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Whither Community Justice?: The Rise of Court-Connected Mediation in the United States

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This paper traces the development of mediation in the United States along two distinct paths: the court-connected paradigm and the community justice paradigm. In the former, as a child of the labour arbitration movement, the link between mediation and the law appears to have been forged at conception. In the latter, we see two distinct branches: the 'Community Mediation Center' model and the 'Neighborhood Justice Center' model. Of those illustrations of community justice, only the first has been strongly connected to the law and legal institutions, while the second strand has retained its institutional independence. These neighborhood justice centres appear to have maintained their autonomy by 'staying local' in terms of goals, staff and clients. While this independence is, in itself, a distinct achievement, this paper queries whether it has served to impede the evolution of NJCs in their aspirations to transform society and empower the marginalized inhabitant, when their integration into the mainstream has been so limited.

Osgoode Hall Law School. Many thanks are due to my Osgoode colleagues generally and to my able research assistant, Robin Senzilet for her diligence and creative initiative. Thanks also to the anonymous reviewers of an earlier version of this article for their helpful comments.
"Discourage litigation. Persuade your neighbors to compromise whenever you can. Point out to them how the nominal winner is often a real loser - in fees, expenses, and waste of time. As a peacemaker the lawyer has a superior opportunity of being a good man. There will still be business enough."

Abraham Lincoln "Notes for a Law Lecture" (July 1, 1850)

I. INTRODUCTION

Since its advent as a tool of social justice and personal empowerment, mediation has become increasingly institutionalized, now finding itself closely aligned with traditional legal systems, professionals and norms. Certainly, the most rapidly growing mediation models are those which are connected to the courts, whereas, by contrast, we have seen a modern withering of those mediation models that remain independent from state institutions. Of greater interest is the link between a given mediation model's objectives, process shape and outcomes and the extent to which that model is institutionalized. As our obsession with efficiency grows, we see parallel growth in institutionalized mediation models aimed entirely at delivering efficient, accessible results, regardless of the quality of justice. By contrast, few examples remain of mediation programs that continue to promote a 'social change' agenda based on transformational, party-centered models operating within local neighbourhoods. What began as mediation's divided promise of enhanced efficiency on the one hand, and social change on the other, has become a story of a single dominant model with a handful of alternative outposts.

This paper traces the development of mediation along two distinct paths: the court-connected paradigm and the community justice paradigm. In the former, as a child of the labour arbitration movement, the link between mediation and the law appears to have been forged at conception. In the latter, we see two separate branches: the Community Mediation Center model and the Neighborhood Justice Center model. In these examples of community justice, only the former has been strongly connected to the law and legal institutions, while the latter has retained its independence. Neighborhood Justice Centers [NJCs] appear to have maintained their institutional independence by 'staying local' in terms of goals, staff and clients. To whatever extent such independence, in itself, may be a distinct accomplishment, query whether the lack of connection to state institutions has served to impede NJCs in achieving their aspirations of transforming society and empowering the marginalized citizen. While we are witnessing a growing integration of state-connected mediation programs into the mainstream, the same cannot be said for NJCs.

We are left with the increasing reality of mediation as a tool of the courts and state institutions, with its pragmatic goals of improving judicial efficiency in a quicker and less costly process. While this goal has been coloured with the rhetoric of access to justice, the emerging question is whether such a characterization is accurate if it fails to result in meaningful access and pivotal social change. As our insistence upon efficiency in dispute resolution
Histog of US. Mediation continues to grow without a parallel demand for accountability, our failure as a field to measure the respondent shifts in the quality of justice being accessed through efficiency gains, threatens irreparable harm to our systems of civil justice.

As mediation has redesigned our dispute resolution landscape across North America, a variety of process frameworks have emerged. Not surprisingly, there are various ways to group these mediation models, in order to compare and contrast their defining characteristics. The categories that I wish to focus upon in this article are two that correspond to what I will call mediation’s “divided promise”. First, we have the “transformative” category that includes mediation models that concentrate primarily upon the social change impacts of a process aimed to transform society and improve relationships among disputants and towards disputes. I think of the other grouping of mediation models as the “efficiency” category. Here, mediation models seek the efficiency gains of mediation by providing faster and cheaper conflict resolution. In this article, my intention is to trace these two mediation paradigms through recent United States history in order to begin to understand the way in which one thread has essentially withered, while the other continues to expand and thrive.

Looking more closely at the content of each category, we find a striking correlation between the objectives and the process models that they inspire. In particular, we find that those mediation programs that have as their primary objective an enhancement of efficiency in dispute resolution almost invariably produce mediation models that are closely linked to, and supported by, state institutions. At the risk of overstating the point, institutionalized mediation models are almost exclusively focused on quicker, faster and more accessible justice. By contrast, we see few if any institutionalized mediation models that aspire to the ‘social change’ agenda of individual empowerment and relationship improvement. Rather, models that are founded on these objectives usually operate independently, peripherally and with the assistance of a cadre of neighbourhood volunteers and staff. While having greater local control over their mandates, these programs also face challenges around meaningful impact and community integration. Unlike their institutionalized cousins, these community based models struggle to attract enduring financial support and mainstream recognition.

It is clear that institutionalized ‘efficiency’ models of mediation have overtaken the field. Mediation scholars have conducted considerable empirical work measuring efficiency outputs of mediation such as shifts in the costs,

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3 I am currently working on a companion piece to this one, considering the historical connections between mediation and the law in a Canadian context. While there has been far less scholarship produced on this point in Canada, my preliminary inquiries support a view that a similar evolution has occurred in our country, albeit somewhat later and perhaps less bifurcated than is found in the American story. As such, while some points will be made in the pages that follow about the Canadian experience with mediation’s development, this piece will be primarily American in its focus.
pace and litigant satisfaction in the context of court-connected mediation programs. As noted in many of the empirical studies, efficiency outputs are measured because it is these outputs – decreased costs, decreased delay, earlier settlements – that lie at the heart of various program objectives. It is clear that the institutionalized models of mediation have little interest in those mediation impacts that are unrelated to efficiency gains.

The American experience with mediation is not alone in this regard. In 1994, for example, Ontario established its Civil Justice Review, structured as a collaborative initiative of the Ontario Court of Justice (General Division) and the Ministry of the Attorney General. From the outset, there was a clear mandate respecting the goals of what was to become the Ontario Mandatory Mediation Program (OMMP). In January 1999, a pilot project was introduced that operated to amend Ontario’s Rules of Civil Procedure by mandating early mediation for all non-family, civil case-managed cases filed in the Ontario Superior Court of Justice in Ottawa and Toronto. The Ontario experience has considered four output measures. First, does the rule improve the pace of litigation? Second, does it reduce costs to the participants? Third, does it improve the quality of disposition outcomes? And finally, does the rule improve the operation of the mediation and litigation processes?

Ultimately, the formal evaluation of the OMMP pilot program concluded that it had succeeded on all measures flowing from its objectives. While scholarship has been conducted around other impacts and effects of the

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6 The Review was established to respond to public complaints that our civil justice system was inaccessible for a variety of reasons. As it was the Review that ultimately led to the implementation of mandatory mediation in Ontario, it is noteworthy to consider its stated mandate: “to develop an overall strategy for the civil justice system in an effort to provide a speedier, more streamlined and more efficient structure which will maximize the utilization of public resources allocated to civil justice.” Emphasis added. Ontario Civil Justice Review, First Report of the Civil Justice Review (Toronto: Ontario Civil Justice Review, 1995) at 3-4; Ontario Civil Justice Review, Supplemental Report and Final Report of the Civil Justice Review (Toronto: Ontario Civil Justice Review, 1996) at 2.

7 It was to be an answer to the inefficient backlogs of traditional adjudication in this province, and during the early stages of planning, there appeared little if any official talk about mediation’s other capacities for social change. This was to be about improved judicial efficiency. While debate has since arisen surrounding other objectives of the OMMP – some noting its role in enabling better access to justice for disputants who are ill equipped to absorb the costs and delay of traditional litigation – the guiding principles of the sponsoring institutions were explicit.

O\textsuperscript{MMP}\textsuperscript{9}, the discourse has been dominated by an efficiency framework, one that has led to striking changes in the program responding to a finding of inefficiency.\textsuperscript{10} As long as the generated data suggests efficiency gains, this program has continued to expand in scope.\textsuperscript{11}

By contrast, the category of transformative programs in the United States continues to shrink. In this way, the divided promise of mediation is increasingly a story of the broken promise of transformational mediation. Why does this matter? What concerns me now, after decades of mediation conversation, is the extent to which mediation has become a whispered opportunity, lost among the many voices clamouring for quicker, cheaper means of resolving disputes. I wonder about the efficiency model of mediation and its capacity for the very objective it aspires to achieve – meaningful access to justice. If we slavishly seek efficiency for its own sake, without demanding accountability alongside, there is a great risk that the very justice, to which we are attempting to grant better access, may consequently be compromised. We need to take a much closer look at the institutionalization of mediation and its impacts.

The intent of this paper is to suggest a lost opportunity: the social transformation once pledged by mediation’s early advocates. In its place, we find a field dominated by one model of mediation and the likelihood that even that model will fail in delivering the enhanced access to justice that it has promised. I begin this task with a consideration of mediation’s ‘divided promise’ as illustrated in the early history of mediation in the United States. Beginning in Colonial America, we will witness the distinct development of mediation’s ‘efficiency’ promise and its ‘social change’ promise. The second section examines the intersections of mediation and the legal process and institutions and professionals in American history. I flesh out several historical models of mediation, focusing on the rise of the court-connected and community justice paradigms of mediation. Using these models as a backdrop, I then examine the contemporary debate: whether to institutionalize or refrain from institutionalizing mediation. At the risk of being seen to dodge the ultimate question about mediation’s institutionalization, this paper serves to illustrate concerns around the current trajectory being travelled by this ever-growing process of dispute resolution. While a focus on efficiency in dispute resolution is clearly not without merit, we must similarly insist on accountability in measuring all of the outcomes of these efficiency gains. To fail to do so risks almost certain erosion of meaningful access to justice.


\textsuperscript{10} In December 2004, a practice direction was issued by the Regional Senior Justice of the Ontario Superior Court for Toronto, entering Toronto into a pilot program that included a significantly reduced and restricted case management scheme. Among other changes, this new program includes shifts that reschedule mandatory mediation to much later on the litigation timeline. The preamble around this direction dearly linked the changes to perceived inefficiencies under the OMMP as it operated in Toronto.

\textsuperscript{11} Although originally the OMMP was limited to the judicial centers of Toronto and Ottawa at its inception in January, 1999, it was expanded into the County of Essex (Windsor) in December, 2002.
II. MEDIATION'S 'DIVIDED PROMISE'

Before we can consider the effects that legalization and institutionalization have had upon the mediation process, we must first attempt to identify those bonds that have developed over time between certain models of mediation and broader legal institutions. In the pages that follow, I will trace mediation's early development in order to show the evolution of its divided promise and the explicit privileging of mediation's 'efficiency capacity' over its 'social change capacity'.

The larger question concerns the impact of the connections between mediation and state-run legal institutions. If court-connected mediation models have blossomed across North America, and if these models emphasize efficiency without some accountability for the quality of justice that is achieved, can we truly characterize this as progress in our approach to dispute resolution? Our need to move accountability onto the agenda has never been greater, as our preoccupation with efficiency begins to erode the fabric of justice in our post-industrial society.

Exactly one hundred years ago, addressing the *A.B.A. Conference on the Causes of Popular Dissatisfaction with the Administration of Justice*, Dean Roscoe Pound noted that "the system does not change until ill effects are felt, often not until they are felt acutely." Clearly, concern over the limitations and shortcomings of our traditional adjudicative processes is not a recent phenomenon. However, as is often the case, identifying the problem and solving the problem are two entirely different issues.

Seventy years later, the now famous "Pound Conference" was convened. Again, the focus was fixed upon the reasons and cures for our perpetual dissatisfaction with the state of the justice system. In his celebrated address, Harvard academic Frank Sander extolled the virtues of the 'multi-door courthouse' approach where disputes could be assessed on a number of enumerated criteria, and then sorted and directed for resolution to the most appropriate process. Referring to the decline of societal institutions, such as church and family, as having led to a greater reliance upon the courts, Sander presented mediation as one of the leading potential processes for relieving the growing judicial burden and, consequently, the resulting dissatisfaction with the administration of justice.

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12 See Della Noce, "Mediation Theory" supra note 2.
13 F. Snyder, "Crime and Community Mediation: The Boston Experience" (1978) Wis. L. Rev. 737
14 The original "Pound Conference" was held in St. Paul MN. in May, 1906, an event that was replicated 70 years later in the same location. See Warren E. Burger, "Agenda for 2000 A.D.: The Need for Systematic Anticipation – Keynote Address Delivered at the National Conference on the Causes for Popular Dissatisfaction with the Administration of Justice (April 7-9, 1976)" (1976) 70 F.R.D. 83 at 93-95; Frank Sander, "Varieties of Dispute Processing – Address Delivered at the National Conference on the Causes for Popular Dissatisfaction with the Administration of Justice (April 7-9, 1976)" (1976) 70 F.R.D. 111.
15 Sander, *ibid.* at 118-126 (the criteria to be considered in determining the most appropriate dispute resolution process included: nature of the dispute, relationship between the disputants, amount in dispute and relative costs and 'speediness' of the different processes).
In the next breath, however, Sander proceeded to endorse the words of
another giant in the field of alternative dispute resolution [ADR], Professor
Lon Fuller. Quoting from Fuller's renowned article on mediation, Sander
celebrated mediation as a process whose central quality is "its capacity to
reorient the parties toward each other, not by imposing rules on them, but by
helping them to achieve a new and shared perception of their relationship, a
perception that will redirect their attitudes and dispositions towards each
other."17 Sander further noted mediation's capacity to improve long-term
personal relationships and support the wider community.18 Commenting a
quarter century after Sander's seminal address, Justice Wayne Brazil observed
the many and varied promises of ADR, noting one of its defining beauties
to be,

[t]hat it is not built on any one promise, but on many different
kinds of promises – promises that can and should evolve over
time. Another notion that is fundamental to court ADR is that
the parties should decide for themselves which promises are
most important to them.19

As mediation is increasingly institutionalized, we must ask if its primary goals
of improving judicial efficiency leave room for other aspirations? Or, does
mediation's capacity to effect meaningful social – to transform relationships
continue to flourish in other forms thought of collectively as community
mediation? I remain unconvinced that these two models, with their divergent
sets of goals and capacities, can co-exist, being more inclined to believe that
one can only thrive at the direct expense of the other. As noted by Nancy
Welsh in discussing the demise of self-determination in court-connected
mediation processes,

Thus, even as most mediators and many courts continue to
name party self-determination as the 'fundamental principle'
underlying court-connected mediation, the party-centered
empowerment concepts that anchored the original vision of
self-determination are being replaced with concepts that are
more reflective of the norms and traditional practices of
lawyers and judges, as well as the courts' strong orientation to
efficiency and closure of cases through settlement.20

At the risk of falling prey to binary thinking, let us more closely consider the
historical intersections between mediation and the law, intersections that will
carry us closer to understanding the relationship between these very different
offspring of mediation.

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17 Ibid. at 115, quoting L. Fuller, "Mediation: Its Forms and Functions" (1971) 44 S. Cal. L. Rev.
305 at 325.
18 Sander, ibid. at 127-128.
19 W. D. Brazil, "Court ADR 25 Years After Pound: Have we Found a Better Way?" (2002) 18
Ohio St. J. Disp. Resol. 93 at 95.
20 N. Welsh, "The Thinning Vision of Self-Determination in Court-Connected Mediation: The
Inevitable Price of Institutionalization?" (2001) 6 Harv. Negot. L. Rev. 1 at 5. [Welsh,
"Thinning Vision"].
III. HISTORICAL INTERSECTIONS: THE TANGLED ROOTS OF MEDIATION AND THE LAW

There are various ways to recount the story of mediation and its connection to our legal institutions, norms and professionals. A close look reveals the emergence of a two-track evolution of mediation in North America. We begin our consideration, therefore, by looking at the early roots of informal, third-party dispute resolution as a backdrop to establishing the current connections between mediation and the law. Scholars largely agree that two branches of mediation developed over time and that each, while distinct from one another, responded to a growing dissatisfaction with the traditional adjudicative model.

By considering the two resulting mediation frameworks of court-connection and community justice, we find the genesis and growth of the institutionalization and legalization of this process. While there are certainly other frameworks of mediation that are neither court-annexed nor oriented towards community justice, these are two of the key mediation frameworks, a comparison of which will serve to highlight the differences that result from the presence or absence of institutional connections, especially insofar as these institutions represent the interests of the state.

A. The Early Evolution: Mediation in the New World

Much has been written about the early history of informal dispute resolution processes in North America, most of which focuses on the American experience. It has been suggested that three models of dispute resolution arose during American Colonial times: arbitration, mediation and group consensus. Susan Donegan argues that all three processes were explicitly communitarian, focusing on resolving disputes within the community and that all three shunned the involvement of adjudicative bodies or lawyers. This philosophy towards dispute resolution was consistent with the commitment to a cohesive community, without which survival for these early settlers would have been impossible. While the nature of communities varied in early 17th Century America, many of these settlements were faith-


based, and were largely “geographically, ethnically and commercially cohesive.” They were committed to Puritan ideals of communal harmony, so that the framework adopted for dispute resolution was based upon enhancing the collective good through consensual, rather than adversarial, decision-making.

Colonial mediation often involved a third party who “intervened in a dispute to aid the principals in reaching an agreement” and who generally operated within ecclesiastical society. Laura Nader notes that the Massachusetts community of Dedham, established in 1636, used mediation as the primary process for resolving disputes and avoided adjudication for virtually fifty years.

Disputes in Dedham were mediated by ‘three understanding men’ or ‘two judicious men’, selected by the townsmen or by the disputants themselves. Mediation urged parties to ‘live together in a way of neighborly love and do each other as they would have the other do themselves’.

One of the strong convictions widely held by Colonial Americans, one that led to the adoption of non-adjudicative dispute resolution mechanisms, was a profound and persistent anti-lawyer/anti-institutional sentiment. As many of these settlers arrived after having fled British rule and authority, it is not difficult to imagine the widespread distrust of the English court system that accompanied these immigrants, along with an enduring suspicion of any British institution amassing too much control. As Donegan notes, local magistrates and colony-based judges made it quite obvious in their decisions that their first allegiance was to the crown; not to the American experience.

What lawyers did exist in the colonies were often subjected to hostility as their mere presence offended the puritan regime with its demands that justice be achieved through communitarian and consensual processes rather than through the application of legal rules. In Colonial Maryland, there is evidence of inflated fees for legal services, usually paid in pounds of tobacco. Lawyers were among the wealthiest men in the colony, creating an elite class.

24 Donegan, supra note 21 at 14.
27 Ibid. at 25.
28 Donegan, supra note 21 at 17.
29 See P. Carrington, “ADR and the Future of Adjudication: A Primer on Dispute Resolution” (1996) 15 Rev. Litig. 485 at 485-86 (claiming that Puritan settlers of New England had little use for law or legal processes). But note that this inclination was not universal among the colonies. See Auerbach, supra note 25 at 36-37 (contrasting the community of Dedham with the two Massachusetts towns of Plymouth and Salem, both known to be extremely litigious. Auerbach attributes this aberration to the high level of commercial activity, religious diversity and private land ownership in these towns as distinct from their counterparts in Dedham and Sudbury, another example of communitarian religious homogeneity).
of landowners and investors. As a result of emerging distrust and perhaps, resentment against these lawyers, the third parties most often retained by colonists to assist in the facilitation of early disputes, were members of the clergy. There, to remind disputants of God's expectations in terms of maintaining harmony, these early American church leaders were able to support consensual processes that would underscore the puritan covenant in the new world.

While the communitarian vision of early Colonial America would gradually be replaced by levels of population growth and diversification that made informal dispute resolution processes impractical, this was not the only reason for the emergence of courts and the legal profession as the prevailing framework for dispute resolution. By the time of the American Revolution, rapid industrialization and commercial growth in the new world led to the formation of complex trade and commerce laws that required expert legal interpretation and application.

In this growing, fragmented and diverse society, where strangers had replaced neighbours, it appeared that "only litigation could assure a measure of stability among conflict." As a result, Auerbach notes that by 1790, at the beginning of the new nation, "[c]ourts were numerous and accessible; and a professional class of lawyers served eager litigants." Despite the abundance of adjudicative models arising from the ashes of the battle for independence, the informal resolution of private disputes continued to flourish, even if they increasingly were located within the greater framework of legal dispute resolution.

If the Colonial era was characterized by homogeneous, religious communities framing puritan communitarian values of peace and harmony rather than individual entitlements, then the post-Revolution 19th Century can only be seen as a rather dramatic departure from its past. Often referred to as the 'golden age' of American law, law became the leading instrument for economic growth, public power and competent dispute resolution. In all of the states and territories, courts were established and adjudication quickly came to dominate other models of dispute resolution. Some scholars credit the restrictions imposed upon arbitration by "a judiciary and bar hostile to extrajudicial settlement" with the significant erosion in the efficacy of arbitration, and its consequent declining use.

30 A. Day, "Lawyers in Colonial Maryland: 1660-1715" (1973) 17 Am. J. Legal Hist. 145; see also L. Friedman, A History of American Law (New York: Academic Press, 1973) (referring to lawyers as 'cursed hungry caterpillars whose fees will eat out the very bowels of our Commonwealth' at p. 83); Auerbach, supra note 25 at 8 (noting that the Fundamental Constitutions of Carolina declared it a 'base and vile thing' to plead a case for a fee).
32 Donegan, supra note 21 at 21.
33 Nader, Ten Societies, supra note 26 at 35.
34 Auerbach, supra note 25 at 46.
35 Auerbach, ibid.
Despite this shift in paradigm, however, informal dispute resolution continued to grow, albeit primarily in those communities that remained on the 'frontier' of settlement and those isolated, religious-based, utopian communities, most commonly associated with New England and the mid-West. And, even within the burgeoning urban centres that embraced the rapid legalization of dispute resolution, some resistance to legalization continued to be felt. A notable plea for the separation of dispute resolution from the law was issued from William Duane's 1805 defence of arbitration. Claiming that early 19th Century America had elevated law to the monopoly of an elite few, Duane called for the end of the "oppression of the people by lawyers", adding that litigation contributed nothing but "intolerable expense, delay and uncertainty." Even at this early date, we see a nascent linkage between 'alternate' processes and the goal of increased judicial efficiency.

Auerbach argues convincingly that the turning point for alternative dispute resolution 'objectives' came with the end of the Civil War. Until that point, the non-adjudicative resolution of disputes was consistent with communitarian values and collective interests. However, that all changed in the 1800s: "beyond [the Civil War], amid turbulence of race and labor relations, alternative dispute resolution was reshaped... and in the second half of the nineteenth century, the purposes (if not the forms) of alternative dispute settlement were redefined." Belief in, and implementation of, processes, such as mediation and arbitration grew as a remedy to the choked courtroom and as a deterrent to the fears of racial uprising and class conflict.

Auerbach provides two detailed examples of the growth of alternative dispute settlement in the second half of the 19th Century. He discusses the establishment, following the Civil War, of the Freedman's Bureau: a government agency intended to manage the transition from slavery to freedom. Confronted with a huge volume of civil disputes between former masters and their newly-freed slaves, arbitration panels were implemented to handle labour disputes involving less than $200 in claimed damages. These panels ran parallel to the classic adjudicative processes established at the time.

Auerbach's second example from the same period revolves around the increasing incidents of industrial labour-management conflict, including
railroad strikes and riots during the violent summer of 1877: "Without arbitration of industrial disputes, [proponents of arbitration] feared the national disaster of another civil war, this time between capital and labor".\(^4\) Again, this illustrates the growing shift of alternative dispute resolution away from its earlier manifestation as a means to achieve and maintain community bonds, towards its use as a tool of the developing bureaucracy and judicial system to efficiently dispose of claims and to avoid the societal threat of large scale disputing.\(^4\)

While the processes in these examples are essentially adjudicative in nature, albeit with alternative decision-makers, they evidenced a 'different' model for solving disputes and, presumably, for reducing burdens on the early Colonial courts caused by the growth of population and the attendant need for dispute resolution. Perhaps more importantly, they evidence the willingness of early settlers to conceive of an alternative process for resolving disputes - a creative willingness that comes to fuel future growth in ADR.

The emergence and establishment of informal dispute resolution was supported, in part, by the cultural patterns and expectations carried by immigrants to the new world. As continuous waves of settlers arrived in America in the early 1900s, they regularly gravitated to one another, settling in ethnocentric neighbourhood pockets where they could continue the ways of the communities left behind, focusing on deeply inherent communal traditions as they made their way in the new world. As Auerbach notes, approaches to disputing were included in these traditions:

New immigrants had good reason to resist, at least temporarily, litigation and the judicial process. They often dwelled [sic] in communities where personal relationships were intricately social and enduring, not impersonally contractual and transitory. They did not share the prevalent American assumption that a judge, adversary relations, and Anglo-Saxon legal procedure guaranteed justice.\(^5\)

Clearly, the early American experience around dispute resolution continues to resonate well beyond its time frame. We will see many of the same issues and concerns with mainstream processes expressed today.

B. Evolving into the 20\(^{th}\) Century: Contemporary Developments

The early Colonial experiments with dispute resolution models can be grouped into two familiar categories: either, they were ethnocentric, community-based and completely distinct from mainstream adjudicative models, or they developed (as the Freedman's Bureau) as court-connected models to dispose of claims that would otherwise fall to the courts to resolve. As populations grew in number and cultural diversity, the community-based

\(^{43}\) Auerbach, \textit{ibid.} at 60.

\(^{44}\) Not all agree with Auerbach's assessment. See, for example, Nejelski & Zeldin, \textit{supra} note 37 at 792 (observing that Americans have traditionally been more inclined to settle disputes by force or its closest substitute, litigation, so that the firm establishment of judicial remedies by the 19th Century led to the virtual absence of efforts to implement or promote arbitration during this period).

\(^{45}\) Auerbach, \textit{supra} note 25 at 69-70.
model of ADR weakened its grasp in response to the dilution of ethnic concentrations in populated centres. The state-connected model, however, continued to evolve and burgeon alongside the growth of legal institutions and the constituencies they served, a burgeoning that continues to this day.

So, while the Colonial period in North American history witnessed the emergent connections between mediation and the law, these connections achieved far greater scope and strength in the decades that followed. It is in the 20th Century that we see a clearer distinction between these models in their contexts, approaches and promises. Both the court-connected and community-based models emerge from the late 20th Century with ideologically distinct identities and we are only now beginning to see the implications of those differences in our culture of disputing.

1. The Rise of the Efficiency Paradigm

When we think of the court-connected paradigm of mediation, a number of descriptors come to mind, but perhaps the most universal objective of these models is that of increased efficiency; cheaper, faster processes that aim to provide enhanced access to justice and a reduced burden on our judicial resources. With these aims in mind, there are significant differences in the mediation processes, however varied, that fall under the umbra of court-connected mediation:

These differences in goals and orientation are reflected in the different approaches which the mediators take. Because the main purpose of adjunct agencies is the efficient processing of minor disputes, and because their survival often depends on the quantity of cases that they can successfully remove from the courts, these programs are not geared toward discovering and treating the underlying causes of a dispute. Even though adjunct mediators are technically free to inquire into any areas that may be troubling the parties, the mediators are under pressure from program directors to focus on quantity. Thus, in practice, the mediators tend to confine their questioning narrowly to those issues immediately related to a specific dispute.

Certainly, there are pressures brought to bear on the mediation process by its proximity to legal institutions. The emergent relationship is not one of peers, but is more aptly characterized as a master-servant connection, with the mediation model growing out of the adjudicative function. As Dorothy Della

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46 When referring here to the 'court-connected model', this definition has been limited to two applications: those programs that are formally joined to courts and those programs or agencies that, although formally independent, have policy priorities and program characteristics that directly align with those of the official court adjuncts. Unlike some of the community-based models, that tend to draw their clientele independently based upon community awareness, court-connected models rely largely, if not exclusively, upon client referrals from the judicial system.

Noce notes, considering the ability of court-connected mediation to withstand connections to the traditional adjudicative model,

...the notion of court-connected mediation presents a fundamental ideological dilemma. Court connected mediation represents a marriage between two distinct social institutions, which are built upon fundamentally different ideologies or moral visions. In essence, when the proposed alternative is wedded to the institutional status quo, the resulting dilemma is how to reconcile the inevitable conflict of moral visions. 48

Reflecting upon Della Noce's 'moral visions', thoughts of mediation's other capacities, completely unrelated to efficiency, spring to mind. If, for example, a mediator is attempting a transformative, relational approach that is party-driven and focused on empowering the parties, how is this impacted by operating within a system that is explicitly focused on settling disputes earlier, faster and cheaper? Before we can answer that question, we need to revisit the development and growing use of arbitration, voluntary and mandatory, in 20th Century North America, as, it is in these processes that we find the "roots" of modern court-connected mediation. 49

(a) The Legacy of Labour Arbitration in America

The historical record clearly establishes that early American courts were hostile to the notion of compelling parties to arbitrate, even when arbitration was contractually agreed upon in advance. While Colonial jurists might well have feared an undermining of judicial authority with the advent of arbitration, 50 their repeated refusal to enforce arbitral awards demonstrates a view that "public policy did not favour final and conclusive arbitration." 51

Despite this widespread judicial suspicion, we see in the early 20th Century the emergence of various strands of neutral decision making, especially in the context of labour disputes. 52 Barry Bartel discusses two such strands. 53 The first was the impartial chairman system established in 1911 in a Chicago factory; a


49 See e.g., J. Stulberg, "Training Interveners for ADR Processes" (1992/93) 81 Ky. L.J. 977 at 983 (noting that "the sustained history of mediation use began as a response to labor-management turmoil and led to the development of the professional service of mediators to help resolve labor-management problems"). See also R. Calkins, "Mediation: The Gentler Way" (1996) 41 S. D. L. Rev. 277 for a similar analysis.

50 Maggio & Bales, Contracting, supra note 20.

51 Ibid. at 160; see Tobey v. County of Bristol, 23 F. Cas 1313, 1321 (D. Mass. 1845) (no. 14,066), holding that a party is not legally entitled to demand the specific performance of an agreement from a court of equity and that public policy does not permit parties being compelled to submit to arbitration to resolve disputes.

52 Certainly the modern history of dispute resolution within organized labour predates the early 1900s, but it is the development during the 20th Century which can be linked to the origins of early mediation. For a complete discussion of the historical development of the modern labour union, see G. Blakey & M. Hogan, "The Legal Framework of Public Intervention in Industrial Disputes" (1960) 35 Notre Dame L.Rev. 654.

model using an arbitrator vested with the "reserved power to render a final and binding decision." Secondly, Bartel describes the umpire system originating in the coal industry following the award of a 1903 Strike Commission that established the Board of Commission to settle industrial grievances. If unable to settle a grievance, all evidence was to be submitted to a neutral umpire for adjudication.

(i) Post-WWI: A New Era in Arbitration

While this article does not purport anything more than a brief review of the emergence of arbitration within and outside of the labour milieu, some background is necessary to contextualize the offshoot of mediation that soon followed. Arbitration historians have noted the dawn of a "new era in American arbitration" following the first World War, marked by legislation holding arbitration agreements to be legally valid and enforceable.

In 1917, President Wilson created a Mediation Commission charged with settling the labour relations problems arising from wartime industrial efforts. The Commission recommended a national labour policy based on principles of collective bargaining, with a central agency to provide a standardized labour-relations policy and an administrative arm to focus on the settlement of labour dispute. As a result of these recommendations, the first National War Labour Board was established in 1918. In 1925, Congress passed the United States Arbitration Act, since codified as the Federal Arbitration Act, focusing primarily on the enforcement of inter-state arbitration agreements.

Returning to the labour context, labour arbitration as a means of settling industrial disputes was rooted more firmly into the American landscape once
management began to agree to multi-step grievance procedures culminating in binding arbitration of disputes in exchange for labour’s promise not to strike, a *quid pro quo* arrangement endorsed much later by the U.S. Supreme Court in the ‘Steelworkers’ Trilogy’ of 1960.60

(ii) Emerging Alternatives: The Small Claims Court

While necessary to provide context, an examination of arbitration does not tell the complete story of early 20th Century dispute resolution. During the same time frame, we see growing discontent concerning access to justice across the new nation. These concerns culminate in the 1913 arrival of the first Small Claims Court and Conciliation Tribunal in Cleveland.61 This tribunal was statutorily mandated to “endeavor to effect an amicable adjustment” of the dispute.62

In practice, the clerk for the Conciliation Branch would initiate the process by offering a settlement to the defendant by telephone or mail. If this failed to resolve the matter, and assuming the claim was less than $35, the case would be heard by a judge sitting in the Conciliation Branch. In 1914, Cleveland managed to settle by conciliation 42% of the cases on its docket.63 A number of small claims courts were established in other urban centres based on the Cleveland model,64 each of which was similarly installed as a branch of the respective municipal court, created by court rule and supervised by judges.

By contrast, the Kansas legislature created Small Debtors’ Courts in Topeka, Leavenworth and Kansas City in 1913.65 These courts were organized quite differently, employing ‘lay’ judges who need not be legally trained, in a model that operated independently of the city municipal courts. Also, lawyers were prohibited from representing clients under this system, and the claim ceiling was set at $20. There was significant reaction to the Kansas system. Focusing on three main complaints, critics argued that (a) judicial supervision was necessary in order to guarantee appropriate dispositions; (b) lay judges were inappropriate for dispensing justice66; and, (c) it was inappropriate for lawyers to be prohibited from participating in a process, noting “there are some cases where a party is ignorant, or frightened, or unfamiliar with our language, so that an attorney might assist the court and facilitate the hearing.”67 We see here the early rumblings of the legal profession’s bid to

63 Harrington, *supra* note 61 at 55.
64 Chicago (1916), Minneapolis (1917), New York (1917), Philadelphia (1920).
65 Harrington, *supra* note 61.
66 R. Pound, “Principles and Outline of a Modern Unified Court Organization” (1940) 23 J. Am. Jud. Soc. 225 at 248 (Pound took particular offence to the idea of lay justice in these Kansas courts, rejecting “the old idea of justice without law administered on the basis of sympathy” as a “repeated failure of the system which fails to be justified by experience”).
retain a monopoly on the 'law business', a movement that has grown in scope and strength over the last 100 years. 68

While reformers consistently urged the reduction of litigation through conciliation and called for more compulsion to achieve this goal, 69 it is clear that the conciliation they sought was one that operated firmly within the existing court system. Christine Harrington notes that "criticisms of the courts after 1940 focuses on the fact that they were appendages of traditional justice institutions rather than genuine alternatives to the adversarial process." 70 Citing a 1975 study conducted by Yngvesson and Hennessey, she argues that small claims court literature from this period indicates that informal procedures were nothing more than a simplified, streamlined version of conventional adjudication without due process protections. 71 While state involvement in these early mediation attempts may have been less overt even a quarter-century ago, the current role of mediation as a process used to achieve state aims is far less subtle.

(iii) The Great Depression, the New Deal and the Taft-Hartley Act

In 1926, the American Arbitration Association was created, consolidating three arbitration societies in New York, ostensibly to ensure that reliable dispute resolution services would be available to those seeking alternatives to traditional adjudication and to more generally promote the use of arbitration in the settlement of disputes. 72 Although there is scant literature describing the exact shape of arbitration processes of the early 20th Century, scholarship from that period suggests approaches that parallel current models, centered on one or more arbitrators chosen for substantive expertise in the field of the dispute. The use of arbitration continued to grow through the late 20s and 30s during the Great Depression and pre-war period.

In 1938, the New York University School of Law offered the first course ever in arbitration law. In 1946, a course in arbitration law was offered at Yale University. 73 Gradually, the link between early ADR processes and the law was being forged, in both professional and academic communities.

Commentators have noted the development in the first quarter-century of a number of federal labour boards, engaged in the "widespread, almost orthodox, use of ADR processes, such as mediation, conciliation and voluntary arbitration to resolve labor disputes." 74 In contrast to this

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69 Harrington, supra note 61 at 57
70 Ibid. at 58.
71 Ibid.
72 R. McCrate, "The Legal Community's Responsibilities for Dispute Resolution" (1988) 43 Arb. J. 15, discussing the merger of the Arbitration Society of America, the Arbitration Foundation and the Arbitration Conference, all three of which had existed with the main goal of promoting the use of arbitration as a means to resolve disputes.
74 V. Sanchez, "A New Look at ADR in New Deal Labor Law Enforcement: The Emergence of a Dispute Processing Continuum under the Wagner Act" (2005) 20 Ohio St. J. Disp. Resol. 621 at 624 (considering primary evidence suggesting that, in fact, the NLRB may have continued to use third party facilitated processes under the Wagner Act); see also R. O'Brien, Workers'
movement towards voluntary processes, the 1935 passage of the National Labor Relations Act (known as the Wagner Act) created the independent National Labor Relations Board [NLRB] that was invested with adjudicatory powers. The majority of scholarship surrounding that Board focuses on its adjudicatory function to the exclusion of informal processes. As Sanchez notes,

The historical record from this period suggests an emerging new orthodoxy that trumpeted the primacy of quasi-adjudication over ADR processes to resolve labor disputes under the Wagner Act. It heralded the Board's investiture with the power to adjudicate disputes in the enforcement of the Wagner Act, and disassociated the Board's adjudicatory function from the use of ADR by other governmental entities to resolve labor disputes that were outside the jurisdiction of the Wagner Act. 75

However, Professor Sanchez proceeds to suggest a revised view of the New Deal era, demonstrating that available evidence from the period evidences a practice whereby the NLRB employed both adjudicative and non-adjudicative, facilitated processes to resolve the disputes before it:

The historical record documenting how the NLRB ‘disposed’ of cases shows that justice was both negotiated and adjudicated along a dispute processing continuum. That continuum began with the use of ADR processes such as negotiation, mediation and conciliation to enforce the law via settlement agreements...If the informal phase of the process failed, agents of the Board would process the case for resolution by a formal decision of the Board, invoking its newly-acquired, quasi-adjudicatory function. 76

Beginning as early as ten years following the Board’s institution, we see the U.S. Supreme Court taking judicial notice of the NLRB’s high rate of settling cases, noting that “50% of all cases before it have been adjusted under its supervision.” 77 As Sanchez notes, “the court also described, unabashedly and with clear approval, the NLRB’s use, since its inception, of informal settlement practices as a means of enforcing the law through ADR without taking recourse in all cases to the most costly and time-consuming adjudicatory processes.” 78

 Presumably concerned with maintaining production stability in the industrial workplace during wartime, President Roosevelt revived the National War Labor Board in January 1942, mere weeks after the attack on

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75 Sanchez, ibid.
76 Ibid. at 652.
77 Wallace Corp. v. N.L.R.B., 323 U.S. 248 (1944) at 254 n.8, from Sanchez, ibid. at 676.
78 Sanchez, supra note 74.
Pearl Harbor. One might think that the concern over strikes or lockouts would have led to a process chiefly characterized by the compulsory arbitration of disputes. In fact, the opposite was true as the Board primarily implemented processes of mediation and voluntary arbitration with the goal of avoiding work stoppages. In terms of approach, the processes implemented appear to have been consistent with the facilitative style of arbitration, commonly used prior to World War II:

Those who functioned as arbitrators were more concerned with getting an 'equitable' or 'fair' answer to the question before them than with reaching a 'legally correct' conclusion. The arbitrator was less the judge between the parties than the friend of both of them, partaking largely of the function of a mediator.

In 1947, the Labor Management Relations Act (also called the Taft-Hartley Act after its co-sponsors) was passed. Based on the premise that labour unions had become too powerful, especially since the passage of the Wagner Act in 1935, the Taft-Hartley Act swung the pendulum of power back towards management through a number of provisions that acted to limit the scope of union strength. A central feature of the Taft-Hartley Act was its creation of the Federal Mediation and Conciliation Service [FMCS], with its stated purpose to "facilitate and promote the settlement of labor-management disputes through collective bargaining by encouraging labor and management to resolve differences through their own resources".

(iv) The Modern Birth of Mediation

Here, we see one of the earliest instances of a process resembling mediation being implemented in the United States in the arena of labour disputes: "[t]he Labor-Management Relations Act of 1947 described the rationale behind such mechanisms as: 'a promotion of a sound and stable industrial peace' and 'the settlement of issues between employer and employees through collective bargaining.'" During this post-war period, arbitrators began to debate the role of mediation as a dispute resolution tool in the context of labour arbitration. An article in the Proceedings of the Ninth Annual

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80 Ibd. at 198.
81 Bartel, supra note 53 at 670.
85 For example, employees were guaranteed the right not to organize, unionization was prohibited from being promoted contrary to a majority's wishes and a number of union activities were denounced as unfair labour practices.
88 Bartel, supra note 53 at 671. See also, Simkin & Fidandis, supra note 79 at 179.
Meeting of the National Academy of Arbitrators suggested that mediation might be used as a fall-back process in cases where an arbitrator is perplexed as to how to resolve a dispute.89

Under FMCS rules, either party to a bargaining dispute could request the agency to provide mediation services, or the agency could make an unsolicited offer of its services. Again, the services of the FMCS were only to be used if all other attempts at collective bargaining under the Taft-Hartley Act had failed. This framework is further evidence of mediation's development beneath the long shadow of the labour arbitration process, as an institutional settlement tool to assist in avoiding the disruption of work, particularly during periods of crucial wartime production.

From the mid-40s well into the 1960s, the debate raged among members of the arbitration community as to the appropriate role, if any, of mediation as a tool in the kit of the skilled labour arbitrator. By reviewing the proceedings of the annual meetings of the National Academy of Arbitrators during this period, one can see various examples of speakers championing both sides of this question. In the early 1970s, one commentator referred to the debate over whether an arbitrator should adjudicate or mediate as one which “threatened to split the Academy.”90 The discussion and debate within the Academy focused primarily on the appropriateness of arbitrators who, when faced with an issue that was clearly best resolved through negotiations, would explore settlement with the parties in an approach more closely resembling familiar models of mediation.

(b) Civil Justice Systems and the Court-Connected Model

And what of the development of mediation as a process distinct from arbitration? The mid-20th Century also witnessed the emergence of formal mediation programs connected to civil justice regimes. What we see in this period is a literal absorption of mediation into the legal profession and our court-based systems of dispute resolution. We can trace the steady development, during this period, of a comprehensive framework that served to link mediation inextricably to the courts and the legal profession. This development can be traced through considering a number of parallel shifts: the growing links between mediation and the legal profession along with the debate those links incited; the growth of court-based mediation programs across North America; the rapid expansion of “legal” publications dedicated to ADR theory; and striking reforms in legal pedagogy.

(i) Links to the Legal Profession: A Simmering Debate

At the annual general meeting of the American Bar Association [ABA] in 1958, Chief Justice Earl Warren described the nearly 70,000 federal case backlog that was causing delay in the civil docket, noting that “interminable and unjustifiable delays in our courts are today compromising the basic legal


rights of countless thousands of Americans and, imperceptibly, corroding the very foundations of constitutional government in the United States.91

To decrease this backlog, Warren suggested a number of systemic changes, including the wider use of pre-trial settlement conferences in civil cases. In this model of pre-trial settlement conference, we see the role of mediator added to the tasks facing trial judges attempting to settle pending litigation in the eleventh hour. Unlike the current practice of judicial dispute resolution facilitated by a judge other than the assigned trial judge, at this point in history, these arguably conflicting roles appear to have been adopted by the same person wearing two different hats.

It is interesting to track some of the scholarly interests of the period as a way of gauging the perceived capacities of these emerging alternative processes. While various period scholars remained engaged in a consideration of the case management potential of arbitration during the 1950s,92 the discussion of mediation during the same period seems limited to mediation’s role as an adjunct to the labour arbitration process.93 In Canada, there was increasing interest in the ‘compulsory conciliation’ apparatuses in place to promote industrial peace and whether this was appropriate.94 Again, we see the early dominance of these processes by the legal profession.


93 M. Lugar, “Negotiation, Mediation and Especially Arbitration in Labor Disputes” (1941) 51 W. Va. L. Rev. 201 at 204 (using mediation and conciliation interchangeably to mean the “active participation by a third party in a negotiation with the view of effecting a compromise” in labour-relations); J. Turnbull & C. Kanun “Conciliation and Mediation in Minnesota” (1952) 3 Lab. L. J. 677 (discussing Minnesota’s longstanding use of mediation/conciliation to settle industrial disputes); C. Kerr, “Industrial Conflict and its Mediation” (1954) 60:3 Am. J. Soc. 230; W. McPherson, “European Variations on the Mediation Theme’ New Vistas in Mediation: Proceedings of the Fourth Ann. Conf. of the Assoc. of State Med’n. Agencies” [1955] Lab. L. J. 525 (considering mediation usage in the labour context in several European countries and comparing that with the same application of mediation in the United States); see also several other articles from the same ASTHMA conference, each of which discusses mediation in the labour context from various perspectives: theoretical, empirical findings, historical, etc. See also “State Mediation in 1956:Problems and Prospects – Proceedings of the Fifth Ann. Conf. Association of State Mediation Agencies”[1956] Lab. L. J. 461-515 which also includes several articles on mediation, all of which focus on the labour relations context from various viewpoints. See the same in “The Seventh Ann. Conf. of ASTHMA” [1958] Lab. L. J. 745; J. Mackraz, “General Role of Mediation in Collective Bargaining” (1960) 11 Lab. L. J. 453 (focusing on the voluntary, non-decisive aspects of mediation and the self-determination of parties as elements of the process which lend it to resolving labour disputes).

94 The inaugural edition of the Osgoode Hall Law Journal included an article on ‘conciliation’ (used interchangeably with ‘mediation’) in the labour relations context: M. Levinson, “Compulsory Conciliation Machinery in Ontario” (1958) 1 Osgoode Hall L. J. 47; see also, A. Kovacs, “Compulsory Conciliation in Canada” (1959) 10 Lab. L. J. 110; J. Stenger, “Industrial Conciliation in Canada” (1956) 74 Int. Lab. Rev. 259 (setting out the principles and process of mandatory conciliation in Canada, a process automatically initiated if parties fail to reach an agreement after 20 days of collective bargaining negotiation); D. Wright, “The Canadian Compulsory Conciliation Laws and the General Problem of Union Power” (1960) 35 Notre
By the mid-20th Century, significant debate began to develop around the institutionalization of mediation and arbitration. By the late 1950s, that debate was especially pronounced in the context of arbitration. The American Arbitration Association appears to have been the key voice for protests against arbitration’s ‘creeping legalism’, citing as evidence the misplaced reliance upon precedent, the overly literal method of contract interpretation and the misuse of procedural technicalities. Many of these pieces refer to mediation, the emerging process, with similar concerns. Not surprisingly, the opposing voices were equally cogent supporting the necessity of a legal foundation in arbitrated decisions as a means of guaranteeing procedural and substantive certainty for those who used the arbitration process and those who followed it. It is a debate that persisted quietly throughout the second half of the last century.

The legal scholarship of the 1960s and beyond similarly evidences a growing interest in the ideas of compulsory arbitration within the labour relations context and, more generally, in the use of arbitration and mediation to solve a growing range of disputes. At the same time we see a surge of interest in the social justice potential of the mediation process, within the context of growing political and social unrest in the United States. In Bartell’s epic consideration of civil rights mediation, in the context of the race-based open housing conflict in Milwaukee in 1967, he queries whether mediation could be transferred from the labour relations context into ‘other areas of controversy’.

Ultimately, Bartell concludes that mediation’s focus on interests and its empowerment of participants balances its detractions, rendering it a potentially excellent mechanism for the resolution of civil rights disputes, one that might have been effectively implemented in the Milwaukee situation. Other commentators at the time, such as Jerome Barrett, agreed with this view of mediation as a tool for solving civil rights disputes, concentrating primarily on the social justice potential of the process.

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Dame L. Rev. 648 (discussing widespread provincial compulsory conciliation mechanisms); A. Craig, "Arbitration of Labor-Management Disputes in Canada" (1961) 12 Lab. L. J. 1053; R. Herbert, "Conciliation Boards in British Columbia" (1963) 3 Current L. 130.


97 M. Bernstein, "Nudging and Shoving all Parties to a Jurisdictional Dispute into Arbitration: the Dubious Procedure of National Steel" (1965) 78 Harv. L. Rev. 784 (opposing compulsory arbitration as unnecessary and potentially unfair); E. Jones, "On Nudging and Shoving the National Steel Arbitration into a Dubious Procedure" (1965) 79 Harv. L. Rev. 327 (responding to Bernstein); A. Schwartz, "Is Compulsory Arbitration Necessary?" (1960) 15 Arb. J. 189 (viewing compulsory arbitration as harming the unions, and hence the national economy, by preventing the freedom to strike).

on the explosive outbreak of unprecedented racial violence in several U.S. cities during the summer of 1967 and the spring of 1968.100

(ii) The Court Programs
The mid-1960s were marked by the establishment of conciliation courts, generally annexed to small claims/debts courts. In 1963, one of the earliest ADR organizations, the Conference of California Conciliation Courts [CCCC] was founded (later renamed the Association of Family, Court and Community Professionals [AFCC]), with a stated mission “to promote the interchange of ideas between California’s conciliation courts.”101 Very quickly, the organization expanded along with the growing interest in court-connected mediation services so that by 1973, the CCCC “had members in 15 states and several Canadian provinces.”102

In 1966, the University of Wisconsin opened one of the first campus-connected mediation centres, with the key objective being, to study and determine whether the “technique of mediation, proved effective in areas such as labor-management disputes...could be equally successful when applied to other areas such as racial disputes.”103 The “Mediation Center” designed and taught the first law school course entitled “Methods of Dispute Resolution” in 1965 and focused on issues of civil rights from the outset.104 It is from these seeds, and a growing concern with access to justice for society’s marginalized members,105 that we mark the birth of the community justice model, discussed below.

Do these shifts mark the end of court-connected mediation? On the contrary, the explosion in this area lay ahead. By 1980, the AFCC106 reported 900 members and a widely-read publication, the Family Court Review. Its historians note the ‘legislation boom’ of that period that was leading to an intense development of court-annexed mediation programs throughout the United States, with its impact rippling far beyond national borders into Canada and Western Europe and Australia/New Zealand.107

The rapid expansion of court-connected mediation, especially in the United States, shows no sign of slowing down. Since the Pound Conference 30 years

101 The Association of Family, Court and Community Professionals, “In the Beginning”, online: AFCC Homepage <http://www.afccnet.org/docs/learn_history.htm>.
102 By 1968, a survey completed by the AFCC indicated that 20 states currently operated some form of court-connected mediation services; ibid. In 1976, due to the growing diversity of its membership, the Conference changed its name to the Association of Family, Court and Community Professionals (the “AFCC”).
103 N. Feinsinger, “University of Wisconsin Center for Teaching and Research in Dispute Resolution” [1968] Wis. L. Rev. 349 at 350.
104 Ibid. at 352. One of the first conflict situations in which the Mediation Center became involved included picketing the homes of certain Milwaukee officials, including judges, who belonged to the Milwaukee Eagles Club, whose by-laws excluded African-Americans from membership. The Mediation Center’s involvement was based on a claim that continued membership in this organization would negatively affect the quality of justice meted out by the public officials involved.
105 See, for example, D. Lowenstein & M. Waggoner, “Neighborhood Law Offices: The New Wave in Legal Services for the Poor” (1967) 80 Harv. L. Rev. 805.
106 Association of Family, Court and Community Professionals (“AFCC”), see supra note 101.
107 Ibid.
ago, a majority of U.S. states have instituted court-connected models. As Senft and Savage assert,

When Frank Sander first proposed the multi-door courthouse in 1976, there were no state offices of dispute resolution, no ethical requirements that lawyers advise their clients of alternatives to litigation and no explicit authorizations for courts to refer cases to ADR...there are now thirty-five state offices of dispute resolution, a number of states have ethical requirements that lawyers advise of alternatives to litigation, and many states have explicitly authorized their judges to refer cases to ADR. 108

While a companion piece to this article, chronicling the development of mediation in Canada, is currently underway, it is noteworthy that similar court-connected programs have sprung up across Canada, including the Ontario Mandatory Mediation Program that requires as part of its case management regime early mediation for a full range of civil disputes in three key judicial centres in Ontario. 109

(iii) ADR Publications

Along with the development of ADR-dedicated organizations, the field of ADR publishing experienced a similar expansion. While the Arbitration Journal was first issued by the Chamber of Commerce of New York State in 1937, this publication was overtaken by the American Arbitration Association in 1945 and continues publication to date, although it was renamed the Dispute Resolution Journal in 1993, as it expanded its horizons to include greater coverage of other non-arbitration processes, especially mediation. In 1983, the Academy of Family Mediators inaugurated the Mediation Quarterly, which in 2001 was renamed the Conflict Resolution Quarterly. 110

In 1984, the University of Missouri-Columbia School of Law began publication of the Missouri Journal of Dispute Resolution, later renamed the Journal of Dispute Resolution. In 1985, the Ohio State Journal on Dispute Resolution began its publication by the Ohio State University School of Law. In the same year, the Negotiation Journal: On the Process of Disputing began quarterly publications, and since then, a number of other ADR periodicals have emerged with the growth of ADR in general and mediation in particular across North America. 111 And, as with the growth of professional associations

109 For further discussion of the Ontario Mandatory Mediation Program, see infra note 7 and accompanying text.
110 In September 2001, three leading American ADR organizations (the Society of Professionals in Dispute Resolution "SPIDR", the Academy of Family Mediators "AFM" and the Conflict Resolution Education Network "CRENet") merged into the Association for Conflict Resolution ("ACR") and took over publication of the former Mediation Quarterly. See, The Association for Conflict Resolution, online: ACR Homepage <http://www.acresolution.org>.
111 For example, Harvard Law School added the Harvard Negotiation Law Review to its annual publications in 1996 and Pepperdine University School of Law began publication of the Pepperdine Dispute Resolution Journal in 2000.
interested in mediation, the connection to law and the legal profession is evident.

(iv) Reforms in Legal Pedagogy

While mediation continued to evolve through the mid-1900s within the court framework, the parallel beginnings of ADR theory was surfacing in the context of pedagogical reforms to legal education. Certainly, legal pedagogy in this period continued to be defined by the 'case method' created in the 1870s by Dean Langdell of Harvard Law School. This model is centered on a study of appellate court opinions and the adversarial litigation process, arguably to the exclusion of framing the lawyer's role as problem solver. By focusing on appellate decisions, the escalation of a dispute is privileged over its prevention or early resolution. As one critic argued,

[to think like a lawyer has come to mean to seek out neutral principles surely devoid of emotion...and often devoid of an awareness that an emphasis on 'process' is a covert form of preferring certain types of policy and power. So that the inevitable thrust becomes conservative.]

This approach dominated legal pedagogy until the late-1960s when the Council on Legal Education for Professional Responsibility prompted a rethinking of the intersection between legal training and public needs. Former ABA President Robert McCrate argues that it was the period of reflection following the Council that encouraged various groups both inside and outside of the legal profession to call for wider reform. Ultimately, this reform within the academy took the shape of a growing alternative dispute resolution movement.

When we look at the development of the court-connected paradigm of mediation, we can see an integration of mediation into the law and the legal profession that has occurred simultaneously on several fronts. As court-based programs have grown in scope and number, ADR has figured more prominently in everything from legal publications to law school approaches and curricula. While there appears to have been considerable debate around the appropriateness of locating mediation within the adjudicative framework, there is no doubt that it was these models of mediation that were able to break through into the mainstream of dispute resolution. As mediation continues to reinvent itself into the 21st Century, its ties to our systems of traditional adjudication are ever strengthened. Clearly, the poster child of the ADR movement has left its labour relations roots far behind.

114 McCrate, supra note 72 at 17.
2. The Transformative Paradigm: Community Justice

But what of other community-based models of mediation? Has the same institutional claiming occurred outside the court-connected models of mediation? Given the confusion around defining and framing community-based models, our consideration will be restricted to those mediation models that are located within specifically defined communities and that are generally linked to municipal, social or religious organizations and that have as their objectives the empowerment of citizens and their communities.

The literature around community mediation models has evidenced longstanding inconsistencies and disagreement around its classification. The late 1970s saw Wahrhaftig's classification system identifying three mediation models defined by sponsorship: justice system sponsored, non-profit sponsored and those that were purely community-based. Two decades later, Ray Shonholtz divided community mediation into two models: the neighborhood justice center and the community mediation center. While there have been a number of more recent contributions to this thinking around categorization of mediation programs, for our purposes the Shonholtz framework is useful to distinguish the institutionalized versus independent models.

Although labels in the associated scholarship vary wildly, I will discuss the two distinct branches of community mediation as the "Justice System Model" and the "Community Model". Each of these frameworks for approaching mediation as a tool for resolving conflict can be illustrated in tangible operation models. These frameworks, and the resultant operation models, remain distinct in their animating concerns, their constituencies, their sponsorship and their administration.

Both of these models trace their genesis to the 1960s, a period characterized by significant social unrest and political activism on the one hand, and a growing dissatisfaction with our traditional systems of adjudicative justice on the other. In the "Community Model" of mediation, we see the emergence of Neighborhood Justice Centers (NJC) developed by local communities as a direct response to the social unrest of the 60s. By contrast, the approaches inherent in the "Justice System Model" of mediation are best concretized by the arrival...
of Community Mediation Centers [CMCs] in direct response to the perceived inability of courts to deal effectively with 'minor' criminal cases involving most commonly neighbours, relatives and acquaintances.

As has been suggested, these two frameworks for understanding community mediation remain distinct not only in their origins, but also in their sponsorship and connections. Following from the discontent with court backlogs and inefficiency, we see an 'ownership' of the CMCs by the justice system, very similar in structure to the court-connected model discussed above, except for a conscious, perhaps idealized, foundation in the local community. Rather than being party-initiated, the majority of cases handled by the CMCs are referred either by local courts directly or by intermediary agencies that are closely connected to the court system, such as police departments or prosecutor's offices. Whatever its nuances, this is a highly institutionalized model of mediation delivery intended to imbue the mediation process with the legalism and authority of the court.

By contrast, we see in the NJCs an example of retained autonomy whereby the mediation program is truly locally-based, relying upon the surrounding environment to produce both disputants and mediators, entirely independent from existing systems of justice. Borrowing from the autonomous approach classified by Della Noce, Folger and Antes, NJCs tend to be responsive to changing community needs and capacities, emphasizing the transformation of the disputing environment and its participants. As will be discussed in greater detail below, some commentators might suggest that this idealized version of community justice, while legendary, is not entirely aligned with reality.

As the community justice paradigm matured in America, these two branches became increasingly distinct in position and focus. However, it is also true that since the origins of this paradigm, there has been significant overlap, by times, between the two divisions, leading to healthy and spirited debate about the proper place and operation of community mediation in the larger scheme of alternative dispute resolution.

What was the impetus behind locating dispute resolution models within the communities that they were intended serve? Looking back on almost two decades of direct involvement in community justice initiatives, Paul Wahrhaftig recounted his realization of the importance of the community in analysing the information generated by its own disputes:

Although the participants perceive their dispute and its solution as unique, in fact it often reflects broader community ills. The organization running a mediation program can draw conclusions from individual disputes about generic problems in its jurisdiction. For example, a number of cases involving vandalism could lead the sponsor to conclude that there is a general juvenile problem in the neighborhood around which resources out to be mobilized. A court or governmental agency probably would not make this generalized analysis; a nonprofit agency might do so but still not take action. The community affected by the problem, however, is likely not only to make the

119 Hedeen, supra note 117.
In her work examining the development of 'citizen dispute resolution', Sally Merry traces the development of community-based mediation programs as part of a "general movement toward delegalization, toward removing dispute management from the courts on the premise that substantive justice is better served outside the formal procedures of the existing legal system." Merry notes that citizen dispute settlement centres, as she calls them, are often modelled after processes of mediation in horticultural and pastoral societies that generally consist of small, stable, close-knit, bounded settlements...community mediation has been transplanted from this social context into a very different setting: the heterogeneous, transient, anonymous, and morally diverse American city whose citizens believe they possess legal rights that should be protected by the courts.

After closely examining the mediation processes used in four non-industrial societies, Merry concluded that the mediators in these communities "represent the norms and values of the communities, most often attaining their positions by virtue of their expertise in moral issues." Noting that these mediators often have ties linking them to both sides of a dispute, Merry found the success in these early mediation systems lay in part in the residential and kinship ties between disputants that "require them to deal with one another in the future. In other words, [mediation] is a phenomenon of communities." And now on to a closer analysis of the historical development of the two branches of the Community Justice Paradigm; the Justice System Model and the Community Model, always with a view to the existence and impacts of institutional connections.

(a) The Justice System Model: Community Mediation Centers [CMCs]

The court-connected movement was, in large part, a response to the perceived inefficiency of the court system and adjudicative model. In 1965, a...
presidential Commission on Law Enforcement and the Administration of Justice focused national attention on America’s overburdened criminal judiciary. Its findings, many of which continue to resonate four decades later, "helped build consensus around the need for reform and experimentation in and around the court system, with particular focus on minor criminal cases involving neighbors, relatives and other acquaintances."127

Early notable programs growing out of the findings of the 1965 Commission included: the Philadelphia Municipal Court Arbitration Tribunal (1969), the Columbus Night Prosecutor Program (1971) (utilizing law students to mediate cases in 30-minute time slots) and the Miami Citizen Dispute Settlement Program (1975).128 Again, we see examples of CMCs whose caseloads are referred either directly from a linked court or indirectly through an agency sponsored by a court or government institution.

We also see a growing number of CMCs that rely upon local criminal courts and/or prosecutors dealing with private prosecutions for their client referrals. Writing in 1982, Wahrhaftig noted that while these programs might appear "folksy and informal", due to their usually unpretentious appearances and use of community mediators and a neighbourhood advisory board, they serve only the needs of the justice system, not of the community. These needs include "the orderly and efficient processing of cases and the freeing of resources to handle cases the system defines as serious."129 In support of this claim, Wahrhaftig cites the evolution of the Neighbor Justice Center, a CMC in central Atlanta, Georgia. Established by an ‘independent’ non-profit agency that was closely connected to the local court system, it claimed the mandate of developing a program oriented to its immediate neighbourhood. Wahrhaftig reports that, by 1979, the Atlanta centre was receiving up to 300 cases per month from across the city, very few of which were from its local neighbourhood.130

As an example of an ‘agency referral’ version of this model, Wahrhaftig points to the Institute for Mediation and Conflict Resolution [IMCR] Dispute Center in Manhattan131. In the early 1970s, two women wanting to create a ‘community-involved’ program of dispute resolution in Harlem, searched for agency sponsorship and discovered the IMCR, a private non-profit agency with a strong reputation for adapting mediation to various forms of community disputes. In creating this program, the two founding women chose a ‘top down’ approach, engaging the cooperation of police and courts and only then selling the idea to the community and recruiting and training community volunteer mediators.

When the centre opened in 1974, it was housed in a homey converted brownstone in Harlem. By 1979, the program had outgrown its brownstone and had relocated to a large government building in Harlem and it handled

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129 Wahrhaftig, supra note 115 at 78.
130 Ibid.
131 Ibid. at 79-80.
over 2200 cases annually, of which all but 300 were referred from a criminal justice agency. The cases came from everywhere across Manhattan, as the center expanded its jurisdiction to all of New York City by 1979. Clearly, this IMCR-sponsored center no longer served the needs of its original, local neighbourhood in Harlem. Wahrhaftig points to a number of factors that prevent the agency model of community justice from thriving. First, as in the Harlem example, the program is never really 'owned' by the community. The idea often comes from outsiders who design the program on the basis of their perceptions of the community. Community stakeholders are rarely involved in the design of these systems, as the design details are often dictated to some extent by the sponsoring agencies as part of the 'pay-off' for their sponsorship. And, most importantly, as a means of increasing the caseload and efficiency of these agency-linked programs, it is not long before the jurisdiction of the programs is expanded so as to ensure a wider usage. In this case, the geographic jurisdiction was expanded and the criminal justice system became a close partner in terms of referrals. Both of these changes serve to diminish the community orientation of the program.

Another example of agency-based community mediation models is that of the Community Relations Service [CRS] of the Department of Justice, established in 1964 by the Civil Rights Act. The CRS was established to act as a third-party intermediary in civil rights-based cases, an early example of labour mediation being effectively relocated to the 'community conflict field.' Again, given the nature of the CRS' sponsorship, it is no wonder that the disputants in its court- and government-referred cases were strongly encouraged to enter into written agreements as "the end product of all mediation." 

While partnerships between CMCs and legal institutions have arguably enabled individual citizens to participate in the justice system as mediators, a host of other issues emerge from these partnerships. In particular, Timothy Hedeen and Patrick Coy have identified six specific areas of concern related to this connection: (1) the dependence of funding on the favour and support of the justice system; (2) the loss of autonomy to turn back inappropriate court referrals; (3) the potential for coerced participation in mediation; (4) the potential to be found at fault is faced by only one party; (5) the misunderstanding of the legal status or basis of mediation processes and outcomes, and (6) the loss of focus on community in community mediation. More recently, scholars have queried whether this level of coordination and institutionalization exemplifies mediation's 'greatest promise'.

In discussing their concern with the increasing funding of CMCs by the courts, Hedeen and Coy recall Albie Davis' warning that "form often follows

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132 Ibid.
134 Ibid. at 1253.
funding,"\textsuperscript{137} and her empirical finding that funding agencies have traditionally had a profound impact on the shape of mediation programs.\textsuperscript{138} As a result, for example, in court-connected cases, achieving a written agreement evidencing settlement of the dispute often becomes the overarching goal of the process, with its absence prompting the administrators and mediators in these programs to refer to the mediation as having been 'unsuccessful'.\textsuperscript{139}

For some scholars, this predisposition of court-connected mediation programs can undermine one of mediation's core values; party self-determination: "[w]hen mediators push disputants to arrive at a written agreement of any sort, much less one that addresses specific issues of concern to an outside agent like the court, the notion that disputants know how best to resolve their own conflicts is sacrificed."\textsuperscript{140} As one commentator notes,

...[a]s mediation has been institutionalized in the courts and as evaluation has become an acknowledged and accepted part of the mediator's function, the original vision of self-determination is giving way to a vision in which the disputing parties play a less central role. The parties are still responsible for making the final decision regarding settlement, but they are cast in the role of consumers, largely limited to selecting from among the settlement options developed for them by their attorneys.\textsuperscript{141}

As key funders for this branch of the community justice paradigm, courts have come to play a determinant role in the future of many CMCs. Phillips notes in his 1997 critique of the development of mediation in the United States, "[t]he powerful influence of the courts can make or break players in the Alternative Dispute Resolution field. Contrast the explosive growth of private judging in California with the withering and dying of community dispute resolution programs ignored by the court in Florida.\textsuperscript{142}

While perhaps architects and advocates of community mediation programs have come to view the involvement of the courts as a necessary evil, recognizing the negative implications but needing the sponsorship that comes with the influence, maybe it is time to consider throwing the baby out with the bathwater and starting afresh. At what point does the 'creeping legalism' render its subject so distorted as to no longer be recognizable as separate from the institutions it was intended to replace? For example, what has become of the community mediation ideal that its mediators (1) would be volunteers, (2) would come from diverse backgrounds, and (3) would begin mediating after a minimum of training?\textsuperscript{143} In the case of Florida, the state's supreme court

\begin{footnotes}
\footnote{Hedeen & Coy, supra note 135 at 356.}
\footnote{Hedeen & Coy, supra note 135 at 356.}
\footnote{\textit{Ibid.} at 357.}
\footnote{N. Welsh, "Thin Vision" supra note 20 at 4.}
\footnote{B. Phillips, "Mediation: Did we get it Wrong?" (1997) 33 Willamette L. Rev. 649 at 677, n.124 [emphasis added].}
\end{footnotes}
requires that mediators in cases claiming in excess of $5,000 must be either former trial court judges or members of the Florida bar having at least five years experience.144

Similarly, in the community mediation context, the Oakland Mediation Center, established in Bloomfield Hills, Michigan in 1989, requires that all mediator staff members must hold either a law degree or a master’s degree in ADR.145 Hedeen and Coy note the growing trend across the United States of long-standing community mediation programs renaming themselves after dropping the word community from their names and titles.146

And what about the discussion around the co-opting of mediation by the judicial system. In their review article, Hedeen and Coy trace some of the milestones in a fairly constant, albeit subdued, protest that has been voiced over time.147 For example, McGillis and Mullen noted in 1977, in reference to a community justice initiative in Boston, "...[t]he Boston project’s dependence upon the court for referrals makes the project highly vulnerable".148 Ten years later, these same concerns resonated with Drake and Lewis: "[i]n recent years, courts have come to play larger roles as sponsors and funders of what initially were community-based programs. Older centers, seeking funding and formal case referral arrangements with the courts, have been giving up their autonomy."149

Sally Merry’s 1982 study of mediation in non-industrial societies led her to conclude that court-connected community mediation programs rely on the ‘threat of court’ to achieve settlement, a move representing “a return to a mode of sanctioning that has already been judged inadequate.”150 Merry warned that compelling disputants to try mediation before using the court could lead to “mediation centers becoming meaningless at best and, at worst, just another hurdle between the citizen and his day in court,”151 while at the same time noting the great potential for those mediation systems built on community potential, instead of existing as appendages to the legal system.

Most recently, in evaluating Michigan’s court-sponsored CMCs, Mika advised caution and vigilance to protect autonomy: “[c]onduct site-specific assessments of centers operating under the auspices of sponsoring or umbrella organizations, for the purpose of evaluating the relative autonomy of program development and decision-making, and the role of the umbrella.”152 When we add Hedeen and Coy’s probing comments to this collection, we can easily

146 Hedeen & Coy, supra note 135 at 364.
147 Ibid. at 358.
150 Merry, supra note 121 at 40.
151 Ibid.
152 H. Mika, An Evaluation of Michigan’s Community Dispute Resolution Program (Lansing, MI: Michigan Supreme Court, State Court Administrative Office, 1996) at 31.
trace the development of concern and, consequently, of protest to the binding ties between mediation and the law:

[although the courts helped provide the nourishment and shelter for many fledgling community programs, the same court systems may also unduly influence the field's further development and in some instances even compromise its integrity.]

Next we turn our attention to the neighborhood justice centres.

(b) The Community Model: Neighborhood Justice Center [NJCs]

Acknowledging what was perceived in the mid-1970s as a radical concept, that is, the settlement of disputes by trained citizens in their own communities without any linkage to the formal civil or criminal justice system, San Francisco Community Board Program founder Ray Shonholtz discusses the organizing principles of the community model. Shonholtz notes the importance of addressing disputes before they entered the legal system, to prevent and de-escalate conflicts and to use conciliatory mechanisms as a vehicle for addressing the relationship between disputants.

Shonholtz traces the development of this model, noting that "local democracy building" lay at the heart of the community conciliation initiative, so that the sources for both cases and volunteer mediators, became community organizations, social clubs, churches and schools, rather than courts, district/city attorney offices, police departments and social services agencies. He further claims that, in a democratic society, law enforcement and social services are only provided after the fact; noting, "it is only after a law has alleged to be violated, an injury documented, or a social need established that police, courts, or social service agencies may intervene...nearly all formal institutional interventions are after the fact and not prevention oriented." By contrast, he argues, the community mediation movement placed the responsibility for conflict prevention and early intervention with the local community.

Bradley and Smith claim that the community model was established "as an activist response to the urban disorders of the late 1960s." At its heart, the community model held principles of democratic participation, seeing these programs as providing opportunities for community members to participate in the prevention of and early intervention in neighborhood conflicts, as an alternative to traditional adjudicative models. Before continuing with this

153 Hedeen & Coy, supra note 135 at 364.
155 R. Shonholtz, "Community Mediation Centers: Renewing the Civic Mission for the Twenty-First Century", supra note 116. Note that Shonholtz’s article reverses the terminology I have employed in this piece, citing the Community Mediation Center as an example of what I call the independent "community model", and referring to Neighborhood Justice Centers as exemplifying the court-connected "justice model".
156 ibid. at 333.
157 ibid. at 335.
158 Bradley & Smith, supra note 127 at 316.
discussion, however, I should clarify for the record that there exists some
debate as to whether such wholly independent programs do, in fact, exist. The
historical record is unclear as to the *bona fide* autonomy of any community
justice mediation models, despite the fact that some authors write as though
that fact is a given.  

In their influential 1994 book, *The Promise of Mediation*, Bush and Folger
claimed that the early community mediation movement would enable
community empowerment and would improve urban living conditions by
addressing fundamental causes and effects of community conflict. In his 1973
piece, Richard Danzig advocated the participation of individual citizens in the
administration of justice by using community programs to promote
reconciliation and peace. Shonholtz' San Francisco Community Board
Program is one of the original standard-bearers of the community model, and
one that remains a leader to this day. The stated mission of this program was
to provide "a first-resort conflict settlement service for local residents outside
the perimeters of the formal legal system." While NJCs like the San
Francisco Community Board arguably shared some of the same goals as the
justice model in aiming at developing better access to justice, these programs
went beyond that to do the following:

.. [s]eek to encourage decentralization of the control of decision
making in communities; create a parallel, community-based
justice system that addresses disputes well before they enter the
formal legal system; develop indigenous community leadership;
work to reduce community tensions by strengthening the
capacity of neighborhood, church, civic, school and social
service organizations to address conflict effectively; and,
Strengthen the ability of citizens to participate actively in their
local democratic processes for effective self-governance.

Wahrhaftig laments the scant and decreasing examples of *bona fide*
community-based dispute resolution programs, suggesting it is easier to obtain
the sponsorship and funding of courts and agencies than it is to "engage in the
slow and arduous task of community organizing, using volunteers and relying
upon minimal funding." Similarly, Shonholtz asserts that community
mediation programs need to reaffirm their civic mission and to "thwart the

159 Some authors state definitively that such an animal does exist. See, for example, R. Tomasic & M. Feeley, *Neighborhood Justice* (White Plains, NY: Longman, 1982); Shwerin, *supra* note 153; Shonholtz, *supra* note 116. However, other commentators indicate that such clear
independence may not be an accurate depiction of this model; Hdeen & Coy, *supra* note 135 at 362 ("Even centers that have maintained offices and funding outside the courts are not immune from being seen as adjunct to the court system due to the high proportion of court referrals in their caseloads").


163 Wahrhaftig, *supra* note 115 at 85.
trend, often the by-product of legislation, to marginalize or reinvent their service as an appendix of the formal justice and agency systems. As Linda Singer noted in 1979,

In order to be a true neighborhood justice center, run by local residents and separate from the official, governmentally controlled system of justice, a dispute center must be operated strictly by local volunteers or have a source of funding that does not make the center dependent on close ties to the official system for referrals and enforcement...all parties must come to [this model] voluntarily...the avoidance of express or implied coercion probably limits these centers to a relatively small number of cases.

While it may hold true that legitimate examples of the Community Model have managed to retain a degree of distance from legal institutions and lawyers, the overall success of this model remains to be determined. Has this model been able to achieve wide implementation, or has it been relegated to isolated examples of community justice operating on the scale of 'few and far between'?

IV. TO INSTITUTIONALIZE OR NOT TO INSTITUTIONALIZE: THE DEBATE

This brief tour through the historical development of mediation's court-connected and community-based branches in the USA, merely begins a conversation around the impacts of these differences. As part of that conversation, scholars in the field ought to begin in earnest to evaluate the outcomes, both procedural and substantive, of our current compulsion with efficiency. Certainly, court-connected models of mediation that can demonstrate gains in judicial efficiency are increasing, but is there a cost to meaningful access to justice?

As one commentator noted, "institutions follow the imperative of their needs and ignore theories, however compelling, which contradict those needs." Perhaps, in this thinking we see the simple explanation for mediation's near complete takeover by 'creeping legalism'. Could it be that, at least for the moment, we need our dispute resolution models, including mediation, to be settlement-oriented, rights-based and efficient, whatever the long-term cost of those options? Perhaps we simply do not have the luxury at this moment in time to choose social change as a primary objective - the leading promise - of mediation. Or, perhaps, efficiency has gradually translated into a legitimate goal unto itself, carrying with it enhanced access to our system of justice, even if the resulting system is one of less process and, arguably, less justice.

164 Shonholtz, supra note 116 at 337.
Conversely, what proof do we have that an efficient system necessarily results in less justice? Could we not argue that mediation, in all of its forms, does effectuate its original objectives of improving harmony, empowering individuals and achieving access to justice? Perhaps all of these aspirations can be as fully achieved by a process that upholds rights and settles disputes in a cost-effective and timely manner.

A. Impacts of the Nexus Between Mediation and the Law

In reviewing the history of mediation in America, we are left with one pressing question; what, exactly, is the problem with mediation becoming increasingly annexed to legal institutions and their agencies? Among other concerns, it would seem that those models of mediation that remain independent from state institutions are less developed and apparently less successful in achieving their missions. As one author has put it,

But some parts of the story seem clear. There is little evidence that neighborhood justice centers have substantially reduced urban social conflict or contributed to a redistribution of power within communities, although they may be helping neighbors work out minor disputes.\(^{167}\)

So, if a trend towards the more ‘successful’ institutionalization can be established, what is the problem? There are a number of ways to structure our thinking around the impacts of mediation’s legalization and institutionalization. Perhaps Nancy Welsh and Robert Ackerman said it best in talking about mediation’s changing focus points,

...[a] young profession that had started with ‘alternative’ (perhaps even revolutionary) aspirations – respect for party self-determination, encouragement of new understandings and creative solutions, solicitation of different visions of public and private justice – had become the victim of its own success, gradually slipping into ‘routinization’ and drifting away from the exciting ‘good work’ and practices embodying those early aspirations.

Mediators now were more likely to be intent on marketing to attorneys and getting agreements than on fostering self-determination; courts that had voiced concern over the quality of dispute resolution had become preoccupied with clearing dockets; academics once concerned with standards were answering the siren call to provide three-hour mediation ‘training programs’.

A field that had promised a different, more creative way of doing things was succumbing to the pressures of the market, to professionals and consumers accustomed to the old dispute resolution paradigm, to the felt need just to get it done rather than to get it done ‘right’. The field of alternative dispute

resolution, and our beloved process of mediation in particular had begun to capitulate to the routine.\textsuperscript{168}

There seems adequate support for a view of the dominance of court-connected mediation programs as responsible for generating a chain-reaction that will create, if it hasn’t already, an environment that suffocates other varieties of mediation. Once a critical mass is achieved in constructing a landscape populated by court-connected models, we have seen that nothing else seems able to grow or sustain itself beyond a marginalized, peripheral level.

History seems to show that the case management model of mediation has been privileged in its North American development, attracting both scholarly attention and systems funding, necessarily leading to other visions of mediation waning in impact through a resulting lack of attention and support. Slowly, we are seeing mediation’s unintended impacts on the ways in which we dispute, as a society, and the question remains whether or not this impact indicates progress. In ‘connecting’ with the courts, mediation has become more an instrument to serve the traditional values, goals and interests of the judicial system, and less a social process in its own right, with its own separate history, traditions, norms and goals. Attention to the realization of social values not directly related to case management—which generally meant those values related to improved quality of human interaction that were uniquely a part of mediation as an independent social process—tended to get lost. In the process, mediation began to look more and more like the legal and judicial processes for which it was once proposed as an alternative.\textsuperscript{169}

Similarly, another scholar pinpoints the erosion of the centrality of party self-determination, an aspiration of early mediation, in the court-connected environment:

\[...\text{a}s\ \text{mediation has been institutionalized in the courts...the original vision of self-determination is giving way to a vision in which the disputing parties play a less central role. The parties remain responsible for making the final decision regarding settlement, but they are case in the role of consumers, largely limited to selecting from among the settlement options developed by their attorneys...Thus, even as most mediators and many courts continue to name party self-determination as the ‘fundamental principle’ underlying court-connected mediation, the party-centered empowerment concepts that anchored the original vision of self-determination are being replaced with concepts that are more reflective of the norms and traditional practices of lawyers and judges, as well as the courts’ strong settlement orientation to efficiency and the closure of cases through settlement.}\textsuperscript{170}

One way to conceptualize consequences of the dominance of court-connected mediation is to divide its impacts into two groups: first, the internal ripples felt

\textsuperscript{169} Della Noce, “Mediation Theory and Policy” supra note 2 at 550-51.
\textsuperscript{170} Welsh, “Thinning Vision” supra note 20 at 4-5.
within the field of mediation itself and, secondly, the external effects that mediation has had, beyond its own field, within the wider continuum of dispute resolution. What follows is really a conversation starter; an attempt to raise some of these issues for further consideration.

B. The Cult of Efficiency and the Absence of Accountability

Tracking the development and narrowing of the mediation field, especially over the past thirty years, we can see one way in which our post-industrial society has deified the pursuit of efficiency in all of its aspects. In a fascinating study of Canadian policy decisions concerning health and education, political theorist Janice Gross Stein describes what she coins the ‘cult of efficiency’. She claims that we have elevated efficiency to an end in itself, bestowing value status upon what should be relegated to a means for achieving more important core values. I suggest that privileging ‘efficiency at any cost’ within our justice system has profound consequences for the ways in which we think about justice.

As Stein illustrates, one of the key problems with identifying efficiency as a value to drive social policy is that, at least in the contexts of health and education policy, our conversations about efficiency have focused exclusively on costs, failing to consider the outputs of this efficiency – effectiveness and productivity:

The cult of efficiency, like other cults, advances political purposes and agendas. In our post-industrial age, efficiency is often a code word for an attack on the sclerotic, unresponsive and anachronistic state, the detritus of the industrial age that fits poorly with our times. The state is branded as wasteful, and market mechanisms are heralded as the efficient alternative.

When looking at justice as a public good, our conversation must not stop at efficiency of costs, time and other resources but must, rather, include the crucial consideration of outcomes and accountability. Certainly, the commentators are largely in agreement that court-connected mediation has brought about an increase in efficiency – mediation is more efficient, but efficient at what? At resolving disputes earlier and more cheaply, perhaps, but what of the quality of those resolutions. As citizens dealing with one of our most cherished public goods, justice, we simply must have these discussions around accountability. Otherwise, the very core values of our justice system will slowly dissolve as we become increasingly preoccupied with making efficiency gains at any cost.

It is not that mediation programs have not measured their outcomes, as they have done this extensively. As Dorothy Della Noce notes,

Where improved case management efficiency was promised in order to gain (or keep) political and financial support for court-connected mediation programs, pressure necessarily came to bear to demonstrate that those efficiencies were being achieved.

The need for tangible, measurable markers of case management

172 Ibid. at 7.
efficiency argued for quantifying case movement and case closure. Therefore, research on program effectiveness measured such factors as case settlement rates, trial rates, case processing time to disposition, agreement-making rates during the period between receiving written notice of the referral to mediation and the mediation session itself, and agreement-making rates during the period after the mediation session concluded without agreement but prior to trial.173 [emphasis added].

What is notably absent from Della Noce's list of what has been researched around mediation's efficiency gains is the extent to which the core values and qualities of our system of justice have been maintained in this alternative framework. Efficiency, in the context of cost reductions, must surely be accompanied by measurable accountability in order to ascertain whether or not the outcomes of such efficiency do improve or at least maintain our public good of justice. When mediation focuses solely on optimizing the required time and resources to resolve disputes, we run the risk of drifting away from any sense of the quality of those resolutions. Nowhere is this risk greater than in the context of our court-connected mediation programs, especially when the process itself tends to be private and there is no consideration of the outcomes achieved.

In the context of traditional adjudication, bracketing its failings for the moment, there remains at least a semblance of transparency around process and outcomes. With typical court-connected mediation models, there is a high level of confidentiality (often required by code) that accompanies the process and may have the effect of hiding from scrutiny any troublesome outcomes of that process. If we only look at efficiency without somehow getting at those protected outcomes in mediation, our quality of justice is immediately threatened, despite any gains made in resource allocation.

C. Mediation's Absorption into the Law and the Legal Profession

In addition to this concern around non-accountable efficiency as a widespread goal in our systems of justice, there are also ideological concerns surrounding mediation's utilization as an agent of the state more generally. As one scholar notes, “the rapid growth of court-annexed programs, many of which are mandatory, has been the most significant catalyst for the incorporation of ADR into legal practice.”174 The debate over the existence and appropriateness of the mediation’s legalization can be seen through various lenses.

We see evidence of this debate over the positioning of ‘the law’ and lawyers as the best vehicles for delivering mediation services in the area of dispute resolution education. According to one commentator, in 1985 there existed only four established graduate programs in the United States in the area of

173 Della Noce "Mediation Theory", supra note 2 at 548. See also Wissler, “The Effectiveness of Court-Connected Dispute Resolution in Civil Cases” supra note 4 (looking at various court-connected mediation programs and measuring the following: settlement rate, participants' assessment of process, impact on litigants' relationship, macrojustice and settlement durability. Wissler's study does consider some of the other capacities of mediation aside from pure cost efficiency, but again the emphasis here is on the rates and durability of settlement).
alternative dispute resolution. By the spring of 2000, there were approximately
130 graduate programs internationally, of which 80 were located in the United
States, offering certificates, baccalaureates, masters and/or doctorates in this
field.\textsuperscript{175} While these programs are located in a variety of disciplinary contexts
and departments, a significant number of them exist within law faculties at the
respective institutions.\textsuperscript{176}

On a related note, by 1998, there were already in excess of thirty five law
schools that had established mediation clinics.\textsuperscript{177} At least one scholar has
challenged the wisdom in allowing the law schools to 'take over' the delivery
doctrine of dispute resolution education in the university sector, rejecting the idea
of law faculties as the natural location for such delivery and stressing the
importance of multi-disciplinary partnerships in developing and disseminating
this knowledge.\textsuperscript{178} We can trace this debate over the role of law in mediation
practice and education through various sources, of which the university
campus is only one.

Writing thirty years ago on the future of the law, Professors Nader and
Singer considered the need for a justice system accessible to the common
person, yet they clearly advocated for lawyers to be the designers and
implementers of that system.\textsuperscript{179} As the authors outlined the various 'litigation-
avoiding' techniques and systems that could achieve justice for those members
of society less sophisticated in the operations of the law, it was interesting to
note their insistence that lawyers lead the way through these changes. For
example, they claimed,

[1] lawyers should spearhead the effort to experiment with
alternative forums to courts for resolving disputes between
people whose relationships are ongoing and thus subject to
mediated solutions, reserving for courts the one-shot, win-lose
type of dispute, such as the adjudication of guilt in the criminal
law or test cases that attempt to define new legal rights and
relationships.\textsuperscript{180}

It seems clear that leading scholars in the field of ADR, such as Nader and
Singer, accepted the connection between law and ADR as the most natural of
bonds, while at the same time, other equally persuasive thinkers found such a
connection problematic. The reality remains that, perhaps through necessity,

\textsuperscript{175} B. Polkinghorn & R. Chenail, "Current Trends in Graduate ADR Programs: Preliminary
Findings", online: Conflict Management in Higher Education Report Homepage
<http://www.campus-adr.org/CMHER/Articles/Grad_adrl_2.html>.

\textsuperscript{176} For a complete listing of international degree programs in ADR, see, "The Alternative
Newsletter: A Resource Newsletter on Dispute Resolution", online Mediate.Com Homepage
<http://www.mediate.com/tan/articles/degree0001.cfm/plain=t.htm>. For a complete
listing of Canadian university-based degree programs, see, online: Conflict Resolution
Network Homepage <http://www.crnetwork.ca>. See also, T. Farrow, "Dispute

\textsuperscript{177} "The Alternative Newsletter", ibid. at 4.

\textsuperscript{178} J. Macfarlane, "Grasping the Nettle: Policy Issues for University Dispute Resolution Programs"

\textsuperscript{179} L. Nader & L. Singer, supra note 112 at 318-319.

\textsuperscript{180} Ibid. at 318.
court-connected mediation programs remain dominated by the legal profession and the norms and values it brings to the table.

D. The Inherent Limitations of Informalism

In his classic mid-1980s call to arms against the evils of private settlement, Owen Fiss focused on three main concerns with settlement: first, it proceeds on the faulty assumption of basic equality among disputants without taking into account the divergent means and respective power differentials between parties; second, settlement takes as a given that disputing parties act as individuals with total capacity and authority to act alone, when in reality, participants in settlement are more often representatives of groups or institutions that present great challenges to consensual authority to act and bind; third, settlement fails to appreciate the larger continuum of a dispute, in which an adjudicated decision may form only one stop along the way towards the parties ultimately achieving justice.

Fiss advocated a view of adjudicative processes as public, representative of societal values and essentially reasonable, as contrasted with the less transparent processes and outcomes that he associated with private settlements. His concern that settlement ultimately deprives disputants – and the wider society – from dispute resolution that is based on normative principles of common law is one that has been echoed and expanded upon by various leading critics, each with a slightly different approach, and is one that continues to challenge the academic acceptance of informal dispute resolution processes, including mediation.

In a later essay responding to critics of "Against Settlement", Fiss expands on his initial theories, claiming that the then-current leaders of the American ADR movement were primarily motivated by the same case-management efficiencies discussed earlier in this paper, and by a desire to protect the status quo from judicial reform. Wary of powerful private actors with the capacity and desire to act unfettered by societal review and standards, Fiss upholds the process of adjudication as more likely to do justice than ADR processes, "precisely because it vests power of the state in officials who act as trustees for the public, who are highly visible and who are committed to reason." This

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181 See, for example, Hanycz, "Looking Glass" supra note 9 (highlighting the dominance of the Ontario Mandatory Mediation Program's roster of mediators by lawyers, despite their being no requirement of legal training).
183 Ibid. at 1085.
186 Ibid. at 1673.
branch of the debate respecting the role of the law and the state in dispute resolution accepts such involvement, but argues that the processes themselves should be open, public and founded on rights and reasoning.

E. The Capacity of State-Connected Mediation to Deliver Party-Connected Results

Another enduring voice in this evolving discussion is that of Carrie Menkel-Meadow, who suggests that we must first decide who ‘owns’ a dispute so as to legitimize the various conflicting interests respecting its resolution.187 If the settlement of an issue – be it public or private – aligns with the ‘best practices’ of settlement advocacy (consensual, representative, party-responsive, principled and creative) then our concerns around informal outcomes should be relaxed. If however, settlement practices depart from these characteristics, then our concerns are appropriate. Menkel-Meadow notes,

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\text{If settlements are not consensually arrived at (through mandatory and coercive court programs, or because the choice is not real when one cannot afford to wait to litigate, or because there are such vast disparities between the parties that ‘consent’ cannot be given), then we must question whether such a settlement should be enforced. As ADR becomes institutionalized in courts, there is a danger that people will “consent” to settlement because they feel they have no real alternative. If there is no consent, an important value justifying settlement is absent.} \tag{8}
\]

In her answer to the critics of settlement, Menkel-Meadow posits a number of conditions under which settlement may, in fact, lead to better, party-centered resolutions. Most relevant to this consideration is her conclusion that a settlement, to be appropriate, must be achieved through a participatory process that is also principled and consensual. I think that Menkel-Meadow got it right – under the right conditions, despite the resonating voices of the critics, ‘good’ settlements can be achieved in both private and public disputes. However, I continue to wonder whether or not the ‘right conditions’ are possible within the context of institutionalized, efficiency-based models of mediation. That may simply be a landscape within which those necessary conditions of meaningful consent, disputant participation and party-centered solutions cannot exist. Rather than a focus on interests and needs of disputants, is it not more likely that efficiency models will be heavily settlement-oriented, urging parties (regardless of their actual interests) towards a final resolution of the dispute? Again, our work on this point has only just begun.

The related worry is that some of the ‘trappings’ of the transformative category of mediation will be imported into a context that does not support them. In a vein reminiscent of Richard Abel, Richard Hofrichter has


188 Ibid. at 2694.
warned of the dangers of ‘imposing’ a community model where no actual community exists:

The pretension of informal neighborly justice disregards the political nature of conflict and the danger of indirect elite control. Thus, what on the surface appears as a movement toward a more personalized, decentralized and community-controlled justice may actually represent a new form of State bureaucracy, extending the purview of State authority well beyond that of conventional courts.\textsuperscript{9}

If mediation processes exist purely as an adjunct to the adjudicative model, sponsored by the courts and administered by the legal profession, some dire predictions might be made about the nature of the social structure that will be upheld through this informal process. This is especially true in a mediation structure connected to courts that leads mediators to “engage in patterns of behaviour not in alignment with the rhetoric of the field.”\textsuperscript{9} As an arm of the state, can it not be argued that legal systems have operated to co-opt mediation programs for goals that are distinctly different from those of mediation’s social change agenda? If so, cloaking mediation in the garments of its origins might well be used in a ‘Trojan Horse’ scenario – inferring a set of objectives, processes and potential outcomes that are far from those actually intended.

Witness this same state sponsorship as a key factor in the development of the community justice paradigm, even as it was born of public protest and aversion to traditional systems of adjudicative justice. As the state has become more firmly embedded in ADR programs, we must be reminded in our resulting discomfort that this is a connection that has existed for decades within the ADR movement. In fact, it is those very branches of the ADR movement that have maintained operational and policy independence that have remained much more limited in scope and, some would argue, results.

V. CONCLUSION AND NEXT STEPS

It would appear that mediation has developed along at least two major paths: the institutionalized ‘efficiency’ paradigm and the community justice paradigm. In the first framework, as an offspring of the labour arbitration movement, the connection between mediation and the law appears from conception. In the community justice framework, by comparison, we see in one of its strands the strong connection to legal institutions again in the development of Community Mediation Center programs. It seems that this link was forged, at least in part, through the funding and sponsorship provided by governmental institutions – a practice continuing to this day – and in part due to the role of courts and related agencies as the primary source of client referrals for these centres.

\textsuperscript{189} R. Hofrichter, “Justice Centers Raise Basic Questions”(1977) 2 New Dir. in Leg. Serv.168 at 171.
\textsuperscript{190} Della Noce, “Mediation Theory" supra note 2 at 552. See also Hanycz, “Looking Glass" supra note 9 (an empirical study of mediators working within the Ontario Mandatory Mediation Program indicating distinct shifts in mediator behaviour to achieve settlement in court-connected mediation).
The second strand of the community justice paradigm, the Neighborhood Justice Center, appears to have maintained a separation from legal institutions by staying local in terms of goals, staff and clients. Not only does there remain some question around whether or not these NJCs are truly independent, but this disconnection from institutional funding and client referrals has served to render this movement a failed attempt at its original objectives of transforming society and empowering the marginalized citizen, when integration into the mainstream continuum of dispute resolution has been so limited.

So there we have it: despite mediation’s modern origins as a catalyst for social change and personal empowerment, the most rapidly growing mediation models are those connected to our courts and administered, by and large, by members of the legal profession, often using legal norms and processes. These court-connected models have grown directly out of a perceived need for improved case management efficiency and better use of judicial resources. By contrast, those mediation programs and models that remain independent from legal institutions, and that have arguably remained ‘truer’ to mediation’s original purposes and aspirations, have developed at a slower and less certain pace.

In addition to tracing these developmental paths, I have suggested certain implications of a mediation landscape increasingly dominated by one model of dispute resolution. While this model has been promoted using the rhetoric of access to justice, we must ask whether such rhetoric is appropriate, especially in the absence of any measured accountability for the outcomes of this increased efficiency. We need to examine more closely the ways in which the efficiency model, with its institutional underpinnings, impacts upon meaningful access to justice. While certainly the transformative models of mediation categorized under its social change agenda continue to be closely focused on access to justice and citizen empowerment, can we say the same for our court-connected models so driven by efficiency? Hopefully, this modest first step will encourage the important consideration of the impacts of mediation’s growth lines. Coincidence cannot explain the explosion of court-connected mediation models to the exclusion of all others, or the resultant institutionalization of the mediation process with its profound consequences for the future shape of justice.
BOOK REVIEWS