEROY, *supra* note 55, § 50, at 51 ("It is absolutely certain from all the existing records, and from the result itself of their work, that they did not refrain from deciding any particular case, according to their views of equity and good conscience, merely because the doctrine which they followed or established in making the decision was inconsistent with the rule of law applicable to the same facts, nor because the law had deliberately and intentionally refused to acknowledge the existence of a primary right, or to give a remedy under those facts and circumstances. That this corrective authority was possessed by the chancellors, and freely exercised by them in the periods of which I am speaking, is recognized by the ancient writers."); 3 BLACKSTONE, *supra* note 56, at 430 (noting that among the legal rules with which equity did not interfere: the doctrine by which the lands of a debtor were generally exempted from all liability for his simple contract debts); *Earl of Bath v. Sherwin*, 10 Mod. 1,3 ("A collateral warranty was certainly one of the harshest and most cruel points of the common law, because there was not so much as an intended recompense, yet I do not find this Court ever gave relief in it.").

207. For example, James Henry, the founder of CPR, long ago recognized that "[i]f a party is looking for a precedent or it believed that an opposing party is 'a hotbed of ill will,' then ADR would be unsuitable. . . ." Milton G. Allimadi, *Alternative Conflict Resolution Gaining Popularity with Firms*, J. COMM., Nov. 23, 1992, at 4A (internal quotations omitted).

208. RISKIN & WESTBROOK, *supra* note 31, at 2. *See also* GOLDBERG ET AL., *supra* note 5, at 8 ("To improve public satisfaction with the justice system; . . . To restore the influence of neighborhood and community values and the cohesiveness of communities.").

209. *See generally* Menkel-Meadow, *supra* note 40, at 6 (recounting the history of neighborhood justice centers); TOMASIC & FEELEY, *supra* note 33; DANIEL MCGILLIS, *COMMUNITY DISPUTE RESOLUTION PROGRAMS AND PUBLIC POLICY* (1986).

210. *See generally* Sanchez, *supra* note 7.

211. *See generally* Andrew W. McThenia & Thomas L. Shaffer, *For Reconciliation*, 94 YALE L.J. 1660 (1985); Carrie Menkel-Meadow, *And Now a Word About Secular Humanism, Spirituality, and the Practice of Justice and Conflict Resolution*, 28 FORDHAM URB. L.J. 1073 (2001).

human growth”” rooted in fundamental moral and spiritual principles.<sup>212</sup>

The excesses of adversarialism, the importance of reaching the merits, and a morally infused understanding of justice have already been discussed in section A of this Part III and in previous subsections of this section B. The reflection and reinforcement of community norms also raises issues of access to courts; those issues are addressed in the next subsection.

### 5. Access to Justice

Proponents of ADR also emphasize that system’s ability to broaden access to justice.<sup>213</sup> ADR initiatives can improve access to justice for individuals lacking the means and wherewithal to overcome the intimidating and confusing setting of a courtroom or to navigate the formal rules of procedure and evidence.<sup>214</sup>

The recourse to legal actors and proceedings is costly, emotionally debilitating, and potentially counterproductive. In many respects, justice has become an empty facade; the august wisdom and high-minded discipline of the law merely create an appearance of dispensing what is right and just among parties in dispute. Although adjudication provides coercive finality to conflicts, the pathway to justice is dehumanizing and riddled with abusive interpretations of the truth.<sup>215</sup>

Psychological, economic, and temporal costs, not to mention linguistic and cultural barriers,<sup>216</sup> made courts ineffective mechanisms for certain types of disputes and certain categories of disputants.<sup>217</sup>

ADR became the means for enabling “access to justice” when adjudication failed.<sup>218</sup> ADR removed certain barriers to formal

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212. Joseph Allegritti, *A Christian Perspective on Alternative Dispute Resolution*, 28 FORDHAM URB. L.J. 997, 1001 (2001) (citing Robert D. Taylor, *Toward a Biblical Theology of Litigation: A Law Professor Looks at 1 Cor. 6:1-11*, 2 EX AUDITU 105, 109 (1986); Wayne D. Brazil, *The Attorney as Victim: Toward More Candor About the Psychological Price Tag of Litigation Practice*, 3 J. LEGAL PROF. 107 (1978–1979)).

213. RISKIN & WESTBROOK, *supra* note 31, at 2. See also GOLDBERG ET AL., *supra* note 5, at 8 (“To provide accessible forums to people with disputes; [t]o teach the public to try more effective processes than violence or litigation for settling disputes.”).

214. See generally Larry R. Spain, *Alternative Dispute Resolution for the Poor: Is It An Alternative?*, 70 N.D. L. REV. 269 (1994); Simon, *supra* note 25 at, 384–87 (supporting ADR as a means of expanding access to justice for those unable to afford traditional litigation); Twining, *supra* note 97, at 380–82.

215. CARBONNEAU, *supra* note 92, at 1.

216. See generally EARL JOHNSON, COURTS AND THE COMMUNITY (Natl. Ctr. for State Courts 1978).

217. Galanter, *supra* note 191.

218. Resnik, *supra* note 49, at 245; Leonard S. Rubenstein, *Procedural Due Process and the*

adjudication and offered a forum tailored to “fit the fuss.”<sup>219</sup> At a very practical level, ADR presented an inexpensive system for the resolution of disputes involving amounts of money that would not justify formal adjudication. At a more conceptual level, ADR offered a new vision of procedural and substantive justice by offering a less formal system that invited participation in both the process and the outcome.

Equity was similarly concerned with access to justice, and provided an alternative forum in those circumstances where the rigidity of the Law courts failed to provide sufficient relief. Procedure—and even substance—could be tailored to fit the fuss. And an especially noteworthy category of Equity’s jurisdiction involved providing justice to the poor.<sup>220</sup> Equity asserted jurisdiction over claims by poor plaintiffs against defendants who were too powerful locally for justice to be obtainable against them by regular means.<sup>221</sup> Indeed, one commentator referred to this as “[t]he most important of the judicial functions of the chancellor.”<sup>222</sup> Access to Equity was facilitated by a simple procedure.<sup>223</sup> Furthermore, whereas Chancery charged a fee for obtaining a writ, Equity required no fee.<sup>224</sup>

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*Limits of the Adversary System*, 11 HARV. C.R.-C.L. L. REV. 48 (1976).

219. Maurice Rosenberg, *Let the Tribunal Fit the Case: Establishing Criteria for Channeling Matters into Dispute Resolution Mechanisms*, 80 F.R.D. 147 (1977).

220. E.g., John Feyrewyn v. Richard the Carpenter, 30 SELDEN SOCIETY, SELECT BILLS IN EYRE 6 (1292). It is addressed to Sir John de Berewick (one of the King’s Justiciars), “you who are put in the place of our Lord the King to do right to poor and rich.” The plaintiff, of Shrewsbury, says that he paid the defendant six marks, receiving in return the defendant’s undertaking in writing to furnish plaintiff, who was getting ready to go to the Holy Land on pilgrimage, with board and lodging meanwhile. But the wicked defendant will not keep his agreement; instead of which he only gives plaintiff occasionally a morsel of bread just as if plaintiff were a pauper begging alms for God’s sake. Unless his Lordship helps the plaintiff before he (his Lordship) leaves town, plaintiff will never get his money back, for the defendant is clerk of the bailiff of Shrewsbury, and the rich folk of this town all work together to keep the poor from getting their rights. Plaintiff has no money to hire a pleader, but if his Lordship will graciously see to it that plaintiff gets his money back, the latter will set out for the Holy Land, and there he will pray for the King and for his Lordship also.

Glenn & Redden, *supra* note 51, at 760 n.17. See also FRIEDRICH KESSLER ET AL., *CONTRACTS: CASES AND MATERIALS* 10 (3d ed. 1986) (“Equity also interfered with contracts in order to protect the interests of weak, necessitous, and unfortunate persons.” (footnotes omitted))

221. Barton, *supra* note 199, at 145–46.

222. Severns, *supra* note 61, at 93 (“Most of the early petitions seem to have originated in the fact that the defendant was so rich or so powerful that he could not be brought into court in the usual way. The phrase ‘he is of too great a maintenance’ is often found in these bills. The early equity jurisprudence appears to have consisted of cases where, although there might have been a remedy at law, yet because the petitioner was poor and the defendant was rich and powerful, the legal remedy was not satisfactory.”). See also W.R. Vance, *Law in Action in Mediaeval England*, 17 VA. L. REV. 1 (1930).

223. See *supra* notes 141–47.

224. Severns, *supra* note 61, at 88.

## IV. TRADITIONAL LAW AND EQUITY—THE DIALECTIC IN PRACTICE

Much of the grand history of Anglo-American law could be characterized as an epic struggle between the regimes of law and equity.<sup>225</sup> We revere law and the rule of law, yet we contrive to avoid legalism.<sup>226</sup> That the law must be applied uniformly may be “the most basic principle of jurisprudence.”<sup>227</sup> Yet experience suggests that, a right too rigid will ultimately harden into a wrong.<sup>228</sup> “Equity plays a strange role in the structure of law; separate from, and yet a part of the legal norms.”<sup>229</sup> As complements and as rivals, separate systems of Law and Equity combined to administer the laws for centuries with both certainty and discretion.<sup>230</sup> This Part builds upon the history of Law and Equity narrated in Part III, and describes the evolution of both systems and also their relation to each other.

225. See generally ROSCOE POUND, AN INTRODUCTION TO THE PHILOSOPHY OF LAW 54 (rev. ed. 1954) (“Almost all of the problems of jurisprudence come down to a fundamental one of rule and discretion, of administration of justice by law and administration of justice by the more or less trained intuition of experienced magistrates.”); KENNETH C. DAVIS, DISCRETIONARY JUSTICE: A PRELIMINARY INQUIRY 17 (1969) (“Every governmental and legal system in world history has involved both rules and discretion. No government has ever been a government of laws and not of men in the sense of eliminating all discretionary power. Every government has always been a government of laws and of men.”); RICHARD A. POSNER, THE PROBLEMS OF JURISPRUDENCE 24–25 (1990) (“[F]or more than two millennia, the field of jurisprudence has been fought over by two distinct though variegated groups. One contends that law is more than politics and in the hands of skillful judges yields . . . correct answers to even the most difficult legal questions. The other contends that law is politics through and through and that judges exercise broad discretionary authority.”). See also BARBARA J. SHAPIRO, PROBABILITY AND CERTAINTY IN SEVENTEENTH CENTURY ENGLAND: A STUDY OF THE RELATIONSHIPS BETWEEN NATURAL SCIENCE, RELIGION, HISTORY, LAW, AND LITERATURE 163–93 (1983).

226. Lord Justice Evershed, *Equity After Fusion: Federal or Confederate*, J. SOC’Y PUB. TEACHERS L. 171, 171 (1948).

227. Henry J. Friendly, *Indiscretion About Discretion*, 31 EMORY L.J. 747, 758 (1982). See also CARDOZO, *supra* note 176, at 112; GIORGIO DEL VECCHIO, JUSTICE 173 n.13 (Edinburgh Univ. Press ed., 1952) (noting that “the worst misfortune of a civilized people is doubt about the impartiality of justice” (internal citation and quotation omitted)); GEOFFREY DE Q. WALKER, THE RULE OF LAW: FOUNDATION OF CONSTITUTIONAL DEMOCRACY 25–27 (1988).

228. Charles D. Frierson, *A Certain Fundamental Difference in Viewpoint Between Law and Equity as Illustrated by Two Maxims*, in 22 CASE & COMMENT 403, 405 (1915). See SALMOND, *supra* note 116, at 97–98; JOHN CHIPMAN GRAY, THE NATURE AND SOURCES OF LAW 303 (2nd ed. 1921); H. Jones, *Law and Morality in the Perspective of Legal Realism*, 61 COLUM. L. REV. 799, 801 (1961) (“Justice is expressed in principles and laws none of which can ever reach the uniqueness of the concrete situation.”); Harlan F. Stone, *Book Review*, 18 COLUM. L. REV. 97, 98–99 (1918).

229. Ralph A. Newman, *Introduction*, in EQUITY IN THE WORLD’S LEGAL SYSTEMS, *supra* note 199, at 15; G. RADBRUCH, EINFÜHRUNG IN DIE RECHTSWISSENSCHAFT 75 (9th ed. 1952) (“The dilemma that equity is to be better than justice and yet not quite opposed to justice, but rather a kind of justice, has troubled men as early as Aristotle’s famous chapter V 14 of the Nichomachean Ethics.”).

230. See MAITLAND, *supra* note 63, at 17 (“[F]or two centuries before the year 1875 the two systems had been working together harmoniously.”).

A. *Equity's Reforming Influence on the Law Courts*

The early Law courts could have maintained some flexibility and liberality by simply accepting the new writs issued by Chancery.<sup>231</sup> In fact, some commentators believe that, had the Law courts accepted these necessary innovations instead of becoming bemused by form and precedent, there may have been no need for the creation of a special, competing court and an alternative system of law.<sup>232</sup> But the common law became a narrow, formalistic system, confined to the method of granting relief by the award of damages after an injury had been suffered.<sup>233</sup> Preventive or special relief was not available from the Common Law courts.<sup>234</sup> Practical circumstances demanded some adaptability and elasticity, and when the Law courts failed to meet contemporary challenges, Chancery filled that void.

English law was thus split into dual systems, with equity and law flowing in separate channels for centuries. During this period, Equity intervened in cases to ameliorate the harsh effects of the Common Law, but also ultimately had a significant reforming influence on the Law courts.<sup>235</sup> This subpart offers many examples of instances where doctrines and rules that were once exclusively recognized and enforced by Chancery were incorporated into the Law whether by statute or by judicial decision. Indeed, over time the Common Law became increasingly "equitized."<sup>236</sup> The enumeration of several examples serves two purposes. First, from an evidentiary perspective, each example illustrates the dialectic of law and equity in operation: law fails to meet a need that is remedied by equity with a method that, in turn, is ultimately codified into law. Second, from a normative perspective, each of these useful reforms illustrates the progressive role that equity can play in the moral growth of the law.<sup>237</sup>

231. See *supra* notes 68–77 and accompanying text.

232. Oleck, *supra* note 51, at 36. See also FREEMAN OLIVER HAYNES, OUTLINES OF EQUITY 8–15 (4th ed. 1874); 1 POMEROY, *supra* note 55, § 16, at 18–19; 1 WILLIAM SEARLE HOLDSWORTH, A HISTORY OF ENGLISH LAW 403 (5th ed. 1931). One commentator has suggested that the law-equity dialectic, though causal, was working in the opposite direction. See "Bona Fides," *supra* note 198, at 340 ("The result of the growth of equity was that the equitable development of the Common Law was nipped in the bud.").

233. See *supra* notes 68–77 and accompanying text.

234. Oleck, *supra* note 51, at 36.

235. Garrett, *supra* note 70 ("The Common Law has plagiarized many things from Chancery.").

236. 7 WILLIAM SEARLE HOLDSWORTH, HISTORY OF ENGLISH LAW 74, 75, See also Brendan F. Brown, *supra* note 76, at 325; 1 POMEROY, *supra* note 55, § 69, at 73–74.

237. See generally E. HOCKING, THE PRESENT STATUS OF THE PHILOSOPHY OF LAW AND OF RIGHTS 2 (1926); O. Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 459 (1897) ("The law is the witness and external deposit of our moral life. Its history is the history of the moral development of the



In the early stages of English law, certain agreements could be enforced only if the instrument sought to be enforced respected certain formalities, oftentimes a seal.<sup>238</sup> The formalities served channeling and cautionary functions,<sup>239</sup> but also served as a bright-line test for the early Law judges, who had very little discretion.<sup>240</sup> Promises that were not enforceable in Law because of some formal defect, however, could be enforced in Equity.<sup>241</sup> “Equity, the sometimes moral policeman of the law,” looked beyond the mere form of a transaction.<sup>242</sup> Recognizing the sanctity of contract, and the resulting moral obligation to honor one’s promises, Equity could enforce the promise otherwise unenforceable.<sup>243</sup> In response to the more evolved position of Chancery, and in fear of losing a competitive advantage,<sup>244</sup> the Law courts ultimately developed and expanded the action of assumpsit to enforce a range of promises, including unsealed and oral promises.<sup>245</sup>

The formalities of contract law had also bound the Law courts to a rule that allowed a creditor to recover a second time from a debtor who

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race.”).

238. James B. Ames, *Specialty Contracts and Equitable Defenses*, in LECTURES ON LEGAL HISTORY 98 (1913); Frederick E. Crane, *The Magic of the Private Seal*, 15 COLUM. L. REV. 24 (1915); Harold D. Hazeltine, *The Formal Contract of Early English Law*, 10 COLUM. L. REV. 608 (1910); Eric Mills Holmes, *Stature and Status of a Promise Under Seal as a Legal Formality*, 29 WILLAMETTE L. REV. 617 (1993).

239. 1 E. ALLAN FARNSWORTH, CONTRACTS § 2.5, at 86–87 (3d ed. 1999); Lon L. Fuller, *Consideration and Form*, 41 COLUM. L. REV. 799, 800–03 (1941).

240. Peter N. Thompson, *Enforcing Rights Generated in Court-Connected Mediation—Tension Between the Aspirations of a Private Facilitative Process and the Reality of Public Adversarial Justice*, 19 OHIO ST. J. ON DISP. RESOL. 509, 522–23 (2004).

241. Frierson, *supra* note 228, at 412 (“Let us not forget the court of chancery was the first to ignore the absence of a seal.”). See also 5 HOLDSWORTH, *supra* note 62, at 294–97; Willard T. Barbour, *The History of Contract in Early English Equity*, in 4 OXFORD STUDIES IN SOCIAL AND LEGAL HISTORY 16 (Paul Vinogradoff ed., 1974) (1914).

242. John McCarthy, *Contemporary Advocacy: Value Free?*, 38 CATH. LAW. 25, 38 (1998).

243. See generally Val D. Ricks, *Contract Law and Christian Conscience*, 2003 BYU L. REV. 993.

244. Barbour, *supra* note 241, at 54, 66 (“In fact, there can be little doubt that the eagerness displayed by certain judges to extend Assumpsit from misfeasance to nonfeasance was prompted by the strong desire to retain jurisdiction that was fast slipping away.”); 2 WILLIAM SEARLE HOLDSWORTH, A HISTORY OF ENGLISH LAW, *supra* note 62, at 456 (noting that the “competition of the chancellor” awakened “even the most conservative common law to the necessity of endeavouring to meet these demands.”).

245. See, e.g., *Slade’s Case*, 4 COKE REPORT 92b, 76 ER 1074 (KB 1602) (presuming existence of a promise from the fact of a debt and allowing Assumpsit to be brought on a simple promise to pay money). See generally Note, *The Right to a Nonjury Trial*, 74 HARV. L. REV. 1176, 1182 (1961); James Oldham, *Reinterpretations of 18th-Century English Contract Theory: The View from Lord Mansfield’s Trial Notes*, 76 GEO. L.J. 1949, 1950–55 (1988); Arthur Allen Leff, *The Leff Dictionary of Law: A Fragment*, 94 YALE L.J. 1855, 1983, 2083 (1985); William F. Walsh, *Is Equity Decadent?*, 22 MINN. L. REV. 479, 493 (1938); Kittle, *supra* note 61, at 28–29.

had paid his debt in full but had neglected to obtain a formal release or a surrender of the contract document.<sup>246</sup>

If he had paid without either getting an acquittance or having his bond returned to him, he would have to pay again, not . . . because this result was in itself desired, but because “the general grounds of the law of England heed more what is good for many than what is good for one singular person only. . . .”<sup>247</sup>

“The [Common Law] rule was that a sealed instrument could be discharged only by another instrument of as high a character, or else by a surrender of it so that the creditor could make *profert* of the instrument . . . .”<sup>248</sup> A debtor facing a demand for payment of a debt that, in fact, had already been repaid could seek relief in Equity.<sup>249</sup> The chancellor would issue an injunction against the creditor, enjoining him from enforcing the legal judgment.<sup>250</sup> Ultimately, the Law courts relaxed their jurisprudence to incorporate such defenses as accord and satisfaction; these reforms ensured a greater uniformity of results in Law as in Equity.<sup>251</sup>

Formalities in contract, again the doctrine of *profert* in particular, also precluded a creditor from enforcing an instrument that had been accidentally lost or destroyed.<sup>252</sup> By the formalities of the common law, the document *was* the debt;<sup>253</sup> hence, there was no notion of secondary evidence of its contents.<sup>254</sup> Because Equity could shape its remedial processes to meet any new emergency, it acquired jurisdiction in this class of cases, and for a long time all suits upon such lost negotiable paper were necessarily brought in equity.<sup>255</sup> The courts of Law ultimately abrogated the ancient requirement of *profert* and, as in Equity, allowed actions to recover a money judgment upon lost obligations or

246. 1 POMEROY, *supra* note 55, § 70, at 74–75; Joseph M. Perillo, *The Origins of the Objective Theory of Contract Formation and Interpretation*, 69 FORDHAM L. REV. 427, 434 (2000) (citing WILLIAM L. CLARK, JR., HANDBOOK OF THE LAW OF CONTRACTS § 262 (1894); 3 ERIC MILLS HOLMES, CORBIN ON CONTRACTS § 10.15 n.1 (Joseph M. Perillo ed., 1996) (1950)). See generally Holmes, *supra* note 238.

247. MILSOM, *supra* note 138, at 250 (quoting ST. GERMAN, *supra* note 196, at 77–79).

248. Kittle, *supra* note 61, at 32.

249. *The History of Contract in Early English Equity*, in IV OXFORD STUDIES IN SOCIAL AND LEGAL HISTORY, *supra* note 241, at 85–89.

250. Kittle, *supra* note 61, at 32.

251. 1 POMEROY, *supra* note 55, § 70, at 74–75.

252. *Id.* § 72, at 76–77.

253. Kittle, *supra* note 61, at 32.

254. See generally Glenn & Redden, *supra* note 51, at 753; MAITLAND, *supra* note 63, at 6–7; Walsh, *supra* note 245, at 483–86 (discussing “the reforming influence of equity”).

255. Ames, *Specialty Contracts and Equitable Defenses*, in LECTURES ON LEGAL HISTORY, *supra* note 238, at 104; 1 POMEROY, *supra* note 55, § 70, at 74–75.

negotiable instruments to be brought in courts of Law according to the legal modes of procedure.<sup>256</sup>

Equity introduced a moral view of contract and, in particular, of penalties and forfeitures.<sup>257</sup> The Law courts rigidly exacted all penalties and enforced the forfeitures of bonds issued in amounts considerably larger than the sum borrowed unless the payment was done at precisely the time and in precisely the manner that had been stipulated.<sup>258</sup> Yet, penalties and forfeitures of all types were avoidable in Equity.<sup>259</sup> Equity looked beyond the form of the transaction and to its substance.<sup>260</sup> It gave the creditor an amount that was just and equitable, usually principal, interest, and expenses incurred by the creditor,<sup>261</sup> but would “restrain the creditor from suing at law for the amount of the bond, on the ground that such a course was unconscientious and oppressive.”<sup>262</sup> Equity gradually extended this doctrine to contracts other than those requiring the payment of money.<sup>263</sup> Many of those and similar equitable doctrines were slowly absorbed into the Common Law.<sup>264</sup>

In reforming the law of property, Equity recognized ownership in the beneficiary of a trust.<sup>265</sup> At Common Law, title to tangible real property could pass only by livery of seisin, which generally required the physical

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256. *Id.* § 71, at 76; Willard Barbour, *The History of Contract in Early English Equity*, in IV OXFORD STUDIES IN SOCIAL AND LEGAL HISTORY, *supra* note 241, at 85–89. See generally Michael Slatery & Ron Martinetti, *The Rights of “Owners” of Lost, Stolen or Destroyed Instruments Under UCC Section 3-804: Can They Be Holders in Due Course?*, 98 COM. L.J. 328 (1993).

257. SPENCE, *supra* note 95, at 630; KESSLER ET AL., *supra* note 220, at 9–10 (footnotes omitted). See generally Mark Gould, *Law and Philosophy: Some Consequences for the Law Deriving from the Sociological Reconstruction of Philosophical Theory*, 17 CARDOZO L. REV. 1239, 1310–13 (1996).

258. 1 POMEROY, *supra* note 55, § 72, at 76–77.

259. D.E.C. YALE, *Introduction*, 2 LORD NOTTINGHAM’S CHANCERY CASES 8–15 (SELDEN SOCIETY 1957).

260. Two maxims of Equity were invoked here: “Equity looks on that as done, which in good conscience ought to be done” and “Equity looks rather to the intent than to the form.” See HOGG, *supra* note 51, §§ 327–328, at 451–55.

261. Kittle, *supra* note 61, at 32. HENRY L. MCCLINTOCK, HANDBOOK OF EQUITY § 30, at 45–46 (1936); HOGG, *supra* note 51, § 509, at 681–83.

262. FETTER, *supra* note 53, § 9, at 23–24. See also SNELL, *supra* note 98, at 340 (noting that chancery “would cut down the penalty to the amount of the actual damages sustained”).

263. FETTER, *supra* note 53, § 9, at 24. MCCLINTOCK, *supra* note 261, §§ 30–31, at 45–47.

264. PLUCKNETT, *supra* note 138, at 677–78; GEORGE L. CLARK, EQUITY: AN ANALYSIS AND DISCUSSION OF MODERN EQUITY PROBLEMS § 457, at 613 (1919); MCCLINTOCK, *supra* note 262, § 30, at 45–46; HOGG, *supra* note 51, § 507, at 678; Kittle, *supra* note 61, at 32–33; SNELL, *supra* note 98, at 340–41 (“The interference of equity was . . . rendered unnecessary by 8 & 9 Will. 3, c. 11, and 4 & 5 Anne, c. 16, which substantially gave the common law Courts similar powers of relief to those hitherto possessed by equity.”).

265. See 1 AUSTIN WAKEMAN SCOTT & WILLIAM FRANKLIN FRATCHER, THE LAW OF TRUSTS § 1, at 4–5 (4th ed. 1987); SNELL, *supra* note 98, at 44–48.

presence of the parties on the land.<sup>266</sup> Thus, in a conveyance to A for the use of B, the Law courts denied any claim of title in B and refused to recognize that B had any right therein.<sup>267</sup> In fact, B could be sued at Law for trespass in taking the rents and profits. Equity, however, recognized B as the beneficial owner, held A to be a mere trustee for B, and would enjoin A from prosecuting any action at law against B. "This recognized the principle of trusts, which in its many phases equity has always fostered."<sup>268</sup> (Equity similarly respected a trust with regard to tangible personal property, and also the right to transfer title to intangible personalty, or choses in action.) After the decline the feudalism as a social and governmental system, courts invoked equity to eliminate most of the obsolete feudalistic legal doctrines<sup>269</sup>—thus leading to the Statute of Uses.<sup>270</sup> Although aimed at restoring tax revenues to Henry VIII,<sup>271</sup> the statute made it possible to convey legal title by written deed, replacing conveyances by livery of seisin, and to create future executory estates impossible under the old law.<sup>272</sup> The statute also destroyed the power to devise land by will recognized by Equity, and resulted in the adoption of the Statute of Wills to restore such power.<sup>273</sup>

The lien theory of mortgages is a direct result of the carrying over

266. See S.E. Thorne, *Livery of Seisin*, 52 LAW Q. REV. 345 (1938); Charles J. Reid, Jr., *The Seventeenth Century Revolution in the English Land Law*, 43 CLEV. ST. L. REV. 221, 281–82 (1995) (recounting evolution of English land law). See generally Kittle, *supra* note 61, at 32–33.

267. Kittle, *supra* note 61, at 32 (citing WILLIAM W. BILLSON, *EQUITY IN ITS RELATIONS TO COMMON LAW* 167 (1917); KENELM E. DIGBY, *HISTORY OF THE LAW OF REAL PROPERTY* 320 (5th ed. 1897)).

268. Kittle, *supra* note 61, at 33; Walter Wheeler Cook, *The Alienability of Choses in Action*, 29 HARV. L. REV. 816 (1916); Walter Wheeler Cook, *The Alienability of Choses in Action: A Reply to Professor Williston*, 30 HARV. L. REV. 449 (1917); Walsh, *supra* note 245, at 484.

269. See generally PLUCKNETT, *supra* note 138, at 62; Percy Bordwell, *The Common Law Scheme of Estates*, 18 IOWA L. REV. 425, 425 (1933); J.M.W. BEAN, *THE DECLINE OF ENGLISH FEUDALISM* 1215–1540 (1968); Richard H. Helmholz, *The Early Enforcement of Uses*, 79 COLUM. L. REV. 1503 (1979); Margaret E. Avery, *An Evaluation of the Effectiveness of the Court of Chancery Under the Lancastrian Kings*, 86 LAW Q. REV. 84 (1970); Margaret E. Avery, *History of Equitable Jurisdiction Before 1460*, 42 BULL. HIST. RES. 129 (1969); A.D. Hargreaves, *Equity and the Latin Side of Chancery*, 68 LAW Q. REV. 481 (1952).

270. 27 HEN. VIII, ch. 10 (1535) (Eng.). See generally A.W.B. SIMPSON, *AN INTRODUCTION TO THE HISTORY OF THE LAND LAW* 184–88 (2d ed. 1986) (discussing history of Statute of Uses); William Searle Holdsworth, *The Political Causes Which Shaped the Statute of Uses*, 26 HARV. L. REV. 108, 465–67 (1913).

271. See CORNELIUS J. MOYNIHAN, *INTRODUCTION TO THE LAW OF REAL PROPERTY* 178 (2nd ed. 1988); Holdsworth, *supra* note 270.

272. See generally Reid, *supra* note 266, at 281–92; Michael Madison, *The Real Properties of Contract Law*, 82 B.U. L. REV. 405, 470–71 (2002).

273. Walsh, *supra* note 245, at 483; CLARK, *supra* note 264, § 246, at 327–28; 4 WILLIAM SEARLE HOLDSWORTH, *A HISTORY OF ENGLISH LAW* 465–67.

into the law of the principles established by the Chancellor's Court in the early part of the seventeenth century. Equity, though recognizing the purely technical legal title of the mortgagee, enforced the real ownership of the mortgagor by establishing his equity of redemption, and by charging the mortgagee as a trustee if he exercised his legal right to take over possession of the mortgaged property and collected the rents and profits. Equity treated the legal title and right of possession as existing in the mortgagee only for the purpose of establishing and protecting his security for payment of the mortgage debt.<sup>274</sup>

Chancery assumed jurisdiction under any circumstances where the remedy at law was not plain, adequate, and complete.<sup>275</sup> The inability of the Law courts to reconcile their rigid forms and processes with the realities of fraud, undue influence, duress, and mistake originated doctrines in Equity to address them.<sup>276</sup> Equity also created the remedies of cancellation, restitution, constructive trusts, and specific performance.<sup>277</sup> The protection by injunction of public or social rights is derivative of Equity.<sup>278</sup> And the modern law of piercing the corporate veil, fiduciary duties, unfair competition, trademarks, and business rights were developed in the Chancery courts.<sup>279</sup>

Chancery also intervened when the procedures of the law courts were inadequate.<sup>280</sup> For example, equity interfered in the name—and with the imprimatur—of efficiency to avoid the injurious effects of a multiplicity of actions.<sup>281</sup> Describing the contrast between Law and Equity in these

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274. Walsh, *supra* note 245, at 484–85.

275. See *supra* notes 82–85 and accompanying text.

276. An old English rhyme describes this jurisdiction: “These three give place in court of conscience, Fraud, accident and breach of confidence.” MAITLAND, *supra* note 93, at 7 n.1. See Comment, 34 YALE L.J. 432 (1925). See also Frierson, *supra* note 228, at 412; Walsh, *supra* note 245, at 483; Smith, *supra* note 75, at 314.

277. Smith, *supra* note 75, at 314.

278. Walsh, *supra* note 245, at 493.

279. Emmerglick, *supra* note 68, at 251 (citing Franklin D. Jones, *Historical Development of the Law of Business Competition*, 35 YALE L.J. 905 (1926); VERNON A. MUND, *MONOPOLY: A HISTORY AND THEORY* (1933); MYRON W. WATKINS, *INDUSTRIAL COMBINATIONS AND PUBLIC POLICY* (1927)); Deborah A. DeMott, *Beyond Metaphor: An Analysis of Fiduciary Obligation*, 1988 DUKE L.J. 879, 880–81 (discussing the equitable origins of fiduciary duties); L.S. Sealy, *Fiduciary Relationships*, 1962 CAMBRIDGE L.J. 69, 60 (same).

280. See Barbour, *supra* note 75, at 858 (noting that equity overcame defects that inhered in the procedure of the law courts and “dealt easily with situations which baffled the common law”); JOHN MITFORD (LORD REDESDALE), *PLEADINGS IN CHANCERY* 112 (John S. Voorhies ed., 1833) (noting that equity exercised jurisdiction where “the principles of law, by which the law courts were guided, give a right, but the powers of those courts were not sufficient to afford a complete remedy, or their modes of proceeding were inadequate to the purpose . . . [or] where the courts of ordinary jurisdiction were made instruments of injustice”). See generally Main, *supra* note 85, at 491–95.

281. See generally 1 POMEROY, *supra* note 55, §§ 243–275, at 318–77. References herein to a “multiplicity of actions” refer to group (iv). See also HENRY L. MCCLINTOCK, *HANDBOOK ON THE*

instances, Professor Chafee wrote:

A common-law action soon came to be a two-sided affair, usually with only one plaintiff and one defendant but sometimes with several plaintiffs or defendants tightly bound together as joint obligees or obligors, etc. Except in such joint situations, however, a dispute of one person against many persons usually had to come before the law courts, if at all, in the form of many separate actions. Hence it was far cheaper and more convenient to have a single suit in chancery, which was accustomed to handle polygonal controversies . . . . [I]t was an obvious waste of time to try . . . common question[s] of law and fact over and over in separate actions at law . . . . It was much more economical to get everybody into a single chancery suit and settle the common questions once and for all.<sup>282</sup>

Thus, Equity would hear a controversy to prevent a multiplicity of suits, even if the exercise of such jurisdiction called for adjudication on purely legal rights and to confer purely legal relief.<sup>283</sup> Moreover, when the number of plaintiffs or defendants were too numerous to join in a single suit, Equity would permit a few of the litigants to represent the many in connection with an equitable bill of peace, the ancestor of the contemporary class action.<sup>284</sup> Other contemporary procedural staples traceable to Equity include, among many others, pleading in the alternative, liberal joinder rules, impleaders, interpleaders, intervention, and case management.<sup>285</sup>

The dynamic and unconstrained processes of Equity spurred innovation and idealism.<sup>286</sup> The repeated exercise of the jurisdiction of

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PRINCIPLES OF EQUITY § 178 (2d ed. 1948) (stating that “the plight of a defendant at law, subjected to one hundred and ten separate actions arising from the same accident, many of the actions being brought in different counties and some of them set for trial in the different counties at the same time, so that it would be impossible for the witnesses for the defense to attend each trial, is one that calls for some sort of relief if it can be given” (citing *S. Steel Co. v. Hopkins*, 47 So. 274 (1908))).

282. ZECHARIAH CHAFEE, JR., *SOME PROBLEMS OF EQUITY* 200–01 (1950).

283. Main, *supra* note 85, at 492 (citations omitted).

284. See 1 POMEROY, *supra* note 55, § 269, at 367–68 (“[T]he jurisdiction may and should be exercised, either on behalf of a numerous body of separate claimants against a single party, or on behalf of a single party against such a numerous body, although there is no ‘common title,’ nor ‘community of right’ or of ‘interest in the subject-matter,’ among these individuals, but where there is and because there is merely a community of interest among them in the questions of law and fact involved in the general controversy, or in the kind and form of relief demanded and obtained by or against each individual member of the numerous body.”). See generally STEPHEN C. YEAZELL, *FROM MEDIEVAL GROUP LITIGATION TO THE MODERN CLASS ACTION* (1987); CHAFEE, *supra* note 282, at 200.

285. Main, *supra* note 85, at 471–73 (citations omitted).

286. See *supra* notes 86–90 and accompanying text. See also 1 JOHN FONBLANQUE, *A TREATISE OF EQUITY* § 3 (A. Strahan & W. Woodfall eds., 1793) (“So there will be a necessity of having recourse to natural principles, that what is wanting to the finite may be supplied out of that which is infinite. And this is properly what is called equity, in opposition to strict law . . . . And thus in chancery every particular case stands upon its own particular circumstances; and, although the common law will not decree against the general rule of law, ye chancery doth, so as the example introduce not a general

Equity identified the systemic failures of the Common Law and ultimately had a reforming influence.

*B. Rigor Æquitatis*  
(or the Common Law's Reforming Influence on Equity)

"What starts as a boon often ends as a boomerang."<sup>287</sup> Earnest, "[s]imple, inexpensive and speedy in its origins," by the eighteenth century Equity had become idly corrupt, "exceedingly complicated, unbelievably slow, and inexcusably expensive."<sup>288</sup> When Chancery was exposed to the pathogens of strict law, it suffered a fate worse than that which plagued the Common Law.<sup>289</sup>

Equity began to experience a process of systematization in the early seventeenth century.<sup>290</sup> Many presumed that Chancery could not remain a "fountain of unlimited dispensations."<sup>291</sup> To reform the "heterogeneous medley of isolated empirical remedies,"<sup>292</sup> Bacon issued one hundred rules of equity that were "wisely conceived, and expressed with the greatest precision and perspicuity."<sup>293</sup> Chancery no longer "decide[d] every individual case according to the result of a sort of ransacking search for the particular set of conscientious principles applicable to the case."<sup>294</sup> Chancery began to respect precedent.<sup>295</sup> And

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mischief. Every matter, therefore, that happens inconsistent with the design of the legislator, or is contrary to natural justice, may find relief here.").

287. Severns, *supra* note 61, at 106.

288. Smith, *supra* note 113, at 112.

289. CARLETON KEMP ALLEN, LAW IN THE MAKING 228–29 (1927) ("The situation was bad enough at law, but much worse in equity."); A.S. DIAMOND, PRIMITIVE LAW 349 (2d ed. 1950) ("Gradually the rules of equity themselves came to suffer the fate of rules of law, and became stereotyped.").

290. Barbour, *supra* note 75, at 858–59 (dating "the change" in equity to the era of James I). See generally Jack Moser, *The Secularization of Equity: Ancient Religious Origins, Feudal Christian Influences, and Medieval Authoritarian Impacts on the Evolution of Legal Equitable Remedies*, 26 CAP. U. L. REV. 483 (1997); Haskett, *supra* note 75.

291. Frederick Pollock, *The Transformation of Equity*, in FREDERICK POLLOCK, ESSAYS IN JURISPRUDENCE AND ETHICS 293 (1882) (noting that Chancery became "as regular a court of jurisdiction as any other"); MAITLAND, *supra* note 63, at 9 ("In the second half of the sixteenth century the jurisprudence of the court is becoming settled.").

292. Smith, *supra* note 75, at 315.

293. 2 JOHN LORD CAMPBELL, LIVES OF THE LORD CHANCELLORS AND KEEPERS OF THE GREAT SEAL OF ENGLAND 134 (5th ed. 1868) ("They are the foundation of the practice of the Court of Chancery, and are still cited as authority.").

294. H.G. Hanbury, *The Field of Modern Equity*, 45 LAW Q. REV. 196, 205 (1929).

295. As early as 1663, in an aggravated case of fraud Lord Clarendon dismissed the plaintiff's bill for lack of a precedent. See *Roberts v. Wynn*, 1 Chan. Rep. 236, 21 Eng. Rep. 560 (1580). See also *Cook v. Fountain*, 3 Swans. 585, 591 (1672) (discussing the logic of consistency); Brown, *supra* note 76, at 321–22 n.12 (discussing *Cook* and noting that the tendency toward stare decisis increased in

particularly under the chancellorships of Lord Nottingham and Lord Hardwicke,<sup>296</sup> the exercise of equity became ever more circumscribed and predictable.<sup>297</sup> And as Nottingham and Hardwicke “deliberately set out to reduce equity to a system of rules established by precedent,”<sup>298</sup> the jurisdiction of Equity “crystallized.”<sup>299</sup>

This is a predictable phenomenon: as soon as a system of law becomes reduced to completeness of outward form, “it has a natural tendency to crystallize into a rigidity unsuited to the free applications which the actual circumstances of human life demand.”<sup>300</sup> But as the jurisdiction of Equity lost its youthful exuberance, so also its freedom, elasticity, and luminance.<sup>301</sup> Equity lost religion and found

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Chancery throughout the eighteenth century); Keeton, *supra* note 159, at 476 (suggesting that respect for precedent was not introduced in Equity until the eighteenth century); Smith, *supra* note 113, at 112 (suggesting that Chancery was far more deeply in bondage to precedent than was the common law); 1 POMEROY, *supra* note 55, § 59, at 59–60 (quoting Lord Keeper Bridgman, “Certainly, precedents are very necessary and useful to us, for in them we may find the reasons of the equity to guide us; and besides, the authority of those who made them is much to be regarded. We shall suppose that they did it upon great consideration and weighing of the matter, and it would be very strange and very ill if we should disturb and set aside what has been the course for a long series of time and ages.”).

296. Lord Nottingham served as Lord Chancellor from 1673 to 1682. *See generally* 4 CAMPBELL, *supra* 293, at 236–79. Lord Hardwicke served from 1736 to 1756. *See generally* 6 *id.* at 158–304.

297. *See* Sparks, *supra* note 77, at 477 (noting that “as time passed on . . . opposition gradually diminished”). *See, e.g.,* Bond v. Hopkins, 1 Sch. & Lef. 413, 428 (1802) (“The cases which occur are various, but they are decided on fixed principles. Courts of equity have in this respect no more discretionary power than courts of law. They decide new cases, as they arise, by the principles on which former cases have been decided, and may then illustrate or enlarge the operation of those principles; but the principles are as fixed and certain as the principles on which the courts of common law proceed.”).

298. Severns, *supra* note 61, at 105–06; Brown, *supra* note 76, at 319 (“[Hardwicke] labored indefatigably to forge those positive precepts which in his estimation would best externalize the traditional philosophy of Chancery.”); Hanbury, *supra* note 294, at 196 (suggesting that Nottingham initiated the first transformation of Equity “from a heterogeneous medley of isolated empirical reliefs into a stable and increasingly rigid system of rules”).

Some commentators credit (or blame, as the case may be) Eldon for completing the process of defining and limiting Equity. *See* 1 HOLDSWORTH, *supra* note 98, at 468.

299. *See* Hanbury, *supra* note 294, at 205 (Nottingham “stiffened and rationalized old ideas and turned them to permanent and practical use.”). *See also* James O’Connor, *Thoughts About the Common Law*, 3 CAMBRIDGE L.J. 161, 164 (1928) (referring to the “crystallized conscience” of equity). *See generally* MAITLAND, *supra* note 63, at 9 (noting that during the sixteenth century, “[t]he day for ecclesiastical Chancellors is passing away”); Paul Vinogradoff, *Reason and Conscience in Sixteenth Century Jurisprudence*, 24 LAW Q. REV. 373 (1908); SHAPIRO, *supra* note 225, at 158; 6 CAMPBELL, *supra* note 293, at 158.

300. SHELDON AMOS, *THE SCIENCE OF LAW* 57 (1875). *See also* MAINE, *supra* note 57, at 19–21 (explaining that equity is a stage in the growth of law, whereby it is expanded but ultimately fossilized); Pound, *supra* note 86, at 711–12 (comparing law to the rules and formulas of the engineer, where the engineer is informed by the wisdom and experience of predecessors); Raymond Evershed, *Is Equity Past Child-bearing?*, 1 SYDNEY L. REV. 1, 9–13 (1953) (discussing equity and modern legislation).

301. *See* Johnson, *supra* note 196, at 350 (“Equity became handcuffed by a rigorous body of rules and concepts.”); *see also id.* at 351 (“The times were not suitable for reasoned discretion. The public demanded ‘certainty.’”).



procedure.<sup>302</sup> The administration of equity, much like the administration of law, became “entangled in the intricacies of its own processes and broken down of its own weight.”<sup>303</sup> Corruption made things worse.<sup>304</sup> For litigants, Chancery became a nightmare. Five years was a minimum for a creditors’ bill to be disposed of, even where there was neither exception nor appeal.<sup>305</sup> Sometimes a case was delayed more than thirty years.<sup>306</sup> Charles Dickens’ *Bleak House* is a depiction of this era of Chancery.<sup>307</sup> Chancery thus became a *jus strictum* differing little from the Common Law except in point of identity of the judicial decisions it had made its own.<sup>308</sup> Indeed, by the first quarter of the nineteenth century, equity “had become so fixed, so certain, that lawyers could say, ‘There is nothing new in equity.’”<sup>309</sup>

### C. The Merger of Law and Equity

The ossification of Equity was happening simultaneously with the

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302. See generally 1–2 CHARLES FISK BEACH, JR., MODERN PLEADING AND PRACTICE IN EQUITY (1894) (two volume set of Equity pleading rules); EDWARD HUGHES, THE EQUITY DRAFTSMAN (1st Amer. ed. 1832) (a tome of nearly one thousand pages describing the procedural rules of Suits in Equity). See also WALTER C. CLEPHANE, HANDBOOK OF THE LAW OF EQUITY PLEADING AND PRACTICE (1926).

303. Equity, in fact, did “lose religion.” Part of the systematization of Equity was an attempt to secularize it. See generally Moser, *supra* note 290; Haskett, *supra* note 75. St. Thomas More was the first lawyer chancellor (1529–1532). He succeeded Cardinal Wolsey (1515–1529) and was described by Maitland as “the last of the great ecclesiastical Chancellors” The last ecclesiastic was Dr. Williams, Bishop of London (1621–1625), and the last non-lawyer was Anthony Ashley Cooper, Earl of Shaftesbury (1672–1673). See MAITLAND, *supra* note 93, at 1–11. Smith, *supra* note 113, at 112. See 1 HOLDSWORTH, *supra* note 232, at 426 (“Firstly a suit in equity very often lasted very many years. This no doubt is true of some common law actions; but it is clear that the fact that many equitable cases involved the taking of accounts and enquiries, necessarily made the proceedings more lengthy than the general run of common law actions, which turned on a clear cut issue of fact or law.”); Charles Synge Christopher & Baron Bowen, *Progress in the Administration of Justice During the Victorian Period*, in 1 SELECT ESSAYS IN ANGLO-AMERICAN LEGAL HISTORY 516, 529 (Ass’n of American Law Schools ed., 1907) (“‘No man, as things now stand,’ says in 1839 Mr. George Spence, the author of the well-known work on the equitable jurisdiction of the Court of Chancery, ‘can enter into a Chancery suit with any reasonable hope of being alive at its termination, if he has a determined adversary.’”).

304. Michael Lobban, *Preparing for Fusion: Reforming the Nineteenth-Century Court of Chancery, Part II*, 22 LAW & HIST. REV. 565 (2004); Smith, *supra* note 113, at 112–13.

305. 9 HOLDSWORTH, *supra* note 236, at 433 (citing C.P. COOPER, A BRIEF ACCOUNT OF SOME OF THE MOST IMPORTANT PROCEEDINGS IN PARLIAMENT, RELATIVE TO THE DEFECTS IN THE ADMINISTRATION OF JUSTICE IN THE COURT OF CHANCERY, THE HOUSE OF LORDS, AND THE COURT OF COMMISSIONERS OF BANKRUPT 86 (1828)).

306. 9 HOLDSWORTH, *supra* note 236, at 375.

307. CHARLES DICKENS, BLEAK HOUSE (1853).

308. See Gane, *supra* note 1, at 572; see also Brown, *supra* note 76, at 325 (“In the eighteenth century . . . not only was Chancery following the Law, but the Common Law in turn was becoming more and more equitized.”); *supra* note 236 and accompanying text.

309. Severns, *supra* note 61, at 106.

equitization of the Common Law.<sup>310</sup> The Common Law had absorbed many of the best practices of Equity,<sup>311</sup> and with Equity reduced to rigid doctrines applied as mechanically as the Common Law, maintenance of a separate system was superfluous.<sup>312</sup>

The merger of law and equity consummated the centuries-long relationship of cooperation, competition, and copying.<sup>313</sup> Differences between the systems were viewed as merely procedural, and a widespread and escalating contempt for procedure suggested that such distinctions were impractical and unnecessary.<sup>314</sup> There was little tolerance for the delays, the expense, and the technical complications that resulted from maintaining separate courts of Law and Equity.<sup>315</sup> Procedure could better fulfill its functional and secondary role if a single set of procedural rules facilitated the joint administration of the substantive principles of both Law and Equity.<sup>316</sup>

Other articles have argued that in merging the systems of Law and Equity, reformers may have swept away part of the wisdom that guided the development and operation of dual systems.<sup>317</sup> One virtue of an autonomous system of Equity was its authority to act in opposition to the strict law when the unique circumstances of a particular case demanded intervention.<sup>318</sup> The architects of the merger purportedly took great pains to sustain this virtue by preserving the *substantive* principles of both Law and Equity in a merged system; only the *procedure* was

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310. Smith, *supra* note 113, at 110–14 (tracing key elements of reforms in the systems of both Law and Equity to the middle of the eighteenth century).

311. See *supra* notes 231–86 and accompanying text.

312. See *supra* note 289 and accompanying text.

313. This story has been narrated. See generally Subrin, *supra* note 14; Main, *supra* note 85. For a more complete discussion of the history of Law and Equity, see generally PLUCKNETT, *supra* note 138, at 381; 1 POLLOCK & MAITLAND, *supra* note 61; 1–2 HOLDSWORTH, *supra* note 62; 1 STORY, *supra* note 55; Kittle, *supra* note 61; KERLY, *supra* note 61; Roscoe Pound, *The End of Law as Developed in Legal Rules and Doctrines*, 27 HARV. L. REV. 195 (1914); Adams, *supra* note 61; Pound, *supra* note 86; Holdsworth, *supra* note 69; Robert L. Munger, *A Glance at Equity*, 25 YALE L.J. 42 (1915); Henry H. Ingersoll, *Confusion of Law and Equity*, 21 YALE L.J. 58 (1911).

314. See generally Main, *supra* note 85.

315. See William Searle Holdsworth, *Blackstone's Treatment of Equity*, 43 HARV. L. REV. 1, 7 (1929). See generally Main, *supra* note 85.

316. See Charles E. Clark, *The Union of Law and Equity*, 25 COLUM. L. REV. 1 (1925); Main, *supra* note 85.

317. See Main, *supra* note 85.

318. See Holdsworth, *supra* note 69, at 293 (stating that “the root . . . of equity [is] the idea that the law should be fairly administered and that hard cases should as far as possible be avoided”). CARDOZO, *supra* note 176, at 65 (“[W]hen the social needs demand one settlement rather than another, there are times when we must bend symmetry, ignore history and sacrifice custom in the pursuit of larger ends.”); Campbell, *supra* note 54, at 110 (noting that principles of equity are a part of the larger concept of fairness and justice upon which all law must be based).

modified, they insisted.<sup>319</sup> But even assuming that the antagonistic substantive regimes of Law and Equity can co-exist and be applied contemporaneously within a single unified procedural system, a fundamental flaw inheres in the procedural infrastructure of a merged system.<sup>320</sup> For in denying Equity any structural autonomy, there remains no relief from the procedures of the merged system itself when the modes of proceeding in that system are inadequate.<sup>321</sup> Thus when the unanticipated situation arises, courts have no choice but to follow the procedural rules drafted instead for the anticipated situations.<sup>322</sup> For no matter the judicial discretion that is supposedly codified<sup>323</sup> in the Federal Rules of Civil Procedure,<sup>324</sup> there remains a schemata of procedural rules that is increasingly prolix, complex, and rigid.<sup>325</sup>

Moreover, the assumption that a merged court can apply the substantive principles of law and equity is an uncertain one. To be sure, many statutes and common law doctrines have incorporated the fundamental equitable principle of individualized justice. This principle is reflected in the evolution of broad principles as opposed to narrow rules,<sup>326</sup> broad grants of discretionary authority,<sup>327</sup> variable standards of

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319. See Ralph E. Kharas, *A Century of Law-Equity Merger in New York*, 1 SYRACUSE L. REV. 186, 187 (1949). See also PHILEMON BLISS, *A TREATISE UPON THE LAW OF PLEADING* 15 (3d ed. 1894) (stating that codes "affect modes of procedure"); Mildred Coe & Lewis Morse, *Chronology of the Development of the David Dudley Field Code*, 27 CORNELL L.Q. 238, 240-43 (1942); Stephen N. Subrin, *David Dudley Field and the Field Code: An Historical Analysis of an Earlier Procedural Vision*, 6 LAW & HIST. REV. 311, 329-30 (1988).

320. See Main, *supra* note 85.

321. See *id.* at 495-514.

322. See *infra* notes 476-91 and accompanying text.

323. The ironic use of the term codification should be emphasized.

324. See Subrin, *supra* note 14, at 929, 970-82; Richard L. Marcus, *Completing Equity's Conquest? Reflections on the Future of Trial Under the Federal Rules of Civil Procedure*, 50 U. PITT. L. REV. 725, 725 (1989) ("[A]s to the pretrial portion of litigation, equity conquered law"); Judith Resnik, *Managerial Judges*, 96 HARV. L. REV. 374, 376 (1982) (explaining that the relaxed procedures of equity allow activist judges to take control of litigation throughout the pretrial stage); Jack B. Weinstein & Eileen Herhenov, *The Effect of Equity on Mass Tort Law*, 1991 U. ILL. L. REV. 269, 278-81 (offering examples of how equity has dominated legal system through "modes of proof and trial," and the "varied circumstances in which courts today turn to equitable remedies" in mass tort cases); Melissa A. Waters, *Common Law Courts in an Age of Equity Procedure: Redefining Appellate Review for the Mass Tort Era*, 80 N.C. L. REV. 527, 542-51 (2002) (discussing equity's triumph in mass tort trial procedures); Douglas Laycock, *The Triumph of Equity*, 1993 LAW & CONTEMP. PROBS. 53, 53-54 ("The war between law and equity is over. Equity won."). See also Chayes, *supra* note 28, at 1292-96 (discerning in public law litigation the "triumph of equity"); 1 CHARLES E. CLARK, *CASES ON PLEADING AND PROCEDURE* PREF. (1930) (covering, among other highlights, "[t]he history of equity, and its triumph over law").

325. See Main, *supra* note 85, at 479-86.

326. See generally FREDERICK SCHAUER, *PLAYING BY THE RULES: A PHILOSOPHICAL EXAMINATION OF RULE-BASED DECISION-MAKING IN LAW AND IN LIFE* 98, 158-62 (1991); Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175 (1989); Robert F. Nagel, *The*

conduct,<sup>328</sup> balancing tests,<sup>329</sup> leeways of precedent,<sup>330</sup> and the acceptance of legal fictions.<sup>331</sup> That equity intervenes when there is *no adequate remedy at law* is a most familiar refrain.<sup>332</sup> Courts frequently exercise their broad discretion to award various equitable remedies, and courts have used the awesome power of equity to create entirely new rights.<sup>333</sup>

Yet, the legacies of neither Law nor Equity can be fully preserved in a merged system. “Law and equity cannot be blended or homogenized because they are [fundamental] antitheses.”<sup>334</sup> “Each [system] has a function to perform that requires some freedom to act upon the other.”<sup>335</sup> Ironically, the Lord Chancellors responsible for “crystallizing” Equity believed strongly in the separation of Law and

*Formulaic Constitution*, 84 MICH. L. REV. 165 (1985).

327. See P.S. Atiyah, *From Principles to Pragmatism: Changes in the Function of the Judicial Process and the Law*, 65 IOWA L. REV. 1249, 1251–59 (1980); ALAN PATERSON, *THE LAW LORDS* 123–24 (1982).

328. See generally Richard Danzig, *A Comment on the Jurisprudence of the Uniform Commercial Code*, 27 STAN. L. REV. 621 (1975); James Henderson, *Expanding the Negligence Concept: Retreat from the Rule of Law*, 51 IND. L.J. 467 (1976); Aaron Twerski, *Seizing the Middle Ground Between Rules and Standards in Design Defect Litigation: Advancing Directed Verdict Practice in the Law of Torts*, 57 N.Y.U. L. REV. 521 (1982).

329. See generally Robert F. Nagel, *Liberals and Balancing*, 63 U. COLO. L. REV. 319 (1992); T. Alexander Aleinikoff, *Constitutional Law in the Age of Balancing*, 96 YALE L.J. 943 (1987); James G. Wilson, *Surveying the Forms of Doctrine on the Bright Line-Balancing Test Continuum*, 27 ARIZ. ST. L.J. 773 (1995).

330. See generally Aldisert, *supra* note 176, at 605; Michael J. Gerhardt, *The Role of Precedent in Constitutional Decisionmaking and Theory*, 60 GEO. WASH. L. REV. 68 (1991).

331. See generally LON FULLER, *LEGAL FICTIONS* 9 (1967); Louise Harmon, *Falling Off the Vine: Legal Fictions and the Doctrine of Substituted Judgment*, 100 YALE L.J. 1 (1990); MAINE, *supra* note 57, at 17–36.

332. See generally Douglas Laycock, *The Death of the Irreparable Injury Rule*, 103 HARV. L. REV. 687 (1990); Daniel J. Morrissey, *SEC Injunctions*, 68 TENN. L. REV. 427 (2001).

333. See generally William T. Quillen, *Constitutional Equity and the Innovative Tradition*, 56 LAW & CONTEMP. PROBS. 29 (1993). See, e.g., *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 17 (1971) (Burger, C.J.) (invoking the judiciary’s “historic equitable remedial powers” in the school desegregation context to require busing). See generally FELIX FRANKFURTER & NATHAN GREENE, *THE LABOR INJUNCTION* (1930); Owen M. Fiss, *The Supreme Court, 1978 Term—Foreword: The Forms of Justice*, 93 HARV. L. REV. 1 (1979); MALCOLM M. FEELY & EDWARD L. RUBIN, *JUDICIAL POLICY MAKING AND THE MODERN STATE: HOW THE COURTS REFORMED AMERICA’S PRISONS* (2000); GARY L. MCDOWELL, *EQUITY AND THE CONSTITUTION: THE SUPREME COURT, EQUITABLE RELIEF, AND PUBLIC POLICY* (1982) (criticizing the Supreme Court’s use of equity to implement a political vision that is inconsistent with positive law). But see *Grupo Mexicano de Desarrollo, S.A. v. Alliance Bond Fund, Inc.*, 527 U.S. 308, 318 (1999) (limiting scope of substantive equity to rights existing in 1789).

334. Emmerglick, *supra* note 68, at 248; Percy J. Bordwell, *The Resurgence of Equity*, 1 U. CHI. L. REV. 741, 747 (1934) (“In an indiscriminate ‘fusing’ or an indiscriminate borrowing, these principles are likely to be lost. They are likely to be lost even in the administration of equity itself by judges with only a legal point of view.”).

335. Emmerglick, *supra* note 68, at 248.

Equity. Lord Bacon wrote that: “All nations have equity. But some have law and equity mixed in the same court, which is worse; and some have it distinguished in several courts, which is better.”<sup>336</sup> Indeed, to perform its high office, equity must be administered as a check upon strict law and in opposition to it. But this requires for equity a selfhood that cannot be fully replicated within a merged system.<sup>337</sup>

#### V. CONTEMPORARY DUAL SYSTEMS—THE DIALECTIC IN PRACTICE

The alternative appearance of law and equity as the law’s complementary yet competing modalities is a lasting, not transitory phenomena. With the systems of Law and Equity merged, ADR stepped into the breach to operate as a check upon the “strict law” that is now codified in the procedures of the merged system. Like Equity, ADR offers *procedural* flexibility and discretion.<sup>338</sup> And by channeling Equity’s emphasis on the moral and ethical significance of individualized justice, ADR offers an alternative *substantive* vision.<sup>339</sup> The maturation of ADR into a rival system of adjudication has already transformed formal adjudication: the courts have been “ADRized.”<sup>340</sup> Meanwhile, ADR becomes increasingly formalized and adversarial.<sup>341</sup>

##### A. ADR’s Reforming Influence on Formal Adjudication

The contemporary understanding of adjudication has been thoroughly transformed by the ideology and processes of ADR. At the most basic level, ADR has invented entirely new and innovative structures for resolving disputes; and these structures are finding their way into courts.<sup>342</sup> Many commentators have reflected upon this “capture, colonization and cooptation” of ADR by courts.<sup>343</sup> Or, cast less

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336. 7 THE WORKS OF SIR FRANCIS BACON 448 (2000). See also 1 STORY, *supra* note 55, § 35, at 27. Lord Hardwicke held the same opinion. JOSEPH PARKES, A HISTORY OF THE COURT OF CHANCERY, App. 504–05 (1828).

337. *Id.* at 255.

338. See *supra* notes 120–75 and accompanying text.

339. See *supra* notes 176–207 and accompanying text.

340. Stempel, *supra* note 5, at 300 (discussing the “ADRization” of the courts). See J. Clark Kelso & Thomas J. Stipanowich, *Protecting Consumers in Arbitration*, DISP. RESOL. MAG., Fall 1998, at 11.

341. Resnik, *supra* note 49, at 253–54; Menkel-Meadow, *supra* note 40, at 5, 13–16; Katz, *supra* note 173, at 5.

342. Jack B. Weinstein, *Some Benefits and Risks of Privatization of Justice Through ADR*, 11 OHIO ST. J. ON DISP. RESOL. 241, 246–47 (1996); Resnik, *supra* note 49, at 213; Stempel, *supra* note 5, at 302.

343. See, e.g., Menkel-Meadow, *supra* note 40, at 5, 13–17 (explaining that ADR was meant to

pejoratively, formal adjudication has recognized the comparative advantage of ADR processes in certain contexts and has borrowed them. Whether in the form of court-annexed arbitration, mediation, summary jury trials, early neutral evaluation, or some other form, various ADR processes have been woven into the dispute resolution fabric so that ADR options are systematically considered at various points along the litigation path.<sup>344</sup>

Judges, especially so-called managerial judges,<sup>345</sup> have also incorporated some of the premises and practices of ADR by viewing the promotion of settlement as an important part of the exercise of the traditional judicial function.<sup>346</sup> Various ADR techniques such as mediation and settlement conferences are no longer “extrajudicial,” but

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“challenge” the adversarial system, but instead ADR has been taken over and changed by the system, and that capture, “colonization,” and co-optation have transformed ADR into “just another stop in the ‘litigation’ game”); Katz, *supra* note 173, at 5 (stating that “voluntary nature of alternatives has been eroded,” and that it is problematic for ADR to take on formalistic characteristics of adjudication); Eric R. Galton & Kimberlee K. Kovach, *Texas ADR: A Future So Bright We Gotta Wear Shades*, 31 ST. MARY’S L.J. 949, 950 n.4 (2000). Resnik, *supra* note 49, at 262–63 (citing Craig A. McEwen, Lynn Mather & Richard J. Maiman, *Lawyers in and Everyday Life: Mediation in Divorce Practice*, 28 LAW & SOC’Y REV. 149, 183 (1994) (explaining that mediation of divorce in Maine as is used in “heavily litigated” cases, relies on “legal rules,” serves as a “relatively formal adjunct to negotiation,” and “strengthens . . . the ability of lawyers to influence decisions.”)).

See also Thomas E. Carbonneau, *Arbitration and the U.S. Supreme Court: A Plea for Statutory Reform*, 5 OHIO ST. J. ON DISP. RESOL. 231, 233 (1990) (criticizing Supreme Court enforcement of agreements to arbitrate as undermining the volition critical to arbitration’s integrity, and lauding arbitration for its capacity to provide “adjudicatory, self-determination”); Richard C. Reuben, *The Dark Side of ADR*, CAL. LAW., Feb. 1994, at 53–54 (growing concern about the bills of court-appointed, court-annexed ADR providers); Susan S. Silbey, *Mediation Mythology*, 9 NEGOTIATION J. 349, 353 (1993) (critiquing proposed “guidelines for selecting mediators” as both wrongly portraying the role and also restricting access to the profession). Cf. Brunet, *supra* note 185 (calling for constitutional rights in private contractual arbitration to ensure due process fairness); James J. Alfini & Catherine G. McCabe, *Mediating in the Shadow of the Courts: A Survey of the Emerging Case Law*, 54 ARK. L. REV. 171 (2001); Sharon Press, *Institutionalization: Savior or Saboteur of Mediation?*, 24 FLA. ST. U. L. REV. 903 (1997); James J. Alfini et al., *What Happens When Mediation is Institutionalized?: To the Parties, Practitioners, and Host Institutions*, 9 OHIO ST. J. ON DISP. RESOL. 307 (1994); Nancy A. Welsh, *The Thinning Vision of Self-Determination in Court-Connected Mediation: The Inevitable Price of Institutionalization?*, 6 HARV. NEGOT. L. REV. 1 (2001); Wayne D. Brazil, *Continuing the Conversation About the Current Status and the Future of ADR: A View from the Courts*, 2000 J. DISP. RESOL. 11, 29 (warning of the potential corruption of the mediation process by “litigizing” it).

344. Sander, *supra* note 33, at 5.

345. Resnik, *supra* note 324, at 380 (“[M]anagerial judging may be redefining sub silentio our standards of what constitutes rational, fair, and impartial adjudication.”).

346. A manual encouraging newly appointed judges to facilitate settlements explains: “Optimal justice is usually found somewhere between the polar positions of the litigants. Trial is likely to produce a polar solution, and often the jury or judge has no choice except all or nothing. Settlement is usually the avenue that allows a more just result than trial.” Philip W. Tone, *The Role of the Judge in the Settlement Process*, in SEMINARS FOR NEWLY APPOINTED UNITED STATES DISTRICT JUDGES 57 (1975), as quoted in RICHARD L. MARCUS & EDWARD F. SHERMAN, *COMPLEX LITIGATION: CASES AND MATERIALS ON ADVANCED CIVIL PROCEDURE* 640 (4th ed. 2004).

rather are “regular features of civil process.”<sup>347</sup>

The growth of ADR has contributed to the beginning of a revolutionary change in the court’s conception of its role from that of a passive provider of trials to an active, problem solving case manager, or, as in some courts, to a catalyst in community change and conflict transformation.<sup>348</sup>

In complex litigation matters, in particular, ADR innovations have been incorporated wholesale into formal adjudication.<sup>349</sup> To the delight of logophiles, the combination of these various practices with litigation have created the phenomena of litigotiation,<sup>350</sup> medigation<sup>351</sup> and arbitigation.<sup>352</sup>

At a more theoretical level, ADR has revitalized discussion about the goals, norms, methods, and results of contemporary adjudication.<sup>353</sup> ADR has empowered parties by giving them ownership in the dispute resolution process;<sup>354</sup> this empowerment, in turn, has generated processes that reflect a greater range of economic norms, ethical precepts, and other cultural beliefs.<sup>355</sup> By inviting interdisciplinary study, ADR has enriched and has been enriched by the perspectives of behavioral science, organizational theory, and other disciplines. The culture of conflict resolution has experienced a shift in emphasis from the adversarial to a problem-solving model.<sup>356</sup>

Ironically, the ADR movement ultimately may be more successful at transforming courts than transforming lawyers or disputes. Recent court decisions suggest that at least some jurists have embraced a new vision of the objectives of the justice system, a vision in which the purpose of legal dispute resolution is to achieve social harmony, rather than to assess factual and legal claims and articulate public norms.<sup>357</sup>

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347. Rensik, *supra* note 37, at 186–87.

348. Louise Phipps Senft & Cynthia A. Savage, *ADR in the Courts: Progress, Problems, and Possibilities*, 108 PENN ST. L. REV. 327, 333 (2003).

349. James F. Henry, *Some Reflections on ADR*, 2000 J. DISP. RESOL. 63 (discussing the incorporation of ADR methods).

350. Marc Galanter & Mia Cahill, “Most Cases Settle”: *Judicial Promotion and Regulation of Settlements*, 46 STAN. L. REV. 1339, 1342 (1994).

351. Jeffrey W. Stempel, *Forgetfulness, Fuzziness, Functionality, Fairness and Freedom in Dispute Resolution: Serving Dispute Resolution Through Adjudication*, 3 NEV. L.J. 305, 306 & n.4 (Winter 2002/2003).

352. *Id.* at 314.

353. Lande, *supra* note 112, at 148–49.

354. Thomas A. Kochan, Brenda A. Lautsch & Corrine Bendersky, *An Evaluation of the Massachusetts Commission Against Discrimination Alternative Dispute Resolution Program*, 5 HARV. NEGOT. L. REV. 233 (2000).

355. Lande, *supra* note 112, at 150.

356. Henry, *supra* note 349, at 63.

357. Hensler, *supra* note 13, at 193.

ADR has changed the practice of law.<sup>358</sup> Conflict management, as opposed to mere conflict resolution, has become significant.<sup>359</sup> Courts, judging, and the aspirations of dispute resolution all have been transformed.<sup>360</sup>

*B. The Ossification of ADR  
(or Adjudication's "Reforming" Influence on ADR)*

The popularity of ADR and its influence on formal adjudication is a sure sign of a boon.<sup>361</sup> But beware the boomerang.<sup>362</sup> Indeed, the system of ADR popularized by its flexibility and informality now faces the inexorable demands to crystallize its processes.<sup>363</sup>

Waves of reforms have already begun to systematize ADR. The new Uniform Mediation Act bemoans the persistence of "more than 2,500 state and federal statutes" governing mediation, and purports to offer "one comprehensive law" that would ensure certainty regarding particular segments of mediation practice.<sup>364</sup> The 2000 revisions to the Uniform Arbitration Act detail "better and more complete arbitration procedures to meet modern needs," and are intended "to provide uniformity in law."<sup>365</sup> The American Arbitration Association has published voluminous and non-trans-substantive procedural rules that the parties to an ADR agreement may incorporate by reference.<sup>366</sup> The

358. HERBERT M. KRITZER, LET'S MAKE A DEAL: UNDERSTANDING THE NEGOTIATION PROCESS IN ORDINARY LITIGATION 122–23 (1991); Lande, *supra* note 112, at 148–49.

359. Henry, *supra* note 349, at 63.

360. *Id.*

361. *See supra* notes 25–44 and accompanying text.

362. *See supra* note 287.

363. *See generally* Developments, *supra* note 24, at 1874 (discussing numerous proposals representing efforts "to impose order on the creative chaos that has nurtured the ADR movement"). *See also* AMOS, *supra* note 300, at 57.

364. *See* Why States Should Adopt the Uniform Mediation Act, [http://www.nccusl.org/Update/uniformact\\_why/uniformacts-why-uma.asp](http://www.nccusl.org/Update/uniformact_why/uniformacts-why-uma.asp) (last visited Apr. 11, 2005). For the text of the Uniform Act, see <http://www.law.upenn.edu/bll/ulc/mediat/2003finaldraft.htm> (last visited Apr. 11, 2005). *See generally* Uniform ADR Effort Sparks First-Time Collaboration, 16 ALTERNATIVES TO HIGH COST LITIG. 58, 58 (1998) (describing a three- to four-year joint effort of the National Conference of Commissioners on Uniform State Laws and the American Bar Association to produce a uniform law); ABA Meeting Examines Uniform Mediation Act, 53 DISP. RESOL. J. 6, 6 (1998) (noting great concern over confidentiality in mediation due to the variations in state laws).

365. *See* Why States Should Adopt the Uniform Arbitration Act, [http://www.nccusl.org/Update/uniformact\\_why/uniformacts-why-uaa.asp](http://www.nccusl.org/Update/uniformact_why/uniformacts-why-uaa.asp) (last visited Apr. 11, 2005). For the text of the Uniform Arbitration Act, see <http://www.law.upenn.edu/bll/ulc/uarba/arbitrat1213.htm> (last visited Apr. 11, 2005).

366. The American Arbitration Association web site prescribes "Rules and Procedures" in dozens of subject matter areas, including commercial disputes, wills and trusts, construction, commercial finance, and the wireless industry. *See* <http://www.adr.org/RulesProcedures> (last visited Apr. 11, 2005).



CPR Institute for Dispute Resolution and JAMS, among others, have also published comprehensive sets of procedural rules for various ADR proceedings.<sup>367</sup> A host of ethical standards affecting neutrals and ADR-providers have been promulgated by national ADR professional organizations, by state-wide regulatory or judicial bodies, by individual court or community ADR programs, and by individual ADR provider organizations.<sup>368</sup> And a number of protocols intended to protect the rights of employees, consumers, and other vulnerable parties have been advanced.<sup>369</sup>

The number and significance of cases that are now resolved in ADR lead well-intentioned reformers to demand that ADR be systematized to provide sufficient “due process” protections.<sup>370</sup>

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With regard to length, embedded in the “Commercial Arbitration Rules and Procedures” are definitions followed by fifty-four basic arbitration rules, ten more rules regarding expedited procedures, an additional four rules for complex matters, and eight optional rules regarding emergency measures of protection. An additional section of rules pertains to the payment and amount of fees. See <http://www.adr.org/sp.asp?id=22440> (last visited Apr. 11, 2005).

367. See CPR Institute for Dispute Resolution Rules for Non-Administered Arbitration, <http://www.cpradr.org/arb-rules.asp?M=9.3.5> (last visited Apr. 11, 2005); JAMS Comprehensive Arbitration Rules and Procedures, <http://www.jamsadr.com/rules/comprehensive.asp> (last visited Apr. 11, 2005).

368. See, e.g., AAA-ABA Code of Ethics for Arbitrators in Commercial Disputes, prepared jointly by committees of the American Bar Association and the American Arbitration Association; Model Standards of Conduct for Mediators, prepared jointly by committees of the American Bar Association, the American Arbitration Association, and the Society of Professionals in Dispute Resolution; CPR-Georgetown Commission on Ethics and Standards of Practice in ADR, Principles for ADR Provider Organizations (May 1, 2002); CPR-Georgetown Commission on Ethics and Standards of Practice in ADR, Proposed Model Rule of Professional Conduct for the Lawyer as Third Party Neutral (Final draft, 2002); Tenn. Sup. Ct. R. 31; Fla. Rules of Ct. for Certified and Court-Appointed Mediators 10.820, 10.83; Ala. Code of Ethics for Mediators § I; Kan. Rules Relating to Mediation 903; Va. Standards of Ethics and Prof'l Resp. for Certified Mediators; CDRC Standards of Practice for California Mediators; Minn. Gen Rules of Pract. for the Dist. Cts. 114 app. Code of Ethics.

See generally Sarah Rudolph Cole, *Updating Arbitrator Ethics: Code Revisions Acknowledge Developments in Consumer, International Arbitration*, DISP. RESOL. MAG., Summer 2004, at 24; Ruth V. Glick, *Should California's Ethics Rules Be Adopted Nationwide? No! They Are Overbroad and Will Discourage Use of Arbitration*, DISP. RESOL. MAG., Fall 2002, at 13.

369. See, e.g., NATIONAL CONSUMER DISPUTE ADVISORY COMMITTEE, DUE PROCESS PROTOCOL ON MEDIATION AND ARBITRATION OF CONSUMER DISPUTES (1998); DUE PROCESS PROTOCOL ON MEDIATION AND ARBITRATION OF HEALTH CARE DISPUTES (1998); NATIONAL ACADEMY OF ARBITRATORS, GUIDELINES ON ARBITRATION OF STATUTORY CLAIMS UNDER EMPLOYER-PROMULGATED SYSTEMS (1987); *The Protocol: Due Process Protocol for Mediation and Arbitration of Statutory Disputes Arising Out of the Employment Relationship*, in JOHN T. DUNLOP & ARNOLD M. ZACK, MEDIATION AND ARBITRATION OF EMPLOYMENT DISPUTES app. B, at 171–78 (1997). See generally Margaret M. Harding, *The Limits of the Due Process Protocols*, 19 OHIO ST. J. ON DISP. RESOL. 369 (2004).

370. See, e.g., Richard C. Reuben, *Public Justice: Toward a State Action Theory of Alternative Dispute Resolution*, 85 CAL. L. REV. 577, 579; Richard C. Reuben, *Constitutional Gravity: A Unitary Theory of Alternative Dispute Resolution and Public Civil Justice*, 47 UCLA L. REV. 949 (2000); Katherine Van Wezel Stone, *Mandatory Arbitration of individual Employment Rights: The Yellow Dog*

Major ADR providers adhere to certain minimal due process constraints prescribed by three due process protocols, including the employment dispute resolution protocol, the consumer protocol, and the health care protocol. The major ADR providers have voluntarily moved to bolster the “due process guarantees” of their processes.<sup>371</sup>

And because “it is common to equate the adversary system with the idea of due process itself,”<sup>372</sup> recent and proposed reforms to ADR tend to mimic the characteristics of formal adjudication.<sup>373</sup> Reforms to systematize the role of neutrals would demand that neutrals be certified, formalize the selection of an impartial neutral, demand written rationales supported by specific facts, insist that neutrals follow the law, introduce rules of evidence, and subject determinations to some form of appellate review.<sup>374</sup> Meanwhile, the participants in ADR are increasingly thought to be entitled, as a matter of right, to discovery, to be represented by counsel, to present evidence, to cross-examine witnesses, and more.<sup>375</sup>

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*Contract of the 1990s*, 73 DENV. U. L. REV. 1017 (1996). “[C]ourts are [also] recreating many of the due process safeguards from nineteenth century courts.” Michael H. Leroy & Peter Feuille, *Judicial Enforcement of Predispute Arbitration Agreements: Back to the Future*, 18 OHIO ST. J. ON DISP. RESOL. 249, 250 (2003).

371. Bryant G. Garth, *Tilting the Justice System: Form ADR as Idealistic Movement to a Segmented Market in Dispute Resolution*, 18 GA. ST. U. L. REV. 927, 935 (2002).

372. Rubenstein, *supra* note 218, at 48.

373. See Sherman, *supra* note 102, at 2082–83 (suggesting that litigation and ADR have “a great deal in common [because b]oth place a high value on a rational approach to dispute resolution, fairness of process, and the centrality of party autonomy. The claim that ADR is not adversary fails to appreciate that it is fundamentally a process of assisted negotiation.”).

374. Dwight Golann, *Making ADR Mandatory: The Constitutional Issues*, 68 OR. L. REV. 487, 493 (1989) (highlighting problems with ADR processes, including the right to a jury trial, separation of powers, due process and equal protection); see also Linda Silberman, *Judicial Adjuncts Revisited: The Proliferation of the Ad Hoc Procedure*, 137 U. PA. L. REV. 2131 (1989); Wayne D. Brazil, *Special Masters in Complex Cases: Extending the Judiciary or Reshaping Adjudication?*, 53 U. CHI. L. REV. 394 (1986).

375. Recent proposed protocols call for elements such as the right to a competent and impartial neutral, representation, prehearing access to reasonably relevant information, full availability of remedies, and reasoned, written opinions. See Reuben, *Constitutional Gravity*, *supra* note 370, at 987–88; Menkel-Meadow, *supra* note 39, at 60.

For a sample of reform efforts regarding the Uniform Model Mediation Act, see, e.g., *Symposium on Drafting a Uniform/Model Mediation Act*, 13 OHIO ST. J. ON DISP. RESOL. 787 (1998); *Model Mediation Law Effort Begins*, DISP. RESOL. MAG., Fall 1997, at 20; expanded judicial review of arbitration awards, see, for example, Kenneth R. Davis, *When Ignorance of the Law is No Excuse: Judicial Review of Arbitration Awards*, 45 BUFF. L. REV. 49, 124–29 (1997) (contending that parties should be allowed to incorporate a desired level of judicial review into their contract); Stephen A. Hochman, *Judicial Review to Correct Arbitral Error—An Option to Consider*, 13 OHIO ST. J. ON DISP. RESOL. 103, 110–16 (1997) (arguing that parties ought to be able to contract for whatever level of judicial review will serve the parties’ interests, but suggesting limiting review to legal error to avoid substantial increased costs); Leanne Montgomery, Casenote, *Expanded Judicial Review of Commercial Arbitration Awards—Bargaining for the Best of Both Worlds: Lapine Technology Corp. v. Kyocera Corp.*, 130 F.3d 884 (9th Cir. 1997), 68 U. CIN. L. REV. 529, 554 (2000) (reviewing the *Lapine* decision and concluding that

Further, arbitrators are often statutorily vested with broad judicial powers to administer depositions<sup>376</sup> and discovery,<sup>377</sup> including subpoena<sup>378</sup> and sanction powers.<sup>379</sup> Arbitrators often write opinions,<sup>380</sup> and their cases grow increasingly complex through procedural machinations of consolidation and intervention.<sup>381</sup> Professor Sherman's conclusion, in 1993, that ADR and formal adjudication had "a great deal in common" grows ever truer.<sup>382</sup> Indeed, Professor and Judge Sabatino's 1998 article catalogs the formalization of ADR processes, referring to ADR (fondly) as "Litigation Lite."<sup>383</sup> And the public, or at least lawyers, appear to want still more formalization.<sup>384</sup> For example, an advertisement for National Arbitration Forum in a recent issue of the ABA Journal reads:

All Arbitration is Not the Same. Unlike the others, only the Forum offers a national panel of seasoned legal professionals and a *procedural code*

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contracting for increased judicial review may encourage continued use of arbitration)); personal liability for arbitrators, see Mark A. Sponseller, Note, *Redefining Arbitral Immunity: A Proposed Qualified Immunity Statute for Arbitrators*, 44 HASTINGS L.J. 421, 421 (1993); Note, *Gaar v. Tigerman: An Attack on Absolute Immunity for Arbitrators!*, 21 CAL. L. REV. 564, 585 (1985); amending arbitration laws to protect the contracting process from corruption, see Steven Goering, *The Standard of Impartiality as Applied to Arbitrators by the Federal Courts and Codes of Ethics*, 3 GEO. J. LEGAL ETHICS 821, 832 (1990); oversight of arbitrators, Carrie Menkel-Meadow, *Ethics in Alternative Dispute Resolution: New Issues, No Answers from the Adversary Conception of Lawyers' Responsibilities*, 38 S. TEX. L. REV. 407, 408, 419 (1997); ethics reforms, see Carrie Menkel-Meadow, *Ethics and Professionalism in Non-Adversarial Lawyering*, 27 FLA. ST. U. L. REV. 153, 166-92 (1999); prohibiting ADR in certain cases, see Weinstein, *supra* note 342. See generally Cameron L. Sabin, Note, *The Adjudicatory Boat Without a Keel: Private Arbitration and the Need for Public Oversight of Arbitrators*, 87 IOWA L. REV. 1337, 1362 (2002).

376. See UNIF. ARBITRATION ACT § 7 (2005), 7 U.L.A. 199; CAL. CIV. PROC. CODE §§ 1283, 1283.05 (West 2006).

377. See UNIF. ARBITRATION ACT § 7, 7 U.L.A. 199; CAL. CIV. PROC. CODE §§ 1283.05, 1283.1.

378. See 9 U.S.C. § 7 (2006); UNIF. ARBITRATION ACT § 7, 7 U.L.A. 199; CAL. CIV. PROC. CODE § 1282.6.

379. See 9 U.S.C. § 7; UNIF. ARBITRATION ACT § 7, 7 U.L.A. 199; CAL. CIV. PROC. CODE § 1283.05. See also Katz, *supra* note 173, at 37-41.

380. James Lyons, *Arbitration: The Slower, More Expensive Alternative?*, AM. LAW. 107, 109 (Jan./Feb. 1985) (discussing an arbitration where the panel's opinions "delivered over the course of eight months, totaled more than 600 pages in length and provided detailed explanations, often with citations, for each decision").

381. Sabatino, *supra* note 39, at 1289.

382. Sherman, *supra* note 102, at 2082-83.

383. Sabatino, *supra* note 39, at 1289 (suggesting that evidentiary norms of materiality, relevance, hearsay, and privilege are replicated in ADR practice). See also Stempel, *supra* note 5, at 343.

384. Professor Reuben argues that the surprisingly small amount of "voluntary" participation in ADR programs is attributable to the lack of formal due process protections. Reuben, *Constitutional Gravity*, *supra* note 370, at 987-88. See generally WAYNE D. BRAZIL, INSTITUTIONALIZING ADR PROGRAMS IN COURTS, appdx. C; *Why 'Volunteer ADR Programs are Likely to Attract Few Cases, and thus, Why Volunteer Programs are Not Likely to Contribute Significantly to Cost and Delay Reduction*, in EMERGING ADR ISSUES IN STATE AND FEDERAL COURTS 52, 122 (ABA 1991).

requiring arbitrators to follow the law in making decisions and awards. To learn more about the National Arbitration Forum, log onto the world wide web at [www.arbitration-forum.com](http://www.arbitration-forum.com).<sup>385</sup>

And, of course, courts continue to struggle in their efforts to figure out which cases belong in ADR.

The “creeping legalism” of ADR is ironic because ADR’s popularity was a product of its flexible and informal processes.<sup>386</sup> And with this formalism, the processes of ADR have become increasingly complex, costly, and time consuming.<sup>387</sup> It should hardly surprise, then, that the contemporary empirical data fails to demonstrate conclusively that ADR is, in fact, always faster or cheaper than formal adjudication.<sup>388</sup> For

385. ABA Journal 14 (October 2004) (emphasis added).

386. Gerald F. Phillips, *Is Creeping Legalism Infecting Arbitration?*, 58 DISP. RESOL. J. 37, 38 & n.1 (2003).

387. *Id.*

388. See generally Deborah R. Hensler, *What We Know and Don’t Know About Court-Administered Arbitration*, 69 JUDICATURE 270 (1986) (finding no significant, demonstrable savings in court-annexed ADR); Deborah R. Hensler, *RAND’s Rebuttal: CJRA Study Results Reflect Court ADR Usage*, 15 ALTERNATIVES TO HIGH COST LITIG. 79 (1997) (finding court-annexed arbitration had little effect on time to disposition or costs); JAMES S. KAKALIK ET AL., AN EVALUATION OF MEDIATION AND EARLY NEUTRAL EVALUATION UNDER THE CIVIL JUSTICE REFORM ACT 48–53 (RAND 1996) (arguing that arbitration, mediation, and early neutral evaluation produced no “statistically significant” reductions in time to disposition, the costs of litigation, perceptions of fairness, or client satisfaction); Deborah R. Hensler, *A Glass Half Full, A Glass Half Empty: The Use of Alternative Dispute Resolution in Mass Personal Injury Litigation*, 73 TEX. L. REV. 1587, 1593 (1995) (“[E]fficiency gains from court-annexed arbitration and court-mandated family mediation in custody suits appear mixed: The fiscal savings to courts from diverting cases from trial may be outweighed by the costs of running an efficient ADR program, and savings in lawyer time are often modest and not necessarily passed on to litigants through lower legal fees.”); Deborah R. Hensler, *Taking Aim at the American Legal System: The Council on Competitiveness’s Agenda for Legal Reform*, 75 JUDICATURE 244, 248 (1992) (“Mandated settlement conferences have been in use in state trial courts for at least four decades. Their effectiveness at saving costs has yet to be demonstrated empirically.”); Bernstein, *supra* note 154, at 2211 (stating that “there is no conclusive evidence that [court-annexed ADR] programs reduce either the private or social costs of disputing”); Michael Heise, *Justice Delayed? An Empirical Analysis of Civil Case Disposition Time*, 50 CASE W. RES. L. REV. 813, 834 (2000) (noting that “cases referred by courts to ADR activities . . . lasted longer, on average, than the mean for all cases”); Dayton, *supra* note 100, at 921 (comparing districts with and without court-annexed ADR and finding that “ADR districts are neither more efficient nor more effective in handling their caseloads or inducing settlement than their peer districts”); Menkel-Meadow, *supra* note 40, at 9 n.33 (collecting sources).

Until [1973], when the [American Arbitration Association’s] 50-year-old logo was redesigned, its motto was “Speed, Economy, and Justice.” That year [the Association’s president, Robert Coulson] dropped the motto. “People used to promote arbitration with those adjectives like religious zealots,” he says. “I don’t think any of these words are entirely accurate.”

Lyons, *supra* note 380, at 107. See also Bayer & Abrahams, *supra* note 155, at 30 (“Today’s research confirms what Hart and Sacks saw twenty-six years ago: arbitration may be quicker than litigation, but it is not less expensive.”); Reuben, *supra* note 343, at 54–55 (using anecdotal information to question whether arbitration is really cheaper than litigation); Thomas J. Stipanowich, *Rethinking American Arbitration*, 63 IND. L.J. 425, 452–76 (1988) (observing that many survey respondents disagreed that

decades, practitioners have reported that arbitration is neither faster nor cheaper than more formal adjudication.<sup>389</sup> This is surely attributable, at least in part, to the fact that many of the procedural bells and whistles of formal adjudication already have been incorporated into arbitration proceedings.<sup>390</sup>

### C. Toward a “Merger” of ADR and Adjudication

The itineraries of ADR and formal adjudication thus identify a common destination: ADR is being “litigized,”<sup>391</sup> while litigation is being “ADRized.”<sup>392</sup> The path toward full integration of ADR and formal adjudication has been paved; in fact, that road has even been named:<sup>393</sup> “CDR,” which stands for complementary dispute resolution,<sup>394</sup> quite literally takes the “alternative” out of ADR. “I like

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arbitration was faster and cheaper than litigation).

On the other hand, of course, there are many who trumpet the time and cost savings associated with ADR—particularly outside the arena of court-annexed ADR.

The Center for Public Resources Institute for Dispute Resolution claims that for a five-year period ending in 1995, 652 companies using CPR panelists reported a total cost savings of over \$200 million, with an average cost savings of over \$300,000 per company. A 1993 article contended that since 1990, 406 companies saved more than \$150 million in legal fees and expert-witness costs by using litigation alternatives in cases with an aggregate of over \$5 billion in dispute. One insurance carrier allegedly saved between \$150,000 to \$200,000 per case by mediating disputes pursuant to a pact negotiated by the Institute for Dispute Resolution.

Charles Silver, *Does Civil Justice Cost Too Much?*, 80 TEX. L. REV. 2073, 2105 (2002) (internal quotations and citations omitted).

389. *Creeping Legalism in Labor Arbitration*, 13 ARB. J. 129 (1958); Lyons, *supra* note 380, at 110. (“‘I tell my clients,’ one lawyer says, ‘that it should cost just as much for a complex construction arbitration as it costs for litigation.’”); *id.* (“But, as one arbitration veteran warns, ‘Once you get Wall Street lawyers in there, you might as well go to court.’ The Kaiser/Condec arbitration is an extravagant—but not unique—demonstration of the fact that the costs of arbitration rise dramatically if the parties hire big outside law firms, call large numbers of witnesses, and present elaborate technical arguments.”); Jones, *supra* note 7, at 193 (“[I]t is asserted that arbitration is frequently a drawn-out process since many cases drag on for months or even years and sometimes end up in court anyway.”).

390. See Martha Neil, *Litigation Over Arbitration*, A.B.A. J. 50, 52 (Jan. 2005) (“Arbitration is beginning to look more and more like litigation. . . . There’s more discovery. There’s more motion practice. There are concepts such as summary judgment that until recent years were foreign to the world of arbitration.” (quoting David A. Hoffman, Chair of the A.B.A.’s Dispute Resolution Section)).

391. Wayne D. Brazil, *Court ADR 25 Years After Pound: Have We Found a Better Way?*, 18 OHIO ST. J. ON DISP. RESOL. 93 (2002); Brazil, *supra* note 343.

392. See *supra* note 340 and accompanying text.

393. Stempel, *supra* note 5, at 308 (advocating adoption of more ADR practices).

394. See generally Sabatino, *supra* note 39, at 1291; Paul L. Tractenberg, *Using Law to Advance the Public Interest: Rutgers Law School and Me*, 51 RUTGERS L. REV. 1001 (1999); Russel Myles & Kelly Reese, *Arbitration: Avoiding the Runaway Jury*, 23 AM. J. TRIAL ADVOC. 129, 129 n.1 (1999) (“Perhaps a better name for ADR is ‘complementary dispute resolution’ because it frequently is used in conjunction with rather than in lieu of a lawsuit which has already been filed or may potentially be filed

to think of ADR as not alternative dispute resolution but more complementary dispute resolution. We do not replace the judicial or the criminal justice system. We work along side it. We complement it. It's not an either/or proposition."<sup>395</sup>

No longer "discrete conversants," formal adjudication and ADR have "begun to be 'integrated,' 'melded,' or 'collapsed' into each other."<sup>396</sup> But with the two systems looking increasingly like each other, the advantage of dual systems of justice is lost.<sup>397</sup>

## VI. MAKING THE CASE FOR EQUITY IN ADR

Hopefully, suggesting that justice remains the essential purpose of law is not naïve. Equity, certainly in its historical moral sense, and perhaps in its administrative sense, is the principal technique thus far developed to make certain that law will be readily adaptable for, and directed toward, the achievement of justice.<sup>398</sup> Fortunately, then, equity enjoys a certain inevitability.<sup>399</sup> When the rigidity of the Law courts failed to keep pace with the growing wants of society, the discretionary and flexible system of Equity provided the sensible remedies.<sup>400</sup> Similarly, when the forms and modes of formal adjudication became insufferable, ADR emerged to provide a sensible method of dispute resolution that was discretionary and flexible.<sup>401</sup> ADR offered a check upon the "strict law" by generating experimental methods of dispute resolution with fresh perspectives on procedural and social justice.<sup>402</sup>

Yet the law's demand for certainty is equity's foil. An ironic consequence of Equity's success was the ensuing effort to crystallize the jurisprudence of that court.<sup>403</sup> The gradual introduction of procedural

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in the future."); Alfani et al., *supra* note 343.

395. James Coben & Penelope Harley, *Intentional Conversations About Restorative Justice, Mediation and The Practice of Law*, 25 HAMLINE J. PUB. L. & POL'Y 235, 292 (2004) (quoting Jeanne Zimmer).

396. Resnick, *supra* note 49, at 214 (referring to a theory about the evolution of the systems of ADR and formal adjudication). See also Jacqueline M. Nolan-Haley, *The Merger of Law and Mediation: Lessons from Equity Jurisprudence and Roscoe Pound*, 6 CARDOZO J. CONFLICT RESOL. 57 (2004).

397. See *supra* notes 101–224 and accompanying text.

398. Oleck, *supra* note 51, at 44.

399. Glenn & Redden, *supra* note 51, at 753 ("Equity is a thing of continuous growth, and not the sort of Phoenix that dies ever so often.").

400. Kittle, *supra* note 61, at 27 ("Many cases arose in which all men of sense admitted that there should be a remedy provided, but which the narrow-minded judges denied.").

401. See *supra* notes 105–207 and accompanying text.

402. Nancy A. Welsh, *Remembering the Role of Justice in Resolution: Insights from Procedural and Social Justice Theories*, 54 J. LEGAL EDUC. 49 (2004).

403. See *supra* notes 287–300 and accompanying text.

rules and structural orthodoxy ultimately caused Equity to collapse under the weight of its own precedents and processes.<sup>404</sup> The legacy of Equity was preserved in those doctrines that had been adopted by the Law courts,<sup>405</sup> but equity is less dynamic and generative in a merged system.<sup>406</sup> ADR reanimated the spirit of equity.<sup>407</sup> But because of ADR's tremendous popularity,<sup>408</sup> ADR now faces a wave of reforms that would transform its flexible and discretionary modes of resolution into a more systematic framework.<sup>409</sup> One might suggest, of course, that this transformation of ADR is inevitable in light of the ongoing dialectic between law and equity. Moreover, the inevitability of equity, too, will ultimately resurface thereafter in some form or another (as ADR succeeded Equity). Those suggestions, though accurate, do not justify inaction, however, because the pace and trajectory of that progression can be moderated. Rather than allowing ADR to ossify, why not maximize the benefits of the administration of justice through dual systems?

In broad design, the emerging system of ADR should be enabled to perform much of equity's function in the administration of justice. But in the same way that the sweeping jurisdiction of (traditional) Equity was untrammelled by any definite rule,<sup>410</sup> ADR must enjoy genuine discretion and flexibility.<sup>411</sup> And thus we should be skeptical of reforms that would introduce detail or complexity. Lord Hardwicke probably did not anticipate that by weaving "the strands of judicial decision making into the indestructible fabric of equitable jurisprudence"<sup>412</sup> he was crafting the cloth that would later asphyxiate his beloved Equity. ADR faces a similar fate if it simply replicates the modes and methodology of formal adjudication. Neutrals in an independent system of ADR should

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404. See *supra* notes 301–09 and accompanying text.

405. See *supra* notes 231–86 and accompanying text.

406. See *supra* notes 317–37 and accompanying text.

407. See *supra* notes 105–224 and accompanying text.

408. See *supra* notes 25–45 and accompanying text.

409. See *supra* notes 361–97 and accompanying text.

410. See *supra* notes 82–90 and accompanying text. See also 1 FONBLANQUE, *supra* note 286, § 3 ("So there will be a necessity of having recourse to natural principles, that what is wanting to the finite may be supplied out of that which is infinite. And this is properly what is called equity, in opposition to strict law. . . . And thus in chancery every particular case stands upon its own particular circumstances; and, although the common law will not decree against the general rule of law, ye chancery doth, so as the example introduce not a general mischief. Every matter, therefore, that happens inconsistent with the design of the legislator, or is contrary to natural justice, may find relief here.").

411. Oleck, *supra* note 51, at 25 (noting that equity must be a "living, changing thing, forever adapting itself to new conditions").

412. Brown, *supra* note 76, at 337 (lauding Lord Hardwicke's indefatigable and worthy efforts on behalf of Equity).

be free to experiment and to adapt to the challenges of the case before them without any obligation or duty to external statutes or rules. Although that jurisprudence may be unpredictable, rough, and intuitive, equity is a purposeful counterpoint to the elegance and monotheism of law.<sup>413</sup> The moral growth of the law is the record of the slow emergence of equity into the mainstream of the law.<sup>414</sup> Dialectic requires dialogue, and it is through the interplay of law and equity that *both* are enriched.<sup>415</sup>

Law and equity should be in continual progress, with the former constantly gaining ground upon the latter. Every new and extraordinary interposition is, by length of time, converted into an old rule. A great part of what is now strict law was formerly considered as equity, and the equitable decisions of this age will unavoidably be ranked under the strict law of the next.<sup>416</sup>

ADR thus plays an important role in the growth of the law. Without this engine of equity, “our law will be moribund, or worse.”<sup>417</sup> ADR has been and should remain a creative force for developing innovative and superior methods of dispute resolution.<sup>418</sup>

This aspiration may be consistent with those commentators who have suggested that “the best use for ADR may be to resolve the types of cases that are extremely difficult or exceedingly costly to resolve in court.”<sup>419</sup> This suggestion resonates with the law-equity model because the jurisdiction of Equity consisted entirely of cases where the legal remedies were inadequate.<sup>420</sup> But the premise that ADR should hear those cases that the formal system cannot adequately resolve leads to an uncomfortable conclusion, because the most profound examples of such cases are some of society’s most important. Chayes’ public law cases,<sup>421</sup> Fiss’ structural suits,<sup>422</sup> Rifkind’s problems,<sup>423</sup> and Fuller’s polycentric

413. I have lifted these exquisite descriptors from an email to me from Professor Paul Horton.

414. Munger, *supra* note 313 (discussing the history and progress of equity “from conscience to precedent”); Bordwell, *supra* note 334, at 750 (“The equity of today becomes the right of tomorrow.”); FREDERIC R. COUDERT, CERTAINTY AND JUSTICE 1 (1914) (“On the one side is made an appeal to progress, on the other to precedent.”); Newman, *supra* note 229, at 15, 18.

415. Emmerglick, *supra* note 68, at 255.

416. 2 JOHN MILLAR, AN HISTORICAL VIEW OF THE ENGLISH GOVERNMENT 358 (1789).

417. Bordwell, *supra* note 334, at 749.

418. See *supra* notes 25–49, 105–224 and accompanying text.

419. Lieberman & Henry, *supra* note 24, at 437.

420. See *supra* notes 82–90 and accompanying text.

421. See Chayes, *supra* note 28. See also Frank M. Johnson, *The Constitution and the Federal District Judge*, 54 TEX. L. REV. 903 (1976); Robert F. Nagel, *Separation of Powers and the Scope of Federal Equitable Remedies*, 30 STAN. L. REV. 661 (1978).

422. Fiss, *supra* note 333; Owen M. Fiss, *The Social and Political Foundations of Adjudication*, 6



cases<sup>424</sup> all strain the competencies of traditional formal adjudication. Could mass torts, environmental management, employment discrimination, voter reapportionment, and school desegregation cases *belong* in ADR—a flexible and discretionary system modeled on Equity without appellate review, more distanced than courts from the pressure of public opinion, and lacking the prospect of impeachment and other safeguards against the dangers of unbridled discretion?

Other commentators have suggested that we should “reserve the courts for those activities for which they are best suited” and should therefore “avoid swamping and paralyzing them with cases that do not require their unique abilities.”<sup>425</sup> This, too, resonates with a law-equity model, although the functions of formal adjudication and ADR are reversed. This approach, which could be characterized as the opposite of the first proposal, allocates the difficult and important cases to formal adjudication, and the mine-run to ADR.<sup>426</sup> But the premise that simple or repetitive cases can be resolved outside of courts may understate the important role of courts in the tasks of applying the law and vindicating rights. The application of law to fact is the source of the court’s legitimacy, if not also its primary responsibility.<sup>427</sup> Can such an important task be outsourced?

The fundamental problem is that ADR requires a selfhood to perform the high task of equity, yet its privatization is, understandably, very troubling.<sup>428</sup> Privatized extrajudicial dispute resolution that is undertaken by parties knowingly and (truly) voluntarily is, of course, eternal and not problematic.<sup>429</sup> But individuals with, say, mandatory

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LAW & HUM. BEHAV. 121 (1982). See generally Susan P. Sturm, *A Normative Theory of Public Law Remedies*, 79 GEO. L.J. 1355 (1991).

423. Rifkind, *supra* note 16, at 51. See generally RUGGERO J. ALDISERT, *THE ROLE OF THE COURTS IN CONTEMPORARY SOCIETY* IN JUDGES ON JUDGING (David M. O’Brien ed., 1997).

424. See Lon L. Fuller, *The Forms and Limits of Adjudication*, 92 HARV. L. REV. 353 (1978). See generally Eisenberg & Yeazell, *supra* note 148.

425. Sander’s Pound Conference speech.

426. See generally COUNCIL ON THE ROLE OF THE COURTS, *THE ROLE OF COURTS IN AMERICAN SOCIETY* (1984); Hensler, *supra* note 13, at 194 (noting that the “core competence of today’s courts is adjudication”).

427. Perhaps no characteristic of an organized and cohesive society is more fundamental than its erection and enforcement of a system of rules and defining the various rights and duties of its members, enabling them to govern their affairs and definitively settle their differences in an orderly predictable manner. Without such a “legal system,” social organization and cohesion are virtually impossible. . . . Put more succinctly, it is this injection of the rule of law that allows society to reap the benefits of rejecting what political theorists call the “state of nature.”

Boddie v. Connecticut, 401 U.S. 371, 374 (1970).

428. Margaret L. Moses, *Privatized “Justice”*, 36 LOY. U. CHI. L.J. 535 (2005); Judith Resnik, *ADR Procedure as Contract*, 80 NOTRE DAME L. REV. 593 (2005).

429. See *supra* notes and accompanying text.

arbitration clauses in consumer, employment, and health plan contracts are not in that group. Whether or not those cases are among those that require ADR, they are surely deserving of a publicly sponsored forum of dispute resolution. Thus for whatever cases are deemed appropriate (regardless of whether there exists an agreement to submit to ADR), there should be a genuinely flexible and discretionary system of ADR that can be administered from within the public apparatus.

Professor Sander's multi-door courthouse may be the most promising resolution.<sup>430</sup> In the system he envisioned, persons with disputes would be directed by a screening clerk to the "room" containing the appropriate dispute resolution mechanism. Paraphrasing Sander, he imagined that the room directory in the lobby might look as follows:

Mediation	Room 1
Med-Arb	Room 2
Arbitration	Room 3
Minitrial	Room 4
Superior Court	Room 5

Importantly, if equity is to be preserved, the neutrals in several of these rooms would need substantial leeway to act in their equitable discretion. One might imagine an increasing quantum of discretion as one moved up the list. Importantly, cases assigned to formal adjudication could be re-assigned later to more discretionary forms of dispute resolution when the forms and modes of formal adjudication proved inadequate.<sup>431</sup> As a safeguard for equity, one might imagine a one-way ratchet whereby cases could easily be re-assigned to fora "up" the list, but where a strong presumption resisted re-assignment "down" the list.

Bringing law and equity under one roof is not a novel concept. For well over a century, the federal court system administered law and equity on different "sides" of the court and by different procedures.<sup>432</sup>

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430. For a description of the multi-door courthouse, see *supra* notes 21–24 and accompanying text.

431. I have argued for example that application of the Federal Rules of Civil Procedure in a given instance may not provide the litigants with plain, adequate, and complete relief. Historically, under separate systems of Law and Equity, such procedural inadequacy would justify resort to the flexible and discretionary system of Equity. The merger of Law and Equity purports to have retained the substance of Equity; yet the substance of Equity is, in fact, not preserved unless there is some escape from the merged system itself when the procedures of that merged system prove inadequate. Main, *supra* note 85, at 444–47.

432. See *Schurmeier v. Conn. Mut. Life Ins. Co.*, 171 F. 1, 16 (1909) (Sanborn, J., dissenting) ("The union of legal and equitable causes of action in one suit is prohibited by § 913, Revised Statutes (United States Comp. St., 1901, at 683), and in removal cases, when such a union is permitted in the state courts from which they come, the causes of action must be separated into distinct actions at law and suits in equity in the national courts."). See generally *Ingersoll*, *supra* note 313, at 65 (recognizing

The federal courts tried cases at law and suits in equity within a “temple of justice . . . [metaphorically] constructed with a partition extending from the foundation to the roof.”<sup>433</sup> Federal judges thus alternately played the role of common law judge or of chancellor.<sup>434</sup> Of course, the merger of Law and Equity ultimately followed and judges have since been assigned the responsibility of upholding the goals of *both* certainty and individualized justice. But neither Law nor Equity can perform the other’s function, and a merged system may perform neither function particularly well.<sup>435</sup> Hence the attractiveness of Sander’s multi-doored temple of justice where, in theory at least, reinforced partitions could ensure that justice (whether law, equity, or law and equity) is publicly administered at the Dispute Resolution Center.

Recall that some historians “blame” the Common Law for the development of a separate system of Equity: but for the stubborn

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two sides to the court “and between them there is no possible connection”); Glenn & Redden, *supra* note 51, at 757 (explaining that “the same judge would do equity work one day and sit as a common law judge on another”); U.S. Comp. Stat. § 913 (1901) (requiring the forms and mode of procedure in equity be according to the rules and usages of courts of equity); *id.* § 917 (authorizing Supreme Court to prescribe rules of practice in courts of equity); JAMES LOVE HOPKINS, *THE NEW FEDERAL EQUITY RULES 2–4* (7th ed. 1930).

For cases discussing a separate jurisdiction in equity, see, for example, *Fenn v. Holme*, 42 U.S. (1 How.) 484, 485, 487 (1858) (noting that distinction explicitly declared in the constitution and separate jurisdiction carefully defined and established); *Berkey v. Cornell*, 90 F. 717, 718 (1898) (explaining that separate equitable jurisdiction extends to cases involving purely legal rights); *Thompson v. Cent. Ohio R.R.*, 73 U.S. (6 Wall.) 134, 137 (1867) (noting that law and equity not to be blended together in one suit); and *Noonan v. Lee*, 67 U.S. (2 Black) 499, 509 (1862) (separate jurisdiction is constitutionally required). See also *Twist v. Prairie Oil & Gas Co.*, 274 U.S. 684, 690–91 (1927).

433. Gustavus Ohlinger, *Problems of Jurisdiction and Venue*, 26 CORNELL L.Q. 240, 255 (1944).

434. See Charles T. McCormick, *The Fusion of Law and Equity*, 6 N.C. L. REV. 283, 284 (1928).

435. See *supra* notes 310–37 and accompanying text. See also Main, *supra* note 85, at 476–95.

The tendency . . . has plainly and steadily been towards the giving an undue prominence and superiority to purely legal rules, and the ignoring, forgetting, or suppression of equitable notions. . . . In short, the principles, doctrines, and rules of equity are certainly disappearing from the municipal law of a large number of the states, and this deterioration will go on until it is checked either by a legislative enactment, or by a general revival of the study of equity throughout the ranks of the legal profession.

See also 1 POMEROY, *supra* note 55, at ix; Menkel-Meadow, *supra* note 40, at 39 (citing MARTIN SHAPIRO, *COURTS: A COMPARATIVE AND POLITICAL ANALYSIS* (1981) (“To what extent will courts lose their legitimacy as courts if too many other forms of case-processing are performed within their walls?”)); Emmerglick, *supra* note 68, at 248 (“Law and equity cannot be blended or homogenized for they are antitheses. The one strives for predictability and treats cases as belonging to a generalized type, the other strives for individual justice and treats cases as being unique. Each has a function to perform which requires freedom to act upon the other.”); Newman, *supra* note 229, at 15, 17–18 (suggesting that merger “has given rise to what might be called a law of equitable fission, which causes the principles of equity, when they are introduced into the relatively unfriendly atmosphere of strict law, to lose their force and to fly apart, like atoms in an exploding universe, inhibiting their complete reception and leaving in their wake, scattered on the surface of legal institutions, only fragmentary applications of the principles.”).

resistance of the Law courts to innovation, there may have been no need for the creation of a special, competing court and an alternative system of law.<sup>436</sup> Tradition and lack of imagination may similarly explain the emerging system of ADR. Although courts have incorporated ADR in significant ways, courts ultimately are constrained by procedure and substance. Formal adjudication fails to provide plain, adequate and complete relief, and the system of ADR is the outlet: “[E]ven though arbitrating a matter might end up costing as much as litigation, businesses like being able to limit discovery, set their own rules for presenting evidence, schedule proceedings at their own convenience and select the third party who will decide their cases.”<sup>437</sup>

Maitland wrote that a system of Equity without Law would be “anarchy”—the oft-mentioned “castle in the air.”<sup>438</sup> Seldom quoted is the accompanying statement that a system of Law without Equity would be “barbarous, unjust, [and] absurd.”<sup>439</sup> The reconceptualization exercise imagined ponders whether that castle might instead be placed inside a public Dispute Resolution Center.

## VII. CONCLUSION

A dialectic of law and equity can be traced from the dual traditional systems of Law and Equity to the contemporary systems of formal adjudication and ADR. The equitization of Law and the legalization of Equity led ultimately to the merger of Law and Equity. In contemporary adjudication we are experiencing, simultaneously, the “ADRization” of litigation and the litigization of ADR. The merger of Law and Equity offers a cautionary tale. Appreciation for the role of ADR in a dual system founded in principles of law and equity would deregulate ADR and transform public forms of dispute resolution.

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436. Oleck, *supra* note 51, at 36. See also HAYNES, *supra* note 232, at 8–15; 1 POMEROY, *supra* note 55, §§ 16–20, at 18–25; HOLDSWORTH, *supra* note 232, at 402–05.

One commentator has suggested that the law-equity dialectic, though causal, was working in the opposite direction. See “Bona Fides,” *supra* note 198, at 340 (“The result of the growth of equity was that the equitable development of the Common Law was nipped in the bud.”).

437. Neil, *supra* note 390, at 50 (quoting Douglas A. Darch, a Chicago attorney who represents companies in employment cases).

438. MAITLAND, *supra* note 93, at 19.

439. *Id.*