THREE WAYS OF LOOKING AT DISPUTE RESOLUTION

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At the heart of contemporary dispute resolution theory stands the method of interest-based negotiation. The reliance on interests to resolve disputes has been seen by critics over the years as minimizing the protections of legal rights and as corrosive to concepts of group solidarity. Taking a broader view of dispute resolution reveals three distinct strands of the theory: a liberal, state-centric, rights-based approach; a neoliberal, individualistic, interest-based approach; and an anti-liberal, communitarian, relationship-based approach. The origins of these strands of dispute resolution theory can be located within the political and legal landscape of the United States in the late 1970s and early 1980s, when contemporary dispute resolution theory began to take shape. While the structure of dispute resolution theory (and its privileging of the interest-based framework) continues to reflect the concerns of that era, it no longer speaks to the immediate concerns of the present. Instead, current questions in dispute resolution theory signal growing interest in more relationship-oriented approaches. Developing such approaches requires understanding the tensions inherent in dispute resolution theory, lest the shortcomings of relationship-based theories create new problems for the practice of dispute resolution. This Article charts a path to rethink the foundational structures of dispute resolution theory.

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I. INTRODUCTION

Stop me if you've heard this story before: a domain of legal practice that was designed to improve access to justice for marginalized litigants, while also strengthening communities, now stands accused of closing off access to the law and of undermining group solidarity. Such is the state of dispute resolution today. Prioritizing the private resolution of disputes in the name of efficiency dissolves social problems into discrete disputes that are resolved between individuals as transactions; the private resolution of disputes involving sexual harassment turns settlements into a cost of doing business without seeming to advance the public interest in actually ending such harassment.[1] Contractual terms preclude the

1. *See* Vasundhara Prasad, *If Anyone Is Listening, #MeToo: Breaking the Culture of Silence around Sexual Abuse through Regulating Non-Disclosure*

possibility of litigating disputes; forced arbitration agreements transform consensual mechanisms intended to resolve disputes within communities on the basis of shared norms and practices into mechanisms used to keep disputes out of court and out of sight, thereby seeming to thwart the availability of justice.[2] Achieving economically efficient outcomes in negotiations without prioritizing the question of how value is distributed contributes to our rampant economic inequality; the maxim of achieving "win-win" resolutions seems to result in a few stakeholders consistently winning more than others.[3] When the founders of contemporary dispute resolution theory set out to change the world, this was not what they had in mind.[4] What accounts for the gap between our field's aspirations and its problematic reputation?

This Article makes two arguments. First, it argues that contemporary dispute resolution theory is built upon three distinct strands of thought, each of which develops a distinct line of analysis in the service of different values: (1) the general architecture of dispute resolution as a means to increase access to justice by reducing costs and increasing speed, building upon Frank Sander's address at the 1976 National Conference on the Causes of Popular Dissatisfaction with the Administration of Justice (the "Pound Conference") on the multidoor courthouse,[5] reflects a state-centric continuation of liberal[6] principles that arose within the legal process

Agreements and Secret Settlements, 59 B.C. L. REV. 2507, 2509 (2018) (arguing that nondisclosure agreements inhibit sexual harassment victims from exposing abuse).

2. *See* Judith Resnik, *Diffusing Disputes: The Public in the Private of Arbitration, the Private in Courts, and the Erasure of Rights*, 124 YALE L.J. 2804, 2811 (2015) (arguing that arbitration deprives people of access to their legal rights and to an audience of their peers).

3. *See* ANAND GIRIDHARADAS, WINNERS TAKE ALL: THE ELITE CHARADE OF CHANGING THE WORLD 50 (2018) ("[T]he claim of a harmony of interests is hope masquerading as description. There are still winners and losers, the powerful and the powerless, and the claim that everyone is in it together is an eraser of the inconvenient realities of others.").

4. *See* Carrie Menkel-Meadow, *Why Hasn't the World Gotten to Yes? An Appreciation and Some Reflections*, 22 NEGOT. J. 485, 486–87 (2006); *see also* Deborah R. Hensler, *Suppose It's Not True: Challenging Mediation Ideology*, 2002 J. DISP. RESOL. 81, 81 (2002) (asserting that although dispute resolution theorists once thought of mediation as a preferred "procedural *choice*[]," it is now often mandated and spurned by the public).

5. *See generally* Frank E.A. Sander, *Varieties of Dispute Processing*, 70 F.R.D. 79 (1976) (describing alternatives to adjudication for resolving disputes).

6. "Liberalism" is a contested term, and it is not this Article's intention to provide an authoritative definition. I use the term in connection with the concept of "liberal consensus" based in principles of capitalism and a harmony of interests, as described in GODFREY HODGSON, AMERICA IN OUR TIME: FROM WORLD WAR II TO NIXON—WHAT HAPPENED AND WHY 76 (Princeton Univ. Press 2005) (1976). The reason for this invocation of liberal consensus is due to how this Article situates dispute resolution in a particular historical moment. *See infra* note 43 and accompanying text.

school of midcentury jurisprudence; (2) the machinery of interest-based negotiation theory, as described in Roger Fisher and Bill Ury's *Getting to Yes*[7] and Howard Raiffa's *Art and Science of Negotiation*,[8] operationalizes neoliberal[9] principles regarding the foundational nature of individual interests and the primacy of efficiency and value creation; and (3) the ways in which dispute resolution mechanisms contextualize conflict are inspired by a loose cluster of anti-liberal[10] principles, focused on strengthening communities and relationships.[11]

Second, this Article situates these three strands of dispute resolution within the particular context of American legal and political thought from approximately 1976 to 1988.[12] Locating the contemporary origins of alternative dispute resolution ("ADR") in the 1970s means locating it within a moment of sharp transition in American political and legal history.[13] For example, the attempt to

7. *See* ROGER FISHER & WILLIAM URY, GETTING TO YES: NEGOTIATING AGREEMENT WITHOUT GIVING IN 11 (Bruce Patton ed., 1981).

8. *See* HOWARD RAIFFA, THE ART AND SCIENCE OF NEGOTIATION 255 (1982).

9. "Neoliberalism" is also a contested term. In general, its use here is consistent with David Singh Grewal & Jedediah Purdy, *Introduction: Law and Neoliberalism*, 77 LAW & CONTEMP. PROBS. 1, 2–3 (2014) ("[N]eoliberalism refers to a set of recurring claims made by policymakers, advocates, and scholars in the ongoing contest between the imperatives of market economies and nonmarket values grounded in the requirements of democratic legitimacy. . . . Neoliberalism, like classical liberalism before it, is also associated with a kind of ideological expansionism, in which market-modeled concepts of efficiency and autonomy shape policy, doctrine, and other discourses of legitimacy outside of traditionally 'economic' areas.").

10. I use the formulation of "anti-liberal" because this strand draws from both the political left and right, against the predominant liberal tradition.

11. These three sets of responses are described in greater detail *infra* Part III.

12. This framing builds upon a standard narrative in which the reactions to midcentury legal process theory spawned a right wing concern with efficiency in the law and economics movement and a left wing politicization of law in critical legal studies. *See, e.g.*, Owen M. Fiss, *The Law Regained*, 74 CORNELL L. REV. 245, 245 (1989). This Article's identification of three strands of dispute resolution modifies this familiar structure in the context of dispute resolution.

13. The changes of the 1970s can be seen in many ways. *See* KEVIN M. KRUSE & JULIAN E. ZELIZER, FAULT LINES: A HISTORY OF THE UNITED STATES SINCE 1974 5–6 (2019) (detailing the disillusionment that came from disappearing jobs, divisions in national institutions, the rise of aggressive conservatism, and partisan media beginning in the 1970s). For the impact of the Vietnam War on the growth of right wing extremism, see KATHLEEN BELEW, BRING THE WAR HOME: THE WHITE POWER MOVEMENT AND PARAMILITARY AMERICA 3 (2018). For a treatment of urban riots, see generally STEVEN M. GILLON, SEPARATE AND UNEQUAL: THE KERNER COMMISSION AND THE UNRAVELING OF AMERICAN LIBERALISM (2018). For the end of the expansion of rights for minority groups, see JOHN D. SKRENTNY, THE MINORITY RIGHTS REVOLUTION 330 (2002). On the growth of conservative politics, see KEVIN M. KRUSE, WHITE FLIGHT: ATLANTA AND THE MAKING OF MODERN CONSERVATISM 6 (2005) and LISA MCGIRR, SUBURBAN WARRIORS: THE ORIGINS OF THE NEW AMERICAN RIGHT (2015).

articulate public values in dispute resolution had a certain salience in midcentury America. This salience increasingly began to ring false amidst the social fragmentation and celebration of difference in the 1970s,[14] while the ebb and flow of the concept of "community" in dispute resolution tied into competing narratives about the perils and promise of modernization.[15] The historical argument of this Article explains how a late-1970s tension between top-down and bottom-up initiatives to develop community-based dispute resolution was transformed during the early 1980s into a situation in which interest-based theory and general concerns with efficiency overshadowed communitarian efforts to extricate dispute resolution from both the state and the market.[16] This situation has persisted until now.

These two arguments result in three advances. First, identifying these three strands within ADR as responses to political and legal events of the 1970s clarifies that the constitutive components of ADR theory have politics. In saying this, I do not mean that the theories are designed to advance some specific political vision (though in some cases they surely have been); rather, I mean that the use of these theories has certain discernable political consequences.[17] The politics of the multidoor courthouse and of interest-based negotiation have been debated in the literature,[18] and this Article contributes to those debates by identifying the existence of a distinct anti-liberal strand concerned with contextualizing conflicts within networks of relationships. This strand has so far been less clearly recognized due to its lack of a clear organizing framework.[19] It has had a profound influence on ADR nevertheless. Explicitly drawing upon the lessons of this alternative tradition can help us see the limitations of the efficiency-oriented schema.

Second, recognizing that the field of ADR encompasses significant tensions among these three strands permits us to see more clearly the fault lines within our theories. Few, if any, ADR practitioners draw on any one of these strands in isolation; the practice of ADR mixes all three strands in varying combinations.[20]

14. *See infra* notes 66–72 and accompanying text.

15. *See infra* notes 30–42, 60–65 and accompanying text.

16. *See infra* Subpart III.D.

17. The reader who is unpersuaded that a seemingly neutral process, such as interest-based negotiation, can have politics is directed to the classic argument in Langdon Winner, *Do Artifacts Have Politics?*, 109 DAEDALUS 121, 123 (1980).

18. *See, e.g.*, Amy J. Cohen, *Dispute Systems Design, Neoliberalism, and the Problem of Scale*, 14 HARV. NEGOT. L. REV. 51, 53 (2009) (arguing that neoliberal policies have influenced dispute resolutions since the 1970s).

19. For traces of this strand, see generally Amy J. Cohen & Michal Alberstein, *Progressive Constitutionalism and Alternative Movements in Law*, 72 OHIO ST. L.J. 1083 (2011). I believe that the taxonomy offered here provides a more helpful way of conceptualizing the role of an antiauthoritarian/antiprofessional discourse within ADR.

20. *See* Carrie Menkel-Meadow, *The Many Ways of Mediation: The Transformation of Traditions, Ideologies, Paradigms, and Practices*, 11 NEGOT. J.

They are abstractions that clarify the fundamentally different premises of the elements of our theory. For example, community mediation may be framed as increasing access to justice, improving the efficiency of mediated outcomes, or strengthening community relations. These goals may not all align; they may instead be at cross purposes or they may be orthogonal to each other. Understanding these tensions also clarifies disagreements internal to the field, such as those regarding whether facilitative mediation actually enhances party autonomy. Understanding the tensions inherent in ADR permits us to recognize how the field has responded to some of its most influential critiques (such as those of Owen Fiss[21] or Richard Delgado)[22] with arguments that fail to respond to the actual concerns raised—critiques based on liberal premises receive responses based in efficiency or in the importance of communal relationships.[23] Having a clearer understanding of the tensions among the many values that ADR purports to advance will help us to be intentional about our work as designers of dispute resolution systems.

Third, understanding how our existing framework of dispute resolution continues to reflect the concerns of a previous generation should liberate us to think outside the framework of the immensely successful *Getting to Yes*.[24] Some of the most important contemporary developments in dispute resolution explicitly *reject* the logic of the interest-based approach in favor of an engagement with strengthening community relationships. Restorative justice, for example, responds to crime on the basis of redressing individual and community harm.[25] Within this relationship-centered approach, an outcome-driven focus that engages the mechanics of interest-based negotiation theory would fail to do justice. The project of fostering dialogue to address political divisions similarly moves away from a search for common ground and dealmaking to meaningfully engage with an interlocutor's otherness.[26] These and other efforts suggest a

217, 232 (1995). For example, public interests in the welfare of minors, the efficient allocation of assets, and the recognition of ongoing relationships of some kind are all very much at issue in dispute resolution in the context of family law. *See generally* Robert H. Mnookin & Lewis Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 YALE L.J. 950 (1979).

21. *See, e.g.*, Owen M. Fiss, *Against Settlement*, 93 YALE L.J. 1073 (1984).

22. *See, e.g.*, Richard Delgado et al., *Fairness and Formality: Minimizing the Risk of Prejudice in Alternative Dispute Resolution*, 1985 WIS. L. REV. 1359 (1985).

23. *See* Jethro K. Lieberman & James F. Henry, *Lessons from the Alternative Dispute Resolution Movement*, 53 U. CHI. L. REV. 424, 431 (1986).

24. In addition to popular success, the book has also been a staple of legal education. *See, e.g.*, John Lande, *Elements of DR Courses*, INDISPUTABLY (Feb. 16, 2016), http://www.indisputably.org/?p=8136 ("Faculty require a wide range of texts. *Getting to Yes* clearly is the most popular, being required in 13 negotiation courses, 4 mediation courses, and 2 survey courses.").

25. *See infra* Subpart IV.A.

26. *See infra* Subpart IV.B.

desire for a new framework that is not built upon the concept of interests.[27] Just as the theory of contemporary ADR was born amidst the social transitions of the 1970s, this moment of social fracture may birth a successor theory.[28] To that end, this Article is the first in a planned series that seeks to rethink dispute resolution as fundamentally concerned with encountering difference.[29]

Part II of this Article sketches the relationship of dispute resolution and legal theory from the early twentieth century through the 1970s. Part III then examines how the constitutive elements of ADR theory enact three different political responses to the specific challenges of the 1970s and 1980s, creating the dispute resolution framework that we have inherited. Part IV explores some questions of contemporary significance through this analytical framework. Part V offers concluding thoughts on where to go from here.

II. SITUATING DISPUTE RESOLUTION WITHIN LAW

The debates of the 1970s built upon arguments from the early twentieth century regarding the relationship of law to society.[30] After legal realist scholarship put dispute resolution at the center of legal analysis, midcentury legal process theory presumed a social cohesion that pushed dispute resolution to the margins of legal thought. The contemporary ADR landscape must be understood as a reaction to that move.

A. Foundations of Locating Law and Dispute Resolution in Society

American society has long contained robust strands of local, community-based dispute resolution, predicated on a given community's exclusion from the wider society. Early American communities built on religious principles, such as Dedham, Massachusetts, or those built on communal land ownership, such as Sudbury, Massachusetts, resolved disputes within the community rather than in the courts.[31] Later, utopian communities, such as Brook Farm outside of Boston, and religious communities, such as the Shakers, continued this process of rejecting the courts in favor of

27. *See* Michael Wheeler, *Learning from Practice*, 32 NEGOT. J. 345, 347 (2016) (contrasting the relationship-oriented approach from the interest-based approach).

28. It will require effort to do so. John Lande asks what it will take to fix the existing framework of ADR theory, given that its "great conceptual confusion" continues to be met with "wide acceptance" in the face of dissatisfaction. John Lande, *A Framework for Advancing Negotiation Theory: Implications from a Study of How Lawyers Reach Agreement in Pretrial Litigation*, 16 CARDOZO J. CONFLICT RESOL. 1, 62 (2014).

29. *See infra* Part V.

30. For additional context, see Carrie Menkel-Meadow, *Mothers and Fathers of Invention: The Intellectual Founders of ADR*, 16 OHIO ST. J. ON DISP. RESOL. 1, 1 (2000).

31. JEROLD S. AUERBACH, JUSTICE WITHOUT LAW? 25–26 (1983).

community-based dispute resolution,[32] as did many immigrant communities.[33] When community norms failed to provide a satisfactory basis for resolution, members had recourse to the law.[34]

Against this background, law was both a force for modernization and a force that fit uncomfortably with lived experience. In 1906, Roscoe Pound argued that the public was broadly dissatisfied with the workings of the legal system due to the disjunction between "the necessarily mechanical operation of legal rules" and the complexity of lived experience.[35] His solution was to engage in a program of sociological jurisprudence that recognized the law's purpose as advancing social interests, using law as a form of social engineering.[36] The ability of law to advance meaningful social progress depended on its ability to provide what disputants needed.[37]

Pound's contemporaries in the legal realist school sought to understand how the law worked in action—and in doing so, they opened up new lines of inquiry into how disputes were actually resolved.[38] In order to understand why and how actors engaged with the legal system, legal realist scholarship emphasized empirical study of disputes and legal practice over normative analysis of what the law should be.[39] Realists, such as Karl Llewellyn, foregrounded the interests of legal subjects in order to highlight the purposiveness of the legal system and its nature as "something man-made, something capable of criticism, of change, of reform . . . not only according to standards found inside law itself . . . but also according to standards vastly more vital found *outside* law itself, in the society law purports

32. *Id.* at 49–53.

33. *Id.* at 69–89.

34. *Id.* at 53–54. For the context of the turn away from informal dispute resolution within immigrant communities, see *id.* at 89–94. *See also* Bruce H. Mann, *The Formalization of Informal Law: Arbitration Before the American Revolution*, 59 N.Y.U. L. REV. 443, 480 (1984).

35. Roscoe Pound, *The Causes of Popular Dissatisfaction with the Administration of Justice*, 29 ANN. REP. A.B.A. 395, 397 (1906). This address inspired the 1976 Pound Conference at which Frank Sander delivered his address on the multidoor courthouse. *See generally* Sander, *supra* note 5 (containing Sander's address).

36. *See* Roscoe Pound, *The Scope and Purpose of Sociological Jurisprudence*, 25 HARV. L. REV. 140, 146–47 (1911).

37. Lieberman & Henry, *supra* note 23, at 438–39.

38. The legal realist strand of American jurisprudence, which peaked in influence in the first half of the twentieth century, focused on understanding law in terms of behavior rather than in terms of systems of formal concepts. There is an extensive literature on the legal realists. *See generally* LAURA KALMAN, LEGAL REALISM AT YALE, 1927–1960 (1986); JOHN HENRY SCHLEGEL, AMERICAN LEGAL REALISM AND EMPIRICAL SOCIAL SCIENCE (1995).

39. Karl N. Llewellyn, *Some Realism About Realism—Responding to Dean Pound*, 44 HARV. L. REV. 1222, 1254 (1931) ("When the matter of *program in the normative aspect* is raised, the answer is: *there is none*.").

both to govern *and to serve*."[40] A focus on interests would therefore help move law beyond sterile conceptualism to underscore its connections with the broader culture. Llewellyn sought to understand law as a fundamental element of culture that encompassed matters of process and substance by engaging in anthropological research within "primitive" legal systems.[41] Working with such systems was a way of understanding how law (and dispute resolution in particular) could function without the formal structures of American law.[42] Adjudication was merely a special case of dispute resolution.

B. Legal Process and Dispute Resolution at Midcentury

Legal process was the legal theory of the midcentury liberal consensus.[43] Legal process challenged the seeming amorality[44] of legal realism's "temporary divorce of Is and Ought"[45] with a belief in the unity of facts and values, and of law and morality.[46] It instead

40. Karl N. Llewellyn, *A Realistic Jurisprudence—The Next Step*, 30 COLUM. L. REV. 431, 442 (1930).

41. K. N. LLEWELLYN & E. ADAMSON HOEBEL, THE CHEYENNE WAY: CONFLICT AND CASE LAW IN PRIMITIVE JURISPRUDENCE ix (1941).

42. For more on the "Rousseauist romanticization of Native American social practices," see Ajay K. Mehrotra, *Law and the "Other": Karl N. Llewellyn, Cultural Anthropology, and the Legacy of* The Cheyenne Way, 26 LAW & SOC. INQUIRY 741, 759 (2001). This romanticization also featured in later efforts to deprofessionalize dispute resolution. Dispute resolution also provided a new perspective into the study of law and culture, which made legal anthropologists well situated to participate in the flourishing of dispute resolution scholarship in the 1970s and 1980s. *See* John M. Conley & William M. O'Barr, *A Classic in Spite of Itself:* The Cheyenne Way *and the Case Method in Legal Anthropology*, 29 LAW & SOC. INQUIRY 179, 188–91 (2004). For more on the central role of dispute resolution in legal realist theory, see K. N. Llewellyn, *The Normative, the Legal, and the Law-Jobs: The Problem of Juristic Method*, 49 YALE L.J. 1355, 1375–76 (1940).

43. The legal process school's faith in the collective belief in the legitimacy of American institutions mirrored the arguments about the Lockean liberal consensus in postwar American history, as most notably captured in DANIEL J. BOORSTIN, THE GENIUS OF AMERICAN POLITICS (1953) and LOUIS HARTZ, THE LIBERAL TRADITION IN AMERICA (1955). On the connection between legal process and consensus history, see Austin Sarat, *The "New Formalism" in Disputing and Dispute Processing*, 21 LAW & SOC'Y REV. 695, 704 n.13 (1988). For more on the idea of the liberal consensus, see THE LIBERAL CONSENSUS RECONSIDERED: AMERICAN POLITICS AND SOCIETY IN THE POSTWAR ERA (Robert Mason & Iwan Morgan eds., 2017).

44. *See* EDWARD A. PURCELL, JR., THE CRISIS OF DEMOCRATIC THEORY: SCIENTIFIC NATURALISM & THE PROBLEM OF VALUE 235–66 (1973).

45. Llewellyn, *supra* note 39, at 1236.

46. In *The Legal Process*, Hart and Sacks challenged the key premise of positivism by claiming that "'is' is not really an 'is' but a special kind of 'ought.'" HENRY M. HART, JR. & ALBERT M. SACKS, THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW 5 (William N. Eskridge & Philip P. Frickey eds., 1994); *see also* Charles L. Barzun, *The Forgotten Foundations of Hart and Sacks*, 99 VA. L. REV. 1, 52–53 (2013); Gary Peller, *Neutral Principles in the*

maintained distinctions between process and substance, and between law and politics; the concept of "legal process" represented the law as something in continuous development, always striving for some value-laden ends.[47] Legal analysis was characterized by being "framed and tested as an exercise of reason and not merely as an act of willfulness or will."[48]

In contrast to Llewellyn, for whom the resolution of disputes was the key to understanding the function of law, legal process theory distinguished the substantive resolution of disputes from the process of legal reasoning. Herbert Wechsler, for example, contrasted the public obligation of the courts to decide cases "on grounds of adequate neutrality and generality, tested not only by the instant application but by others that the principles imply"[49] against the use of "principles [that] are largely instrumental . . . in relation to results that a controlling sentiment demands at any given time."[50] Therein lay the procedural public-private distinction that continues to define ADR—public judicial institutions resolve disputes by advancing publicly cognizable reasoning on the basis of neutral principles expressing shared values, whereas the resolution of disputes outside of adjudication could be done in purely instrumental terms.[51] Private ordering—through contract, negotiation, etc.—describes a set of processes that permit flexible, decentralized, and fact-specific resolutions to problems that do not require the use of a public forum.[52]

Legal process's commitment to the elucidation of public values through reasoned argument rested upon a prior commitment to the existence of shared values and traditions.[53] *Brown v. Board of Education*[54] exposed the tension between those two commitments and the gap between the expression of legal principles and the resolution of disputes. Wechsler believed *Brown* had been wrongly decided, making too sharp a break with segregationist principles; the *Brown* court's principle of ending invidious discrimination collided with the

1950's, 21 U. MICH. J.L. REFORM 561, 587–90 (1988); Geoffrey C. Shaw, *H. L. A. Hart's Lost Essay*, 127 HARV. L. REV. 666, 677–78 (2013). For more on the milieu, see Peller, *supra*, at 573–86.

47. *See generally* LON L. FULLER, THE LAW IN QUEST OF ITSELF (1940) (discussing law as a process).

48. Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1, 11 (1959).

49. *Id.* at 15.

50. *Id.* at 14.

51. *See id.* at 9–10, 14.

52. Peller, *supra* note 46, at 597–98.

53. *See* Mark V. Tushnet, *Following the Rules Laid Down: A Critique of Interpretivism and Neutral Principles*, 96 HARV. L. REV. 781, 785 (1983) (arguing that elements of legal process theory are incoherent for advancing liberal goals on a foundation of communitarian assumptions). On the Burkean character of this tension, see Anthony T. Kronman, *Alexander Bickel's Philosophy of Prudence*, 94 YALE L.J. 1567, 1604–05 (1985).

54. 347 U.S. 483 (1954).

segregationist principle that the right of free association implied a right *not* to associate.[55] Fellow process theorist Alexander Bickel instead argued that a decision permitting segregation to stand as an expression of deference to state legislatures expressed normative support for segregation.[56] He nevertheless praised the "deliberate speed" formulation of *Brown II*[57] as "poetry" for embracing judicial passivity after the court announced its guiding principle, permitting the parties to craft practical resolutions to disputes without needing court approval.[58] Within this vision of the law, such restraint in resolving disputes was important for the "least dangerous branch."[59] Dispute resolution moved to the periphery precisely because the resolution of disputes required delving into messy specifics rather than remaining at the level of legal principle.

C. Growing Tensions Between Public Values and Community Empowerment

By the late 1960s, this faith in shared values began to come undone in recognition of the diversity of needs along racial and economic lines.[60] Accompanying its broad legislative agenda directed towards racial equality and expanding social welfare programs, the social program of Lyndon Johnson's Great Society included a focus on community development and economic empowerment, particularly within urban centers.[61] This top-down concern with community development as a means of encouraging equality across society[62] was

55. *See* Norman Silber & Geoffrey Miller, *Toward "Neutral Principles" in the Law: Selections from the Oral History of Herbert Wechsler*, 93 COLUM. L. REV. 854, 865–66 (1993). Wechsler had originally framed his problem with *Brown* as the decision's lack of a neutral principle regarding associational rights. *See* Wechsler, *supra* note 48.

56. Alexander M. Bickel, *Foreword: The Passive Virtues*, 75 HARV. L. REV. 40, 48 (1961).

57. Brown v. Bd. Of Educ., 349 U.S. 294 (1955).

58. Bickel, *supra* note 56, at 50. Bickel borrowed from Hartz to describe the role of judicial review as renewing the "moral unity" of the nation. Kronman, *supra* note 53, at 1577. *See generally* HARTZ, *supra* note 43 (describing Hartz's views on politics in America).

59. *See* William N. Eskridge, Jr. & Philip P. Frickey, *The Making of The Legal Process*, 107 HARV. L. REV. 2031, 2048 (1994); *see also* Shaw, *supra* note 46, at 680–81.

60. *See* Eskridge & Frickey, *supra* note 59, at 2054.

61. *See* DANIEL IMMERWAHR, THINKING SMALL: THE UNITED STATES AND THE LURE OF COMMUNITY DEVELOPMENT 132–63 (2015).

62. Sargent Shriver, Director of the Office of Economic Opportunity, stated in 1966 that

> [w]e need to begin to devise ways in which disputes can be settled locally, within the community . . . . Above all, we need to begin to build a sense of community, of full membership and full citizenship in a society that does not pit 'we' against 'they,' the powerful against the poor, or white against black.

met with grassroots initiatives to strengthen community justice that went beyond the provision of legal aid as a way to strengthen the independent character of communities of shared interests.[63] And alongside the concern with grassroots community empowerment came arguments in favor of empowering laypeople to resolve disputes without the intermediation of judges or lawyers due to the potential for disputes to be distorted by professionals within the legal system pursuing their own interests and due to the potential for dispute resolution to be personally meaningful to disputants.[64] But community-based solutions—whether devised by the state or by local activists—foundered on the question of whether it was possible to impose community-based solutions on populations that did not necessarily see themselves as having any particular community identity.[65]

By the 1970s, the legal process theory was attacked as inconsistent with the continuing fight for equality after the initial victories of the civil rights era, and its principles were rejected by a more activist generation entering the legal profession.[66] The recognition of the struggles of multiple interest groups (including, but not limited to, those defined in terms of race, gender, and sexual orientation), the recognition that the "public interest" could be understood in very different ways by different publics, and the recognition that social values were far less consensual than previously believed all challenged the possibility of engaging in the kind of reasoning advocated by the legal process school.[67] Legal processes predicated upon social consensus regarding ultimate values could not work when social disorder made it clear that no such consensus existed.[68] Following the end of the Great Society's ambitions of broad social reform, the focus on reform turned even

Edgar S. Cahn & Jean Camper Cahn, *What Price Justice: The Civilian Perspective Revisited*, 41 NOTRE DAME LAW. 927, 950 n.31 (1966).

63. Edgar S. Cahn & Jean C. Cahn, *The War on Poverty: A Civilian Perspective*, 73 YALE L.J. 1317, 1334–52 (1964) (contrasting a top-down war on poverty against a bottom-up "civilian perspective" based in neighborhoods); *see also* Cahn & Cahn, *supra* note 62, at 948–49.

64. McGillis and Mullen described the use of lay mediators as "requisite in a model of neighborhood justice which seeks to involve citizens in the remediation of community problems" because they "have a vested interest in the welfare of the community and the satisfactory reconciliation of disputing parties" while also educating members of the community about dispute resolution and the problems facing "official justice." DANIEL MCGILLIS & JOAN MULLEN, NEIGHBORHOOD JUSTICE CENTERS: AN ANALYSIS OF POTENTIAL MODELS 72 (1977).

65. The literature contrasted idealizations of "urban villages" against those of "dark ghettoes." *See* IMMERWAHR, *supra* note 61, at 153.

66. J. Skelly Wright, *Professor Bickel, the Scholarly Tradition, and the Supreme Court*, 84 HARV. L. REV. 769, 769 (1971).

67. G. Edward White, *The Evolution of Reasoned Elaboration: Jurisprudential Criticism and Social Change*, 59 VA. L. REV. 279, 294–96 (1973).

68. *Id.* at 298.

more to the local.[69] Amidst the economic crises of the 1970s, questions of resource distribution came to the fore,[70] while the challenges of racial equality remained unresolved.[71] In an age of fracture,[72] the institutional settlement of legal process theory would not survive.

III. THREE WAYS OF LOOKING AT DISPUTE RESOLUTION

This Part situates the origins of modern ADR as responses to the challenges of the 1970s. The architecture of the dispute resolution landscape, captured by Frank Sander's image of the multidoor courthouse, redirected attention to alternatives to adjudication in order to expand access to justice but otherwise continued the fundamentally liberal direction of legal process theory by distinguishing disputes that could be resolved privately from those that implicated public values.[73] The mechanics of interest-based negotiation, which, in part, operationalized certain microeconomic principles to increase efficiency and, in part, maintained some critical distance from economic theory, aligned neatly with the emergent individualist, neoliberal orthodoxy and grew in influence along with it.[74] Meanwhile, the concern with resolving disputes within communities on the basis of strengthened community norms and relationships reflected antistatist, antitechnocratic, and antiprofessional tendencies within the field.

A. Fitting the Forum to the Fuss: An Extension of Legal Process

Frank Sander's address at the Pound Conference, which launched a program of institutionalizing ADR as a way to reduce burdens on courts and expand affordable access to justice, is often considered to be the point of origin for contemporary dispute resolution.[75] The Pound Conference responded to concerns regarding

69. McGillis and Mullen quote a newspaper editorial that pithily captured this point: "We no longer seek the Great Society or even the Model City. We seek better neighborhoods." MCGILLIS & MULLEN, *supra* note 64, at 32. To that end, Gerald Ford had declared 1976 as the "Year of the Neighborhood." *See* IMMERWAHR, *supra* note 61, at 168.

70. Eskridge & Frickey, *supra* note 59, at 2051.

71. *See, e.g.*, BELEW, *supra* note 13, at 27; GILLON, *supra* note 13, at 296. Busing was a particularly fraught issue. *See, e.g.*, Owen M. Fiss, *The Jurisprudence of Busing*, 39 LAW & CONTEMP. PROBS. 194, 194 (1975).

72. *See* DANIEL T. RODGERS, AGE OF FRACTURE 9 (2011) (describing changes to postmodern culture culminating in the shattering and dissolution of structuralist assumptions of post-World War II).

73. *See* Frank E.A. Sander, *Alternative Methods of Dispute Resolution: An Overview*, 37 U. FLA. L. REV. 1, 11–12 (1985).

74. *See supra* notes 5–11 and accompanying text.

75. *See* Sander, *supra* note 5, at 113–14; *see also* Warren E. Burger, *Agenda for 2000 A.D.—A Need for Systematic Anticipation*, 70 F.R.D. 79, 85 (1976) ("Our task, then, once we review what has gone before, is to reexamine the 'map' Pound drew, to assess the direction of the roads he laid out, and to consider whether we need, not just to tighten 'nuts and bolts,' but to begin work on the design of some

the institutional capabilities of the courts to handle all the claims brought before them amidst the perception of rapid growth in litigation rates caused by a growth in regulation, administrative costs of the welfare state, and a breakdown of the social fabric that led to increased litigiousness.[76] The Pound Conference also addressed the appropriate role of the courts in overseeing complex matters of social change arising from desegregation and the expansion of minority rights.[77] As Sander assessed the role of the *courts* in protecting fundamental rights, he drew upon the legal process school's concern with the particular responsibilities of the judiciary and asserted that "the goal is to reserve the courts for those activities for which they are best suited and to avoid swamping and paralyzing them with cases that do not require their unique capabilities."[78] The ideas sketched in his talk suggested the urgency of identifying which processes were most appropriate for which disputes—or how to "fit the forum to the fuss."[79] The notion that alternative mechanisms would be better equipped to resolve certain disputes—and to reach better resolutions of certain disputes—directly extended the legal process school's concern with institutional fit,[80] even as the characterization of these processes as "alternative" means of dispute resolution—a residuum of court-centric theory—was contested.[81]

new—even radically new—'vehicles' to take us where we want to go in the years ahead."). For more context on Sander and his 1976 address, see Michael L. Moffitt, *Before the Big Bang: The Making of an ADR Pioneer*, 22 NEGOT. J. 437 (2006).

76. *See* John H. Barton, *Behind the Legal Explosion*, 27 STAN. L. REV. 567, 567 (1975); Bayless Manning, *Hyperlexis: Our National Disease*, 71 NW. U. L. REV. 767, 767 (1977). For a critique of these arguments, 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, 61–69 (1983) (explaining that the fear of a litigation explosion spoke to concerns about the erosion of the professional character of the law, particularly among elites, coupled with the perception of a social breakdown that has rendered the public unable to address disputes without going to court).

77. On the school busing cases, see *supra* note 71 and accompanying text. For a contemporaneous examination of the difficulty of situating *Brown* against prevailing concepts of "judicial restraint," see Morton J. Horwitz, *The Jurisprudence of* Brown *and the Dilemmas of Liberalism*, 14 HARV. C.R.-C.L. L. REV. 599, 600 (1979).

78. Sander, *supra* note 5, at 132.

79. *See* Frank E.A. Sander & Stephen B. Goldberg, *Fitting the Forum to the Fuss: A User-Friendly Guide to Selecting an ADR Procedure*, 10 NEGOT. J. 49, 50 (1994); *see also* Robert A. Baruch Bush, *Dispute Resolution Alternatives and the Goals of Civil Justice: Jurisdictional Principles for Process Choice*, 1984 WIS. L. REV. 893, 895–97 (discussing the urgency of ADR reform to deal with the increase of legal activity).

80. *See* Sander, *supra* note 73, at 3; Sarat, *supra* note 43, at 704 (explaining the transformation of the legal process approach to include discussions of the proper fit between institutions and processes).

81. *See* Marc Galanter, *Worlds of Deals: Using Negotiation to Teach about Legal Process*, 34 J. LEGAL EDUC. 268, 269 (1984) ("[N]egotiation and litigation

The question of how to "fit the forum to the fuss" takes the substance of a dispute (the "fuss") as a given, while the appropriate process used to resolve a dispute (the "forum") is determined through a mapping generated by the theory of ADR.[82] Within this analysis of institutional competencies, courts would still necessarily handle certain kinds of disputes that impacted public values by virtue of their unique capabilities and responsibilities.[83]

As an example of what those were, Judge Leon Higginbotham reminded participants at the Pound Conference that the courts remained an essential forum for litigants to seek justice through the protection of basic rights.[84] While considering whether it was appropriate for the courts to take on responsibility for, *inter alia*, advancing school desegregation in the face of local opposition, Higginbotham defended the use of the courts to intervene in the workings of public institutions when such institutions were unwilling or unable to protect rights:

> The courts, I submit, are not reaching out for these responsibilities; they come to the courts by default. And so long as other institutions in society default on *their* responsibilities, the court will have what I consider an absolutely necessary role to play in the vindication of individual and collective rights.[85]

This was an uneasy fit with the argument in legal process theory that big, polycentric problems were not appropriate for the binary outcomes of litigation.[86]

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are not separate processes, but are inseparably entwined. Negotiation . . . is not the law's soft penumbra, but the hard heart of the process.").

82. *See* Sander, *supra* note 5, at 118–26 (describing five elements used to map the appropriate process to resolve a given dispute).

83. *See, e.g.*, Lon L. Fuller, *The Forms and Limits of Adjudication*, 92 HARV. L. REV. 353, 365–67 (1978).

84. A. Leon Higginbotham Jr., *The Priorities of Human Rights in Court Reform*, 70 F.R.D. 79, 138, 140 (1976).

85. *Id.* at 155.

86. *See* Sander, *supra* note 5, at 118. On the solution of polycentric problems through dealmaking, see Fuller, *supra* note 83, at 398–400. This contains an echo of Bickel's view that while *Brown* was correct to strike a blow against segregation, *Brown II* was also correct in limiting itself to the statement of principle, leaving the complex political settlement to local actors. *See supra* notes 56–59 and accompanying text. Higginbotham argued at the Pound Conference for a more assertive role for the courts in the complex matters attending desegregation, due in part to a recognition that the legal process had constrained the opportunities for progress toward racial equality earlier. *See* A. Leon Higginbotham, Jr., *The Relevance of Slavery: Race and the American Legal Process*, 54 NOTRE DAME L. REV. 171, 179–80 (1978); *see also* A. Leon Higginbotham, Jr., Book Review, 122 U. PA. L. REV. 1044, 1067 (1974) (reviewing DERRICK A. BELL JR., RACE, RACISM, AND AMERICAN LAW (1973)) (discussing several desegregation cases recently decided and currently before the US Supreme Court that may indicate the extent of judicial activism the Court will take in matters of desegregation).

The program of institutionalizing ADR as a means to manage court administration involved deciding which disputes were appropriate for scarce judicial resources and which disputes could be resolved more efficiently elsewhere.[87] The task of "fitting the forum to the fuss" required understanding the goals of the parties to a dispute and the potential procedural barriers to resolution.[88] The goals of the parties would also need to be tempered by considerations of public interest.[89] The central challenge of "fitting the forum to the fuss" was to determine the conditions in which the substance of a given dispute and procedural considerations at play in that dispute could be appropriately handled in a private forum.[90] Critiques of ADR from within the liberal tradition challenged whether this distinction between public and private could be drawn in the way that this theory of ADR demanded.[91]

1. The Limits of Private Justice: Public Interest in the Substance of Disputes Read Against the Prioritization of Efficiency

With the expansion of rights for those on the margins of the legal system, effective access to justice was becoming a significant concern.[92] ADR offered the hope of increasing access to justice by providing lower-cost alternatives to litigation.[93] To critics, however, even if informal dispute resolution had the potential to provide better outcomes for individual disputants,[94] the efficient resolution of individual disputes potentially froze out the possibility of identifying collective problems.[95] Seeing disputes in their full particularity

87. *See* Sander, *supra* note 5, at 112–13.

88. *See* Sander & Goldberg, *supra* note 79, at 50.

89. *See id.* at 60.

90. Sander's address considered five elements: the nature of the dispute, the amount at issue, the relationship between the parties, applicable costs, and speed. Sander, *supra* note 5, at 118–26. Of these, only the analysis of the nature of the dispute suggested on its face engagement with the larger questions implicated by the dispute; it otherwise presumed that the dispute be understood as a matter whose importance was limited to the immediate parties. *See id.* at 118–20.

91. *See supra* notes 21–22 and accompanying text.

92. *See* Eric H. Steele, *The Historical Context of Small Claims Courts*, 1981 AM. B. FOUND. RES. J. 293, 322.

93. Burger, *supra* note 75, at 93.

94. For the role of value creation in ADR, see *infra* Subpart III.B.

95. In this moment of informal justice's rapid expansion, Eric Steele described a dynamic, cyclical process in which small grievances were, at some times, treated as minor matters to be efficiently resolved and, at other times, seen as indicative of deeper social injustices requiring fundamental change. *See* Steele, *supra* note 92, at 295. Steele saw the expansion of informal dispute resolution in the late 1970s as fundamentally conservative:

> No longer was the emphasis on redressing the balance between rich and poor. Small claims and minor disputes came to be seen as general social problems. Everyone, rich or poor, is a consumer and a neighbor, and

prevented aggrieved parties from coming together to demand action.[96] The expansion of ADR signaled to critics that the courts were unwilling to confront the structural problems facing those on the margins.[97]

In this way, even if dispute resolution sought to increase access to justice by creating new venues for disputes to be addressed and for those on the margins to raise disputes and air their grievances,[98] critics argued that it did so in a way that promoted an ideology of social harmony and avoided questions of right.[99] Resolving a series of individual disputes through private means would not create legal or social change, even if such means would permit individual disputes to be resolved more efficiently.[100] This was a part of the more

> may be a spouse or a tenant, and thus is entitled to means of effective redress. . . . In tune with a more conservative national mood . . . reform activity in the handling of small claims too has shifted its focus toward simplification and efficiency and increased use of informal and even private remedies to save public resources as well as provide justice.

Id. at 356. Importantly, however, the "conserving" tendency of the late 1970s and early 1980s did not exhaust the possibilities of informal dispute resolution; these procedures could also be used for reformist or radical purposes. *See id.* at 368–76 (describing various periods of legal reform movements); *see also* Leonard L. Riskin, *Mediation and Lawyers*, 43 OHIO ST. L.J. 29, 41–42 (1982) (noting the danger of viewing mediation solely as a way of "maintaining the *status quo*").

96. Richard Delgado, *ADR and the Dispossessed: Recent Books About the Deformalization Movement*, 13 LAW & SOC. INQUIRY 145, 147, 150 (1988).

97. *See* AUERBACH, *supra* note 31, at 124. On the pressures faced by those on the margins to bring such claims to ADR processes, see Phyllis E. Bernard, *Power, Powerlessness and Process*, *in* THE NEGOTIATOR'S FIELDBOOK 257, 257–58 (Andrea Kupfer Schneider & Christopher Honeyman eds., 2006).

98. *See, e.g.*, John C. Cratsley, *Community Courts: Offering Alternative Dispute Resolution within the Judicial System*, 3 VT. L. REV. 1, 35 (1978).

99. The tendency to minimize the depth of conflict within this particular strand of ADR was recognized in early dispute resolution scholarship, such as in Richard E. Miller & Austin Sarat, *Grievances, Claims, and Disputes: Assessing the Adversary Culture*, 15 LAW & SOC'Y REV. 525, 527 (1980) ("Dispute processing research has thus acquired its own ideology which, apart from its intrinsic merits, further obscures the social context of disputing. It denies, implicitly, that disputes and disputing are normal components of human association."). Miller and Sarat connect these views to understandings of American society promulgated by consensus historians as well as anthropologically inflected arguments that Americans are reluctant to complain in order to conform to a culture of self-reliance. *Id.* at 532. Sally Engle Merry described ADR as teaching "that conflicts should not be resolved by fighting, arguing, violence, or litigation but by calm and rational discussion, compromise, avoidance, and the creation of a contract." Sally Engle Merry, *Anthropology and the Study of Alternative Dispute Resolution*, 34 J. LEGAL EDUC. 277, 283 (1984).

100. Sander had raised this point in his 1976 Pound Conference address:

> By establishing new dispute resolution mechanisms, or improving existing ones, we may be encouraging the ventilation of grievances that are now being suppressed. Whether that will be good (in terms of supplying a constructive outlet for suppressed anger and frustration) or whether it will simply waste scarce societal resources (by validating grievances that might otherwise have remained dormant) we do not

generalized concern that ADR dissolved big questions of public values into small matters of private interest, so context dependent that shared features were obscured.[101]

The question of the relative priority of public value and private interest came to a head in Owen Fiss's *Against Settlement*. Fiss argued against the informal resolution of disputes on the basis that it failed to address the public values at issue in a given dispute.[102] The responses from the ADR community reveal their different orientation with respect to this question. Carrie Menkel-Meadow responded to Fiss with the fundamental "fit" question: "under what circumstances adjudication is more appropriate than settlement, or vice-versa. In short, when settlement?"[103] Her question presumed that there are circumstances in which public adjudication is appropriate, and circumstances in which private settlement is appropriate, and that private settlement "can be particularized to the needs of the parties, it can avoid win/lose, binary results, provide richer remedies than the commodification or monetarization of all claims, and achieve legitimacy through consent."[104] It was an argument grounded in the ability of private settlement to achieve superior outcomes for disputants.

But Fiss's polemic denied that this was the right question by positing a deeper difference in outlook regarding the purpose of the law: he denied outright that "[t]he purpose of lawsuits and the civil courts is to resolve disputes," arguing instead that litigation was "an institutional arrangement for using state power to bring a recalcitrant reality closer to our chosen ideals."[105] Even seemingly minor, seemingly private disputes nevertheless implicated matters of public concern *by necessity*; every private matter was also public, and the public element predominated.[106] Amy Cohen rightly sees Fiss as fighting against a rising tide of privatization and neoliberalism.[107] But the elements of contemporary ADR that she identifies as engaging with public values speak to ADR's ambitions to address

> know. . . . [T]he price of an improved scheme of dispute processing may well be a vast increase in the number of disputes being processed.

Sander, *supra* note 5, at 113–14. Even this articulation of the issue, however, limited the positive value of disputes to their function as release valves rather than as opportunities for social transformation.

101. While a concern from the perspective of public law, this is precisely the theoretical benefit of restorative justice. *See infra* notes 303–07 and accompanying text.

102. *See* Fiss, *supra* note 21.

103. Carrie Menkel-Meadow, *For and Against Settlement: Uses and Abuses of the Mandatory Settlement Conference*, 33 UCLA L. REV. 485, 498 (1985).

104. *Id.* at 504.

105. Fiss, *supra* note 21, at 1089.

106. *See id.* at 1088–89.

107. Amy J. Cohen, *Revisiting* Against Settlement*: Some Reflections on Dispute Resolution and Public Values*, 78 FORDHAM L. REV. 1143, 1150–51 (2009).

matters of explicit public concern,[108] rather than addressing Fiss's denial of the existence of matters of purely private concern.[109] Fiss's concerns cannot be answered by leaning on the virtues private resolution holds for disputants but must be answered by addressing the public dimension of these disputes.

2. The Limits of Private Justice: Public Interest in Formal Procedure Read Against Communitarian Arguments for Informality

Not only did informal dispute resolution not address the substance of the law but it also bypassed procedural protections built into the law.[110] In addition to the possible opportunities for value creation through negotiation, a separate justification for informal dispute resolution emphasized the possibility of more authentic communication by addressing disputes without the alienating intermediation of rights.[111] From the perspective of liberal thought, however, formal procedures defended the most marginalized individuals against prejudice. Richard Delgado warned that informal processes might foster prejudice in a way that formal trials did not.[112] Part of the problem with informality, argued Delgado, was that it failed to appeal to the quintessentially liberal "American Creed."[113]

108. *Id.* at 1165–67. As an example of how ADR theorists are addressing public issues today, see discussion *infra* Subpart IV.B.

109. Indeed, insofar as the expansion of ADR into traditionally public matters injects explicit considerations of private interest into what might otherwise be idealized as principled deliberations about the public interest, ADR's engagement with public values may be quite *un*welcome in the terms set out by Fiss. *See* Fiss, *supra* note 21, at 1085 (stating that a public official's "job is not to maximize the ends of private parties"); *see also* Owen M. Fiss, *Out of Eden*, 94 YALE L.J. 1669, 1673 (1985) ("Adjudication is more likely to do justice than . . . any . . . contrivance of ADR, precisely because it vests the power of the state in officials who act as trustees for the public . . . .").

110. *See* Fiss, *supra* note 109, at 1670.

111. *See* discussion *infra* Subpart III.C.

112. Delgado et al., *supra* note 22, at 1367–75. A recent assessment of Delgado's thesis leaves unresolved the impact of ADR on minorities. *See* Gilat J. Bachar & Deborah R. Hensler, *Does Alternative Dispute Resolution Facilitate Prejudice and Bias? We Still Don't Know*, 70 SMU L. REV. 817, 817 (2017).

113. Delgado et al., *supra* note 22, at 1383–84. Rogers Smith argues that Delgado's invocations of Gunnar Myrdal's analyses of racism as a deviation from America's higher principles is essentially Hartzian. *See* Rogers Smith, *Response* to Jacqueline Stevens, *Beyond Tocqueville, Please!*, 89 AM. POL. SCI. REV. 987, 992 (1995). I take this to suggest that Delgado's arguments in favor of formal process in the 1980s remained within the framework of midcentury liberal theory. Key to this argument is, as noted in *supra* note 53, that rights formalize pre-existing commitments to shared values. Delgado's appeal to the American Creed denied that these shared higher values would operate without the intermediation of the legal system, even as the mobilization of these values within the legal system required pre-existing, broad-based commitment to them. Formal process, therefore, operated as a means to enforce values that the public may hold in principle if not always in practice.

The atmosphere of the courtroom—its solemnity, its symbols of American ideals (such as the flag) and of the power of the law, the civic responsibility associated with serving as a juror or taking an oath before testifying—was conducive to reducing the role of prejudice by reminding the public of their higher ideals.[114] A process overseen by a judge and following written rules of procedure offered some safeguards that all litigants would be treated equally.[115] Indeed, part of the reason why so many fights for black progress occurred in the courts, the argument went, was precisely that they offered a forum in which black litigants would be on more equal footing in making their case.[116] Similar power differentials affected the desirability of ADR for women.[117] The choice of forum and procedure had consequences for the substantive resolution of the dispute; mediation of domestic disputes, for example, might presume a continuation of relationships on the basis of a social worker's understanding of family dynamics rather than the parties' visions of how they wished their relationship to continue (or terminate), reducing their agency.[118] The alternative to rights-based dispute resolution through litigation was more likely to be a contest resolved through the use of power.[119]

The move away from relying on courts as institutions to protect the rights of those on the margins was happening precisely as the

114. *See* Delgado et al., *supra* note 22, at 1383–89. Peter Gabel instead argued that these features of the courtroom should be demystified as part of a strategy of undermining the existing social order, providing a striking contrast of the utopianism of the left as against the essentially liberal defense of legal formality. *See* Peter Gabel & Paul Harris, *Building Power and Breaking Images: Critical Legal Theory and the Practice of Law*, 11 N.Y.U. REV. L. & SOC. CHANGE 369, 399 (1982).

115. *See* Delgado et al., *supra* note 22, at 1387–89. *But see generally* Charles Craver, *Do Alternative Dispute Resolution Procedures Disadvantage Women and Minorities?*, 70 SMU L. REV. 891 (2017) (arguing that minorities are no more disadvantaged in ADR processes than they are in adjudication). Delgado has recently argued that even formal processes no longer offer these kinds of protections to disadvantaged litigants. *See* Richard Delgado, *The Unbearable Lightness of Alternative Dispute Resolution: Critical Thoughts on Fairness and Formality*, 70 SMU L. REV. 611, 635–36 (2017).

116. *See* Randall Kennedy, *Martin Luther King's Constitution: A Legal History of the Montgomery Bus Boycott*, 98 YALE L.J. 999, 1034 (1989).

117. *See generally* Trina Grillo, *The Mediation Alternative: Process Dangers for Women*, 100 YALE L.J. 1545 (1991) (discussing negative impacts of ADR for women); Lisa G. Lerman, *Mediation of Wife Abuse Cases: The Adverse Impact of Informal Dispute Resolution on Women*, 7 HARV. WOMEN'S L.J. 57 (1984) (same).

118. *See* David M. Trubek, *The Handmaiden's Revenge: On Reading and Using the Newer Sociology of Civil Procedure*, 51 LAW & CONTEMP. PROBS. 111, 130–32 (1988); *see also* Martha Fineman, *Dominant Discourse, Professional Language, and Legal Change in Child Custody Decisionmaking*, 101 HARV. L. REV. 727, 730 (1988).

119. As Jerold Auerbach noted, amidst a growth in community mediation programs in the cities during the 1960s, "[b]y far the largest role in urban conflict resolution, from Watts to Harlem, was played by the police, the National Guard, and the army." AUERBACH, *supra* note 31, at 118.

Warren Court's expansion of those rights was beginning to be curtailed.[120] Would informal mechanisms, lacking accessible legal backups, provide meaningful relief for the disadvantaged?[121] The concern was that this was a second-rate form of justice for those who were on the margins of society and who were struggling to have their voices heard in the first place.[122] Interests in system efficiency could come at the expense of access to justice for minorities, whose legal needs could be expensive, high volume, and challenging to the status quo.[123] The heart of these critiques of ADR was that a system that promised either more efficient outcomes or more direct, authentic relationships failed to understand power.[124] The liberal vision of ADR was a way to expand access to dispute resolution, but critics alleged that it conceded too much to private interest or to an unwarranted faith in shared egalitarian norms.[125]

B. Achieving Pareto Superior Outcomes: The Privileging of Interests

One response to the shortcomings of legal process theory within American legal thought was to turn to the methods of economic analysis to identify economically efficient outcomes in disputes.[126]

120. *See* Sally Engle Merry, *Disputing without Culture*, 100 HARV. L. REV. 2057, 2072 (1987) ("Proponents of the notion that the courts are too congested, and therefore that new alternatives are necessary, may be responding to the presence of new users in the courts who are considered undesirable and who present frustrating and unrewarding problems . . . . Their use of legal institutions, however, is a response to the new legal entitlements of the 1960's and to the expansion of access to the courts produced through the vigorous legal services and legal advocacy of the same period."); *see also* AUERBACH, *supra* note 31, at 128 ("Nothing, it seemed, propelled enthusiasm for alternative dispute settlement like a few legal victories that unsettled an equilibrium of privilege.").

121. *See* Laura Nader, *Disputing without the Force of Law*, 88 YALE L.J. 998, 999 (1979).

122. Chief Justice Burger directly addressed this in his opening remarks at the 1976 Pound Conference:

> The topics selected for this conference will inevitably provoke cries that our objective is to reduce access to the courts. Of course, that is not the objective, for what we seek is the most satisfactory, the speediest and the least expensive means of meeting the legitimate needs of the people in resolving disputes.

Burger, *supra* note 75, at 93.

123. *See* Harry T. Edwards, *Alternative Dispute Resolution: Panacea or Anathema?*, 99 HARV. L. REV. 668, 679 (1986). *See generally* Eric K. Yamamoto, *Efficiency's Threat to the Value of Accessible Courts for Minorities*, 25 HARV. C.R.-C.L. L. REV. 341 (1990) (discussing the disadvantages minorities face in the legal system).

124. *See* Yamamoto, *supra* note 123, at 343–44.

125. *Id.* at 344–45.

126. *See* Robert D. Cooter & Daniel L. Rubinfeld, *Economic Analysis of Legal Disputes and Their Resolution*, 27 J. ECON. LITERATURE 1067, 1067–68 (1989) (describing the developing use of economic analysis in law); Richard A. Posner, *An Economic Approach to Legal Procedure and Judicial Administration*, 2 J.

The application of economic analysis to legal theory promised to generate value-creating solutions for the parties to a dispute.[127] ADR's flexibility with respect to process was a major advantage, from an economic perspective. Private agreement on ADR processes permitted the resolution of disputes without needing to privilege a particular substantive understanding of social order.[128] By "fractionating" complex conflicts into smaller disputes, or by expanding the set of negotiation issues to permit value-creating trades, the theory begins with certain process principles (treated as universally applicable) and adjusts the scope of the dispute with a spirit of pragmatic experimentation.[129]

The key statement of interest-based negotiation remains Roger Fisher and William Ury's *Getting to Yes*, first published in 1981.[130] The general idea of *Getting to Yes* was that negotiations could lead to substantively better outcomes for the parties, including improved working relationships, by addressing the interests of the parties and following a principled procedure to identify interests, design options for mutual gain, and to select among those options on the basis of objective criteria.[131] This theory built upon a foundation of rationalistic analysis and provided the analytical structure with which ADR processes could claim to achieve superior outcomes.

LEGAL STUD. 399, 399 (1973) (applying a positive economic theory to discuss the efficiency of legal institutions and procedures); Steven Shavell, *Suit, Settlement, and Trial: A Theoretical Analysis Under Alternative Methods for the Allocation of Legal Costs*, 11 J. LEGAL STUD. 55, 55 (1982) (examining legal decision-making through an economic analysis of risk and reward for plaintiffs and defendants in legal suits).

127. For context on the law and economics movement, see R.H. Coase, *Law and Economics at Chicago*, 36 J.L. & ECON. 239, 240, 242–43 (1993); Keith N. Hylton, *Calabresi and the Intellectual History of Law and Economics*, 64 MD. L. REV. 85, 85–86 (2005).

128. *See* Merry, *supra* note 99, at 282. Christine Harrington described three elements of this ideology: the attempt to ground legitimacy in procedure, rather than in the substance of the law; a focus on pluralistic politics that focuses on the distribution of access rather than on competing values; with the state regarded solely as a facilitator or enforcer of private agreements. Christine B. Harrington, *Socio-Legal Concepts in Mediation Ideology*, 9 LEGAL STUD. F. 33, 36–38 (1985). For an argument that this recognition of the fragmentation of values is consistent with neoliberal reason, see Corinne Blalock, *Neoliberalism and the Crisis of Legal Theory*, 77 LAW & CONTEMP. PROBS. 71, 94 (2014), stating

> The neoliberal state invokes a pluralist society in which each group can pursue its own values and interests, which are then merely aggregated. This is particularly appealing in the age of identity politics and the recognition of difference. More than not requiring it, neoliberalism capitalizes on our experience of the impossibility of value consensus.

129. *See generally* William H. Simon, *Solving Problems vs. Claiming Rights: The Pragmatist Challenge to Legal Liberalism*, 46 WM. & MARY L. REV. 127 (2004) (explaining a pragmatic, experimental approach to dispute resolution, allowing parties to reach more desirable outcomes in disputes).

130. FISHER & URY, *supra* note 7.

131. *Id.* at 10–14.

The focus on interests sought to accomplish two things: First, it aimed to provide a robust basis for dispute resolution in the parties' interests, as opposed to force or contestable claims of right or shared norms.[132] Second, resolving disputes on the basis of interests, rather than rights or shared norms or force, increased the possibility of reaching outcomes that better satisfied the interests of all affected parties.[133] The two were related insofar as the possibility of achieving better outcomes made resolution on the basis of interests that much more robust. The development of the theory began with an examination of interests in the context of midcentury international relations and then incorporated lessons about value creation from the field of law and economics.[134]

1. Grounding Dispute Resolution in Interest Rather Than Rights or Norms

Getting to Yes generalized a series of studies in dispute resolution within international law.[135] International law offered particular enforcement challenges for a system in which the parties were sovereign states with few opportunities for formal adjudication.[136] Midcentury attempts to bring new methods of quantitative social science to bear on matters of war and peace provided international law practitioners and scholars with new tools to understand and model the behavior of states. Structural transformations in the international order made dispute resolution more challenging: the development of nuclear weapons increased the stakes of conflict, the Cold War situated even the smallest conflicts as elements within a totalizing geopolitical struggle, and decolonization populated the realm of sovereign states with members from beyond the Eurocentric family of "civilized nations."[137]

Roger Fisher used formal models (such as the game theoretic models described in Thomas Schelling's *The Strategy of Conflict* of 1960)[138] as heuristics that could prompt new thinking about behavior in disputes in ways that legal doctrine alone could not.[139] Where formal adjudication through rights-based mechanisms seemed inadequate to the task of maintaining order, appealing to the interests of the actors could potentially provide a greater measure of

132. *See id.* at 6, 10–12, 40–41, 81–83.

133. *Id.* at 11, 40–43.

134. *See* Andrew Mamo, *Getting to Peace: Roger Fisher's Scholarship in International Law and the Social Sciences*, 29 LEIDEN J. INT'L L. 1061, 1061–63 (2016).

135. *See id.* at 1061–62.

136. *See, e.g.*, Julius Stone, *Law, Force and Survival*, 39 FOREIGN AFF. 549, 551 (1961).

137. *See* MARTTI KOSKENNIEMI, THE GENTLE CIVILIZER OF NATIONS: THE RISE AND FALL OF INTERNATIONAL LAW 1870–1960 512–13 (2002).

138. THOMAS C. SCHELLING, THE STRATEGY OF CONFLICT 83–84 (1960).

139. Mamo, *supra* note 134, at 1068.

stability. The challenge was how to design a workable system that states would choose to engage when enforcing treaties or adjudicating other disputes.[140] While this system could include formal adjudication and appeals to shared norms as well as appeals to power, a well-functioning system would primarily engage state self-interest.[141]

The right process principles could define problems in ways that would make them more manageable. Fisher advanced a concept of "fractionating" conflicts in which large, intractable problems could be broken into subproblems of a manageable scope.[142] This was particularly important in the context of the Cold War, with its global scope, in which matters of conflicting ideology left little room for backing down, and with arsenals of nuclear weapons on alert. Fisher's colleague, Herman Kahn, explained the importance of actively shaping the scope of disputes: "[Conflict] is as inevitable as death and taxes. But conflict need not inevitably lead to . . . crises and escalations. . . . One important aspect of escalation control and crisis management, then, is simply conflict management."[143] The right process could define the scope of disputes. No less a cold warrior than Kahn claimed that the creation of processes to raise issues, share legal analyses, conduct dialogues, and negotiate the peaceful resolution of disputes constituted the signature achievement of arms control.[144] Fisher's later *Points of Choice* project provided examples of how law could shape specific disputes in ways that could lead to better conflict management; law would fractionate conflicts and bring "analytical clarity" to international politics "to increase the role of reason."[145] The parties could shape the "game" being played, which was particularly important given the possibility of repeated interactions over the long term within a larger system.[146]

Formal models and appeals to simplified notions of interests were intended to be normatively appealing models to guide behavior.[147] Critics, however, argued that these models were problematic insofar

140. *See* ROGER FISHER, POINTS OF CHOICE 23–24 (1978) ("The crisis-prevention aspect of an international system lies not so much in the normative content of the substantive rules as in the system of rules itself and in the machinery for coping with differences among states. . . . The legal system we seek is a way of dealing with man's fallibility, not ending it.").

141. *See id.* at 22–23.

142. Roger Fisher, *Fractionating Conflict*, *in* INTERNATIONAL CONFLICT AND BEHAVIORAL SCIENCE: THE CRAIGVILLE PAPERS 91–92 (Roger Fisher ed., 1964).

143. HERMAN KAHN, ON ESCALATION: METAPHORS AND SCENARIOS 260 (1965).

144. *Id.* at 261.

145. FISHER, *supra* note 140, at 20.

146. *See* Mamo, *supra* note 134, at 1072.

147. *See* ROGER FISHER ET AL., COPING WITH INTERNATIONAL CONFLICT: A SYSTEMATIC APPROACH TO INFLUENCE IN INTERNATIONAL NEGOTIATION 13 (1997) ("[W]e are trying to reason about reality, with all its irrational components. . . . If we do well at trying to figure out what ought to be done, we may earn a larger role for reason than it now plays.").

as they oversimplified uncertainties to become analytically tractable.[148] Models of self-interested behavior could become self-fulfilling prophecies. More problematic still, using appeals to self-interest as a guide to rationality represented a step backwards according to theories of childhood moral development.[149] Resolving disputes on the basis of interest was not just an alternative to resolving disputes on the basis of right, it threatened to undermine such efforts.

2. Win-Win as Neoliberal Ethos

Some of the leading figures in interest-based negotiation theory approached the topic from the perspective of economic analysis,[150] while others maintained a deep interest in the methodology of economic analysis while keeping a critical distance.[151] Interest-based negotiation theory provided a mechanism for parties to maximize joint utility by sharing information and overcoming the challenges of strategic behavior.[152] Individual rights-bearing subjects would utilize informal, interest-based processes as a means to achieve superior resolutions.[153] The framework gave a principled edge to a structure of self-interest.[154] The theory distinguished "integrative" bargaining, which could expand the pie to reach outcomes on the Pareto frontier, from "distributive" bargaining, which would then divide the pie.[155] Within the context of negotiation theory, zero-sum games were matters of distributional bargaining, while integrative bargaining

148. Anatol Rapoport, *Critique of Strategic Thinking*, *in* INTERNATIONAL CONFLICT AND BEHAVIORAL SCIENCE: THE CRAIGVILLE PAPERS, *supra* note 142, at 211, 228.

149. Jeffrey Harrison connected the reasoning of economic analysis of behavior with the preconventional ethical reasoning of children in Robert Kohlberg's stages of mental development. Jeffrey L. Harrison, *Egoism, Altruism, and Market Illusions: The Limits of Law and Economics*, 33 UCLA L. REV. 1309, 1324 (1986).

150. *See* HOWARD RAIFFA ET AL., NEGOTIATION ANALYSIS: THE SCIENCE AND ART OF COLLABORATIVE DECISION MAKING 1 (2007).

151. *See* Mamo, *supra* note 134, at 1068.

152. RAIFFA ET AL., *supra* note 150, at 81–96.

153. *See* Carrie Menkel-Meadow, *Toward Another View of Legal Negotiation: The Structure of Problem Solving*, 31 UCLA L. REV. 754, 795 (1984).

154. Describing an earlier understanding of negotiation as "slightly sordid," Peter Adler argues that "it is possible to suggest that the ADR movement has been fueled, if not overtly driven, by the social legitimization of the bargaining process itself. . . . The idea of a negotiated agreement has replaced the concept of imposed judgment as the guiding metaphor of dispute resolution." Peter S. Adler, *The Future of Alternative Dispute Resolution: Reflections on ADR as a Social Movement*, *in* THE POSSIBILITY OF POPULAR JUSTICE: A CASE STUDY OF COMMUNITY MEDIATION IN THE UNITED STATES 67, 69–70 (Sally Engle Merry & Neal Milner eds., 1993).

155. RAIFFA ET AL., *supra* note 150, at 97.

reflected the nonzero-sum dimensions.[156] So described, the structure of negotiation theory separated the question of redistribution from that of efficiency.[157]

It is worth pausing on the distinction between integrative and distributive bargaining. The integrative dimension entails each party sharing their interests with each other by building rapport and trust, generating options that create value by trading across differences and by building upon points of shared interest, and gradually approaching the most efficient solutions along the Pareto frontier.[158] It is a process of shared interpersonal discovery that has the possibility of increasing value for all. By contrast, the distributive dimension is necessarily competitive—one party's gain is the other party's loss.[159] In this binary, the *objective* process of generating value-creating options in the integrative dimension contrasts with the *subjective* process of contesting and claiming value in the distributive dimension.[160] To the extent that negotiation theory prioritizes the value-creating dimensions of negotiation over the value-distributing dimensions, the theory affirmatively extends the logic of neoliberalism to expressly downplay the matter of distribution relative to that of efficiency.[161] Through the invocation of "objective

156. On the integration of game theory into the literature on bargaining within the field of industrial administration, see RICHARD E. WALTON & ROBERT B. MCKERSIE, A BEHAVIORAL THEORY OF LABOR NEGOTIATIONS: AN ANALYSIS OF A SOCIAL INTERACTION SYSTEM 6–9 (2d ed. 1991).

157. Martha T. McCluskey, *Efficiency and Social Citizenship: Challenging the Neoliberal Attack on the Welfare State*, 78 IND. L.J. 783, 787–88 (2003); *see also* Gary Peller, *The Metaphysics of American Law*, 73 CALIF. L. REV. 1151, 1263 (1985).

158. See James R. Holbrook, *Using Performative, Distributive, Integrative, and Transformative Principles in Negotiation*, 56 LOY. L. REV. 359, 364–66 (2010); *see also* Gerald B. Wetlaufer, *The Limits of Integrative Bargaining*, 85 GEO. L.J. 369, 370 (1996).

159. Russell Korobkin, *Against Integrative Bargaining*, 58 CASE W. RES. L. REV. 1323, 1324 (2008).

160. *See* Peller, *supra* note 157, at 1267–68. Peller argues that the prioritization of the objective element of this binary is consistent with a social scientific approach that treats social life and the social world as primary, as contrasted with theories that prioritize the subjective element and the autonomy and equality of subjects. Consistent with this framing, the popular idea of negotiation emphasizes the heroic subject who claims value from his or her adversary, as against the more rational, scientific framing of interest-based negotiation theory that aims to identify rules or practices that generate efficient outcomes, regardless of starting endowments. Within interest-based negotiation theory, the objective element of total utility to be maximized is based on the subjective utilities of each individual—and it is this that gives it its neoliberal character. *See supra* note 128.

161. *See* Korobkin, *supra* note 159, at 1323–24. I suspect that the prioritization of value creation over distribution is at least as strongly due to conflict aversion as it is to theoretical commitments to value creation—suggesting important linkages between the rarified realm of high theory and the ground-level experiences of negotiation practice.

criteria," negotiators can engage in value distribution in principled ways, rather than simply dividing the pie through the exercise of power and subjective will.[162]

The key concern in the interest-based negotiation literature has been to understand how a negotiating process could permit the parties to move beyond their (often entrenched) starting positions and share the information that would permit the creation of Pareto superior outcomes with mechanisms to increase party commitment to those outcomes.[163] The theory provided the tools for parties to explore interests and find solutions that maximized utility while dividing gains equitably. It recognized that rational action was not *descriptively* accurate, even as it insisted on rational action as *normatively* superior,[164] and it engaged *prescriptively* to bridge the gap between is and ought.[165] Some of the early theorists, such as Howard Raiffa,[166] were early advocates of the behavioral approach to economic analysis that has now entered the mainstream.[167] Since then, the theory has developed more psychological depth to balance its more rationalistic assumptions.[168] Through this emphasis on psychology, the framework of interest-based negotiation encourages discussions of difficult topics by engaging with parties' partial perspectives, emotions, and identity.[169] But these have been treated as additions to the theory that have not fundamentally changed its basic premises; for example, emotions are described as being important for instrumental reasons.[170] Concessions to human

In this respect, Russell Korobkin's reframing of the negotiation process into one of "zone definition" (which cuts across the integrative/distributive dichotomy) and one of "surplus allocation" (which is distributive in nature) is an important advance for emphasizing that every integrative move implies the need for distribution. *See* Russell Korobkin, *A Positive Theory of Legal Negotiation*, 88 GEO. L.J. 1789, 1791–92 (2000).

162. FISHER & URY, *supra* note 7, at 84–85. To the extent that the question of distribution is inescapably political, it is essential to consider whether the application of such objective criteria simply masks power rather than bypassing it.

163. *See* RAIFFA ET AL., *supra* note 150, at 81–96.

164. *See* FISHER ET AL., *supra* note 147, at 13–14.

165. *See* RAIFFA ET AL., *supra* note 150, at 1.

166. *See, e.g.*, Max H. Bazerman, *Prescriptions Based on a Realistic View of Human Behavior*, 33 NEGOT. J. 309, 310 (2017).

167. *See* Christine Jolls et al., *A Behavioral Approach to Law and Economics*, 50 STAN. L. REV. 1471, 1471 (1998).

168. *See, e.g.*, ROGER FISHER & DANIEL SHAPIRO, BEYOND REASON: USING EMOTIONS AS YOU NEGOTIATE 5 (2005).

169. *See generally* DOUGLAS STONE ET AL., DIFFICULT CONVERSATIONS: HOW TO DISCUSS WHAT MATTERS MOST (1999) (providing a method for engaging in difficult conversations).

170. *See* Daniel L. Shapiro, *Enemies, Allies, and Emotions*, *in* THE HANDBOOK OF DISPUTE RESOLUTION 66, 79 (Michael L. Moffitt & Robert C. Bordone eds., 2005) ("Positive emotions can be used to help us reach our instrumental and affective goals in a negotiation. We can stimulate positive emotions in

irrationality identified how rational action could best be achieved by actual disputants.[171]

The central concern of this variant of ADR scholarship was in achieving efficient outcomes, even as its advocates acknowledged the poverty of economic theory as a guide to actual human behavior. Reliance on (enlightened) self-interest would guide rational action within a world lacking a consistent foundation of shared norms. The structure of interest-based negotiation theory focused on tools for real people to transcend the narrow vision of *homo economicus* while nevertheless approaching the kind of rational action that would permit negotiators to enact the principles of microeconomic theory.[172] While the process itself can be independently valuable for negotiating parties insofar as it creates a structure for thinking about the issues and for providing space for discussion, "success" under the theory's own terms means working toward an agreement that exceeds the reservation values of the parties (and ideally approaching the Pareto efficient frontier) or recognizing that no such agreement is possible.[173] It is an unabashedly settlement-focused process with the possibility of some ancillary benefits along the way.

C. Visions of Community: Disputes as Fundamentally Relational

The communitarian visions of dispute resolution recognized disputants as constituted through their membership in their communities and embedded within networks of relationships in which they engage in disputes as a matter of course, and such disputes, in turn, affect the relationships that constituted the community.[174] Community-based dispute resolution held the promise of strengthening local self-government and empowering laypeople to directly address disputes with their fellow community members rather than having disputes managed by professionals.[175] While the concept of community-based dispute resolution was contested

negotiators by dealing constructively with people's relational identity concerns . . . .").

171. *See, e.g.*, MAX H. BAZERMAN & MARGARET A. NEALE, NEGOTIATING RATIONALLY ix (1992); Gary Goodpaster, *Rational Decision-Making in Problem-Solving Negotiation: Compromise, Interest-Valuation, and Cognitive Error*, 8 OHIO ST. J. ON DISP. RESOL. 299, 300 (1993).

172. *See, e.g.*, Leonard L. Riskin, *Managing Inner and Outer Conflict: Selves, Subpersonalities, and Internal Family Systems*, 18 HARV. NEGOT. L. REV. 1, 30–31 (2013).

173. *See* FISHER & URY, *supra* note 7, at 100.

174. *See* James R. Coben, *Community-Based Dispute Resolution*, 12 HAMLINE J. PUB. L. & POL'Y 13, 16 (1991).

175. Raymond Shonholtz, *Justice from Another Perspective: The Ideology and Developmental History of the Community Boards Program*, *in* THE POSSIBILITY OF POPULAR JUSTICE, *supra* note 154, at 201, 202–05; Barbara Yngvesson, *Local People, Local Problems, and Neighborhood Justice: The Discourse of "Community" in San Francisco Community Boards*, *in* THE POSSIBILITY OF POPULAR JUSTICE, *supra* note 154, at 379, 389–90.

between top-down, state-led initiatives and bottom-up, grassroots initiatives in the 1970s,[176] Attorney General Griffin Bell supported the creation of "neighborhood justice centers"[177] on the basis of Sander's address at the Pound Conference.[178]

The communitarian analysis required understanding the institutional structures and the patterns of culture that shaped the resolution of specific disputes by private means: "private ordering may involve more than disputants devising an *ad hoc* legal regime for themselves. The parties may not constitute an isolated dyad, but be embedded in (or adhere to) a group or network with its own rules and standards."[179] If the resolution of disputes between individual disputants would have a bearing upon the community's health and practices, then dispute resolution could center on the community, communal relationships, and shared social norms with lay decision makers.[180] Effectively implementing this vision required social science research regarding practices of dispute resolution and often drew upon the practices of indigenous communities.[181] Scholars in the law and society tradition sought to understand how disputants actually used (or failed to use) existing systems to resolve their disputes.[182] This line of thinking drew upon midcentury studies of small group dynamics.[183]

There were many different ways of thinking about how the community was defined and the means by which community membership and norms evolved. This Part describes four such approaches. A Burkean approach presumed the existence of a well-defined community that evolves organically, while feminist analyses contested concepts of community built on traditionalism and contrasted an ideal of relatedness with one of separation.[184] Meanwhile, analyses from the critical legal studies camp sought new forms of relatedness by exploring the tension between the protection

176. *See supra* notes 61–72 and accompanying text.

177. Am. Bar Ass'n, *Report of Pound Conference Follow-Up Task Force*, 74 F.R.D. 159, 175–77 (1976).

178. *See* MCGILLIS & MULLEN, *supra* note 64, at 29–30.

179. Marc Galanter, *Justice in Many Rooms: Courts, Private Ordering, and Indigenous Law*, 19 J. LEGAL PLURALISM 1, 23 (1981).

180. SALLY ENGLE MERRY, *Sorting Out Popular Justic*e, *in* THE POSSIBILITY OF POPULAR JUSTICE, *supra* note 154, at 31, 46.

181. Only belatedly did scholars recognize that these practices did not reflect timeless traditions but instead reflected histories of colonialism and missionary activity. *See* Laura Nader, *When is Popular Justice Popular?*, *in* THE POSSIBILITY OF POPULAR JUSTICE, *supra* note 154, at 435, 444–45. For the connection to Llewellyn's earlier work with the Cheyenne, see *supra* note 42 and accompanying text.

182. *See, e.g.*, Sally Engle Merry, *Going to Court: Strategies of Dispute Management in an American Urban Neighborhood*, 13 LAW & SOC'Y REV. 891, 891–92 (1979).

183. *See* IMMERWAHR, *supra* note 61, at 25–39.

184. *See* Ernest Young, *Rediscovering Conservatism: Burkean Political Theory and Constitutional Interpretation*, 72 N.C. L. REV. 619, 663–64 (1994).

of individual selves and the importance of relationships, and a strand of left republicanism sought to build more inclusive and egalitarian communities.

Collectively, these visions focused on deeply understanding the relationships in which disputes occur, rather than on understanding disputes in the context of individual rights or interests, which alienated individuals from each other and the community.[185] The community-oriented views of dispute resolution treated the *process* of resolving disputes as substantively valuable in its own right and not only in instrumental terms. While some of the communitarian approaches described below, such as those of critical legal studies, have often been seen as a left counterpoint to the more conservative development of law and economics,[186] that framing does not capture the ways that even politically conservative strands of communitarian thought contrasted powerfully with law and economics. Here, the salient dimension is the form of rationality mobilized by each strand of dispute resolution—a prudential wisdom in communitarianism that contrasts with the more instrumental reason of economic methods.[187]

1. Reflections on the Revolution in Dispute Resolution

The conservative, Burkean orientation in dispute resolution emphasized the importance of traditions for grounding communal norms and building institutions that are organically embedded within the community.[188] Perhaps the most important contribution of the Burkean vision for dispute resolution is in its prudential orientation and belief in the fallibility of top-down rationalistic solutions, which recalls the "passive virtues" debate within legal process jurisprudence.[189] Localized dispute resolution on the basis of shared community interests and values would address issues within the community while strengthening neighborly relationships, resolving disputes incrementally rather than abruptly through the application of abstract, utopian principles.[190] Accordingly, the courts were left with a relatively modest role, as Alexander Bickel most notably argued they should be.[191] A less active judiciary meant that disputes would be resolved at the ground level, through encounters between individuals bringing their lived experiences to their shared institutions to achieve "a workable accommodation of existing

185. *See* Trubek, *supra* note 118, at 128–30.

186. *See* Fiss, *supra* note 12, at 245.

187. For an argument that Burke provides common ground for right and left on the basis of "putting theories aside in favor of experience" and rejecting intellectual certainty, see Carl T. Bogus, *Rescuing Burke*, 72 MO. L. REV. 387, 470–71 (2007).

188. *See id.* at 390–91.

189. *See* Bickel, *supra* note 56, at 40.

190. *See* Trubek, *supra* note 118, at 130.

191. *See* ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH 16–17 (1962).

interests and ideals, one to which those affected are willing to give their consent even though the accommodation itself is theoretically indefensible."[192] While recognizing that conflict is both inevitable and necessary, the Burkean feels

> an overriding obligation to prevent the conflict from becoming too generalized or too deeply entrenched. While promoting his own views, he will seek means of accommodation and pursue a gradualist strategy of piecemeal reform rather than revolutionary reconstruction, in the hope that time will ease tensions and show the way to some as yet unthought-of resolution capable of securing the consent of all involved.[193]

This approach assumes an underlying harmony of interests.

Consistent with this framing of disputes, conservative proponents of community, such as Mary Ann Glendon, identified problems with a purely rights-oriented view of disputes on the basis that rights talk "heightens social conflict, and inhibits dialogue that might lead toward consensus, accommodation, or at least the discovery of common ground" through "its silence concerning responsibilities," "its relentless individualism," "its neglect of civil society," and "its insularity."[194] "The rule of law" was not a matter of abstract rights, but of values woven into the "fabric of society."[195] This was a conservative counterpart to the left's critique of rights, stressing the importance of networks of internalized obligation rather than external standards of right.

But challenging the use of legal rights to resolve disputes did not mean that Burkeans believed in addressing disputes through the market-based logic of interest-based negotiation either. On the contrary, the prudential approach emphasized the resolution of disputes on the basis of shared community norms rather than on purely self-interested, rational calculation that carried no normative weight.[196] The prudential approach challenged the interest-based theory's failure to critique the subjective interests of the parties.[197] Prudential reason instead required that "the choice of ends as well as means is governed by what we learn in the course of objective inquiry.

192. Kronman, *supra* note 53, at 1604.

193. *Id.*

194. MARY ANN GLENDON, RIGHTS TALK: THE IMPOVERISHMENT OF POLITICAL DISCOURSE 14 (1991).

195. Bogus, *supra* note 187, at 453; *see* John Paul Lederach & Ron Kraybill, *The Paradox of Popular Justice: A Practitioner's View*, *in* THE POSSIBILITY OF POPULAR JUSTICE, *supra* note 154, at 357, 361 ("Where community members experience abstract principles as the arbiter of disputes, the fabric of community ultimately suffers. Community is no longer a vital, ever-unfolding encounter with diverse others. Rather it is a static location for imposition of values defined by one's predecessors.").

196. *See* Young, *supra* note 184, at 626 n.30.

197. *See* Kronman, *supra* note 53, at 1615.

To think of ends as necessarily nonrational or as brute givens is at best a premature abandonment of reason."[198] The ethic required the interrelationship of fact and value, objective means for understanding the good of the community, and recognition of shared values.[199]

2. The Ethic of Care and the Relational Self

A feminist approach to understanding community drew upon Carol Gilligan's ethic of care to emphasize the relational and contextual dimensions of disputes. Gilligan identified a "conception of morality as concerned with the activity of care [that] centers moral development around the understanding of responsibility and relationships, just as the conception of morality as fairness ties moral development to the understanding of rights and rules."[200] The distinction between the ethic of care and that of fairness was based on a psychological distinction "between a self defined through separation and a self delineated through connection, between a self measured against an abstract ideal of perfection and a self assessed through particular activities of care."[201] The ethic of care operates "by sustaining the web of connection so that no one is left alone."[202] This feminist variant challenged the liberal assumptions of legal orthodoxy while also challenging the traditionalism of the Burkean approach.

The liberal and neoliberal visions of interest-based dispute resolution, for example, still emphasized individual autonomy, including autonomy *from* the community.[203] This orientation towards individuals and individualism is built into the interest-based dispute resolution framework.[204] The legal subject envisioned there is an individual with defined and consciously known interests (the social and moral worthiness of which we generally do not judge)[205], each of

198. Philip Selznick, *The Idea of a Communitarian Morality*, 75 CALIF. L. REV. 445, 459 (1987).

199. *Id.* at 460.

200. CAROL GILLIGAN, IN A DIFFERENT VOICE: PSYCHOLOGICAL THEORY AND WOMEN'S DEVELOPMENT 19 (1982).

201. *Id.* at 35. Within this distinction, the ideal of separation was coded male, while the ideal of connection was coded female. The conceptualization of legal personhood, as founded in separation, implied that "women are not human beings." *See* Robin West, *Jurisprudence and Gender*, 55 U. CHI. L. REV. 1, 3 (1988).

202. GILLIGAN, *supra* note 200, at 62.

203. *See* Susan Silbey & Austin Sarat, *Dispute Processing in Law and Legal Scholarship: From Institutional Critique to the Reconstruction of the Juridical Subject*, 66 DENV. U. L. REV. 437, 490–91 (1989) ("Interest claims seem both individuated and irreconcilable because human wants are understood to be the constitutive elements of distinct and separate human personalities—no two are ever the same. Personality is, in this view, the unique prism of an ontological, physical individuality which generates competitive and distinct preferences as a direct product of that ontological separateness.").

204. *See* Cohen, *supra* note 18, at 62.

205. *See* Silbey & Sarat, *supra* note 203, at 492.

which is assigned a given weight in order to identify the trades that can generate Pareto optimal outcomes. These must also accord with basic economic axioms of rationality. This rationality is limited somewhat by the importance of social relationships, the experience of emotions, and cognitive biases,[206] which can affect the desirability of substantive outcomes and can shape process decisions.[207] At heart, subjects are fundamentally the same[208] rather than differing fundamentally by virtue of being constituted socially.[209] This is the kind of individual autonomy that was traditionally withheld from women and people of color through the denial of rights.[210] The feminist approach directly challenged these assumptions about the subject.[211]

Feminist analysis not only emphasized the importance of relationships and connectedness as against the idea of fundamentally autonomous individuals; it also asked *who* defined the terms of relationships, which is where it deviated from more traditionalist understandings.[212] Consequently, some critiques of ADR processes noted that approaches that recast family law in terms of improving ongoing relationships *prevented* women from exercising agency with respect to terminating their relationships.[213]

206. *See* BAZERMAN & NEALE, *supra* note 171, at 2; Goodpaster *supra* note 171, at 300.

207. More recent works, responding to critiques of this liberal concept of the self, recognize that interests are socially constituted. *See* Amy J. Cohen, *Negotiation, Meet New Governance: Interests, Skills, and Selves*, 33 LAW & SOC. INQUIRY 503, 531 (2008).

208. Silbey & Sarat, *supra* note 203, at 488 ("[D]ispute processing gets to the 'core' of human personality and human character; in this view, the right form of dispute processing can encourage disputants to see themselves as essentially similar beings rather than as creatures of irreconcilable rights and interests.").

209. *See* Trubek, *supra* note 118, at 123–25.

210. David Trubek has argued that classical legal conceptions of personhood involved both a limitation on which humans meet standards of personhood with recognized legal subjectivity (such as propertied white males) and an assumption that all individuals recognized as legal subjects are "fully constituted, self-contained actor[s] capable of autonomous choice." *Id.* at 113. While the formal limitation regarding which humans are recognized as legal subjects has fallen away, the assumption that legal subjects are fully constituted in an unproblematic way has been more enduring. *See id.* at 119.

211. This is part of a reconceptualization of the rights-bearing subject into a subject with interests and needs to be attended to through problem-solving, moving "from conventional legal claims of right, beyond utilitarian demands of interest, to both relational and therapeutic understandings of need." Silbey & Sarat, *supra* note 203, at 486.

212. For a description of some tensions between feminist theory and other strands of communitarian thought, see Susan B. Apel, *Communitarianism and Feminism: The Case against the Preference for the Two-Parent Family*, 10 WIS. WOMEN'S L.J. 1 (1995). *But see* Suzanna Sherry, *Civic Virtue and the Feminine Voice in Constitutional Adjudication*, 72 VA. L. REV. 543, 569–74 (1986).

213. *See* Grillo, *supra* note 117, at 1594–96; *see also* Sander & Goldberg, *supra* note 79, at 60 ("The disputing parents may believe that they have no interest in a better relationship, but only in vindication, and hence prefer court to mediation.

Within negotiation scholarship, the work of Carrie Menkel-Meadow has been a particularly important conduit for feminist thought. Her early analysis of problem-solving negotiation was "motivated by a desire to see the legal system work in a way which promotes and maximizes human interactions that are creative, enfranchising, enriching and empowering, rather than alienating and conflict provoking."[214] Feminist theory emphasized the situatedness of the parties to a dispute.[215] This insight aligned with ADR's recognition that individuals perceive the world and communicate about it through partial perspectives.[216]

But perspective taking within negotiation scholarship has its limits. While identity-based arguments risked falling into essentialism (as was claimed of Gilligan's association of the ethic of care with women)[217], later manifestations of identity-based theories—such as the theories of intersectionality pioneered by black feminists—tackled the problem of essentialism head-on.[218] And yet, negotiation theory's understanding of the subject has so far failed to engage meaningfully with this literature. Even with ADR's deep appreciation for multiple perspectives, intersectional analysis has not

However, many states believe that a better relationship between the parents serves the public interest by improving the life of the child, and so mandate that child custody disputes go first to mediation.").

214. Menkel-Meadow, *supra* note 153, at 763. She ties this view to Carol Gilligan's work. *Id.* at 763 n.28. Fiss reads Gilligan's arguments as "a supplementary ideal" to one in which adjudication expresses the ideals of justice and accordingly criticizes Menkel-Meadow's reading of Gilligan as a basis for ADR. *See* Fiss, *supra* note 12, at 254.My reading of Gilligan is far closer to Menkel-Meadow's than to Fiss's. Gilligan's engagement with Robert Kohlberg's theories of moral development as reflecting a masculine logic speaks indirectly to the reliance on self-interest (an element of Kohlberg's preconventional morality) within interest-based negotiation theory. And it was precisely the connection between interest-based theories and preconventional morality that some of the earliest critics of the use of formal models of dispute resolution attacked. *See* Harrison, *supra* note 149, at 1323–24. Recent studies suggest that levels of moral reasoning have fallen in the past few decades, with an increase in reasoning based on advancing personal interests and avoiding punishment. *See* Sara Konrath, *The Empathy Paradox: Increasing Disconnection in the Age of Increasing Connection*, *in* HANDBOOK OF RESEARCH ON TECHNOSELF: IDENTITY IN A TECHNOLOGICAL SOCIETY 204, 210 (Rocco Luppicini ed., 2013).

215. *See, e.g.*, Carrie Menkel-Meadow, *Feminist Legal Theory, Critical Legal Studies, and Legal Education or "The Fem-Crits Go to Law School"*, 38 J. LEGAL EDUC. 61, 83 (1988).

216. *See, e.g.*, ROGER FISHER, DEAR ISRAELIS, DEAR ARABS: A WORKING APPROACH TO PEACE 5 (1972) (arguing that the advice given to various parties in the Middle East need not cohere into a collective approach).

217. *See, e.g.*, Cressida J. Heyes, *Anti-Essentialism in Practice: Carol Gilligan and Feminist Philosophy*, 12 HYPATIA 142, 143 (1997).

218. *See, e.g.*, Kimberle Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics*, 1989 U. CHI. LEGAL F. 139, 140 (1989); Angela P. Harris, *Race and Essentialism in Feminist Legal Theory*, 42 STAN. L. REV. 581, 585–92 (1990).

been a natural fit. Standpoint theories went beyond perspective taking to privilege the perspectives from the margins,[219] and that privileging of certain perspectives has been an uncomfortable fit with ideas of neutrality in ADR.

3. Searching for Unalienated Relatedness

The critical legal studies movement contained two distinct insights regarding informal dispute resolution and the role of community.[220] Several scholars recognized that individuals exist within social relationships and identified ways in which law alienated individuals from each other. For example, Roberto Unger defined the self "by the totality of its relations with other beings"[221] and focused on understanding the "experience of mutual longing"[222] outside of a narrowly "political" sphere. Unger's ideal was "a style of communal attachments that recognizes the benefits of conflict and insists upon the priority of heightened vulnerability and mutual acceptance."[223] Duncan Kennedy, meanwhile, described a fundamental contradiction in which individual freedom and full membership in a collective are both necessary and impossible.[224] Kennedy and his colleagues expressed a yearning for "unalienated relatedness" by moving beyond conceptualized rights talk.[225] The critique of rights on the political left in the early 1980s built upon this tension.[226]

The critique of rights was challenged by others on the left. Critical race theorists defended rights from the embrace of informalism.[227] As Patricia Williams put it, for many whites, "social relationships are colored by viewing achievement as the function of committed self-control, of self-possession," while for many blacks, "relationships are frequently dominated by historical patterns of

219. *See* Mari J. Matsuda, *When the First Quail Calls: Multiple Consciousness as Jurisprudential Method*, 11 WOMEN'S RTS. L. REP. 7, 9 (1989).

220. For more on the connection between critical legal studies and communitarian thought, see Richard W. Bauman, *The Communitarian Vision of Critical Legal Studies*, 33 MCGILL L.J. 295, 295 (1988).

221. ROBERTO MANGABEIRA UNGER, KNOWLEDGE AND POLITICS 216 (1975).

222. ROBERTO MANGABEIRA UNGER, PASSION: AN ESSAY ON PERSONALITY 22 (1984).

223. ROBERTO MANGABEIRA UNGER, FALSE NECESSITY: ANTI-NECESSITARIAN SOCIAL THEORY IN THE SERVICE OF RADICAL DEMOCRACY 104 (1987).

224. Duncan Kennedy, *The Structure of Blackstone's Commentaries*, 28 BUFF. L. REV. 205, 211–13 (1979). Kennedy later renounced the fundamental contradiction and the critique of rights as abstractions in Peter Gabel & Duncan Kennedy, *Roll Over Beethoven*, 36 STAN. L. REV. 1, 15, 37 (1984).

225. "Unalienated relatedness" offered an affirmation "that we aren't caught just sort of hopelessly, desperately in a duality of utter otherness and engulfed unity." *See* Gabel & Kennedy, *supra* note 224, at 22.

226. This line of analysis has been dormant, though there have been some recent calls for its revival. *See* Robin L. West, *Tragic Rights: The Rights Critique in the Age of Obama*, 53 WM. & MARY L. REV. 713, 719 (2011).

227. *Id.* at 717–18 n.17.

physical and psychic *dis*possession."[228] For people of color, relaxing strict adherence to legal rights "has meant not untrammeled vistas of possibility, but the crushing weight of totalistic—bodily and spiritual—*intrusion*."[229] Alienation had its advantages when compared against subjugation.[230]

The critiques of rights-based procedures voiced within the ADR movement in some respects mirrored the critique of substantive rights.[231] But this did not mean that critical legal scholars embraced ADR any more than their counterparts on the right did.[232] A session at the second Conference on Critical Legal Studies in 1978 launched a study of how state-sponsored ADR programs extended social control.[233] These critics saw ADR—especially in its most institutionalized forms, such as the neighborhood justice centers being piloted in the wake of the Pound Conference—largely reproducing the dynamics of formal legal institutions.[234] These community-based institutions were funded by the state and relied upon state institutions for cases, created new forms of professional expertise, and extended the reach of the state into minor disputes that heretofore had not experienced regular state intervention.[235] Institutionalized ADR, in this view, masked state power behind the claim of participant control of dispute resolution within decentralized

228. Patricia J. Williams, *Alchemical Notes: Reconstructing Ideals from Deconstructed Rights*, 22 HARV. C.R.-C.L. L. REV. 401, 404–05 (1987).

229. *Id.* at 430–31. For more on "the instability and danger of founding political relationships on love rather than respect," see David Luban, *Difference Made Legal: The Court and Dr. King*, 87 MICH. L. REV. 2152, 2205 n.180 (1989) ("[T]he vocabulary of rights expresses the discourse of mutual respect, and to abandon the centrality of mutual respect is to move in an unacceptable direction: either toward disrespect (domination and subservience) or toward a communitarianism of love about which we may rightly be skeptical.").

230. *See* Richard Delgado, *Critical Legal Studies and the Realities of Race—Does the Fundamental Contradiction Have a Corollary?*, 23 HARV. C.R.-C.L. L. REV. 407, 412 (1988); *see also* Peter Fitzpatrick, *The Impossibility of Popular Justice*, *in* THE POSSIBILITY OF POPULAR JUSTICE, *supra* note 154, at 453, 470 ("Yet, in the sentimentality of informalism, the virtues of alienation are too readily ignored. In its origins, modern formal law opposed old informal power through the production of 'visibility, accountability and clarity.' To render social relations, literally, in this light entails an alienating, reflective distance from them."). It bears reminding that the communitarian orientation was not necessarily an "unalienated" one. *See* Gabel & Kennedy, *supra* note 224, at 21.

231. *See* Silbey & Sarat, *supra* note 203, at 479. It was on these grounds that Richard Delgado associated ADR with critical legal studies. *See* Richard Delgado, *The Ethereal Scholar: Does Critical Legal Studies Have What Minorities Want?*, 22 HARV. C.R..-C.L. L. REV. 301, 314–15 (1987). For Delgado's critique of ADR's informal procedures, see *supra* notes 110–19 and accompanying text.

232. *See supra* notes 194–99 and accompanying text.

233. Richard L. Abel, *Introduction* to THE POLITICS OF INFORMAL JUSTICE 1, 2 (Richard L. Abel ed., 1982).

234. *See* RICHARD L. ABEL, *The Contradictions of Informal Justice*, *in* 1 THE POLITICS OF INFORMAL JUSTICE, *supra* note 233, at 268–69.

235. *Id.* at 270–74.

offices, as demonstrated by the ways that ADR was being sold to particular audiences: the poor, minorities, women, and workers.[236] ADR extended state control over the maintenance of social order beyond the jurisdictional and functional limits placed on the courts.[237]

This critique of the institutions of informal dispute resolution circa 1980 charged that they did not actually advance or empower the communities in which they were located; they were merely adjuncts of the justice system, with the trappings of community centers, backed by state or federal funding, designed from the top-down by outside reformers.[238] In so doing, they served state interests rather than those of the community, measuring success in terms of the number of agreements reached and the individual satisfaction of disputants, blind to "the ways in which individuals may benefit qua individuals but lose as members of a larger social class whose interests cannot be fully satisfied through law or private case-by-case resolution of personal grievances because the issues involve questions of political power that extend beyond legality."[239] At the same time, the novelty of neighborhood justice centers offered a tantalizing potentiality; their operations remained up for grabs, and community residents potentially could transform them into spaces for protest, collective mobilization and education, and social transformation.[240]

236. *Id.* at 274; *see also* Bernard, *supra* note 97, at 258. Barbara Yngvesson noted that these programs did create cohesive communities among volunteer mediators, even if not within a neighborhood. *See* Yngvesson, *in* THE POSSIBILITY OF POPULAR JUSTICE, *supra* note 154, at 396–97.

237. CHRISTINE B. HARRINGTON, *Delegalization Reform Movements: A Historical Analysis*, *in* 1 THE POLITICS OF INFORMAL JUSTICE, *supra* note 233, at 35, 63.

238. Paul Wahrhaftig, *An Overview of Community-Oriented Citizen Dispute Resolution Programs in the United States*, *in* 1 THE POLITICS OF INFORMAL JUSTICE, *supra* note 233, at 75, 78–79. In some cases, informal processes and institutions were created at the behest of the powerful. *See* Mark H. Lazerson, *In the Halls of Justice, the Only Justice Is in the Halls*, *in* 1 THE POLITICS OF INFORMAL JUSTICE, *supra* note 233, at 119.

239. Richard Hofrichter, *Neighborhood Justice and the Social Control Problems of American Capitalism: A Perspective*, *in* 1 THE POLITICS OF INFORMAL JUSTICE, *supra* note 233, at 207, 213. By explicitly addressing questions of political power, this critique went beyond the argument that individualized dispute resolution would obscure shared legal grievances. *See supra* notes 95–101 and accompanying text.

240. *See* Hofrichter, *supra* note 239, at 243.

As Boaventura de Sousa Santos described this latent potentiality,

> the central contradiction is that the reform movement is associated with the powerful symbols of participation, self-government, and real community. This is its utopian transcendental element. It is true that these symbols are imprisoned within an overall strategy of social control. But though their form is distorted, the value of these symbols is nevertheless confirmed since even state-controlled community justice requires a certain amount of popular participation. It thus contains a potentially liberating element, if one that can be unleashed and made effective only through an autonomous political movement of the dominated classes.[241]

The utopian vision of popular justice contrasted with actually existing communitarianism.[242]

4. Civic Republicanism

Because arguments for the existence of some unifying tradition within American culture tended to be politically conservative (particularly as originalism was becoming a leading theory of constitutional interpretation on the right),[243] those creating a left form of communitarianism sought to recover a counter-tradition—which they found in historical engagement with the idea of republicanism.[244] The appeal to a republican tradition on the left was motivated by a demand for the "recovery of practical knowledge, situated judgment, dialogue, and civic friendship"[245]—elements associated with prudentialism.[246] As has been explained above, prudential reasoning required an appeal to objective standards, such as a shared set of social norms within a coherent community.[247] The "republican revival" used "culture" as an explanatory variable, understanding actors as constituted by their experiences, bounded in space and time.[248] It reclaimed an alternative history of the American

241. Boaventura de Sousa Santos, *Law and Community: The Changing Nature of State Power in Late Capitalism*, *in* 1 THE POLITICS OF INFORMAL JUSTICE, *supra* note 233, at 249, 264.

242. *Cf.* IMMERWAHR, *supra* note 61, at 12–14.

243. LAURA KALMAN, THE STRANGE CAREER OF LEGAL LIBERALISM 143–60 (1996).

244. *See generally* Daniel T. Rodgers, *Republicanism: The Career of a Concept*, 79 J. AM. HIST. 11 (1992) (analyzing the historical concept of Republicanism and its growth through the 1980s).

245. Frank I. Michelman, *Foreword: Traces of Self-Government*, 100 HARV. L. REV. 4, 25 (1986).

246. *See supra* Subpart III.C.1.

247. *See supra* note 198 and accompanying text.

248. G. Edward White, *Reflections on the "Republican Revival": Interdisciplinary Scholarship in the Legal Academy*, 6 YALE J.L. & HUMAN. 1, 11 (1994). Even as the prudential actor occupied a certain subject position within the objective structure, this framing had little room for the more radical

political tradition to address the "what next?" question posed to critical legal studies.[249] And, yet, republicanism remained a problematic concept for a progressive response to liberalism in that it remained an explicitly elitist ideology that was grounded in exclusion and was decidedly *not* a theory of mass participatory democracy.[250]

What really distinguished left republicanism was its concern with overcoming the ways that communities typically functioned to exclude.[251] Appeals to the organic unity of the community had less appeal for those who had long been excluded and whose membership as equals in the community remained in doubt.[252] Indeed, a basic tenet of critical race theory was that the glue that held white America together was racial domination; political bipartisanship, for example, tended to occur when whites united around black subjugation.[253] Legal equality had not entailed the baseline social equality that grounded the communitarian vision; reference to community norms (rather than to rights) presumed an agreed-upon equality and shared values.[254] This was the crux of the left version of republicanism: how to create a community upon shared values sufficiently robust to permit the exercise of practical reason and dialogue without relying on the Burkean invocations of tradition when that tradition excluded women, minorities, the poor, and others.[255] This was a vision that

subjectivism within feminist epistemology. Indeed, Fiss argued that this strand of legal thought rescued law from critical legal studies and feminist epistemology. *See* Fiss, *supra* note 12, at 255.

249. White, *supra* note 248, at 21.

250. *Id.* at 29–30; *see also* Cohen & Alberstein, *supra* note 19, at 1112 (explaining that deliberative democracy may represent a mistrust of the people and empower elite groups).

251. *See* Robert Weisberg, *Restorative Justice and the Danger of "Community"*, 2003 UTAH L. REV. 343, 348 ("[N]o matter how many 'communities' any individual is allowed to belong to, every such community identification has to have an outside in order to define the inside, and so any use of the term must exclude—and not always harmlessly.").

252. Derrick Bell & Preeta Bansal, *The Republican Revival and Racial Politics*, 97 YALE L.J. 1609, 1611–13 (1988).

253. *See* Derrick Bell, Brown v. Board of Education*: Reliving and Learning from Our Racial History*, 66 U. PITT. L. REV. 21, 30 (2004); Derrick A. Bell, Jr., Brown v. Board of Education *and the Interest-Convergence Dilemma*, 93 HARV. L. REV. 518, 523 (1980).

254. Judy H. Rothschild, *Dispute Transformation, the Influence of a Communication Paradigm of Disputing, and the San Francisco Community Boards Program*, *in* THE POSSIBILITY OF POPULAR JUSTICE, *supra* note 154, at 265, 318; *see also* Kevin Avruch, *Culture as Context, Culture as Communication: Considerations for Humanitarian Negotiators*, 9 HARV. NEGOT. L. REV. 391, 395 (2004).

255. Frank Michelman, *Law's Republic*, 97 YALE L.J. 1493, 1495 (1988) (describing a project that "entails not only the recognition but also the kind of re-cognition—reconception—of those histories that will always be needed to extend political community to persons in our midst who have as yet no stakes in 'our' past because they had no access to it").

placed disagreement and the recognition of difference at its core.[256] Members of a community so constructed would necessarily have sustained, ongoing interactions, and accordingly dispute resolution could contribute to the health of the community by empowering members to engage in civic dialogue and by developing the capacity for the community to resolve disputes internally and organically.[257] The contrast between this recognition of the profound tensions in the concept of community and the assumption of shared fundamental values in the legal process vision is striking.

5. How Communitarian Thought Manifests in ADR

Despite the differences among the ways these schools of thought define community and community norms, their attitudes towards dispute resolution share common features. Communitarianism enters into ADR as a cognizable orientation that privileges informal processes on the basis of their ability to foster human relatedness rather than for their instrumental ability to foster efficient settlements.[258]

The appeal of noninstrumental ways of thinking about disputes lay in the opportunities they created for disputants to engage their capacity for wisdom by broadening their perspectives and questioning their desired goals. The process of interest-based negotiation, by comparison, remained neutral with respect to the interests that individuals choose to satisfy because there was no independent basis on which to identify the good; what remains is instrumental reason.[259] The liberal concern with rights, to the extent these differed from internalized community values, imposed external standards on disputants rather than relying upon their situated wisdom.

There are some obvious ways in which communitarian thought manifests in dispute resolution theory. Perhaps its most concrete

256. *See* Cass R. Sunstein, *Beyond the Republican Revival*, 97 YALE L.J. 1539, 1575–76 (1988) ("A belief in universalism need not be accompanied by a desire to erase differences. Indeed, republicans see disagreement as a creative and productive force, highly congenial to and even an indispensable part of the basic republic faith in political dialogue. Discussion and deliberation depend for their legitimacy and efficacy on the existence of conflicting views. . . . Modern republicanism is thus not grounded in a belief in homogeneity; on the contrary, heterogeneity is necessary if republican systems are to work.").

257. Sally Engle Merry & Neal Milner, *Introduction, in* THE POSSIBILITY OF POPULAR JUSTICE, *supra* note 154, at 3, 10–11. One study of this variant of communitarianism describes it as a "citizens-around-the-table" vision. *See* Cynthia V. Ward, *A Kinder, Gentler Liberalism? Visions of Empathy in Feminist and Communitarian Literature*, 61 U. CHI. L. REV. 929, 932 (1994).

258. The antiprofessional element of this move was critical to strengthen the agency of participants without grounding success in the achievement of outcomes requiring process expertise. *See* Paul Wahrhaftig, *Nonprofessional Conflict Resolution*, 29 VILL. L. REV. 1463, 1465, 1468 (1984).

259. *See* Drucilla Cornell, *Toward a Modern/Postmodern Reconstruction of Ethics*, 133 U. PA. L. REV. 291, 307–08 (1985).

manifestation is Bush and Folger's transformative model of mediation, which they described as fundamentally relational: "The transformative framework is based on and reflects *relational* ideology, in which human beings are assumed to be fundamentally social—formed in and through their relations with other human beings, essentially connected to others, and motivated by a desire for both personal autonomy and constructive social interaction."[260] Carrie Menkel-Meadow's invocations of Carol Gilligan's ethic of care also foreground relatedness, and contrast informal dispute resolution against the adversarial nature of litigation.[261] Despite the liberal concern that ADR theory minimized the depth of conflict in order to foster harmony,[262] communitarian perspectives embraced the inevitability of conflict. As Andrew McThenia and Thomas Shaffer argued, the process of dispute resolution "is a process of reconciliation in which the anger of broken relationships is to be confronted rather than avoided, and in which healing demands not a truce but confrontation."[263]

By prioritizing the transformative potential of creating space for dialogue, many communitarian approaches have been less concerned with whether or not parties reached a settlement.[264] It is on this basis that some communitarians—including both those in the critical legal studies school[265] and mediation scholar Robert Bush[266]—questioned whether community mediation programs actually strengthened communities and disputants or whether they instead strengthened the state and pushed parties toward settlement.[267] The value of communitarian dispute resolution as a vehicle for justice was instead rooted in the possibility of forging authentic human connections rather than in achieving efficient outcomes. Arguing that "[j]ustice is not the will of the stronger; it is not efficiency in government; it is not the reduction of violence," McThenia and Schaffer claimed that "[j]ustice is what we discover . . . when we walk together, listen together, and even love one another, in our curiosity about what justice is and where justice comes from."[268] Justice inhered in

260. Dorothy J. Della Noce et al., *Clarifying the Theoretical Underpinnings of Mediation: Implications for Practice and Policy*, 3 PEPP. DISP. RESOL. L.J. 39, 51 (2002).

261. Menkel-Meadow, *supra* note 153, at 763–64 n.28.

262. *See supra* note 99.

263. Andrew W. McThenia and Thomas L. Shaffer, *For Reconciliation*, 94 YALE L.J. 1660, 1664 (1995).

264. Robert A. Baruch Bush & Joseph P. Folger, *Mediation and Social Justice: Risks and Opportunities*, 27 OHIO ST. J. ON DISP. RESOL. 1, 41 (2012).

265. *See supra* notes 233–41 and accompanying text.

266. *See, e.g.*, Robert A. Baruch Bush, *The Unexplored Possibilities of Community Mediation: A Comment on Merry and Milner*, 21 LAW & SOC. INQUIRY 715, 725 (1996).

267. *Id.* at 725–28; *see also supra* notes 234–39 and accompanying text.

268. McThenia & Shaffer, *supra* note 263, at 1665.

relationship-based processes that permitted individuals to authentically encounter each other.

Downplaying settlement in favor of an unalienated encounter left communitarian approaches open to the claims that they made unreasonable demands on disputants while being marginal to the actual practice of dispute resolution. David Luban contrasted the ideal of reconciliation based on love, rooted in Gilligan's feminist theory and in Unger's communitarian social theory,[269] against a vision of justice in which reconciliation is based in nothing more than "unexciting" mutual respect.[270] Luban's liberal critique of ADR's communitarian elements faults it for relying too much on love.[271] Owen Fiss instead critiqued ADR's communitarian elements for being a distraction from ADR's neoliberalism and mistaking the theory's periphery for its core.[272] He argued that

> Chief Justice Burger is 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.[273]

For these liberal critics, reconciliation was a naïve basis on which to design dispute resolution.

D. Varieties of Dispute Processing Theories

The relationship among these three approaches to dispute resolution changed significantly between 1976 and 1988. By the late 1980s, the interest-based approach predominated, and it has continued to do so up to the present day.[274] Current trends suggest that this may gradually be changing.

The aftermath of the 1976 Pound Conference involved fundamental questions regarding the nature of community-based informal dispute resolution and the role of the state in this form of dispute resolution. From the perspective of the judges and academics participating in the conference, informal dispute resolution promised the possibility of clearing court dockets while permitting swift, affordable justice to those with relatively straightforward complaints. Neighborhood justice centers were models for how to address disputes

269. David Luban, *The Quality of Justice*, 66 DENV. U. L. REV. 381, 414 (1989).

270. *Id.* at 415–16 ("Reconciliation based on respect is an unexciting and decidedly liberal idea, while the communitarian versions of reconciliation are often coupled with critiques of liberalism."); *see also supra* note 229.

271. Luban, *supra* note 269, at 415–17.

272. *See* Fiss, *supra* note 109, at 1669–70.

273. *Id.* at 1670.

274. *See* Jim Hilbert, *Collaborative Lawyering: A Process for Interest-Based Negotiation*, 38 HOFSTRA L. REV. 1083, 1087–88 (2010).

efficiently while tying into other neighborhood-level social reform initiatives.[275]

But this state-led effort to build community-based dispute resolution raised questions regarding whether they were actually empowering the communities they purported to serve.[276] Even the neighborhood justice center that seemed closest to the community, the San Francisco Community Boards,[277] nevertheless faced significant questions regarding whether or not it was sufficiently rooted in the community and whether or not it enhanced party autonomy.[278]

There was a great deal of interest in the wide-scale institutionalization of ADR programs at the local level, backed by the attorney general of the United States and drawing on the initiative of local reformers.[279] In contrast to elite-led initiatives, critical perspectives on community justice and programs that kept themselves at a distance from the state were at a relative disadvantage.[280] And there were significant pressures to professionalize local dispute resolution.[281] Notwithstanding the antiprofessional orientation of community-based justice, lay mediators received formal training in order to participate in these programs.[282] While initially permitting a wide variety of approaches, state agencies gradually obtained oversight over trainings for court-connected programs, while informal programs also developed more standardized trainings and certification processes.[283]

The publication of *Getting to Yes* in 1981, along with other texts in the interest-based framework, reshaped the field.[284] The formalization of interest-based negotiation theory brought disputant interests to the center of dispute resolution, promising a method of universal application for resolving a wide range of disputes without resorting to contests of rights—and promising the possibility of creating value for the parties in the process. Interest-based theory instrumentalized some of the concepts emphasized by communitarian perspectives on dispute resolution, such as thinking about disputants as being embedded within relationships, utilizing empathy, and

275. MCGILLIS & MULLEN, *supra* note 64, at 32.
276. *See supra* notes 233–41 and accompanying text.
277. MCGILLIS & MULLEN, *supra* note 64, at 163–72.
278. Merry & Milner, *supra* note 257, at 26.
279. *See id.* at 10–11; AUERBACH, *supra* note 31, at 131.
280. *See* AUERBACH, *supra* note 31, at 131.
281. Joseph B. Stulberg, *Training Interveners for ADR Processes*, 81 KY. L.J. 977, 980–81 (1993).
282. *Id.* at 981–82.
283. *See id.* at 996–98; Donald T. Weckstein, *Mediator Certification: Why and How*, 30 U.S.F. L. REV. 757, 757 (1996).
284. *See* Carrie Menkel-Meadow, *Legal Negotiation: A Study of Strategies in Search of a Theory*, 1983 AM. B. FOUND. RES. J. 905, 918 (discussing *Getting to Yes*).

focusing on communication.[285] Empathy, for example, could be understood in interest-based frameworks as fundamentally instrumental. According to one leading text, "Even if you are not interested in sharing a deeply soulful moment with your counterpart, remember that empathizing has highly practical benefits."[286] And the concepts of "relationship" and "communication" in negotiation could also be understood instrumentally as factors affecting the achievement of substantive goals.[287] Even when relationships are understood to be important in their own right, the negotiation theory literature generally does not go so far as to take the communitarian position that individuals are constituted by their relationships or their membership in communities; community matters as a way to help reach lasting settlements.

The possibility of creating value through interest-based negotiation also offered a further impetus to implementing ADR programs at scale at a time of heightened skepticism regarding the existence of a coherent public interest. Emphasizing the gains that could be achieved for individual disputants, even if at the expense of addressing systemic problems, highlighted the collective action problem at the heart of dispute resolution—the problem that concerned Fiss in his critique of the encroaching neoliberalism of dispute resolution theory.[288]

There were efforts to rethink dispute resolution beyond the constraints of neoliberalism, grounding the theory in its potential to foster genuine encounters between people. The communitarian revival of the 1980s tried to shift the focus away from the efficient resolution of disputes to strengthen communication and relationships in noninstrumental terms.[289] But aside from specific interventions that could be incorporated into the interest-based framework (as described above), this effort did not touch the core of ADR theory. For

285. *See* Hilbert, *supra* note 274, at 1085–86; *see also* David Millon, *New Directions in Corporate Law: Communitarians, Contractarians, and the Crisis in Corporate Law*, 50 WASH. & LEE L. REV. 1373, 1382–83 (1993).

286. ROBERT H. MNOOKIN ET AL., BEYOND WINNING: NEGOTIATING TO CREATE VALUE IN DEALS AND DISPUTES 49 (2000). Among these benefits are that empathy can improve the persuasiveness of one's own messages. *Id.* Admittedly, this requires genuine curiosity and cannot be purely strategic. *See id.* at 64.

287. *See* Bruce Patton, *Negotiation*, *in* THE HANDBOOK OF DISPUTE RESOLUTION, *supra* note 170, at 279, 282, 284; *see also* Bush, *supra* note 266, at 725–26 ("[T]he reason that communication is important [in the San Francisco Community Board Program] is that it helps produce good settlements. . . . [T]he definition of success and the expectation set by the CBP—for both the parties and the mediators—is reaching a win-win resolution. As for communication, it is valued primarily because it can help produce this result.").

288. *See supra* notes 102–09 and accompanying text.

289. Carrie Menkel-Meadow, *Regulation of Dispute Resolution in the United States of America: From the Formal to the Informal to the 'Semi-Formal'*, *in* REGULATING DISPUTE RESOLUTION: ADR AND ACCESS TO JUSTICE AT THE CROSSROADS 419, 422, 431–32 (Felix Steffek & Hannes Unberath eds., 2013).

example, from the perspective of legal theory writ large, theorists, such as Roberto Unger, have been read as central to ADR theory[290] even though the contributions of critical legal studies to ADR are now largely invisible and unacknowledged by ADR practitioners.

The theories of dispute resolution bring together a wide range of competing perspectives. One way of looking at this landscape is on the basis of the connection between the liberal strand of ADR and the legal process school. This approach sees dispute resolution theory as a big tent that encompasses all these traditions in an unproblematic way.[291] In this vein, one observer has described the development of ADR as part of a "new legal process" synthesis of economic methodology and critical analysis.[292] This paints a picture of a more comfortable synthesis than is warranted from the other perspectives.

Recognizing ADR as a synthesis of concerns with fundamentally different premises clarifies why its major critiques have enduring value. Some of the most influential critiques—such as those of Fiss or Delgado—owe their force to the liberal framing of the question of fitting the forum to the fuss; the question of which disputes involve arguments about public values or require the procedural protections of public institutions, and which (if any) are most appropriately considered purely private matters, implicates one of the core questions of liberalism. Seen from this perspective, it seems almost inevitable that the relationship between ADR and adjudication would be contested as ADR practitioners worked to make room for the play of market forces, on the one hand, or to distinguish the community from the state, on the other. Trying to find the public values at play in ADR does not reconcile the liberal element of ADR with either its neoliberal or its communitarian elements because the latter two have redefined how we understand the "public" in the first place.

The neoliberal and communitarian elements of ADR fit together even less comfortably. At the heart of this tension are two basic differences. One concerns the nature of the negotiating subject. From one perspective, the subject is autonomous and self-knowing (subject to certain cognitive or behavioral limitations), and group identity is largely a matter of choice. From the other perspective, the subject is fundamentally embedded within networks of relationships, and

290. *See supra* note 269 and accompanying text.

291. For example, Albert Sacks had identified the intellectual interest in dispute resolution as building upon legal process scholarship's focus on the interrelationships of various processes, the recognition of the law's differential impacts on different identity groups, interdisciplinary scholarship drawing on economics and psychology (particularly insofar as it brought greater recognition to the importance of emotions), the reflective methodologies of clinical legal education, and the growing study of the legal profession. Albert M. Sacks, *Legal Education and the Changing Role of Lawyers in Dispute Resolution*, 34 J. LEGAL EDUC. 237, 240–42 (1984).

292. Edward L. Rubin, *The New Legal Process, the Synthesis of Discourse, and the Microanalysis of Institutions*, 109 HARV. L. REV. 1393, 1424 (1996).

identity is not freely chosen. The other basic difference concerns the nature of reasoning in ADR. From one perspective, ADR involves specialized processes that are broadly applicable to resolve any number of disputes, independent of the specific ends to be achieved. From the other perspective, the processes are inextricably contextual and require the exercise of practical wisdom. The dominance of the interest-based approach in the past three decades has meant that we have focused on one particular side of these tensions—that of universal principles applied to decontextualized actors.

While the interest-based approach has predominated since the 1980s, there are some topics of current interest that rely on more communitarian principles and may require shifts in how we think about ADR or, in other words, how we think about individuals as embedded within relationships and communities, exercising practical wisdom that is deeply situational. The purpose of engaging with disputes, in this view, becomes one of deeply engaging with difference rather than one of getting to yes. In this shift from prioritizing interest-based resolution to prioritizing relationships, the liberal critiques defending public values retain their salience.

IV. CONTEMPORARY PROBLEMS

I now turn to some current problems within the broader field of dispute resolution that suggest that a shift is underway in ADR theory toward a renewed focus on community, relationships, and difference.[293] The first problem concerns the role of restorative justice within criminal law. The second problem concerns the role of dialogue in a moment of political polarization.

A. Restorative Justice

Restorative justice is an expressly communitarian approach to rethinking the ways in which outcomes are determined in criminal matters or in other matters of serious harm.[294] While drawing on approaches to criminal law as diverse as those from eleventh century England and from indigenous cultures,[295] the modern drive for

293. This is consistent with other developments in legal theory suggesting a new republicanism, such as K. Sabeel Rahman & Ganesh Sitaraman, *The Second Republican Revival*, LAW & POL. ECON. (Apr. 30, 2018), https://lpeblog.org/2018/04/30/the-second-republican-reviv/. For another argument that there is a growing "ethic of relationality," see Amy J. Cohen, *Moral Restorative Justice: A Political Genealogy of Activism and Neoliberalism in the United States*, MINN. L. REV. (forthcoming).

294. *See generally* JOHN BRAITHWAITE & PHILIP PETTIT, NOT JUST DESERTS: A REPUBLICAN THEORY OF CRIMINAL JUSTICE (1990) (discussing restorative justice ideas from a republican standpoint).

295. Mark S. Umbreit et al., *Restorative Justice: An Empirically Grounded Movement Facing Many Opportunities and Pitfalls*, 8 CARDOZO J. CONFLICT RESOL. 511, 515 (2007). On the complexity of framing restorative justice as a return to indigenous forms of justice, see Weisberg, *supra* note 251, at 371–72.

restorative justice in North America began contemporaneously with the 1970s establishment of neighborhood justice centers described earlier but drew on initiatives pioneered by Mennonite and Quaker communities.[296] The importance of community within the theory of restorative justice and the contrast that this theory creates between community justice and state justice—including the framing that crimes were "stolen" from victims by the state[297]—speaks to the importance of understanding the complicated relationship between community and the state within American democracy.[298] Recognizing that state actors, such as judges, prosecutors, and legislators, are accountable to the public, the theory of restorative justice nevertheless questions whether such state actors adequately speak for the community and whether the delegation of criminal justice to the state creates the appropriate relationship between the community and the criminal justice system.[299]

It is important to understand how restorative justice addresses the harms of crimes in terms of the distinction between private interest and public values. The state-centric understanding of crimes transmutes the private harms experienced by victims into public harms that require a collective response through the state.[300] Punishment by the state forestalls individual acts of retribution through the use of the state's monopoly on violence, possesses an expressive function to indicate social opprobrium and deter others, and incapacitates and possibly rehabilitates the offender.[301] By contrast, restorative justice keeps the focus on the individual who has experienced harm and the community in which the victim and offender are embedded.[302] Restorative justice focuses on restoring the victim and the community by repairing harm and removes punishment or retribution from the set of available restorative responses.[303]

For more on the allure of indigenous forms of justice for dispute resolution scholarship, see *supra* note 42.

296. Susan Olson & Albert W. Dzur, *Revisiting Informal Justice: Restorative Justice and Democratic Professionalism*, 38 LAW & SOC'Y REV. 139, 142–43 (2004).

297. Nils Christie, *Conflicts as Property*, 17 BRIT. J. CRIMINOLOGY 1, 3–4 (1977).

298. Weisberg, *supra* note 251, at 373–74; *see also* Olson and Dzur, *supra* note 296, at 145. One element that may contribute to the distancing of the community from the state within the theory of restorative justice is the explicitly religious dimensions of restorative justice. *See* Frederick Mark Gedicks, *Restorative Justice and the Two-Track Establishment Clause*, 2003 UTAH L. REV. 523, 523 (2003).

299. *See* Albert W. Dzur & Susan M. Olson, *The Value of Community Participation in Restorative Justice*, 35 J. SOC. PHIL. 91, 93–94 (2004).

300. Erik Luna, *Punishment Theory, Holism, and the Procedural Conception of Restorative Justice*, 2003 UTAH L. REV. 205, 220 (2003).

301. *Id.* at 209, 217–18.

302. *Id.* at 228.

303. Christie, *supra* note 297, at 10. *But see* Stephen P. Garvey, *Restorative Justice, Punishment, and Atonement*, 2003 UTAH L. REV. 303, 305 (2003).

This creates conceptual difficulties. First, understanding the harm as fundamentally private—as a matter between victim and offender or confined within a particular community—means that the restorative actions to be taken by the offender are subject to the satisfaction of the victim and the community (perhaps within some upper and lower bounds set by law).[304] This raises the possibility of unequal sanctions for otherwise similar crimes—a major problem from a public law perspective.[305] It also significantly reduces the participation of the state, which might take a different view of the social consequences of a crime than the immediate community.[306] And because criminal matters may implicate public values and the protections afforded by formal legal processes, restorative justice is more generally open to the same critiques as ADR.[307]

In addition, some critics of restorative justice have asked what distinguishes crimes, within a restorative justice framework, from torts—where remedies are intended to make plaintiffs whole rather than to punish wrongdoing.[308] In this view, the salient feature of crime is that it causes *moral* injury that requires more than restoration of the victim.[309] For restorative justice to provide the symbolic remedy that punishment can (theoretically) accomplish, it would need to go beyond the acknowledgment of wrongdoing and expiation of guilt through reparation in order to also achieve atonement through the offender's acceptance of—rather than the community's imposition of—some hardship.[310] Notwithstanding the importance of the offender's voluntary assumption of penance, the

304. *See* John Braithwaite, *Holism, Justice, and Atonement*, 2003 UTAH L. REV. 389, 395 (2003).

305. Dan Markel, *Wrong Turns on the Road to Alternative Sanctions: Reflections on the Future of Shaming Punishments and Restorative Justice*, 85 TEX. L. REV. 1385, 1408–09 (2007).

306. *Id.*; *see also supra* note 101 and accompanying text. This is further complicated by the ways in which restorative justice often draws upon traditionalist understandings of community and community norms. *See* Dzur & Olson, *supra* note 299, at 98–99.

307. Richard Delgado has extended his critique of the procedural informality of ADR to restorative justice. *See generally* Richard Delgado, *Goodbye to Hammurabi: Analyzing the Atavistic Appeal of Restorative Justice*, 52 STAN. L. REV. 751 (2000) (viewing restorative justice in light of the current judicial system). As others have noted, the use of plea bargains to process the overwhelming majority of criminal cases already removes most criminal matters from public scrutiny. *See* Luna, *supra* note 300, at 247. Nils Christie makes the more fundamental point that even formally public proceedings are often inaccessible to the public and conducted in terms that are legally significant but may not speak to lay concerns. *See* Christie, *supra* note 297, at 3.

308. Garvey, *supra* note 303, at 311. For the inverse of this—the movement to eliminate punitive damages from tort law in order to limit damages to compensation for harm—see Morton J. Horwitz, *The History of the Public/Private Distinction*, 130 U. PA. L. REV. 1423, 1425 (1982).

309. Garvey, *supra* note 303, at 306–07.

310. *Id.* at 313–14.

focus of restorative justice is on the victim and the community—not on the offender's rehabilitation.[311]

This is where the distinction between the settlement-oriented current of ADR and the communitarian countercurrent brings some clarity; restorative justice's insistence on keeping the focus on the *relationships* among victim, offender, and the community is what preserves the distinction between crime and tort. The theory of restorative justice is built upon the necessity of *engaging* with conflict rather than resolving it away through monetary damages.[312] It has been developed as a reaction against systems of justice that are dominated by professionals and the pursuit of efficiency.[313] That is, while a negotiated or mediated settlement in a private tort matter might be expected to focus on efficient solutions (recognizing that there may also be some important relationship elements to attend to), an approach to restorative justice that prioritized efficiency would be perverse.[314] This raises the question of whether restorative justice, so understood, can be implemented at scale. The danger for

311. David Dolinko, *Restorative Justice and the Justification of Punishment*, 2003 UTAH L. REV. 319, 331 (2003).

312. Christie, *supra* note 297, at 7.

313. *See id.* at 11; Olson & Dzur, *supra* note 296, at 148. This orientation is complicated by the creation of new dispute resolution professionals, such as facilitators and mediators. *See* Weisberg, *supra* note 251, at 354 n.48; *see also* Lederach & Kraybill, *supra* note 195, at 376 ("While the values and goals of the movement, that is, the desired end-state, is participatory empowerment, that *end* is undermined when the *means*, the delivery and training structures, are increasingly professional and prescriptive, or co-opted as part of the current system in order to gain legitimacy."); *supra* notes 209–16 and accompanying text.

314. For a parallel, consider the strategic use of apologies in tort matters. Jonathan Cohen argues that it would be unethical to apologize insincerely for strategic benefits, but a sincere apology is not ethically questionable for also being motivated by strategic considerations. Jonathan R. Cohen, *Advising Clients to Apologize*, 72 S. CAL. L. REV. 1009, 1065–66 (1999). Similarly, while participation in restorative justice may require a genuine commitment to the healing process by all parties, we need not be troubled if it also results in some personal benefits to the parties.In the context of apology, however, Lee Taft argues that the encouragement of apology through legislated safe harbors undercuts the moral weight of apology:

> When the performer of apology is protected from the consequences of the performance through carefully crafted statements and legislative directives, the moral thrust of apology is lost. The potential for meaningful healing through apologetic discourse is lost when the moral component of the syllogistic process in which apology is situated is erased for strategic reasons.

Lee Taft, *Apology Subverted: The Commodification of Apology*, 109 YALE L.J. 1135, 1157 (2000). For Taft, it is precisely the risk of making an apology that makes it a "truly moral act" in contrast to Cohen's call for "safe" apologies which let "the parties speak with one another without the specter of liability lurking in the background." *Compare id.*, *with* Cohen, *supra*, at 1067 (discussing the impetus behind apologies). Ultimately Taft's fear is that the strategic dimensions of apology, while not precluding genuine contrition, nevertheless create a significant risk of corruption. *See* Taft, *supra*, at 1158.

implementing restorative justice on a wide scale is that, while settlement is important, a single-minded pursuit of settlement may limit the scope of restorative justice to matters that are amenable to easy solutions rather than to addressing the community's deeper concerns of justice.[315]

The dilemmas of restorative justice provide a dramatic example of the tensions among the three currents of ADR explored in this Article.[316] The desire to reach efficient outcomes can easily overwhelm the goal of restoring relationships and community norms. Keeping the focus on the immediate parties to the crime highlights the construction of the public/private dichotomy that remains central to the theory of dispute resolution while also challenging the process/substance dichotomy insofar as the use of restorative process is itself intended to achieve the substantive goal of restoring community relationships.

B. Dialogue

There are several reasons why we might care about political polarization and the possibilities of engaging in political dialogue with our peers. For example, dialogue may be understood in functional terms as a way to strengthen deliberative democracy within a public sphere that complements the functions of government institutions.[317] Dialogue may also be understood instrumentally in connection with civility as a way of creating the conditions in which politicians can govern more effectively by reducing barriers to dealmaking and avoiding *ad hominem* attacks.[318] Within the framework of this Article, dialogue as an element of deliberative democracy speaks to the concerns of legal process while dialogue as creating conditions for legislative dealmaking speaks to the concerns

315. *See* Jennifer L. Llewellyn, *Dealing with the Legacy of Native Residential School Abuse in Canada: Litigation, ADR, and Restorative Justice*, 52 U. TORONTO L.J. 253, 281 (2002); *see also* Braithwaite, *supra* note 304, at 400 ("[E]motional and relational forms of reparation seem to be more important to most victims than material reparation.").

316. These tensions do not map onto a left/right distinction; rather, each side of the issue draws upon economic and relational logics. *See* Cohen, *supra* note 293.

317. *See* Edward L. Rubin, *Getting Past Democracy*, 149 U. PA. L. REV. 711, 752 (2001). Rubin, however, questions the ideal of deliberative democracy as a romanticized view of Athenian democracy. *Id.* at 749; *cf.* Cornell, *supra* note 259, at 367–68 ("The shrinkage of the public realm . . . has considerably diluted the ideal of the citizen, and with it the ideal of the participatory democracy . . . The opportunity to participate in . . . political life . . . requires more . . . than liberalism's formal recognition of each of us as abstract subjects equal before the law. It depends on the achievement of the material and cultural conditions for participation.").

318. Toni M. Massaro & Robin Stryker, *Freedom of Speech, Liberal Democracy, and Emerging Evidence on Civility and Effective Democratic Engagement*, 54 ARIZ. L. REV. 375, 383 (2012).

of interest-based negotiation. My point of entry, however, is a third understanding of dialogue that has been prominent recently—as an exploration of sameness and difference to promote mutual understanding. This Part explores how that element of dialogue impacts the others.

The participants in the 2018 symposium on "Dispute Resolution and Political Polarization" in the *Journal of Dispute Resolution* identified a wide range of problems created by polarization and identified ways in which engaging in dialogue could reduce this polarization.[319]

Calls for dialogue often manifest as an exhortation of shared values; for example, Nancy Rogers appeals to an "American spirit" representing "agreement among a large segment of the nation, across the major political parties, about what people living in the country share."[320] This recapitulates Boorstin's arguments from the consensus history tradition.[321] And just as Boorstin valorized politics

319. *See generally* Rafael Gely, *Introduction to "Dispute Resolution and Political Polarization"*, 2018 J. DISP. RESOL. 1 (2018).

320. Nancy H. Rogers, *One Idea for Ameliorating Polarization: Reviving Conversations About an American Spirit*, 2018 J. DISP. RESOL. 27, 27–28 (2018).

321. Rogers's "American spirit" literally follows in Boorstin's footsteps; the "genius" in the title of his book refers to the spirit presiding over America's destiny. BOORSTIN, *supra* note 43, at 1. To Rogers's point about the American spirit representing what is shared within American society, Boorstin argued that "[h]ere the number of people who do not accept the predominant values of our society is negligible" and that political disagreements have been "over the practical question of how to secure the agreed objective, while conciliating different interests, rather than over ultimate values or over what interest is paramount." *Id.* at 138–39. What Boorstin saw as a characteristic American volubility, that we "are inordinately fond of hearing ourselves and others talk about what we believe," was due to this fundamental agreement about the ends of politics. *Id.* at 149–57. This contrasted with the situation in Europe, in which differences over the ends of politics necessitated political *theory*, as distinguished from political *speech*. *Id.* at 138. Within the ideological context of the Cold War, Boorstin feared that this appreciation of a shared political framework was fading; his proposal to restore dialogue was an explicitly Burkean project of surfacing "the general truths about institutions by which we have actually lived" and recognizing the culture's seamlessness across space and time. *Id.* at 169, 175–79. An American attuned to these truths of the institutions of American life would "see[] the complexity of his task and the constant need for improvement. He can never rest in the puffing satisfaction of righteous knowledge." *Id.* at 180. Boorstin's closing words seem to capture much of what the contemporary movement for civil political dialogue advocates: "We must refuse to become crusaders for liberalism, in order to remain liberals. . . . We must refuse to become crusaders for conservatism, in order to conserve the institutions and the genius which have made America great." *Id.* at 189. The final three words have taken on an unfortunate meaning in the current climate.In short, as regards dialogue, for Boorstin, values arose from experience rather than from reason, and the shared experiences of American life meant that politics was strictly a matter of creating the means by which to achieve broadly shared ends. Democratic politics meant incrementalism, problem-solving, and compromise. *See* PURCELL, *supra* note 44, at 252–53.

as a nonideological exercise in pragmatism, so too do contemporary paeans to bipartisanship wrap themselves in such terms as a "problem solvers convention" organized by "No Labels."[322] Such labels explicitly assume a politics of finding technocratic solutions to shared problems on the basis of agreed-upon values rather than seeing values themselves as contested.

Even as defenders of the faith in shared American values insist that a social consensus exists, they fear that this consensus is fragile and continually in need of defense, lest it be swept away. One of the principal weapons deployed against challenges to privileged political positions is the charge of *incivility*, which "is often couched as politically neutral; but it is not. It aligns with a dominant, centrist, status quo approach."[323] The demand for civil political discourse privileges centrist, mainstream, and elite positions from which political conflict actually can be understood as a question of *means* rather than of *ends*.[324] Accordingly, charges of incivility can raise a procedural challenge to discussing difficult substantive topics, keeping the focus on means rather than acknowledging the desire to work toward different ends. But the problem of politics for outsiders is fundamentally about the distribution of power and resources and one's relative place within society—issues that are not "civil" insofar as they are fraught with conflict.[325] Opening the political process to the marginalized entails hearing their grievances. Appeals to civility can therefore be ways of silencing those on the margins, including people of color, women, and those with unpopular political views.[326]

322. *See Problem Solvers*, NO LABELS, https://www.nolabels.org/nh/ (last visited Dec. 23, 2019). William Simon sees the pragmatic, problem-solving approach as requiring "the transcending of distributive bargaining." *See* Simon, *supra* note 129, at 208. To the extent that claiming the mantle of "problem-solving" means downplaying distributive questions, it eliminates much of politics. For more on the relationship between integrative and distributive elements of negotiation theory, see *supra* notes 142–44 and accompanying text.

323. Bernard E. Harcourt, *The Politics of Incivility*, 54 ARIZ. L. REV. 345, 370 (2012).

324. *See id.*

325. *Id.* at 350.

326. Radin and Michelman recognized that "dialogue (insofar as it is not disguised coercion) presupposes community; but community is not, finally, a matter of will or sympathetic exertion but rather is a contingency of cognitive structures into which we are thrown." This led to "a disturbing conceptual instability: the collapse of conceptual walls between personal and societal, internal and external, self-active and compulsive; and the concomitant confusion of persuasion (choice, freedom) with prescription (necessity, compulsion)." Margaret Jane Radin & Frank Michelman, *Pragmatist and Poststructuralist Critical Legal Practice*, 139 U. PA. L. REV. 1019, 1041 (1991); *see also* LYNN MIE ITAGAKI, CIVIL RACISM: THE 1992 LOS ANGELES REBELLION AND THE CRISIS OF RACIAL BURNOUT 6 (2016).

Limiting dialogue to a search for common ground deprives it of its *political* character.[327]

Concern with civility focuses on the behavior through which concerns are expressed, rather than the social conditions that have brought this behavior into being, as Martin Luther King, Jr. reminded us.[328] Consider King's compromises to transform the 1963 March on Washington from a multiday sit-in at the Capitol into a narrower, day-long event:

> The only way to hold together a biracial coalition of white liberals, labor unions, Northern urban politicians, and blacks was to accept the framework of the dominant culture. Civility was the minimum common denominator for that compromise—playing by the rules of the game, not breaching propriety, acting in a reasonable and dignified manner. Yet civility was also the instrument through which the dominant culture regulated social and political discourse and, therefore, in the largest sense, retained control of the political agenda.[329]

This should not be taken as a brief for incivility—on the contrary, civility is a powerful weapon.[330] But it remains a double-edged one.

An alternative to the search for consensus instead understands society as fundamentally agonistic, focusing on the experience of difference and seeing conflict as fundamental and necessary. Rather than grounding the possibility of dialogue on the potential of participants to encounter each other on the basis of some fundamental relatedness, one might consider a vision of dialogue that begins with radical otherness.[331] Rather than seeking solutions to problems by "getting to yes," the goal is being able to "live with no."[332]

Related to this effort to live with fundamental difference is an effort to build the capability to engage in "robust exchange"[333] and develop "conflict resilience."[334] The concern here is not about

327. Robert Post, *Theorizing Disagreement: Reconceiving the Relationship Between Law and Politics*, 98 CALIF. L. REV. 1319, 1339–40 (2010) ("If our disagreement becomes too intense, if we wish to exterminate each other rather than peaceably to live together, we cannot engage in the practice of politics. Alternatively, if we agree too much, if we cease normatively to value disagreement because we expect all to concur on common remedies for common problems, we also cannot engage in the practice of politics.").

328. *See* Martin Luther King, Jr., *Letter from Birmingham City Jail*, *in* A TESTAMENT OF HOPE: THE ESSENTIAL WRITINGS OF MARTIN LUTHER KING, JR. 289 (James Melvin Washington ed., 1986).

329. WILLIAM H. CHAFE, CIVILITIES AND CIVIL RIGHTS: GREENSBORO, NORTH CAROLINA, AND THE BLACK STRUGGLE FOR FREEDOM 246 (1980).

330. Harcourt, *supra* note 323, at 373.

331. *See* Erik Cleven et al., *Living with No: Political Polarization and Transformative Dialogue*, 2018 J. DISP. RESOL. 53, 57 n.29 (2018).

332. *Id.* at 55.

333. Robert C. Bordone, *Building Conflict Resilience: It's Not* Just *About Problem-Solving*, 2018 J. DISP. RESOL. 65, 66 (2018).

334. *Id.* at 70.

emphasizing civility as a good in itself or about looking for common ground and solving problems;[335] rather, it is about strengthening the ability of individuals to surface and engage with tension while maintaining political community.[336] To that end, dialogue engages more than just the rational dimension of thought[337] with empathy doing much of the work of understanding what our counterparts want and how they feel in addition to how they understand the world.[338] But empathy, understood as a projection of the self into the position of the other, can only generate meaning insofar as there is some element of the self that persists through that act of projection.[339] We can draw upon some wellspring of shared experiences and imaginatively construct something that may (or may not) be akin to others' experiences[340]—but understanding becomes harder as the differences multiply, and consequently it requires that much more work to build the foundation for understanding. And make no mistake, it requires *work*. For dialogue as an exploration of difference to *mean* anything requires building some shared understanding against which to measure those differences and acknowledging the limits of that understanding.[341]

The exploration of sameness and difference through dialogue permits the reconciliation of plural values—not by insisting that one side or the other is right, let alone by meeting somewhere in the middle, but by constructing new forms of solidarity.[342] The process of dialogue becomes substantively important insofar as it permits new ways of relating to each other—and not as a means to achieve some predetermined end.[343] The centrality of process in midcentury legal thought was due to an identification of legal reason with the use of instrumental reason to advance subjectively determined ends, which became a guiding principle of ADR in its liberal and neoliberal forms.[344] Dialogue—understood as a fundamentally relational undertaking in which participants explore each other's stories and the reasons for which they hold their beliefs, engaging in discussion and argument without needing to reach agreement and thereby

335. *See id.* at 69.

336. *Id.* at 72.

337. Carrie Menkel-Meadow, *Why We Can't "Just All Get Along": Dysfunction in the Polity and Conflict Resolution and What We Might Do About It*, 2018 J. DISP. RESOL. 5, 9 (2018).

338. *Id.* at 17–18.

339. *See* Ward, *supra* note 257, at 939–43.

340. *See id.* at 944–51.

341. Peter Gabel has recently described practices centering on such understanding as a possible path to a revitalized jurisprudence of social transformation. *See* Peter Gabel, *Critical Legal Studies as a Spiritual Practice*, 36 PEPP. L. REV. 515, 530–31 (2009).

342. *See* Cornell, *supra* note 259, at 377.

343. *See id.* at 376.

344. *Id.* at 377.

creating new forms of relationship[345]—can be seen as fundamentally an exercise in developing practical wisdom regarding the ends of the law.

This view of dialogue as permitting the identification of sameness and difference presumes that we can, with effort, identify some shared premises with our dialogical partners. By contrast, radical subjectivity—taking seriously that you have your views and I have my views and there is no way to reconcile them in some objective way[346]—would make the exercise of dialogue pointless by making understanding impossible, and we would have no recourse to polarization save to either eke out some narrow deals on matters of shared concern or to join our friends to defeat our enemies. Instead, maintaining faith in our ability to achieve some objective basis for understanding means that we can, and indeed must, explore the perspectives of our dialogical partners *without* sacrificing our abilities to exercise judgment. Dialogue need not mean condoning evil in an attempt to preserve some fig leaf of neutrality. A sensitive attempt to learn from others while sharing our own perspectives as part of a common search for truth still permits us to join Arthur Leff in insisting that evil is real.[347]

345. Carol Gilligan, revisiting the lessons of *In a Different Voice* in 2019, recognized a growing interest in "the need for a human voice to counter a voice that constrains our humanity—the call to reframe our understanding of care and to recognize the audacity in caring: the risk it involves, the intelligence it takes, the audacity of love." Carol Gilligan, *"In a Different Voice": Act II*, L.A. REV. BOOKS (Mar. 15, 2019), https://lareviewofbooks.org/article/in-a-different-voice-act-ii/.

346. Some work in ADR gestures in this direction. *See, e.g.*, MICHAL ALBERSTEIN, PRAGMATISM AND LAW: FROM PHILOSOPHY TO DISPUTE RESOLUTION 313 (2002) ("What would have been considered radical and subversive in the legal realm - the claim that perception of facts is always subjective, that our judgments are full of biases, and that it is all a matter of settling and the way we present a matter - is assumed here nonchalantly as a state of nature, as a problem we can try and then master.").

347. Leff challenged the refusal to speak in terms of ethical principles, writing:

Napalming babies is bad.
Starving the poor is wicked.
Buying and selling each other is depraved.
Those who stood up to and died resisting Hitler, Stalin, Amin, and
Pol Pot—and General Custer too—have earned salvation.
Those who acquiesced deserve to be damned.
There is in the world such a thing as evil.
[All together now:] Sez who?
God help us.

Arthur Allen Leff, *Unspeakable Ethics, Unnatural Law*, 1979 DUKE L.J. 1229, 1249 (1979).

V. AN AGENDA

The tripartite structure of ADR theory laid out in this Article describes a series of responses to a particular moment in American history. The dislocations of the 1970s challenged notions of social consensus and whether the existing legal system was adequate to the difficult tasks of, on the one hand, making justice accessible to disputants in relatively small-scale cases and, on the other hand, of addressing structural injustices occurring across American society. The framework of interest-based negotiation added a fundamentally different justification for the use of ADR procedures in the 1980s based in efficiency and value creation rather than in community building or enforcement of rights. A renewed communitarian movement emphasizing relationships and community values in the 1980s directly challenged the instrumental reason of the interest-based framework but remained on the margins. While interest-based negotiation principles have predominated in ADR practice, contemporary developments may signal increased interest in addressing disputes through communitarian principles. This calls for addressing long-standing challenges with the concept of community.[348]

One important set of questions concerns the role of identity in dispute resolution. Although matters of identity have been addressed in the literature, left unresolved are the ways in which more fundamental elements of identity shape the experience of shared community membership that drives the communitarian visions of ADR.[349] While the intersection of race and ADR theory has generally been understudied, this becomes particularly important because of the ways that community has traditionally been used to exclude people of color.[350] Richard Delgado's critiques of ADR[351] raise important questions about how informality may exacerbate the impacts of prejudice, and recent work in understanding implicit bias[352] extends these insights. The framework of intersectional

348. *See* IMMERWAHR, *supra* note 61, at 184 ("To recognize communitarians' place in history is to give up on a fantasy, the fantasy that community is the great untried experiment of the industrial age. It is to treat community with less reverence and with more curiosity, to move it from the altar to the dissection table.").

349. *See* STONE ET AL., *supra* note 169, at 111–28. *Difficult Conversations* discusses identity in terms of three core questions: "Am I competent? Am I a good person? Am I worthy of love?" *Id.* at 112. While important, these fail to engage directly with structural problems of identity relating to race, gender, class, etc.

350. Indeed, Derrick Bell's pioneering early works in critical race theory were roughly contemporaneous with early developments in ADR; bringing these two stories into conversation may shed light on the use of difference and community in legal thought in the final quarter of the twentieth century.

351. *See supra* notes 112–15 and accompanying text.

352. *See, e.g.*, Carol Izumi, *Implicit Bias and Prejudice in Mediation*, 70 SMU L. REV. 681, 681 (2017).

theory offers a powerful lens through which to see the relationship between identity and power, and ADR theory must grapple with it.

Another important set of questions concerns the tension between the universal aspirations of interest-based theory based in instrumental reason and the particularism of communitarian theories based in practical wisdom. This Article locates the origin of modern ADR in a particular moment in American history and shows how ADR theory has long oscillated between the universal and the particular.[353] ADR drew inspiration from specific indigenous traditions for their ability to address disputes in their full particularity and generalized abstract principles from these traditions.[354] The story of how indigenous and customary dispute resolution regimes became sources of practical wisdom, were processed to extract abstract universal principles, and then exported back to their points of origin as part of a project of legal modernization remains to be told.[355]

A third set of questions concerns what is involved in implementing communitarian forms of ADR processes at scale. This is particularly important now, as online dispute resolution ("ODR") systems are being developed. While the term covers a wide range of topics, the main benefits of ODR center on the efficiencies that it can achieve, particularly within the small-scale, largely impersonal transactions that occur online.[356] This is not a context that seems to lend itself to thinking about difference, but several recent studies emphasize how technology can reinforce prejudice.[357] As ODR systems begin to be used more widely, it is important to surface the assumptions about identity that are built into them and the pressures that prioritize efficiency over developing understanding. This will

353. To be sure, American developments were part of a larger pattern; for an argument situating ADR within Duncan Kennedy's concept of contemporary legal thought, see Amy J. Cohen, *ADR and Some Thoughts on "the Social" in Contemporary Legal Thought*, *in* SEARCHING FOR CONTEMPORARY LEGAL THOUGHT 454 (Justin Desautels-Stein & Christopher Tomlins eds., 2017).

354. For example, one of the earliest efforts to create community-based "moots" for addressing crime drew upon practices from Liberia. *See* Richard Danzig, *Toward the Creation of a Complementary, Decentralized System of Criminal Justice*, 26 STAN. L. REV. 1, 42 (1973); *see also* Eric A. Fisher, *Community Courts: An Alternative to Conventional Criminal Adjudication*, 24 AM. U. L. REV. 1253, 1285 (1975). The literature on mediation also drew upon Chinese experiences and Confucian thought. *See generally* Jerome Alan Cohen, *Chinese Mediation on the Eve of Modernization*, 54 CALIF. L. REV. 1201 (1966).

355. An important contribution is Amy J. Cohen, *Debating the Globalization of U.S. Mediation: Politics, Power, and Practice in Nepal*, 11 HARV. NEGOT. L. REV. 295 (2006).

356. *See generally* ETHAN KATSH & ORNA RABINOVICH-EINY, DIGITAL JUSTICE: TECHNOLOGY AND THE INTERNET OF DISPUTES (2017) (discussing the past, present, and future of ODR).

357. *See generally* THE INTERSECTIONAL INTERNET: RACE, SEX, CLASS, AND CULTURE ONLINE (Safiya Umoja Noble & Brendesha M. Tynes eds., 2016) (discussing prejudice online).

require a robust theory of how identity affects dispute resolution at scale.

Such studies can help us refine our thinking about the role of difference within ADR. In order to address the challenges of a diverse society, riven by profound disagreements and historic levels of inequality, our theory must reckon with the ways in which the desires to protect public values, achieve efficiencies, and build community can conflict with each other. The guiding principles of the field derive from a particular moment in our history and may no longer speak to our pressing concerns. The time is ripe to reassess the theoretical basis of dispute resolution.