Abstract: This article joins an important conversation about the proper role of alternative dispute resolution ("ADR") in the administration of civil justice. Both ADR and formal adjudication are being reconceptualized as ADR matures into an alternative system, and as ADR methods and methodology are incorporated into formal adjudication. Professor Main invokes the history of Equity, another "alternative" system, to inform our understanding of the forms and limits of ADR. He envisions ADR and formal adjudication as dual systems of dispute resolution, and uses the Equity analogue as a template to develop a theory of ADR.

ADR: THE NEW EQUITY

Thomas O. Main[*]

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

INTRODUCTION

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

The administration of justice through divided systems is a familiar model. For centuries the Anglo-American legal system administered justice through the systems of law and equity. The law courts ensured uniformity and predictability, while courts in equity tempered the law to the needs of the particular case. Although there was considerable tension between the

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[1] Douglas M. Gane, *The Birth of a New Equity*, 67 THE SOLICITORS' JOURNAL & WKLY. RPTR. 572, 572 (May 26, 1923).

two regimes, they were also symbiotic. Over time the law courts adopted many of the best practices of equity. Meanwhile, efforts to crystallize the jurisdiction of equity introduced complexity and procedural technicalities that turned that system into a jus strictum differing little from the common law. With each system looking increasingly like the other, law and equity were merged into a single system in a wave of reforms in the late nineteenth and early twentieth centuries. The reformers envisioned a unified procedural apparatus that would permit judges to jointly administer the substance of both law and equity. However, an important ingredient of the jurisprudence of equity was displaced by the procedural merger: a merged system offered no recourse from the procedural apparatus itself when the unique needs of a particular case demanded a different procedure. Moreover, the substance of equity lost much of its vitality in the merged system.

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

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

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

The repeated exercise of that protean jurisdiction identifies systemic failures of the formal system and ultimately wields a reforming influence. The need for an autonomous system of discretionary law is as great as or greater than ever. I thus argue that equity should make the most of the modern instrument, ADR, as it once did of the subpoena.

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

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

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

I. THE DEVELOPMENT OF A SYSTEM OF ADR

There are numerous social, cultural and practical forces that steer disputing parties away from state-sponsored adjudicatory processes.[2] Accordingly some grievances never become disputes at all.[3] Some disputes are resolved through private negotiations that lead to consensual solutions.[4]

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

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

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

And some disputes are resolved in a triangulated process facilitated by a neutral third party who is not a judge.[5] Even among those cases that are pursued in the courts, the vast majority are resolved by means other than a judicial determination.[6] The many paths of extrajudicial dispute resolution have been trod for centuries, and probably always will be.[7]

Certain contours of the dispute resolution landscape changed in the 1970s, however, as formal adjudication faced especial criticism and pressures.[8] There was an "explosion" of new and complex cases.[9]

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official processes).

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

[5] *See generally* STEPHEN B. GOLDBERG ET AL., DISPUTE RESOLUTION: NEGOTIATION, MEDIATION, AND OTHER PROCESSES 6-9 (3d ed. 1999); Jeffrey W. Stempel, *Reflections on Judicial ADR and the Multi-Door Courthouse at Twenty: Fait Accompli, Failed Overture, or Fledgling Adulthood?*, 11 OHIO ST. J. ON DISP. RESOL. 297, 309-28 (1996); Lon Fuller, *Mediation—Its Form and Functions*, 44 S. CAL. L. REV. 305 (1971).

[6] A federal court study shows that in 2002 the percentage of federal civil cases tried had dropped to 1.8% from 11.5% in 1962. Marc Galanter, *The Vanishing Trial: An Examination of Trials and Related matters I Federal and State Courts*, 1J. E MPIRICAL LEGAL STUDIES 459 (2004).

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

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

IAN R. MACNEIL, AMERICAN ARBITRATION LAW: REFORMATION, NATIONALIZATION, INTERNATIONALIZATION 4 (1992).

For earlier reports of data collections regarding the high ratio of settlement to trial, *see* Marc Galanter and Mia Cahill, *"Most Cases Settle": Judicial Promotion and Regulation of Settlements*, 46 STAN. L. REV. 1339, 1339-40 (1994); Stephen C. Yeazell, *The Misunderstood Consequences of Modern Civil Process*, WIS. L. REV. 631, 662 (1994); David M. Trubek et al., *The Costs of Ordinary Litigation*, 31 UCLA L. REV. 72, 89 (1983); H. LAURENCE ROSS, SETTLED OUT OF COURT 3 (1980); Alvin B. Rubin, *A Causerie on Lawyers' Ethics in Negotiation*, 35 LA. L. REV. 577 (1975); H. LAURENCE ROSS, SETTLED OUT OF COURT: THE SOCIAL PROCESS OF INSURANCE CLAIMS ADJUSTMENTS 217 (1970).

The history of arbitration, in particular, has been successfully mined. *See, e.g.*, Paul L. Sayre, *Development of Commercial Arbitration Law*, 37 YALE L.J. 595 (1927-28); Earl S. Wolaver, *The Historical Background of Commercial Arbitration*, 83 U. PA. L. REV. 132, 132-34 (1934); FRANCES KELLOR, ARBITRATION AND THE LEGAL PROFESSION 3 (1952); William C. Jones, *Three Centuries of Commercial Arbitration in New York: A Brief Survey*, 1956 WASH. U. L.Q. 193; James B. Boskey, *A History of Commercial Arbitration in New Jersey*, 8 RUT.-CAM. L.J. 1 (1976) (tracing English and colonial roots of commercial arbitration); Bruce H. Mann, *The Formalization of Informal Law: Arbitration Before the American Revolution*, 59 NYU L. REV. 443 (1984); Katherine Van Wezel Stone, *Rustic Justice: Community and Coercion Under the Federal Arbitration Act*, 77 N.C. L. REV. 931 (1999).

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

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

[9] John H. Barton, *Behind the Legal Explosion*, 27 STAN. L. REV. 567 (1975); Macklin Fleming, *Court Survival in the Litigation Explosion*, 54 JUDICATURE 109 (1970); Bayless Manning, *Hyperlexis: Our National Disease*, 71 NW. U. L. REV. 767 (1977); Maurice Rosenberg, *Let's Everybody Litigate?*, 50 TEX. L. REV. 1349

"Discovery abuse" reached intolerable levels.[10] And an unprecedented lack of civility among lawyers delayed the resolution of cases and jeopardized the reputation of a profession.[11] Critics complained that ordinary citizens no longer had meaningful access to the courts;[12] business clients, too, were demanding more efficient dispute resolution alternatives.[13]

Acknowledging a certain amount of "deferred maintenance" in the courts, Chief Justice Burger convened in April of 1976 The National

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(1972); Maurice Rosenberg, *Devising Procedures That Are Civil To Promote Justice That Is Civilized*, 69 MICH. L. REV. 797, 808 (1970-1971) ("A comprehensive reinvestigation of the question which human disputes belong in the courts and which ones do not is long overdue. One reason for this undertaking is practical necessity. Our courts are simply and plainly being engulfed by a tidal wave of litigation, criminal and civil."). *See generally* Marc Galanter, *The Turn Against Law: The Recoil Against Expanding Accountability*, 81 TEX. L. REV. 285, 292 n.44 (2002) (claiming that the term "litigation explosion" first appeared in print in 1970 and attributing it to Justice Macklin Fleming of the California Court of Appeals); Arthur R. Miller, *The Pretrial Rush to Judgment: Are the "Litigation Explosion," "Liability Crisis," and Efficiency Clichés Eroding Our Day in Court and Jury Trial Commitments?*, 78 N.Y.U. L. REV. 982, 985 (2003) ("The contemporary perception of a crisis in the judicial system first became prominent in the 1970s"); Arthur R. Miller, *The Adversary System: Dinosaur or Phoenix*, 69 MINN. L. REV. 1, 3 (1984) (discussing the "litigation explosion"); Thomas Lambros, *The Summary Jury Trial and Other Alternative Methods of Dispute Resolution: A Report to the Judicial Conference of the United States Committee on the Operation of the Jury System*, 103 F.R.D. 461, 465 (1984) (same); Maurice Rosenberg, *Devising Procedures That are Civil to Promote Justice That is Civilized*, 69 MICH. L. REV. 797, 801 (1970-1971) (referring to "glutted calendars and mobbed courtrooms; the unconscionable delays, alternating with rush-rush-rush; the mistreatment of jurors and witnesses; the excessive expense; [and] the tarnished image of justice for millions of Americans"); Alan O. Sykes, *Cases, Courts and Congestion in* LAW IN CULTURE AND SOCIETY 327, 328 (Nader, ed. 1969) ("Part of the difficulty in getting rid of court congestion appears to be … [that] it is not simply an accidental defect of the law, but is rooted in some of the legal system's most cherished characteristics.").

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

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

Two other reform currents may merit mention here. First, it was during this decade that prohibitions on advertising by lawyers were lifted. *See generally* Geoffrey C. Hazard, Russell G. Pierce & Jeffrey W. Stempel, *Why Lawyers Should be Allowed to Advertise: A Market Analysis of Legal Services*, 58 N.Y.U. L. REV. 1084 (November 1983). Second, the Model Code of Professional Responsibility was created in 1969 when the American Bar Association grouped and adopted nearly 50 canons from various state bar associations. *See generally* Jason J. Kilborn, *Who's in Charge Here?: Putting Clients in Their Place*, 37 GA. L. REV. 1 (2002).

[12] *See, e.g.*, Laura Nader, *Disputing Without the Force of Law*, 88 YALE L.J. 998, 1001 & n.16 (1978-1979) ("Our legal system has taken too literally the ancient maxim, 'de minimis non curat lex.'") (quoting REGINALD HEBER SMITH, JUSTICE AND THE POOR 41 (1924)); Laura Nader and Linda R. Singer, *Law in the Future: What are the Choices? Dispute Resolution…*, 51 CALIF. ST. B. J. 281 (July 1976); LAWRENCE M. FRIEDMAN, SOME HISTORICAL ASPECTS OF LAW AND SOCIAL CHANGE IN THE UNITED STATES (1973); Mauro Cappelletti & Bryant Garth, *Access to Justice: The Newest Wave in the World-Wide Movement to Make Rights Effective*, 27 BUFF. L. REV. 181 (1978); Russell G. Pearce, Patrick W. Shea & Jeffrey W. Stempel, *An Assessment of Alternative Strategies for Increasing Access to Legal Services*, 90 YALE L.J. 122 (1980); AMERICAN BAR ASSOCIATION-AMERICAN BAR FOUNDATION SURVEY ON THE LEGAL NEEDS OF THE PUBLIC (Barbara Curran, Rptr., 1976); *Dispute Resolution*, 88 YALE L.J. 905, 906 (1979) (bemoaning "the persistent inaccessibility of judicial relief for poor and middle-class people").

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

Conference on the Causes of Popular Dissatisfaction with the Administration of Justice.[14] This extraordinary event brought together three hundred conferees from the bench, bar and academia.[15] The varied agendas of this crowd adumbrated dozens of problems ranging from diversity jurisdiction and the prosecution of victimless crimes to the right to a jury trial and the dearth of empirical research.[16] The conference "arous[ed] a new spirit of zeal for fundamental procedural reform" and endorsed innovation.[17]

> Our own great hope for the Pound Conference is that it will be remembered in the year 2000 not simply as a lively colloquium of experts but as the occasion when, under the strong leadership of the Chief Justice, Twentieth Century law reform in the United States really got under way. For this reason, we invite the reader's particular attention to the reports of the Pound Conference Follow-Up Task Force, which appear at pages 295-336 of this book…. The campaign for procedural improvement must be waged on many fronts, and the reports of the Task Force provide a unique and valuable map of the terrain as well as the first practical step, and a highly encouraging one, towards the attainment of Agenda 2000 A.D.[18]

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[14] The conference adopted the precise title of Roscoe Pound's 1906 indictment at the American Bar Association's annual meeting St. Paul, Minnesota. Pound had then criticized the "sporting theory of justice," "our exaggerated contentious procedure," and "our archaic system of courts." Pound's speech was a catalyst for reform efforts leading ultimately to the adoption of the Rules Enabling Act and uniform Federal Rules of Civil Procedure. *See* Stephen N. Subrin, *How Equity Conquered Common Law: The Federal Rules of Civil Procedure in Historical Perspective*, 135 U. PA. L. REV. 909, ___ (1987). The 1976 conference, which has come to be known as The Pound Conference, symbolically was also held in St. Paul, Minnesota. Chief Justice Burger proudly stated that The Pound Conference was addressing the "'unfinished business' placed on the American Agenda by Pound's 1906 speech. Warren E. Burger, *Preface* in THE POUND CONFERENCE: PERSPECTIVES ON JUSTICE IN THE FUTURE 5, 5 (A. Leo Levin & Russell R. Wheeler eds., 1979). *See generally* Symposium, *The Impact of Mediation: 25 Years After the Pound Conference*, 17 OHIO ST. J. DISP. RESOL. 527-712 (2002).

[15] According to the published list, approximately 60% of the conferees were judges or court administrators; fewer than 10% were law professors; and about 15% were various representatives of the American Bar Association. Conferees haled from 48 of the 50 states (and also from Puerto Rico and American Samoa). I fantasize that the State of Montana was purposely excluded in an effort to spite the legacy of Thomas J. Walsh, the noble senator therefrom who for nearly two decades almost single-handedly blocked the adoption of Federal Rules of Civil Procedure. *See* Stephen N. Subrin, *How Equity Conquered Common Law: The Federal Rules of Civil Procedure in Historical Perspective*, 135 U. PA. L. REV. 909, ___ (1987). Alas there is probably some stock explanation. (West Virginia, too, appears to have had no representative in attendance.)

[16] Robert H. Bork, *Dealing With the Overload in Article III Courts in* THE POUND CONFERENCE: PERSPECTIVES ON JUSTICE IN THE FUTURE 150 (A. Leo Levin & Russell R. Wheeler eds., 1979) (advocating for the abolition of diversity jurisdiction); Simon H. Rifkind, *Are We Asking Too Much of Our Courts? in* THE POUND CONFERENCE: PERSPECTIVES ON JUSTICE IN THE FUTURE 51 (A. Leo Levin & Russell R. Wheeler eds., 1979) (inviting the legislative branch to reexamine the possibility of decriminalizing dunkenness, prostitution, and gambling); Walter Schaefer, *Is the Adversary System Working in Optimal Fashion? in* THE POUND CONFERENCE: PERSPECTIVES ON JUSTICE IN THE FUTURE 171 (A. Leo Levin & Russell R. Wheeler eds., 1979) (suggesting that trial by jury in civil cases has no contemporary justification); Laura Nader, *Commentary in* THE POUND CONFERENCE: PERSPECTIVES ON JUSTICE IN THE FUTURE 114 (A. Leo Levin & Russell R. Wheeler eds., 1979) (emphasizing the absence of important data).

[17] William T. Gossett *et al*., *Foreword, in* THE POUND CONFERENCE: PERSPECTIVES ON JUSTICE IN THE FUTURE 7, 15 (A. Leo Levin & Russell R. Wheeler eds., 1979). *Cf.* John H. Wigmore, *Roscoe Pound's St. Paul Address of 1906*, 20 J. AM. JUDICATURE SOC'Y 176, 176 (1936) (crediting Pound's speech as "the spark that kindled the white flame of high endeavor, now spreading through the entire legal profession").

[18] William T. Gossett, Bernard G. Segal and Chesterfield Smith, *Foreword* in THE POUND CONFERENCE: PERSPECTIVES ON JUSTICE IN THE FUTURE 7, 15 (A. Leo Levin & Russell R. Wheeler eds., 1979).

The papers presented at the conference were published in a bound volume entitled *The Pound Conference: Perspectives on Justice in the Future.*[19] The title's upbeat and reformist tone is revealing in light of the title of the conference itself.[20]

Professor Frank Sander's speech at the Pound Conference, entitled *Varieties of Dispute Processing,* envisioned "by the year 2000 not simply a court house but a Dispute Resolution Center, where the grievant would first be channelled [CQ] through a screening clerk who would then direct him to the process (or sequence of processes) most appropriate to his type of case."[21] Sander suggested that dispute resolution required a flexible and diverse panoply of processes to meet the systematic needs of entire categories of certain types of cases and also the unique circumstances presented in particular cases.[22] Although he did not himself then use the phrase "multi-door courthouse," such is the frequent characterization of his ideal.[23] Moreover, his remarks are often credited as marking the birth of the modern ADR movement.[24]

The ADR movement found traction because it intertwined threads of the political left[25] and right,[26] responded to a genuine problem within the legal

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[19] THE POUND CONFERENCE: PERSPECTIVES ON JUSTICE IN THE FUTURE (A. Leo Levin & Russell R. Wheeler eds., 1979).

[20] Query whether Pound's reforms might have been more warmly embraced and more promptly enacted, had the title of his speech "Causes for Popular Dissatisfaction with the Administration of Justice" enjoyed the benefit of such handlers. *See generally* John H. Wigmore, *Roscoe Pound's St. Paul Address of 1906: The Spark that Kindles the White Flame of Progress*, 20 J. AM. JUDICATURE SOC'Y 176 (1937). With regard to the delay, see Stephen N. Subrin, *How Equity Conquered Common Law: The Federal Rules of Civil Procedure in Historical Perspective*, 135 U. PA. L. REV. 909, ___ (1987).

[21] Frank E.A. Sander, *Varieties of Dispute Processing*, *in* THE POUND CONFERENCE: PERSPECTIVES ON JUSTICE IN THE FUTURE 65, 84 (A. Leo Levin & Russell R. Wheeler eds., 1979).

[22] *See* Frank E.A. Sander, *Varieties of Dispute Processing*, *in* THE POUND CONFERENCE: PERSPECTIVES ON JUSTICE IN THE FUTURE 65, 72-79 (A. Leo Levin & Russell R. Wheeler eds., 1979) (outlining criteria for determining how particular disputes might best be resolved). *See also* Richard L. Abel, *A Comparative Theory of Dispute Institutions in Society*, 8 LAW & SOC. REV. 217 (1973).

[23] *See* Jeffrey W. Stempel, *Reflections on Judicial ADR and the Multi-Door Courthouse at Twenty: Fait Accompli, Failed Overture, or Fledgling Adulthood?*, 11 OHIO ST. J. ON DISP. RESOL. 297, 331 & nn. 110 & 111 (1996). Professor Stempel points out that Sander used the term in a subsequent article. *Id*. (citing Frank E.A Sander, *The Multi-Door Courthouse*, NATIONAL FORUM, Vol. LXIII, No. 4, Fall 1983).

[24] *See, e.g.*, Jean R. Sternlight, *ADR is Here: Preliminary Reflections on Where it Fits in a System of Justice*, 3 NEV. L.J. 289, 289 & n.3 (Winter 2002/2003); Developments, *The Paths of Civil Litigation*, 113 HARV. L. REV. 1851, 1853 & n.9 (2000); Kimberlee K. Kovach & Lela P. Love, *Mapping Mediation: The Risks of Riskin's Grid*, 3 HARV. NEGOT. L. REV. 71 (1998); Jeffrey W. Stempel, *Reflections on Judicial ADR and the Multi-Door Courthouse at Twenty: Fait Accompli, Failed Overture, or Fledgling Adulthood?*, 11 OHIO ST. J. ON DISP. RESOL. 297, 309 (1996); E. WENDY TRACHTE-HUBER & STEPHEN K. HUBER, ALTERNATIVE DISPUTE RESOLUTION: STRATEGIES FOR LAW AND BUSINESS 3-4, 29 (1996); Laura Nader, *Controlling Processes in the Practice of Law: Hierarchy and pacification in the Movement to Re-Form Dispute Ideology*, 9 OHIO ST. J. ON DISP. RESOL. 1, 5-6 (1993); Laura Nader, *The ADR Explosion—The Implications of Rhetoric in Legal Reform*, 8 WINDSOR Y.B. OF ACCESS TO JUSTICE 269 (1988); Jethro K. Lieberman & James F. Henry, *Lessons From the Alternative Dispute Resolution Movement*, 53 U. CHI. L. REV. 424, 427 n.17 (1986).

[25] *See generally*, Ralph Nader, *Consumerism and Legal Services: The Merging of Movements*, 11 LAW & SOC. REV. 247, 255 (1976) ("The [legal] system must be designed to encourage the non-legal resolution of disputes, and public participation in planning processes, as well as more traditional legal activity like litigation."); William H. Simon, *Legal Informality and Redistributive Politics*, 19 CLEARINGHOUSE REV. 384, 384-87 (1985); Laurence H. Tribe, *Too Much Law, Too Little Justice*, THE ATLANTIC, July 1979 at 25; FORD FOUNDATION, MEDIATING SOCIAL CONFLICT 4 (1978) (third-party intervention efforts supported by Ford Foundation include

profession,[27] and resonated with a changing sociopolitical culture.[28] Litigants of all types had a new forum for dispute resolution.[29] Courts had competition.[30] The academy had a new discipline.[31] And the rhetoric of

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mediation, arbitration, facilitiation, fact-finding, and conciliation); FORD FOUNDATION, CURRENT INTERESTS OF THE FORD FOUNDATION: 1978 AND 1979 6-7 ("The [Ford] Foundation plans to support investigations of new ways of settling disputes that may be more equitable, cheaper, and less divisive than the adversary process.").

[26] Chief Justice Burger and others viewed ADR as a mechanism for lightening the caseload of judges. *See, e.g,* Warren Burger, *Isn't There a Better Way?*, 68 A.B.A. J. 274, 276-77 (1982) (advocating private binding arbitration as "a better way to do it"); Derek Bok, *The President's Report to the Board of Overseers of Harvard College, 1981-1982*, reprinted in N.Y. ST. B.J., Oct. 1983, at 8, and N.Y. ST. B.J., Nov. 1983, at 31; Cannon, *Contentious and Burdensome Litigation: A Need for Alternatives*, 63 NAT'L FORUM, Fall 1983, at 10; Ehrlich, *Legal Pollution*, N.Y. TIMES MAG., Feb. 8, 1976, at 17, 21; Footlick, *Too Much Law?*, NEWSWEEK, Jan. 10, 1977, at 42, 47; Manning, *Hyperlexis: Our National Disease*, 71 NW. U. L. REV. 767, 780 (1977); Rosenberg, *Let's Everybody Litigate?*, 50 TEX. L. REV. 1349, 1360-63 (1972); Tribe, *Too Much Law, Too Little Justice*, ATLANTIC MONTHLY, July 1979, at 25. Owen Fiss wrote that Chief Justice Burger was not "moved by love, or by a desire to find new ways to restore or preserve loving relationships, but rather by concerns of efficiency and politics. He seeks alternatives to litigation in order to reduce the caseload of the judiciary or, even more plausibly, to insulate the status quo from reform by the judiciary." Owen M. Fiss, *Out of Eden*, 94 YALE L.J. 1669 (1985); Jeffrey W. Stempel, *Reflections on Judicial ADR and the Multi-Door Courthouse at Twenty: Fait Accomplis, Failed Overture, or Fledgling Adulthood?*, 11 OHIO ST. J. ON DISP. RESOL. 297, 344 (1996) ("ADR's biggest boosters are commercial organizations, employers, insurers, political conservatives and Republicans.").

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

[27] ABA REPORT ON THE NATIONAL CONFERENCE ON MINOR DISPUTES RESOLUTION 11-12 (May 1977); Robert Mnookin & Lewis Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 YALE L.J. 950 (1979).

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

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

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

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

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

ADR was quickly viewed as part of the solution to many categories of cases. *See, e.g.,* Ronald L. Goldfarb & Linda R. Singer, *Redressing Prisoners' Grievances*, 39 GEO. WASH. L. REV. 175; Raymond G. Leffler, *Dispute Settlement Within Close Corporations*, 31 ARB. J. (n.s.) 254 (1976); Andrew J. Nocas, *Arbitration of Medical Malpractice Claims*, 13 FORUM 254 (1977); Comment, *Nontraditional Remedies for the Settlement of Consumer Disputes*, 49 TEMP. L.Q. 385 (1976); Symposium, *The Value of Arbitration and Mediation in Resolving Community and Racial Disputes Affecting Business*, 29 BUS. LAW. 1005 (1974); Note, *Arbitration of Attorney Fee*

peaceful problem-solving offered a quixotic escape from all of that which plagued formal adjudication.[32] At the time of Sander's speech there already existed a broad array of proposed and experimental models of alternative dispute resolution[33] But Sander elevated these various methods of dispute

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Disputes: New Direction for Professional Responsibility, 5 UCLA-ALASKA L. REV. 309 (1976); Timothy S. Hardy & R. Mason Cargill, *Resolving Government Contract Disputes: Why Not Arbitrate?*, 34 FED. B.J. 1 (1975); Matthew W. Finkin, *The Arbitration of Faculty Status Disputes in Higher Education*, 30 SW. L.J. 389 (1976).

[31] *See, e.g.*, DEAN PRUITT & JEFFREY RUBIN, SOCIAL CONFLICT (1986); CHRISTOPHER W. MOORE, THE MEDIATION PROCESS (1986); HOWARD RAIFFA, THE ART AND SCIENCE OF NEGOTIATION (1982); GARY BELLOW & BEA MOULTON, THE LAWYERING PROCESS: NEGOTIATION (1981); HARRY T. EDWARDS & JAMES J. WHITE, THE LAWYER AS NEGOTIATOR: PROBLEMS, READINGS AND MATERIALS (1977); ROGER FISHER & WILLIAM C. URY, GETTING TO YES: NEGOTIATING AGREEMENT WITHOUT GIVING IN (1981); P. H. GULLIVER, DISPUTES AND NEGOTIATIONS: A CROSS-CULTURAL PERSPECTIVE (1979); DEAN G. PRUITT, NEGOTIATION BEHAVIOR (1981); STEVEN J. BRAMS & ALAN D. TAYLOR, FAIR DIVISION: FROM CAKE-CUTTING TO DISPUTE RESOLUTION (1996); Carrie Menkel Meadow, Review Essay, *Legal Negotiation: A Study of Strategies in Search of a Theory*, 1983 AM. BAR FOUND. RES. J. 905.

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

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

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

Today, of course, there are many excellent casebooks devoted exclusively to these fields of study. *See, e.g.*, CARRIE J. MENKEL-MEADOW, LELA PORTER LOVE, ANDREA KUPFER SCHENIDER & JEAN R. STERNLIGHT, DISPUTE RESOLUTION: BEYOND THE ADVERSARIAL MODEL (2004); STEPHEN B. GOLDBERG, FRANK E. A. SANDER, NANCY H. ROGERS & SARAH RUDOLPH COLE, DISPUTE RESOLUTION: NEGOTIATION, MEDIATION, AND OTHER PROCESSES (4th ed. 2003); ALAN SCOTT RAU, EDWARD F. SHERMAN & SCOTT R. PEPPET, PROCESSES OF DISPUTE RESOLUTION: THE ROLE OF LAWYERS (3rd ed. 2002); E. WENDY TRACHTE-HUBER & STEPHEN K. HUBER, ALTERNATIVE DISPUTE RESOLUTION: STRATEGIES FOR LAW AND BUSINESS (1996).

[32] *See, e.g.*, Nancy H. Rogers & Craig A. McEwen, *Employing the Law to Increase the Use of Mediation and to Encourage Direct and Early Negotiations*, 13 OHIO ST. J. ON DISP. RESOL. 831, 833-39 (1998) (arguing that increased use of mediation may elevate legal practice); *see also* Frances McGovern, *Beyond Efficiency: A Bevy of ADR Justifications (An Unfootnoted Summary)*, DISP. RESOL. MAG., Summer 1997, at 12, 13; *cf.* GABRIEL A. ALMOND & SIDNEY VERBA, THE CIVIC CULTURE: POLITICAL ATTITUDES AND DEMOCRACY IN FIVE NATIONS 1-10 (1965) (arguing that cultural factors shape political institutions).

[33] *See* Frank E.A. Sander, *The Future of ADR: The Earl F. Nelson Memorial Lecture*, 2000 J. DISP. RESOL. 3, 4 ("Obviously, we didn't invent mediation, we didn't invent arbitration. But, by common agreement, it was in about 1975 that the current interest in ADR began. The first period, I think, was about 1975 to 1982. I call it, 'Let a thousand flowers bloom.' There were many experiments…."). ADR mechanisms then in practice included neighborhood justice centers, rejuvenated small claims courts, arbitration, mediation, ombudsmen, and even reconceptualized state and federal agencies. *See* Daniel McGillis, *Minor Dispute Processing: A Review of Recent Developments*, in ROMAN TOMASIC & MALCOLM FEELEY, NEIGHBORHOOD JUSTICE: ASSESSMENT OF AN EMERGING IDEA 60, 64 (1982) (recounting how, in the 1960s, local communities established neighborhood justice centers to provide facilitative dispute resolution services for neighbors, families, tenants, and consumers); DANIEL

resolution from their shadowy adjunct and ancillary status to a legitimate alternative *primary* process for the resolution of certain disputes.[34] Charting a spectrum of available processes from formal adjudication, at one end, through mediation and negotiation at the other end, Sander emphasized that the critical issue was determining, for a particular conflict, the "appropriate dispute resolution process."[35]

Notwithstanding a vocal and persistent chorus of disquietude,[36] ADR has expanded to become something of a court of general civil jurisdiction.[37] No longer a niche product for certain commercial and labor law cases,[38]

MCGILLIS & JOAN MULLEN, NEIGHBORHOOD JUSTICE CENTERS: AN ANALYSIS OF POTENTIAL MODELS (Nat'l Inst. L. Enforcement & Crim. Just. No. J-LEAA-030-76, 1977); DAVIS S. GOULD, NATIONAL INSTITUTE FOR CONSUMER JUSTICE, STAFF STUDIES ON SMALL CLAIMS COURTS (1972) (documenting success of small claims courts); Thomas L. Eovaldi & Joan E. Gestrin, *Justice for Consumers: The Mechanisms of Redress*, 66 NW. U. L. REV. 281, 302-12 (1971) (discussing arbitration and mediation of consumer claims); Mary Gardiner Jones & Barry B. Boyer, *Improving the Quality of Justice in the Marketplace: The Need for Better Consumer Remedies*, 40 GEO. WASH. L. REV. 357 (1972) (same); Wexler, *Court-Ordered Consumer Arbitration*, 28 ARB. J. 175 (1973) (same); Maurice Rosenberg & Myra Schubin, *Trial by Lawyer: Compulsory Arbitration of Small Claims in Pennsylvania*, 74 HARV. L. REV. 448 (1961) (same); George King, *The Consumer Ombudsman*, 79 COM. L.J. 355 (1974) (__); Eric H. Steele, *Fraud, Dispute, and the Consumer: Responding to Consumer Complaints*, 123 U. PA. L. REV. 1107 (1975) (__); David A. Rice, *Remedies, Enforcement Procedures and the Duality of Consumer Transaction Problems*, 48 B.U. L. REV. 559 (1968) (__); NATIONAL ASSOC. OF ATTORNEYS GENERAL, COMM. ON THE OFFICE OF ATTORNEY GENERAL, STATE PROGRAMS FOR CONSUMER PROTECTION 4-5 (1973) (__); Maurice Rosenberg, *Devising Procedures that are Civil to Promote Justice that is Civilized*, 69 MICH. L. REV. 797 (1971) (___); Richard Danzig, *Toward the Creation of a Complementary, Decentralized System of Criminal Justice*, 26 STAN. L. REV. 1 (1973).

See generally E. WENDY TRACHTE-HUBER & STEPHEN K. HUBER, ALTERNATIVE DISPUTE RESOLUTION: STRATEGIES FOR LAW AND BUSINESS 29 (1996) (suggesting that ADR is "Not a new or even recent development," and citing decision of King Solomon, Federal Arbitration Act of 1925, and use of arbitration and mediation to resolve trade and labor disputes). *See also* n. __, *supra*.

[34] Frank E.A. Sander, *Varieties of Dispute Processing*, in THE POUND CONFERENCE: PERSPECTIVES ON JUSTICE IN THE FUTURE 65, 80 (A. Leo Levin & Russell R. Wheeler eds., 1979).

[35] Frank E.A. Sander, *Varieties of Dispute Processing*, in THE POUND CONFERENCE: PERSPECTIVES ON JUSTICE IN THE FUTURE 65, 84 (A. Leo Levin & Russell R. Wheeler eds., 1979).

Commentators have since adopted this appellation of the "ADR" acronym. *See, e.g.*, Albie M. Davis & Howard Gadlin, *Mediators Gain Trust the Old-Fashioned Way—We Earn It!*, 4 NEGOT. J. 55, 62 (1988); STEPHEN B. GOLDBERG, FRANK E.A. SANDER, NANCY H. ROGERS & SARAH RUDOLPH COLE, DISPUTE RESOLUTION: NEGOTIATION, MEDIATION, AND OTHER PROCESSES 6 at n.* (4th ed. 2003); Janet Reno, *Lawyers as Problem-Solvers: Keynote Address to the AALS*, 49 J. LEGAL EDUC. 5, 8 (1999) (urging lawyers to engage in "appropriate dispute resolution"); LEONARD L. RISKIN & JAMES E. WESTBROOK, DISPUTE RESOLUTION AND LAWYERS 51 (2d ed. 1997); Carrie Menkel-Meadow, *Whose Dispute Is It Anyway? A Philosophical and Democratic Defense of Settlement (in Some Cases)*, 83 GEO. L.J. 2663, 2689-90 (1995) (urging that *appropriate* should replace *alternative* in describing mediation and other nontrial dispute resolution processes). Of all the credit heaped upon Professor Sander for his 1976 speech, I find it surprising that he has not also justly received the credit for inventing the term "appropriate dispute resolution." In any event, upon my reading of the tea leaves and the contemporary scholarship, it appears that "CDR" ("complementary dispute resolution") is the next iteration. *See* n. __ *infra* and accompanying text.

[36] The bibliographies cited in n. __, *infra*, collect the relevant sources.

[37] *See* Thomas J. Stipanowich, *Punitive Damages and the Consumerization of Arbitration*, 92 NW. U. L. REV. 1, 8 (1997) (noting that arbitration has "moved from the role of commercial court to that of a civil court of general jurisdiction."). *See also* Judith Resnik, *For Owen M. Fiss: Some Reflections on the Triumph and Death of Adjudication*, 58 U. MIAMI L. REV. 173, 186 (2003) (suggesting that ADR has "creat[ed] a 'new' civil procedure").

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

ADR now commands attention in all sectors of the economy[39] and in virtually every segment of society.[40]

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

A review of recent literature indicates the expansion of ADR in antitrust, *see, e.g.*, Howard Adler, Jr. & Richard Chernick, *The Expanding Role of ADR in Antitrust Cases*, 9 No. 2 DISP. RESOL. MAG. 34 (Winter 2003); entertainment, *see, e.g.*, Symposium, *Alternative Dispute Resolution in the Entertainment Industry*, 4 CARDOZO ONLINE J. CONFLICT RESOL. 1-___ (October 23, 2002); Peter A. Carfagna, *"Show Me the Money:" In Lucrative Sports Contracts, an ADR Clause Makes All the Difference*, 57 DISP. RESOL. J. 9 (2002); MARGERY HOLMAN, DICK MORIARTY & JANICE FORSYTH, SPORTS, FITNESS AND THE LAW: NORTH AMERICAN PERSPECTIVES __-__ (2nd ed. 2001) (chapter on ADR in Sports Law); Gerald F. Phillips, *Entertainment Industry is Accepting ADR*, 21 No. 1 ENT. L. REP. 5 (1999); health care, *see, e.g.*, Glenn Cohen, *Negotiating Death: ADR and End of Life Decision-Making I*, 9 HARV. NEGOT. L. REV. 253 (2004); Phyllis E. Bernard, *Mediating With an 800-Pound gorilla: Medicare and ADR*, 60 WASH. & LEE. L. REV. 1417 (2003); John W. Cooley, *A Dose of ADR for the Health Care Industry*, 57 DISP. RESOL. J. 16 (Feb.-Apr. 2002); Bryan A. Lian, *ADR in Health Care: An Overview of the ADR Landscape* in HEALTH CARE DISPUTE RESOLUTION MANUAL 3:1 – 3:43 (2000); construction, *see, e.g.*, AMERICAN ARBITRATION ASSOC. CONSTRUCTION INDUSTRY DISPUTE RESOLUTION PROCEDURES (INCLUDING MEDIATION AND ARBITRATION RULES) (2000); CPR INSTITUTE FOR DISPUTE RESOLUTION, CPR MODEL ADR PROCEDURES AND PRACTICES, CONSTRUCTION INDUSTRY ADR (1994); HIBBERD & NEWMAN, ADR AND ADJUDICATION IN CONSTRUCTION DISPUTES (1999); natural resources, *see, e.g.*, Eileen B. Vernon, *Arbitration in the Energy/Minerals Field: Customizing the Clause*, 56 J AN DISP. RESOL. J. 50 (Nov. 2001/Jan. 2002); P. Jean Baker, *ADR Assists Energy Industry Restructuring*, DISP. RESOL. J. 9 (Feb. 1999); intellectual property, *see, e.g.*, Manny D. Pokotilow, *Why Alternative Dispute Resolution Should be Used for Intellectual Property Disputes*, 16 No. 7 J. PROPRIETARY RTS. 17 (July 2004); Kevin M. Lemley, *I'll Make Him an Offer He Can't Refuse: A Proposed Model for Alternative Dispute Resolution in Intellectual Property Disputes*, 37 AKRON L. REV. 287 (2004); Rodney C. Kyle, *Arbitration Makes Sense in International Intellectual Property Disputes*, 56 J AN DISP. RESOL. J. 30 (Nov. 2001/Jan. 2002); Scott H. Blackman & Rebecca M. McNeill, *Alternative Dispute Resolution in Commercial Intellectual Property Disputes*, 47 AM. U. L. REV. 1709, 1716 (1998) (arguing that ADR is an effective means of resolving disputes that involve "shared rights" and for which an "either/or result in which one party walks away with all the rights at issue" is ill-suited); Eugene R. Quinn, Jr., *Using Alternative Dispute Resolution to Resolve Patent Litigation: A Survey of Patent Litigators*, 3 MARQ. INTELL. PROP. L. REV. 77, 84 (1999); telecommunications, *see, e.g.*, Lori Tripoli, *Telecommunications Act Offers Opportunity for ADR Advocates*, INSIDE LITIG., Mar. 1997, at 3, 3 (reporting that the CPR Institute's Telecommunications Group is recommending ADR to state agencies that must implement the Telecommunications Act of 1996); and technology industries, *see, e.g.*, William F. Baron, *High Tech/High Resolution: ADR in Technology Disputes*, DISP. RESOL. J., Apr. 1996, at 88, 90 (noting characteristics of ADR amenable to technology disputes).

Not surprisingly, certain of these growth areas have proven especially controversial. *See, e.g.*, Clyde W. Summers, *Mandatory Arbitration: Privatizing Public Rights, Compelling the Unwilling to Arbitrate*, 6 U. PA. J. LAB. & EMP. L. 685 (2004); Richard M. Alderman, *Pre-Dispute Mandatory Arbitration in Consumer Contracts: A Call for Reform*, 38 HOUS. L. REV. 1237 (2001); Sarah R. Cole, *Uniform Arbitration: "One Size Fits All" Does Not Fit*, 16 OHIO ST. J. ON DISP. RESOL. 759 (2001); Sidney Charlotte Reynolds, *Closing a Discrimination Loophole: Using Title VII's Anti-Retaliation Provision to Prevent Employers from Requiring Unlawful Arbitration Agreements as Conditions of Continued Employment*, 76 WASH. L. REV. 957 (__); Ronald Turner, *Employment Discrimination, Labor and Employment Arbitration, and the Case Against Union Waiver of the Individual Worker's Statutory Right to a Judicial Forum*, 49 EMORY L.J. 135 (2000); Jean R. Sternlight, *Rethinking the Constitutionality of the Supreme Court's Preference for Binding Arbitration: A Fresh Assessment of Jury Trial, Separation of Powers, and Due Process Concerns*, 72 TUL. L.REV. 1 (1997); Michael D. Donovan & David A. Searles, *Preserving Judicial Recourse for Consumers: How to Combat Overreaching Arbitration Clauses*, 10 LOY. CONSUMER L. REV. 269 (1998); Carrie Menkel-Meadow, *Do the "Haves" Come Out Ahead in Alternative Judicial Systems? Repeat Players in ADR*, 15 OHIO ST. J. ON DISP. RESOL. 19 (1999).

[40] The Better Business Bureau, for example, may be the most familiar dispute resolution program. *See* __ KING & __ MCEVOY, A NATIONAL SURVEY OF THE COMPLAINT-HANDLING PROCEDURES USED BY CONSUMERS (1976) (Nat'l Technical Information Serv., U.S. Commerce Dep't) (finding the Better Business Bureau more familiar to consumers than 19 of 21 public and private organizations; only the Post Office and the Social Security Administration were better known). Trade associations and county, city and state-sponsored consumer affairs offices also often offer dispute resolution services. *See generally* Laura Nader, *Disputing Without the Force of Law*, 88 YALE L.J. 998, 1003-04 & n.25 (1978-1979).

The American Arbitration Association (AAA) has formed special panels from time to time to deal with

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

Providing ADR has, itself, become a cottage industry.[42] And in cyberspace, disputes are resolved through ADR[43]—even if we have yet to appreciate

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particular phenomena: forming a claims resolution program at the request of the Florida Department of Insurance following the devastation of southern Florida by Hurricane Andrew in 1992; constituting a National Technology Panel in 1998 to address issues arising from the "Y2K Problem" which then loomed as a potential threat; establishing in 2000 a panel for the USA Track and Field doping arbitration program. AMERICAN ARBITRATION ASSOCIATION, PUBLIC SERVICE AT THE AMERICAN BAR ASSOCIATION 8-9 (2004). Other arbitration panels of general interest may include the Tribunal Arbitral du Sport, which recently adjudicated the Olympic medal controversy between gymnasts Paul Hamm and Yang Tae Young. *See* http://www.tas-cas.org/ (CAS 2004/A/704 Yang Tae Young v. International Gymnastics Federation) (last visited November 10, 2004).

Perhaps the largest effort at private dispute resolution was the formation of the Asbestos Claims Facility. This was an entity created with the assistance of Dean Emeritus Harry Wellington, on behalf of manufacturers of asbestos and their insurers , to facilitate prompt disputes between and among producers and insurers. *See generally* Harry Wellington, *Asbestos: The Private Management of A Public Problem*, 33 CLEV. ST. L. REV. 375 (1984-85); Carrie Menkel-Meadow, *Pursuing Settlement in an Adversary Culture: A Tale of Innovation Co-Opted or "The Law of ADR"*, 19 FLA. ST. U. L. REV. 1. 14 & n.56 (1991); Jethro K. Lieberman & James F. Henry, *Lessons from the Alternative Dispute Resolution Movement*, 53 U. CHI. L. REV. 424, 438 (1986) (suggesting optimism at early stages of program).

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

[41] Jean R. Sternlight, *ADR is Here: Preliminary Reflections on Where it Fits in a System of Justice*, 3 NEV. L.J. 289, 290-91 (Winter 2002/2003) (citing The Alternative Dispute Resolution Act of 1998, 28 U.S.C. §§ 651-58, 652(a) (requiring each district court to have litigants in all civil cases consider using ADR, and to provide at least one ADR process to litigants); NANCY H. ROGERS & CRAIG A. MCEWEN ET AL., MEDIATION: LAW, POLICY PRACTICE app. B (1999 & Supp. 2000) (listing territory, state, and federal legislation on mediation); Jeffrey M. Senger, *Turning the Ship of State*, 2000 J. DISP. RESOL. 79 (listing federal agencies utilizing various ADR processes, including the U.S. Postal Service, federal Justice Department, Equal Employment Opportunity Commission, and the Air Force); Marc Galanter & Mia Cahill, *"Most Cases Settle": Judicial Promotion and Regulation of Settlements*, 46 Stan. L. Rev. 1339, 1340-41).

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

Stephen K. Huber, *The Arbitration Jurisprudence of the Fifth Circuit*, 35 TEX. TECH. L. REV. 497, 499 (2004).

[42] A. Leo Levin & Denise D. Colliers, *Containing the Cost of Litigation*, 37 RUTGERS L. REV. 219, 248 (1985); Jack M. Sabatino, *ADR as "Litigation Lite": Procedural and Evidentiary Norms Embedded Within Alternative Dispute Resolution*, 47 EMORY L.J. 1289, 1301 (1998); YVES DEZALAY & BRYANT G. GARTH, DEALING IN VIRTUE: INTERNATIONAL COMMERCIAL ARBITRATION AND THE CONSTRUCTION OF A TRANSNATIONAL LEGAL ORDER 33-62 (1996).

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

The Center for Information Technology and Dispute Resolution (CITDR) at the University of Massachusetts

fully what and where cyberspace is.[44] The increasing incidence of transnational disputes has likewise fueled the ADR boom.[45]

Reference to a system of ADR could be misleading in its simplicity since there is, in fact, a constellation of different ADR mechanisms that can vary dramatically in form, substance and purpose.[46] Generally speaking, however, I draw conclusions based on the similarities of those mechanisms rather than their differences.[47] As Professor Resnik described in a similar context, "I am interested in the interaction of two generic modes of dispute resolution, one styled 'adjudication' and one styled 'alternative dispute resolution'—even as we know that both are constructs, with internal distinctions, a variety of expressions, and a good deal of overlap."[48] At this initial stage in my argument, then, I am content to have simply outlined the

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supports and sustains the development of information technology applications as a means for better understanding and managing conflict. As part of this effort they maintain a list of profit and nonprofit ADR projects and ventures that provide online dispute resolution services. As of October 19, 2004, over 50 projects were enumerated. *See* http://www.ombuds.org/center/onlineadr.html (last visited Oct. 19, 2004). *See also* //www.odr.info/providers.php (last visited Oct. 19, 2004).

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

[45] *See, e.g.*, First Global Research Facility Dedicated to ADR Launched, DISP. RESOL. J., Aug. 1999, at 4, 4; Betty Southard Murphy, *ADR's Impact on International Commerce*, DISP. RESOL. J., Dec. 1993, at 68, 69. Because some foreign courts refuse to hear technology and Internet cases, ADR is the only recourse in these situations. *See* Lepera & Costello, *supra* note __, at 600.

Researchers report widespread dissatisfaction among Mexican and Canadian disputants, with more than 50 sets of laws that must be managed in U.S. litigation, and indicate that the availability of ADR has significantly improved the international free trade climate. Mediation is also more compatible with cultural biases in Canada and Mexico against litigation. *See* L. Richard Freese, Jr. & Robert Sagnola, *New Challenges in International Commercial Disputes: ADR Under NAFTA*, COLO. LAW., Sept. 1997, at 61, 62.

[46] *See* STEPHEN B. GOLDBERG, FRANK E.A. SANDER, NANCY H. ROGERS & SARAH RUDOLPH COLE, DISPUTE RESOLUTION: NEGOTIATION, MEDIATION, AND OTHER PROCESSES 4-5 (4th ed. 2003) (offering a useful table comparing and contrasting various methods of dispute resolution, including arbitration, mediation, negotiation, private judging, neutral expert fact-finding, minitrial, ombudsman, and summary jury trial); *see also id*. at 287-94 (describing various innovative forms of arbitration, including final offer arbitration, high-low arbitration, and mediation-arbitration ("med-arb")); *id.* at 303-04 (discussing early neutral evaluation); Cary Coglianese, *Assessing Consensus: The Promise and Performance of Negotiated Rule-Making*, 46 DUKE L.J. 1255 (1997) (evaluating regulation negotiation ("reg-neg")).

For extensive bibliographies describing and evaluating the myriad processes and implications of ADR, *see* STEPHEN B. GOLDBERG, FRANK E.A. SANDER, NANCY H. ROGERS & SARAH RUDOLPH COLE, DISPUTE RESOLUTION: NEGOTIATION, MEDIATION, AND OTHER PROCESSES 691-755, 761-82 (4th ed. 2003); ALAN SCOTT RAU, EDWARD F. SHERMAN & SCOTT R. PEPPET, PROCESSES OF DISPUTE RESOLUTION: THE ROLE OF LAWYERS 1007-18 (3rd ed. 2002)

[47] *See generally*, __, *Dispute Resolution*, 88 YALE L.J. 905, 906 (1979) ("'Alternative dispute resolution' is a label ascribed to an increasingly broad range of options that share few characteristics aside from their common departure from traditional courtroom procedures.").

There are occasions where distinctions are necessary. *See, e.g.*, nn. ___, *infra*, and accompanying text.

Of course one should also note that the form, substance and processes of "formal adjudication" can also vary. Consider, for example, the differences between small claims court and the United States Supreme Court. *See* Frank E.A. Sander, *Varieties of Dispute Processing*, in THE POUND CONFERENCE: PERSPECTIVES ON JUSTICE IN THE FUTURE 65, 69-70 (A. Leo Levin & Russell R. Wheeler eds., 1979).

[48] Judith Resnik, *Many Doors? Closing Doors? Alternative Dispute Resolution and Adjudication*, 10 OHIO ST. J. ON DISP. RESOL. 211, 256 (1995) (citing: Lauren K. Robel, *Private Justice and the Federal Bench*, 68 Ind. L. Rev. 891, 895-96 (1993) (the "privatization continuum"); Galanter & Lande, *supra*, at 399-400 (charting the "dimensions of privatization")).

emergence of a system of ADR that is resolving many types of disputes, and in large numbers.

II. THE ECHOES OF EQUITY IN ADR

In its most ambitious form, ADR presents an alternative paradigm of dispute resolution. ADR proponents espouse a larger and less traditional view of lawyering skills, criticize the physical and financial barriers to justice, and focus attention upon the drawbacks of the judicial process—the needless complication of issues, the unidimensional character of adversarial representation, the excessive costs and delays, and the sporting theory of justice.[49] They envision a complete restructuring of the adjudicatory framework and a reeducation not only of lawyers and other professionals, but also of the general public about the ideals of justice and the methods of dispute resolution.[50]

This Part draws attention to the characteristics of equity that inhere in that alternative system of ADR. To be sure, comparing two regimes as protean and multi-dimensional as equity and ADR without over-generalizing or caricaturing either, and without cherry-picking the best analogues and avoiding the complexities, can be difficult. I have attempted to minimize those risks by focusing here on abstractions of the two systems rather than on either system's constituent parts. For the most part these abstractions also consider the systems of ADR and Equity in their pure, original forms.[51] The observations made in this Part are purposely uncritical, if not somewhat superficial. A more thorough analysis of the relationships between and among the systems of ADR and formal adjudication, on one hand, and the systems of Law and Equity, on the other, follows in subsequent Parts. That later discussion also addresses the evolution and perversion of these analogous "alternative" systems.

A. Locating a Jurisprudence

As a threshold matter, the word *equity* requires clarification. There are at least three definitions of equity and, to some extent, all are implicated here. One popular meaning of equity invokes a collection of eternal and universal principles that captures all that which is moral, right, just and

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[49] THOMAS E. CARBONNEAU, ALTERNATIVE DISPUTE RESOLUTION: MELTING THE LANCES AND DISMOUNTING THE STEEDS 4 (1989); Thomas E. Carbonneau, *A Consideration of Alternatives to Divorce Litigation*, 1986 U. ILL. L. REV. 601, 606-07, 612-15.

[50] THOMAS E. CARBONNEAU, ALTERNATIVE DISPUTE RESOLUTION: MELTING THE LANCES AND DISMOUNTING THE STEEDS 4 (1989).

[51] Moreover, mining the history of Equity relies heavily on incomplete pictures painted by secondary sources, making all conclusions somewhat tentative. .*See generally* JOHN HAMILTON BAKER, THE LAW'S TWO BODIES: SOME EVIDENTIAL PROBLEMS IN ENGLISH LEGAL HISTORY (Oxford 2001).

good.[52] In the broadest understanding of this view, equity is ethical rather than jural.[53] Grounded in the precepts of the conscience, this notion of equity includes such mandates as gratitude, kindness, and charity, and thus extends well beyond the reach of positive law.[54]

A second, similar meaning sometimes given to equity makes equity synonymous with "natural law." [55] In this view equity is the soul and spirit of all law[56]—the moral standard to which all law should conform.[57] In this sense equity, the "real law,"[58] has a place in every rational system of jurisprudence, if not in name, at least in substance.[59]

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[52] *See generally* Anton-Hermann Chroust, *Aristotle's Conception of "Equity" (Epiekia)*, 18 NOTRE DAME L. REV. 119 (1942-1943); MAX HAMBRUGER, MORALS AND LAW: THE GROWTH OF ARISTOTLE'S LEGAL THEORY (1965); NANCY SHERMAN, THE FABRIC OF CHARACTER: ARISTOTLE'S THEORY OF VIRTUE (1989).

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

[53] NORMAN FETTER, HANDBOOK OF EQUITY JURISPRUDENCE 1-2 (1895).

[54] JOSIAH W. SMITH, A MANUAL OF EQUITY JURISPRUDENCE 3-4 (1st American Edition from the 9th London Edition 1871).

[55] *See* Walter Wheeler Cook, *Equity, in* ENCYCLOPEDIA OF THE SOCIAL SCIENCES 582 (1931) ("The most common of the non-technical meanings of equity, one in which lawyers themselves not infrequently use the word, is as a synonym for 'natural justice.'")

[56] 3 WILLIAM BLACKSTONE, COMMENTARIES.. . p. 429. It is with this meaning of the word that French jurists have said: "*L'equité est l'esprit de nos lois*"; and a Roman jurist said "*Æquitas est honestas*."

[57] 1 JOHN NORTON POMEROY, A TREATISE ON EQUITY JURISPRUDENCE § 45 at 45-46 (2d ed. 1892);

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

[59] *See* "1 FONBLANGUE EQUITY, B. 1, § 3, p.24, note (h); PLOWDEN, COMM. p. 465, 466. Lord Bacon said in his Argument on the jurisdiction of the Marches, there is no law under heaven which is not supplied with equity; for summum jus summar injuria; or as some have it, summa lex summa crux. And, therefore, all nations have equity. 4 BAC. WORKS, p. 274. Plowden, in his note to his Reports, dwells much (p. 465, 466) on the nature of equity in the interpretation of statutes, saying, Ratio legis est anima legis. And it is a common maxim in the law of England, that Apices juris non sunt jura BRANCH'S MAXIMS, p. 12; CO. LITT. 304(b)." 1 JOSEPH STORY, COMMENTARIES ON EQUITY JURISPRUDENCE § 7 at 6 (12th ed. 1877).

This definition of equity has led some to focus on the commonality of the foundational principles of the common law and equity. Thus, Blackstone says: "The [common] law is the perfection of reason; it always intends to conform thereto; and what is not reason is not law." He then goes on to say: "Not that the particular reason of every rule in the law can at this distance of time be always precisely assigned; but it is sufficient that there be nothing in the rule flatly contradictory to reason, and then the law will presume it to be well founded." 1 WILLIAM BLACKSTONE, COMMENTARIES ON … p. 70.

> The moral law, as such, is not an element of the human law. Whatever be the name under which it is described,—the moral law, the natural law, the law of nature, the principles of right and justice,—this code which is of divine origin, and which is undoubtedly compulsory upon all mankind in their personal relations, is not *per se* or *ex proprio vigore* a part of the positive jurisprudence which, under the name of the municipal law, each independent state has set for the government of its own body politic. This truth, so simple and so plain, and yet so often forgotten by text-writers and judges, removes at once all doubt and difficulty from a clear conception of the positive human law, and of its relations with the higher and divine law which we call morality. Speculative writers upon the natural law may well see in it the foundation of all perfected human legislation, and it is not surprising that they should confound the two. It is surprising that those who treat of the human jurisprudence alone, and especially those who administer that jurisprudence, should confound the commands uttered by the divine Law-giver with those issued by human law-makers. It is true that many of the precepts of this moral code relate to mankind considered as members of an organized society,—the state,—and prescribe the obligations which belong to them as component parts of a national body; and therefore these precepts are *jural* in their nature and design, and the duties which they impose upon individuals are of the same kind as those imposed by the human authority of the state. It is also true that human legislation ought to conform itself to and embody these jural precepts of the moral code; every legislator, whether he legislate in a Parliament or on the judicial bench, ought to find the source and material of the rules he lays down in these principles of morality; and it is certain that the progress toward a perfection of development in every

A third, technical definition of Equity (a meaning typically signified by use of the capital letter "E") refers to that system of jurisprudence that was originally administered by the High Court of Chancery in England.[60] The circularity of this definition requires a brief narration of the scope of the jurisprudence of Equity.

The system of Equity evolved from the royal prerogative of kings, as the fountainhead of justice,[61] to ensure that justice was administered in each

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municipal law consists in its gradually throwing off what is arbitrary, formal, and unjust, and its adopting instead those rules and doctrines which are in agreement with the eternal principles of right and morality. But it is no less true that until this work of legislation has been done, until the human law-giver has thus borrowed the rules of morality, and embodied them into the municipal jurisprudence by giving them a human sanction, morality is not binding upon the citizens of a state as a part of the law of that state. In every existing municipal law belonging to a civilized nation, this work of adaptation and incorporation has been performed to a greater or less degree.

1 JOHN NORTON POMEROY, A TREATISE ON EQUITY JURISPRUDENCE § 63 at 65-67 (2d ed. 1892).

[60] *See* n. __, *infra*.

Equity Jurisprudence, in the specific and technical sense of the term, as contradistinguished from natural, abstract, and universal Equity, and from Law and the Statutory Jurisprudence of the Court of Chancery, may be described to be a portion of justice or natural Equity, not embodied in legislative enactments or in the rules of the Common law, yet modified by a due regard thereto, and to the complex relations and convenience of an artificial state of society, and administered in regard to cases where the particular rights in respect whereof relief is sought come within some general class of rights enforced at Law, or may be enforced without detriment or inconvenience to the community, but where, as to such particular rights, the Courts of Law cannot, or originally did not, clearly afford any relief or adequate relief, at least not without circuity of action or multiplicity of suits, or cannot make such restrictions, adjustments, compensations, qualifications, or conditions, as may be necessary in order to take due care of the rights of all who are interested in the property in litigation.

JOSIAH W. SMITH, A MANUAL OF EQUITY JURISPRUDENCE 2-3 (1st American Ed. from the 9th London Ed. 1871). *See also* 1 JOHN NORTON POMEROY, A TREATISE ON EQUITY JURISPRUDENCE § 67 AT 70-71 (2d ed. 1892) (defining equity as "those doctrines and rules, primary and remedial rights and remedies, which the common law, by reason of its fixed methods and remedial system, was either unable or inadequate in the regular course of its development, to establish, enforce, and confer, and which it therefore either tacitly omitted or openly rejected"); MELVILLE M. BIGELOW, ELEMENTS OF EQUITY 9 (1879) ("The jurisdiction of courts of chancery now extends to all civil cases proper in good conscience and honesty for relief or aid as to which the procedure of the common-law courts is unsuited to give an adequate remedy, or as to which the common-law courts, when able to extend their aid, have refused to do so."); CHARLES E. PHELPS, JURIDICAL EQUITY 192 (1894) ("By juridical equity is meant a systematic appeal fro relief from a cramped administration of defective laws to the disciplined conscience of a competent magistrate, applying to the special circumstances of defined and limited classes of civil cases the principles of natural justice, controlled in a measure as well by considerations of public policy as by established precedent and by positive provisions of law."); 1 JOSEPH STORY, COMMENTARIES ON EQUITY JURISPRUDENCE: AS ADMINISTERED IN ENGLAND AND AMERICA § 25 AT 18 (12th ed. 1877) ("[E]quity jurisprudence may … properly be said to be that portion of remedial justice, which is exclusively administered by a court of equity, as contradistinguished from that portion of remedial justice, which is exclusively administered by a court of common law."); GEORGE TUCKER BISPHAM, THE PRINCIPLES OF EQUITY: A TREATISE ON THE SYSTEM OF JUSTICE ADMINISTERED IN COURTS OF CHANCERY 1 (11th ed. 1931) (1874) ("[equity] is that system of justice which was administered by the high court of chancery in England in the exercise of its extraordinary jurisdiction."); Howard L. Oleck, *Historical Nature of Equity Jurisprudence*, 20 FORDHAM L. REV. 23, 24 (1951) ("The description of equity as that law which was administered by the old English courts of Chancery, of course, is hardly a definition. Yet that is the customary introductory description of equity.").

[61] The king is accordingly both the chosen head of the nation and the lord paramount of the whole land; he is the source of justice and the ultimate resource in appeal for such equity as he is pleased to dispense; the supreme judge of his own necessities and the methods to supply them. He is in fact despotic, for there is no force that can constitutionally control him, or force him to observe conditions to which, for his own security or for the regular dispatch of business, he may have been pleased to pledge himself.

STUBBS, CONSTITUTIONAL HISTORY § 118 at ___ (___). *See also* Howard L. Oleck, *Historical Nature of Equity Jurisprudence*, 20 FORDHAM L. REV. 23, 33 (1951); W__ WALSH, EQUITY c. 1 (1930); George Burton Adams, *The Origin of English Equity*, 16 COL. L. REV. 87, 89 (1916); __ TREVELYAN, HISTORY OF ENGLAND 91-3, 133 (1937); Bracton, De Legibus, etc., II, ch. 9, 107 b; ch. 10, fol. 108, V; ch. 15, fol. 412, 1, 2, 3. Warren B. Kittle, *Courts of Law and Equity—Why They Exist and Why They Differ*, 26 W. VA. L. Q. 21, 23 (1919-1920); Colin P. Campbell, *The Court of Equity*, 15 GREEN BAG 108, 109 (1903); Warren B. Kittle, *Courts of Law and Equity—*

case.[62] The Chancellor, who functioned as a secretary to the king and also as the keeper of the king's seal and "conscience" administered the king's justice by issuing, at his discretion, brevia or writs commanding the performance or cessation of certain acts.[63] The repeated issuance of writs based upon similar circumstances led to a standardization of that process, such that the Chancellor's court could issue the appropriate writ whenever a complainant presented a certain pattern of facts.[64] These writs became the foundation of the "common law."[65] To the king's court were added, in turn, the court of the Exchequer, the court of Common Pleas, and the court of the King's Bench—all common law courts, [66] and all approachable only upon the authority of a writ issued by the Chancery.[67]

Why They Exist and Why They Differ, 26 W. VA. L. Q. 21, 21 (1919-1920); Robert L. Severns, *Nineteenth Century Equity: A Study in Law Reform*, 12 CHI.-KENT L. REV. 81, 89 (1934); *See* Warren B. Kittle, *Courts of Law and Equity—Why They Exist and Why They Differ*, 26 W. VA. L. Q. 21, 23 (1919-1920) ("It was the firm policy of the Norman kings to concentrate all power within themselves."); 1 SIR FREDERICK POLLOCK & FREDERIC WILLIAM MAITLAND, THE HISTORY OF ENGLISH LAW 85-87 (1895); D.M. KERLY, AN HISTORICAL SKETCH OF THE JURISDICTION OF THE COURT OF CHANCERY 13-14 (1890). The operative principle was that the king was the fountainhead of all justice, and in him, resided the final power to do whatever was just and righteous. *See* ROBERT WYNESS MILLAR, CIVIL PROCEDURE OF THE TRIAL COURT IN HISTORICAL PERSPECTIVE 12–13 (1952); WILLIAM F. WALSH, OUTLINES OF THE HISTORY OF ENGLISH AND AMERICAN LAW 69–70 (1923).

[62]. Until the latter part of the twelfth century, ordinary law and justice in England was governed by custom and was administered rather informally (if not crudely) by the shire courts and the courts of the hundred motes (in the time of Saxons and Danes, dating back to the seventh century) and by the county, borough and manor courts (in the early Norman period beginning with the Norman Conquest in 1066). The forms of trial were, in large part, appeals to the supernatural. *See generally* 1 SIR FREDERICK POLLOCK & FREDERIC WILLIAM MAITLAND, THE HISTORY OF ENGLISH LAW 14-22 (1895); 1 WILLIAM SEARLE HOLDSWORTH, A HISTORY OF ENGLISH LAW 40 (7th ed. 1956); GEORGE L. CLARK, PRINCIPLES OF EQUITY 3 (1948); George Burton Adams, *The Origin of English Equity*, 16 COLUM. L. REV. 87, 91 & n.10 (1916) (discussing the king's "prerogative machinery"); Frederick Pollock, *English Law Before the Norman Conquest* 14 L.Q. REV. 291, 297 (1898).

[63]. *See* George Burton Adams, *The Origin of English Equity*, 16 COL. L. REV. 87, 89 (1916) (discussing the new "judicial machinery" brought into England at the Norman Conquest); Garrard Glenn & Kenneth Redden, *Equity: A Visit to the Founding Fathers*, 31 VA. L. REV. 753, 760 (1945) ("Justice did open the door, of course, and it was the royal hand that was on the knob."); FREDERIC WILLIAM MAITLAND, EQUITY AND THE FORMS OF ACTION, 4–5 (Chaytor ed. 1909).

[64] This development is generally credited to Henry II (Curtmantle), who reigned from 1154–1189. *See* JOHN H. BAKER, AN INTRODUCTION TO THE ENGLISH LEGAL SYSTEM 13 (4th ed. 2002); 1 SIR FREDERICK POLLOCK & FREDERIC WILLIAM MAITLAND, THE HISTORY OF ENGLISH LAW 138-46 (1895); WILLIAM F. WALSH, A TREATISE ON EQUITY 2 (1930).

[65] *See* JOHN H. BAKER, AN INTRODUCTION TO ENGLISH LEGAL HISTORY 49 (4th ed. 2002); WILLIAM F. WALSH, A TREATISE ON EQUITY 86-88 (1930); 1 SIR FREDERICK POLLOCK & FREDERIC WILLIAM MAITLAND, THE HISTORY OF ENGLISH LAW 129-30 (1895); *See also* JOSEPH H. KOFFLER & ALISON REPPY, COMMON LAW PLEADING 18 (1969) ("Substantive law grew out of procedure. Courts were organized to handle a series of specific cases, the division of which gradually developed theories of rights and liabilities. Our rights and liabilities as defined by substantive law, then, had their origin in and developed out of procedural law."). Of course, it bears emphasis that the rights that were recognized were almost exclusively property rights; there were no personal rights, political rights, civil rights as we understand them. *See* William Q. deFuniak, *Origin and Nature of Equity*, 23 TUL. L. REV. 54, 56 (1948-1949).

[66] Although each of these courts initially had its own proper sphere, these distinctions faded. Generally speaking, plaintiffs had a choice between the three courts, and each of them dealt with the case in the same way and by the same rules. These courts administered traditional law and statutes. The phrase "common law" was borrowed from the canonists—who used *jus commune* to denote the general law of the Catholic Church. The common law refers to that part of the law that is unenacted and non-statutory yet common to the whole land and to all Englishmen. It is contrasted with statute, local custom, and the royal prerogative. When Chancery courts developed, common law would also be contrasted with equity. *See* FREDERIC WILLIAM MAITLAND, EQUITY ALSO THE FORMS OF ACTION AT COMMON LAW 2 (1909).

[67] Howard L. Oleck, *Historical Nature of Equity Jurisprudence*, 20 FORDHAM L. REV. 23, 35–36 (1951).

But the common law system became a hard and fast system with certain clearly defined things which it could do and with equally clearly defined things which it could not do.[68] The universe of writs was fixed and their construction by law judges narrowly circumscribed;[69] precise and technical rules of pleading, procedure and proof cabined judicial discretion within the form of action.[70] And even for those who could navigate the procedural minutiae successfully, the remedies which the law courts gave were often wholly inadequate.[71]

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[68] This statement requires some qualification. There is evidence that, in fact, the early "law courts" of the twelfth and thirteenth centuries enjoyed and exercised considerable discretion in the administration of what we would later be called law and equity. Leonard J. Emmerglick, *A Century of the New Equity*, 23 TEX. L. REV. 244, 246 (1945); H.D. Hazeltine, *The Early History of English Equity in* ESSAYS IN LEGAL HISTORY 261 (Paul Vinogradoff, ed. 1913); William Searle Holdsworth, *The Relation of the Equity Administered by the Common Law Judges to the Equity Administered by the Chancellor*, 26 YALE L.J. 1, 1 (1916) (accumulating evidence that common law judges in the twelfth through fourteenth centuries "administered both law and equity"); Aaron Friedberg, *The Merger of Law and Equity*, 12 ST. JOHN'S L. REV. 317, 318 n.2 (1938) ("during the reign of Henry II, both equity and common law were administered under the same system of procedure and were quite undistinguishable from each other").The ossification soon followed, however. *See* George Burton Adams, *The Origin of English Equity*, 16 COLUM. L. REV. 87, 96 (1916). *See also* William Q. deFuniak, *Origin and Nature of Equity*, 23 TUL. L. REV. 54, 57 (1948-1949) ("A growing worship of formalism and technicality also began to obsess the courts of law.").

[69]. For example, a provision in Magna Charta (1215) significantly diminished the scope of the royal writ in respect to titles to land. Also, the Provisions of Oxford (1258) expressly forbade the Chancellor to issue any new writs "without the commandment of the King and his council who shall be present." The Provisions were annulled five years later, but the common law courts nevertheless were transformed during the 13th century into a rigid system of formal actions. *See* 1 WILLIAM SEARLE HOLDSWORTH, A HISTORY OF ENGLISH LAW 196 (7th ed. 1956); 2 WILLIAM SEARLE HOLDSWORTH, A HISTORY OF ENGLISH LAW 291 (7th ed. 1956); ROBERT WYNESS MILLAR, CIVIL PROCEDURE OF THE TRIAL COURT IN HISTORICAL PERSPECTIVE 18 (1952) (citing FREDERIC WILLIAM MAITLAND, THE FORMS OF ACTION 41 (1936); 1 WILLIAM SEARLE HOLDSWORTH, A HISTORY OF ENGLISH LAW 58-59 (7th ed. 1956)). Later, in the reign of Edward the First (1272-1307), Chancery was empowered to issue new writs to deal with new situations, but met resistance from the common law courts which could, and often did, throw out the writ as unlawful. Howard L. Oleck, *Historical Nature of Equity Jurisprudence*, 20 FORDHAM L. REV. 23, __ (1951). This coincides with the development of the common law courts into an institution that was separate from the king. *See* Leonard J. Emmerglick, *A Century of the New Equity*, 23 TEX. L. REV. 244, 246 (1945) (noting independence of common law courts as of the fourteenth century); William Searle Holdsworth, *The Early History of Equity*, 13 MICH. L. REV. 293, 294 (1915) ("In the latter half of the 14th and in the 15th centuries the common law tended to become a fixed and rigid system. It tended to be less closely connected with the king, and therefore less connected with, and sometimes even opposed to, the exercise of . . . royal discretion.").

[70]. *See* Sherman Steele, *The Origin and Nature of Equity Jurisprudence*, 6 AM. L. SCH. REV. 10, 10-11 (1926)("In accordance with its technical mode of procedure, every species of legal wrong was supposed to fit into some one of a limited number of classes; for each class an appropriate remedy was provided, obtainable only by the use of some one of a limited number of 'forms of action.' An action was begun by the issuance of a writ appropriate to the form of action; in time these writs became standardized, and, where the facts of a case were without precedent, no writ to cover them was found, and hence no action could be brought."); George Palmer Garrett, *The Heel of Achilles*, 11 VA. L. REV. 30, 31 (1924-1925) (discussing "form-mad common lawyers"); JAMES FOSDICK BALDWIN, THE KING'S COUNCIL IN ENGLAND DURING THE MIDDLE AGES 61–62(1913) (referring to the common law's "formulaic procedure"); William Searle Holdsworth, *The Relation of the Equity Administered by the Common Law Judges to the Equity Administered by the Chancellor*, 26 YALE L.J. 1, 22 (1916) (discussing the "complicated machinery" of the law courts).

[71]. *See* ELIAS MERWIN, THE PRINCIPLES OF EQUITY AND EQUITY PLEADING 17 (1895) (discussing inability of common law courts to compel the performance of duties); Warren B. Kittle, *Courts of law and Equity—Why They Exist and Why They Differ*, 26 W. VA. L.Q. 21, 28 (1919-1920) ("[T]he remedies which the law courts gave were often wholly inadequate. They were as bad as no remedy at all.").

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

The ossification of the common law made it impossible for many petitioners to obtain writs appropriate to their peculiar problems. Without appropriate writs, they could obtain no adequate redress from the common law courts.[72] Yet there remained the royal prerogative.[73] Chancery, which was under the influence of ecclesiastical Chancellors who had some acquaintance with the *aequitas* of Roman law and also knowledge of canon law, ushered in the next stage of development in English law.[74]

> The early ecclesiastical Chancellors thought that it was consistent with belief in a revealed Word which stressed, among other things, a golden rule, for them to translate moral and ethical rights into juridical rights, enforced by the State, through its tribunals, when it was reasonable thus to summon political sovereignty to the aid of morals, and when the violation of such ethical rights involved proprietary consequences affecting the common good.[75]

By the late fourteenth century, a separate Court of Chancery administered this jurisprudence.[76] To minimize its conflict with the common law courts,

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William Q. de Funiak, *Origin and Nature of Equity*, 23 TUL. L. REV. 54, 57 (1948-1949) (citing MERWIN, PRINCIPLES OF EQUITY 17 (1895)).

[72] Howard L. Oleck, *Historical Nature of Equity Jurisprudence*, 20 FORDHAM L. REV. 23, 36 (1951).

[73] FREDERIC WILLIAM MAITLAND, EQUITY AND THE FORMS OF ACTION at 3 (Chaytor ed. 1909) ("Though these great courts of law have been established (King's Bench, Common Pleas, etc.) there is still a reserve of justice in the king.").

[74] *See* Sidney Smith, *The Stage of Equity*, 11 CAN. B. REV. 308, 312 (1933); Garrard Glenn & Kenneth Redden, *Equity: A Visit to the Founding Fathers*, 31 VA. L. REV. 753, 760–61 (1945). According to Professor Glenn, much pomp accompanied the early chancellors when they marched in state. A graphic description appears in GEORGE CAVENDISH, THE LIFE OF THOMAS WOLSEY (1893), which was written by a gentleman usher of a chancellor. *See also* Walter E. Sparks, *The Origin, Growth, and Present Scope of Equity Jurisprudence in England and the United States*, 16 W. JURIST 473, 475 (1882) ("From the time of the reign of Henry VI [chancery] constantly grew in importance, and in the reign of Henry VII it expanded into a broad and almost boundless jurisdiction under the fostering care and ambitious wisdom and the love of power of Cardinal Wolsey.").

[75] Brendan F. Brown, *Lord Hardwicke and the Science of Trust Law*, 11 NOTRE DAME L. REV. 319, 321 n.10 (1935-1936).

[76] *See* Sherman Steele, *The Origin and Nature of Equity Jurisprudence*, 6 AM. L. SCH. REV. 10, 11 (1926) (the "practice of referring to the Chancellor all of these special appeals to the kind led to the establishment of a tribunal which by the time of Edward III (1327–1377) had become recognized as a distinct and permanent court, with its separate jurisdiction and mode of procedure and its seat at Westminster"); William Searle Holdsworth, *The Relation of the Equity Administered by the Common Law Judges to the Equity Administered by the Chancellor*, 26 YALE L.J. 1, 6 (1916) (describing that all cases which called for equity were "handed over to a tribunal which, in time, came to be perfectly distinct from any of the common law courts"); William F. Walsh, *Equity Prior to the Chancellor's Court*, 17 GEO. L.J. 97, 107 (1928-1929) (suggesting that Chancery as a court of equity was taking form "around the 14th century"); George Burton Adams, *The Origin of English Equity*, 16 COL. L. REV. 87, 97 (1916) (dating origins of a separate system of equity to the fourteenth century); George Burton Adams, *The Continuity of English Equity* 26 YALE L.J. 550, 556 n.17 (1917) ("The chancellor's court had become distinct from the Council before the end of the 15th century."); 1 WILLIAM SEARLE HOLDSWORTH, A HISTORY OF ENGLISH LAW, 404 (7th ed. 1956) (suggesting that the Chancellor first made a decree on his own authority in 1474); Robert Severns, *Nineteenth Century Equity: A Study in Law Reform*, 12 CHI.-KENT L. REV. 81, 96 (1934) ("It was not until the end of the fifteenth century that purely equity matters go to the chancellor alone."); Walter E. Sparks, *The Origin, Growth, and Present Scope of Equity Jurisprudence in England and the United States*, 16 W. JURIST 473, 474 (1882) (quoting the proclamation of 22 Edward III addressed to the sheriffs of London "commanding them that, whatsoever business relating as well to the common law of our kingdom, as our special grace, cognizable before us, from henceforth to be prosecuted as followeth; viz., The common law business before the Archbishop of Canterbury, elect, our chancellor, by him to be dispatched, and the other matters grantable by our special grace be prosecuted before our special chancellor, or our well beloved clerk, the keeper of the privy seal, so that they, or one of them, transmit to us such petitions of business which, without consulting us, they cannot determine, together with their advice thereupon, without any further prosecution to be had before use for the same."). In an effort to date the commencement of a court of chancery, it bears mention that

which were already ordained and established with judges and practitioners defensive of their jurisdiction,[77] Chancery took as the basis of its jurisdiction the maxim, *aequitas agit in personam.* By acting *in personam*, Chancery could administer complete relief according to conscience and the principles of natural justice, without reference to the common law or its courts.[78]

The Chancellor unrolled a vast body of legal principle to which we now refer as Equity to offer relief in those cases where, because of the technicality of procedure, defective methods of proof, and other shortcomings in the Common Law, there was no "plain, adequate and complete remedy" otherwise available.[79] In this context, plain is the opposite of "doubtful and obscure." [80] A remedy is not adequate if it "falls short of what the party is entitled to."[81] And a remedy that does not "attain the full end and justice of the case" is not complete.[82] The legal remedy

> must reach the whole mischief, and secure the whole right of the party in a perfect manner, at the present time, and in [the] future; otherwise, equity will interfere and give such relief and aid as the exigency of the particular case may require.[83]

Intervention was premised on the notion that justice incorporated the moral sense of the community, existing as a function not only of a community's technical rules, but also of "magisterial good sense, unhampered by rule."[84] It was not a usurpation on the part of Chancery for the purpose of acquiring and exercising power; rather it was an interposition to correct gross injustice and to address circumstances which the static and rigid common law could not.[85] There was a strong tendency to sacrifice the particular to the general,

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the earliest writers of the common law, such as Bracton, Glanville, Britton and Fleta make no reference to an equitable jurisdiction of a court of chancery. *See also* 10 SELDEN SOCIETY, SELECT CASES IN CHANCERY A.D. 1364 TO 1471(William Paley Baildon ed., London, Bernard Quaritch 1896); *id.* at xix ("It seems clear that the Chancellor had and exercised judicial functions of his own as early as the reign of Richard II if not Edward III."). *See generally* JOSEPH PARKES, A HISTORY OF THE COURT OF CHANCERY (1828).

[77] Sidney Smith, *The Stage of Equity*, 11 CAN. B. REV. 308, 312 (1933).

[78] Helmut Coing, *English Equity and the Denunciatio Evangelica of the Canon Law*, 71 LAW QTRLY. REV. 223 (April 1955).

[79] ROBERT WYNESS MILLAR, CIVIL PROCEDURE OF THE TRIAL COURT IN HISTORICAL PERSPECTIVE 24 (1952); 1 JOSEPH STORY, COMMENTARIES ON EQUITY JURISPRUDENCE: AS ADMINISTERED IN ENGLAND AND AMERICA § 33 AT 22-26 (12th ed. 1877); GEORGE COOPER, A TREATISE OF PLEADING ON THE EQUITY SIDE OF THE HIGH COURT OF CHANCERY 128-29 (1813); MITFORD, EQUITY PLEADING 112, 123 (Jeremy, ed. ___); 1 WOODES., LECTURES vii, 214, 215; ELIAS MERWIN, THE PRINCIPLES OF EQUITY AND EQUITY PLEADING 17 (1895); Willard Barbour, *Some Aspects of Fifteenth-Century Chancery*, 31 HARV. L. REV. 834, 854 (1918); Robert Severns, *Nineteenth Century Equity: A Study in Law Reform*, 12 CHI.-KENT L. REV. 81, 84 (1934).

[80] 1 JOSEPH STORY, COMMENTARIES ON EQUITY JURISPRUDENCE § 33 at 22-26 (12th ed. 1877) (citing Rathbone v. Warren, 10 Johns. 587; King v. Baldwin, 17 Johns. 384; Southampton Dock Co. v. Southampton H. & P. Board, L. R. 11 Eq. 254).

[81] 1 JOSEPH STORY, COMMENTARIES ON EQUITY JURISPRUDENCE § 33 at 22-26 (12th ed. 1877).

[82] 1 JOSEPH STORY, COMMENTARIES ON EQUITY JURISPRUDENCE § 33 at 22-26 (12th ed. 1877) ("Where the remedy at law is adequate, but is involved in delay and is in several respects inconvenient and circuitous, the cause will entertain jurisdiction in equity.")

[83] 1 JOSEPH STORY, COMMENTARIES ON EQUITY JURISPRUDENCE § 33 at 22-26 (12th ed. 1877).

[84] Roscoe Pound, *Justice According to Law*, 13 COLUM. L. REV. 696, 701-02 (1913).

[85] Warren B. Kittle, *Courts of Law and Equity—Why They Exist and Why They Differ*, 26 W. VA. L. Q. 21,

justice to certainty."[86] The function of Equity was the correction of the law where it was deficient by reason of its universality.[87] The regimes of Law and Equity thus approached a given set of facts from opposite angles—invoking distinctive traditions, applying different reasoning, and pursuing separate aims.[88]

This exercise of defining Equity invites an immediate comparison to ADR. As with Equity,[89] ADR is routinely noted as difficult to define.[90] Both systems tend to be defined by the heterogeneous medley of subjects that they resolve rather than *a priori* reasoning:

> ADR has never had a unified theory to explain what it accomplishes and how it works. … It is easier to point to discrete practices than to discern the entire direction of the new movement. ADR has no generally accepted abstract or theoretical definition.[91]

Yet with both, elaborate systems of illustrations and generalizations, even if "loose and liberal, large and vague,"[92] suggests some discernible jurisprudence.[93]

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22 (1919-1920).

[86] Sidney Smith, *The Stage of Equity*, 11 CAN. B. REV. 308, 310 (1933).

[87] ARISTOTLE, ETHICS, V, xiv; CICERO, DE ORATORE, I, § 57; JUSTINIAN, PANDECT, 50.17.85; BRACTON, DE LEGIBUS ET CONSUETUDINIBUS ANGLIAE, I, iv, § 5 (1569); GROTIUS, DE AEQUITATE, c. 1, § 2 (1689) ("Haec Aequitas suggerit, etsi jure deficiamur."); 5 PUFFENDORF, LAW OF NATURE, c. 12, § 21 (Oldfather's transl. 1934); 1 STORY, EQUITY JURISPRUDENCE 3 (14th ed. 1918).

[88] *See* Thomas O. Main, *Traditional Equity and Contemporary Procedure*, 78 WASH. L. REV. 429, 444 (2003).

[89] *See, e.g.*, William Q. deFuniak, *Origin and Nature of Equity*, 23 TUL. L. REV. 54 (1948-1949) ("All writers on the subject of equity seem to start their discussions in agreement that the term is difficult to define."); CHARLES E. HOGG, EQUITY PRINCIPLES 3 (1900) ("[T]o attempt to define the powers and jurisdiction of a court of equity would only result in embarrassment and confusion…."); Howard L. Oleck, *Historical Nature of Equity Jurisprudence*, 20 FORDHAM L. REV. 23, 23 (1951) ("The legal term 'equity' is generally acknowledged to be impossible to define completely."); Garrard Glenn & Kenneth Redden, *Equity: A Visit to the Founding Fathers*, 31 VA. L. REV. 753, 756 (1945) ("There is no definition of equity that will satisfy.").

[90] *See also* Carrie Menkel-Meadow, *Pursuing Settlement in an Adversary Culture: A Tale of Innovation Co-Opted or "The Law of ADR"*, 19 FLA. ST. U. L. REV. 1. 1 n.2 (1991) ("Terminology and categorization are very problematic in this field."); Jean R. Sternlight, *Is Binding Arbitration a Form of ADR?: An Argument that the term "ADR" Has Begun to Outlive its Usefulness*, 2000 J. DISP. RESOL. 97, 102 (2000) (noting that the modes of ADR range from "pin stripes" to "Birkenstocks). *See also* n.__ *supra* and accompanying text. And, of course, problems with terminology can, in turn, create doctrinal and analytical challenges. *See* Jean R. Sternlight, *Is Binding Arbitration a Form of ADR?: An Argument that the term "ADR" Has Begun to Outlive its Usefulness*, 2000 J. DISP. RESOL. 97, 110 (2000) ("We should be more self-conscious of grouping together techniques that may often merit separate analysis.").

[91] Jethro K. Lieberman & James F. Henry, *Lessons From the Alternative Dispute Resolution Movement*, 53 U. CHI. L. REV. 424, 425-26 (1986). *Compare* FREDERIC WILLIAM MAITLAND, EQUITY AND THE FORMS OF ACTION 19 (Chaytor ed. 1909) ("I do not think that any one has expounded or ever will expound equity as a single, consistent system, an articulate body of law. It is a collection of appendixes between which there is no very close connection."); Sidney Smith, *The Stage of Equity*, 11 CAN. B. REV. 308, 315 (1938) (referring to Equity as a set of "empirical remedies"—disconnected appendices or glosses to the common law in particular areas); Alexander Holtzoff, *Equitable and Legal Rights and Remedies Under the New Federal Procedure*, 31 CAL. L. REV. 127, 130 (1942-1943) (referring to the separate systems of law and equity as "accidents of history").

[92] William Searle Holdsworth, *The Early History of Equity*, 13 MICH. L. REV. 293, 295 (1915) (discussing the jurisprudence of equity) (quotation omitted).

[93] Carrie Menkel-Meadow, *Pursuing Settlement in an Adversary Culture: A Tale of Innovation Co-Opted or "The Law of ADR"*, 19 FLA. ST. U. L. REV. 1. 2 (1991) (discussing the development of a "'jurisprudence' of ADR"); Judith Resnik, *Many Doors? Closing Doors? Alternative Dispute Resolution and Adjudication*, 10 OHIO ST. J. ON DISP. RESOL. 211, 222 (1995) (discussing the evolution and history of a "law of ADR").

The systemic comparison runs still deeper. Both Equity and ADR pre-existed their respective formal counterparts.[94] And both matured incrementally and in reaction to those formal systems.[95] Courts of Equity exercised jurisdiction if, but only if, the law courts failed to provide plain, adequate and complete relief.[96] Every order or rule administered in Equity was born of some emergency, to meet some new condition that was not otherwise remediable in the Common Law courts.[97] Catching the overflow of the litigation crisis in waves of procedural reforms,[98] ADR may be no less an accident of history: ADR may not be "so much as a good, in and of itself, but rather as a good because the system is in 'crisis' and something is needed to fix it."[99]

In crude summary, then, both ADR and Equity are systems that channel a jurisprudence larger than themselves with a jurisdiction defined in large part by the inability of their respective formal counterparts to adjudicate a particular matter plainly, adequately, and completely.

B. Identifying Motives

A fundamental difference between the jurisdiction of Equity and the jurisdiction of ADR is who makes the determination about whether the

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[94] *See* nn. __ and accompanying text, *infra* and *supra*. *See also* Judith Resnik, *Many Doors? Closing Doors? Alternative Dispute Resolution and Adjudication*, 10 OHIO ST. J. ON DISP. RESOL. 211, 213 (1995) (discussing "What came first?").). The roots of equity run as deep as history can dig. *See generally History of the Peloponnesian War*, *in* 3 THUCYDIDES 37–40 (Richard Crawley trans., Encyclopedia Britannica 1952); *The Laws*, *in* THE DIALOGUES OF PLATO 757d–e, 736d–e, 875c (Benjamin Jowett trans., Encyclopedia Britannica 1952); *The Statesman*, *in* THE DIALOGUES OF PLATO 294a (Benjamin Jowett trans., Encyclopedia Britannica 1952); GEORGE SPENCE, THE EQUITABLE JURISDICTION OF THE COURT OF CHANCERY 326 (1846) (associating the royal prerogative with sovereignty itself).

[95] *See* nn. __ and accompanying text, *infra* and *supra*.

[96] EDMUND H. T. SNELL, THE PRINCIPLES OF EQUITY 2 (18th ed. 1920). *See also* Sherman Steele, *The Origin and Nature of Equity Jurisprudence*, 6 AM. L. SCH. REV. 10, 13 (1926) ("The process of delimiting the jurisdiction of chancery was largely one of self-determination."); 1 WILLIAM SEARLE HOLDSWORTH, A HISTORY OF ENGLISH LAW 453 (5th ed. 1931) ("To write fully of the equitable jurisdiction of the Chancellor would be to write the history of equity itself").

[97] *See* 1 JOHN NORTON POMEROY, A TREATISE ON EQUITY JURISPRUDENCE § 48 at 49 (2d ed. 1892) ("[E]very equitable rule which it announced, was *of necessity* an innovation to a greater or less extent upon the then existing common law"); Alexander Holtzoff, *Equitable and Legal Rights and Remedies Under the New Federal Procedure*, 31 CAL. L. REV. 127, 130 (1943) (history of equity).

[98] For a discussion of ADR in the context of other procedural reforms, *see* Judith Resnik, *Many Doors? Closing Doors? Alternative Dispute Resolution and Adjudication*, 10 OHIO ST. J. ON DISP. RESOL. 211, 222-241 (1995); Jeffrey W. Stempel, *Reflections on Judicial ADR and the Multi-Door Courthouse at Twenty: Fait Accomplis, Failed Overture, or Fledgling Adulthood?*, 11 OHIO ST. J. ON DISP. RESOL. 297, 309-23 (1996).

[99] Judith Resnik, *Many Doors? Closing Doors? Alternative Dispute Resolution and Adjudication*, 10 OHIO ST. J. ON DISP. RESOL. 211, 244-45 (1995). *See also* Judith Resnik, *Civil Litigation in the Twenty-First Century: A Panel Discussion*, 59 BROOK. L. REV. 1199, 1207 (1993); Carrie Menkel-Meadow, *Pursuing Settlement in an Adversary Culture: A Tale of Innovation Co-opted or "The Law of ADR"*, 19 FLA. ST. U. L. REV. 1, 6 (1991); Susan Silbey & Austin Sarat, *Dispute Processing in Law and Legal Scholarship: From Institutional Critique to the Reconstruction of the Juridical Subject*, 66 DENV. U. L. REV. 437, 450-51 (1989); Harry Edwards, *Commentary: Alternative Dispute Resolution: Panacea or Anathema?*, 99 HARV. L. REV. 668, 672-74 (1986).

Compare FREDERIC WILLIAM MAITLAND, EQUITY AND THE FORMS OF ACTION 3 (__) (suggesting that by the end of the thirteenth century the number of petitions had become very large and the work of reading them was onerous).

remedy provided by the formal system is plain, adequate and complete to the satisfaction of the litigant. In Equity, the Chancellor made that decision.[100] Participation in ADR, however, if often at the discretion of the parties.[101] To compare the systems of ADR and Equity, then, one must explore the motives that generate interest in ADR.

In the sections that follow, I examine the keystones of the system of ADR, and explore their medieval equitable analogues. A quote from the ADR casebook authored by Professors Riskin and Westbrook provides the organizational structure for this discussion. Those thoughtful commentators write:

> Five motives, often intermingled, fire most of the current interest in alternatives to traditional litigation: 1. Saving time and money, and possibly rescuing the judicial system from an overload; 2. Having "better" processes—more open, flexible and responsive to the unique needs of the participants. … 3. Achieving "better" results—outcomes that serve the real needs of the participants or society; 4. Enhancing community involvement in the dispute resolution process; and 5. Broadening access to "justice".[102]

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

1. Saving Time and Money

Rhetoric about the rampant costs and inefficiencies of formal adjudication occupies a central role in the ADR canon.[103]

> The common perception is that judges and lawyers, the procedural rigor of justice and substantive incantations of legality, lay juries and technical experts hurt more than they help. The recourse to legal actors and proceedings is

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[100] *See* nn. __ *supra* and accompanying text.

[101] Of course not all ADR is voluntary. *See* ALAN SCOTT RAU, EDWARD F. SHERMAN & SCOTT R. PEPPET, PROCESSES OF DISPUTE RESOLUTION: THE ROLE OF LAWYERS 545-596 (3rd ed. 2002); Edward F. Sherman, *Court-Mandated Alternative Dispute Resolution: What Form of Participation Should be Required?*, 46 SMU L. REV. 2079 (1993).

[102] LEONARD L. RISKIN & JAMES E. WESTBROOK, DISPUTE RESOLUTION AND LAWYERS 2 (2d ed. 1997).

Another leading ADR casebook offers the following list of "justifications" for ADR: (i) "To lower court caseloads and expenses"; (ii) "To reduce the parties' expenses and time"; (iii) "To provide speedy settlement of those disputes that were disruptive of the community or the lives of the parties' families"; (iv) "To improve public satisfaction with the justice system"; (v) "To encourage resolutions that were suited to the parties' needs"; (vi) "To increase voluntary compliance with resolutions"; (vii) "To restore the influence of neighborhood and community values and the cohesiveness of communities"; (viii) "To provide accessible forums to people with disputes"; and (ix) "To teach the public to try more effective processes than violence or litigation for settling disputes." STEPHEN B. GOLDBERG, FRANK E.A. SANDER, NANCY H. ROGERS, SARAH RUDOLPH COLE, DISPUTE RESOLUTION: NEGOTIATION, MEDIATION, AND OTHER PROCESSES 8 (4th ed. 2003). Although I opted for the Riskin & Westbrook framework for organizational purposes (finding less overlap in the enumerated factors), I also refer occasionally to the Goldberg et al. factors.

[103] LEONARD L. RISKIN & JAMES E. WESTBROOK, DISPUTE RESOLUTION AND LAWYERS, ABRIDGED EDITION 2 (2d ed. 1998) (a principal motive fueling ADR is "saving time and money, and possibly rescuing the judicial system from an overload"). *See also* STEPHEN B. GOLDBERG, FRANK E. A. SANDER, NANCY H. ROGERS & SARAH RUDOLPH COLE, DISPUTE RESOLUTION: NEGOTIATION, MEDIATION, AND OTHER PROCESSES 8 (4th ed. 2003) ("To lower court caseloads and expenses; To reduce the parties' expenses and time, To provide speedy settlement of those disputes that were disruptive of the community or the lives of the parties' families").

> costly, emotionally debilitating, and potentially counterproductive.[104]
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> [T]he adversary system … can be a hugely inefficient means of uncovering facts; its relentless formalities and ceaseless opportunities for splitting hairs are time consuming and expensive.[105]

Naturally, these criticisms are often infused with crisis rhetoric about the litigation explosion and overburdened courts.[106] By providing "a less legalistic process than litigation"[107] the effective use of ADR is thought to compare favorably with the acrimony, costs, and time of ordinary litigation.[108]

Equity, too, was "simple, inexpensive and speedy in its origins."[109] Litigants came to Equity to avoid the gratuitous rigor, relentless formalities, and tedious hair-splitting that epitomized formal adjudication in the common law courts.[110] In Equity there were no technical rules of pleading or procedure.[111] Indeed, animated by the juristic principles of discretion, natural justice, fairness and good conscience, the essence of a jurisprudence of equity is somewhat inconsistent with the establishment of formal rules.[112]

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[104] THOMAS E. CARBONNEAU, ALTERNATIVE DISPUTE RESOLUTION: MELTING THE LANCES AND DISMOUNTING THE STEEDS 1 (1989).

[105] JETHRO LIEBERMAN, THE LITIGIOUS SOCIETY 171 (1983).

[106] *See* nn. __ and accompanying text, *supra*.

Alvin B. Rubin et al., *Colloquy on Complex Litigation*, 1981 BYU L. REV. 741, 747 ("[I]f more is not done to reduce the expense of litigation, the legal profession will be destroyed."); Thomas Lambros, *The Summary Jury Trial and Other Alternative Methods of Dispute Resolution: A Report to the Judicial Conference of the United States Committee on the Operation of the Jury System*, 103 F.R.D. 461, 465 (1984) (growing workload demands on courts "best relieved by diverting cases" to ADR techniques); Robert F. Peckham, *A Judicial Response to the Cost of Litigation: Case Management, Two-Stage Discovery Planning and Alternative Dispute Resolution*, 37 RUTGERS L. REV. 253, 253 (1985); *Chief Justice Urges Greater Use of Arbitration to Relieve Courts of Litigation Burdens*, 17 THE THIRD BRANCH 1, 1 (Oct. 1985); Arthur R. Miller, *The Adversary System: Dinosaur or Phoenix*, 69 MINN. L. REV. 1, 3 (1984) (discussing "litigation explosion").

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

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

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

[110] *See* nn. __ *infra* and accompanying text.

[111]. *See* Robert Severns, *Nineteenth Century Equity: A Study in Law Reform*, 12 CHI.-KENT L. REV. 81, 88 (1934) ("No form was necessary and no strict procedure had to be followed."); William F. Walsh, *Equity Prior to the Chancellor's Court*, 17 GEO. L.J. 97, 106 (1928-1929) ("Relief was given without a writ. The bill [in equity] was generally in simply form, without formality, and free from the technical rules which applied to writs."); Willard Barbour, *Some Aspects of Fifteenth-Century Chancery*, 31 HARV. L. REV. 834, 854 (1918) ("Less exactness of pleading was required than by the law, and even if a bill were 'misconceived' the complaint was not out of court.").

[112] *See* Roscoe Pound, *The Decadence of Equity*, 5 COLUM. L. REV. 20, 20 (1905). *See generally* Colin P. Campbell, *The Court of Equity—A Theory of its Jurisdiction*, 15 GREEN BAG 108, 110 (1903) (noting the intimacy of the relations among the basic principles of "natural justice, equity, honest, generosity and good conscience"). *See generally* FREDERIC WILLIAM MAITLAND, EQUITY AND THE FORMS OF ACTION 12-22 (Chaytor ed. 1909); JOHN SALMOND, THE FIRST PRINCIPLES OF JURISPRUDENCE 1 (1893) (suggesting there is no body of rules for equity)_; JAMES FOSDICK BALDWIN, THE KING'S COUNCIL IN ENGLAND DURING THE MIDDLE AGES 64 (1913)

Equity's mandate to do justice demanded that it be administered swiftly and inexpensively.[113] Litigants did not need the representation of a pleader.[114] Nor were litigants required to pay a filing fee.[115]

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

2. Procedural Flexibility

Interest in ADR is also generated by the desire for processes that can be tailored to the unique needs of a particular case.[116] Proponents of ADR argue that control or autonomy over issues of process may lead to a more effective and satisfying resolution of the dispute.[117] The ADR narrative emphasizes that rigid procedural rules can be manipulated, misused, and abused by "'gladiators' fixated on purely adversarial solutions."[118] The relative informality of ADR means that pre-trial procedures, elaborate pleading, motion practice, and discovery can be modified, streamlined, or in many cases completely eliminated to reach the merits of the dispute.[119] Of course formal adjudication is thought to have experienced a similar conversion in favor of a flexible and subservient procedural schemata.[120] Yet ADR remains a popular alternative to many because of its "'better' processes—more open, flexible and responsive to the unique needs of the

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(describing equity as a court "of indefinite powers and unrestricted procedure").

[113] JOHN H. BAKER, AN INTRODUCTION TO ENGLISH LEGAL HISTORY 103-04 (4th ed. 2002)

[114] Garrard Glenn & Kenneth Redden, *Equity: A Visit to the Founding Fathers*, 31 VA. L. REV. 753, 760 n.17 (1945).

[115] Garrard Glenn & Kenneth Redden, *Equity: A Visit to the Founding Fathers*, 31 VA. L. REV. 753, 760 n.17 (1945).

[116] LEONARD L. RISKIN & JAMES E. WESTBROOK, DISPUTE RESOLUTION AND LAWYERS, ABRIDGED EDITION 2 (2d ed. 1998). *See also* STEPHEN B. GOLDBERG, FRANK E. A. SANDER, NANCY H. ROGERS & SARAH RUDOLPH COLE, DISPUTE RESOLUTION: NEGOTIATION, MEDIATION, AND OTHER PROCESSES 8 (4th ed. 2003) ("To improve public satisfaction with the justice system; … to increase voluntary compliance with resolutions")

[117] Clark Freshman, *Tweaking the Market for Autonomy: A Problem-Solving Perspective to Informed Consent in Arbitration*, 56 U. MIAMI L. REV. 909, ___ (2002) (commenting that autonomy is a key value in ADR).

[118] Stefan H. Krieger, *Domain Knowledge and the Teaching of Creative Legal Problem Solving*, 11 CLINICAL L: REV. 149, 159 (2004) (citations omitted).

Of course whether disputants favor adversarialism is highly disputed. *See, e.g.*, Laurens Walker, E. Allan Lind & John Thibaut, *The Relation Between Procedural and Distributive Justice*, 65 VA. L. REV. 1401, 1420 (1979).

[119] Alan S. Rau, *Resolving Disputes Over Attorney's Fees: The Role of ADR*, 46 SMU L. REV. 2005, 2027-28 (1993). *See also* Edward Brunet, *Questioning the Quality of Alternative Dispute Resolution*, 62 TUL. L. REV. 1, 31 (1987) (viewing ADR as procedural reform). *See also* Edward Brunet, *Questioning the Quality of Alternative Dispute Resolution*, 62 TUL. L. REV. 1, 31, 33 (1987) ("While various ADR procedures permit some exchange of information between disputants, the process is informal, ambiguous, and not administered in a managerial fashion…. The spirit of ADR is antidiscovery.").

[120] *See* Stephen N. Subrin, *How Equity Conquered Common Law: The Federal Rules of Civil Procedure in Historical Perspective*, 135 U. PA. L. REV. 909 (1987).

participants."[121] ADR offers relief from the "formal, tricky, divisive, time-consuming, and distorting" subterfuge that plagues formal adjudication.[122]

The Law courts were notorious for their idolatry of form and forms.[123] Complex, unforgiving and formulaic rules of pleading, procedure, and proof could be navigated successfully only by the "form-mad common lawyers."[124] Failure to purchase the correct writ or to comply with minor technical requirements were incurable mistakes.[125] The rigors of single issue pleading, too, tolerated not even the slightest misjudgment.[126] The entire fate of a lawsuit could turn upon the exact words that the parties uttered when they appeared before the tribunal: "The client was unthought of…. The right was nothing, the mode of stating, everything."[127]

> If a wrong action was adopted, the error was fatal to the whole proceeding, however clearly the facts of the controversy might have been brought before the proper court…. It was not enough that he stood within the temple of justice, he must have entered through a particular door.[128]

This pathways-to-justice metaphor (although evocative of Sander's "multi-door courthouse"[129]) may be deceptively pacific. Other commentators used

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[121] LEONARD L. RISKIN & JAMES E. WESTBROOK, DISPUTE RESOLUTION AND LAWYERS, ABRIDGED EDITION 2 (2d ed. 1998).

[122] Jethro K. Lieberman & James F. Henry, *Lessons From the Alternative Dispute Resolution Movement*, 53 U. CHI. L. REV. 424, 427 (1986). *See also* nn. __ and accompanying text, *supra*.

[123] William Q. de Funiak, *Origin and Nature of Equity*, 23 TUL. L. REV. 54, 57 (1948-1949) ("A growing worship of formalism and technicality also began to obsess the courts of law."); George Palmer Garrett, *The Heel of Achilles*, 11 VA. L. REV. 32, 35 (1924-25) ("[T]he Common Law has brought about its own downfall by its idolatry of the forms it created.").

[124] George Palmer Garrett, *The Heel of Achilles*, 11 VA. L. REV. 30, 31 (discussing "form-mad common lawyers"). *See also* George Burton Adams, *The Origin of English Equity*, 16 COLUM L. REV. 87, 96 (1916) (explaining the law court's "hard and fast system"); JAMES FOSDICK BALDWIN, THE KING'S COUNCIL IN ENGLAND DURING THE MIDDLE AGES 61-62 (1913) (referring to the common law's "formulaic procedure"); 1 WILLIAM SEARLE HOLDSWORTH, A HISTORY OF ENGLISH LAW ___ (__ ed. ___) (discussing the "complicated machinery" of the law courts).

[125] JOSEPH H. KOFFLER & ALISON REPPY, COMMON LAW PLEADING 39 (1969) ("When the plaintiff petitioned the Chancellor for an Original Writ, he was under great pressure to select the right Writ for the facts of his case…. If he selected a Form of Writ which did not fit his case … he could not succeed.").

[126] The common law pleadings rules earned the dubious distinction as "the most exact, if not the most occult, of the sciences." 2 FREDERICK POLLOCK & FREDERIC WM. MAITLAND, HISTORY OF ENGLISH LAW 612. There are three fundamental rules to single-issue pleading. First, after a declaration, the parties must at each stage (i) demur; (ii) plead by way of traverse; or (iii) plead by way of confession and avoidance. Second, upon a traverse, issue must be tendered. And third, the issue, when well tendered, must be accepted. Either by virtue of the first rule, a demurrer takes place which is a tneder of an issue in law, or, by the joint operation of the first two rules, the tender of an issue in fact. And then, by virtue of the second and third rules, the issue so tendered, whether in fact or in law, is accepted and becomes finally complete. It is by these rules that th eproduction of an issue is effected. *See generally* HENRY JOHN STEPHEN, PRINCIPLES OF PLEADING IN CIVIL ACTIONS § 136 (2d ed. 1901). Encyclopedic volumes of supplemental rules and principles ensure the production of an issue that is truly but one issue, *see, e.g., id.* §§ 137-69, 164-339, that is material, *see, e.g., id.* §§ 170-74, 340-45, and is unified, *see, e.g.*, §§ 175-90, 346-71, and is certain, *see, e.g, id.* §§ 191-228, 372-430, and is neither obscure nor confusing, *see, e.g.*, §§ 229-243, 431-52, and will lead to neither prolixity nor delay in pleading, *see, e.g.*, §§ 244-49, 453-65. *See also id.* §§ 250-59, 466-81 ("Certain Miscellaneous Rules"); R. ROSS PERRY, COMMON-LAW PLEADING 231-81 (1897) (discussing the rules and mechanics of issue pleading).

[127] Coleridge, *The Law in 1847 and the Law in 1889*, THE CONTEMPORARY REVIEW 797, 800 (1890). *See also* FREDERICK POLLOCK & FREDERIC WM. MAITLAND, 1 HISTORY OF ENGLISH LAW 559 (__ ed. 19__).

[128] CHARLES HEPBURN, THE HISTORICAL DEVELOPMENT OF CODE PLEADING IN AMERICA AND ENGLAND 46 (1987).

[129] Frank E.A. Sander, *Varieties of Dispute Processing*, in THE POUND CONFERENCE: PERSPECTIVES ON

war metaphors to express the stakes and the intricate terms of engagement.[130] By all accounts, the process was a contest of skill; and success depended upon observing the formal rules of the combat.[131]

The contemporary discourse of ADR uses the same rhetoric and metaphors in its derisive characterizations of formal adjudication.[132] In fact, the Roscoe Pound speech that served as the rallying cry for Chief Justice Burger's Pound Conference in 1976 (the birth of the modern ADR movement[133]) was itself a plea for equity. Roscoe Pound referred to the "sporting theory of justice" when criticizing the rigidity of common law pleading.[134] Arguing in 1906 for a more equity-based procedure, Pound criticized the sporting theory on the ground that it led to deciding cases "according to the rules of the game" rather than in accordance with a "search independently for truth and justice."[135]

Although the manner by which procedure was exploited in the Law courts and in contemporary formal adjudication differed,[136] the result of the

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JUSTICE IN THE FUTURE 65, 84 (A. Leo Levin & Russell R. Wheeler eds., 1979) ("The room directory in the lobby of such a [Dispute Resolution] Center might looks as follows: Screening Clerk—Room 1; Mediation—Room 2; Arbitration—Room 3 …"). *See generally* Judith Resnik, *Many Doors? Closing Doors? Alternative Dispute Resolution and Adjudication*, 10 OHIO ST. J. ON DISP. RESOL. 211, 217 (1995) (discussing Sander's metaphor). *See also* Jeffrey W. Stempel, *Reflections on Judicial ADR and the Multi-Door Courthouse at Twenty: Fait Accomplis, Failed Overture, or Fledgling Adulthood?*, 11 OHIO ST. J. ON DISP. RESOL. 297, 348 (1996) (discussing the importance of the procedural justice metaphors).

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

2 FREDERICK POLLOCK & FREDERIC WM. MAITLAND, 2 THE HISTORY OF ENGLISH LAW 559.

For a discussion of the importance of metaphors generally, see Elizabeth G. Thornburg, *Metaphors Matter: How Images of Battle, Sports, and Sex Shape the Adversary System*, 10 WIS. WOMEN'S L.J. 225 (1995).

[131] CHARLES HEPBURN, THE HISTORICAL DEVELOPMENT OF CODE PLEADING IN AMERICA AND ENGLAND 47-48 (1897) (The issue of the combat must not be determined by mere brute force—not even by the brute force of indisputable facts arrayed before the Court.")

[132] *See, e.g.*, Douglas Yarn, *The Death of ADR: A Cautionary Tale of Isomorphism Through Institutionalization*, 108 PENN ST. L. REV. 929, 957 (2004) (referring to adjudication and ADR as "war and diplomacy," respectively) (citation omitted); Robert F. Blomquist, *Some (Mostly) Theoretical and (Very Brief) Pragmatic Observations on Environmental Alternative Dispute Resolution in America*, 34 VAL. U. L. REV. 343, __ (2000) (discussing the relative efficiency and efficacy of ADR in contrast to "courtroom battles"); Kenneth R. Feinberg, *Resolving Mass Tort Claims: The Perspective of a Special Master*, 53 WTR DISP. RESOL. J. 10, __ (1998) (contrasting ADR with the typical "protracted litigation war of attrition"); Thomas R. McCoy, *The Sophisticated Consumer's Guide to Alternative Dispute Resolution Techniques: What You Should Expect (or Demand) From ADR Services*, 26 U. MEM. L. REV. 975, __ (1996) ("Mediation is not a spectator sport for the parties like litigation where lawyer-champions do battle on behalf of their parties…"); Richard A. Williamson, *The Use of Experts Under the Amended Federal Rules of Civil Procedure, and in Alternative Dispute Resolution Forums*, PLI Order No. H4-5185 Mar.-Apr. 1994 at 414 ("Whereas litigation is war, Arbitration is a Skirmish, and Mediation, Early Neutral Evaluation and similar informal non-binding ADR process can be likened to Powwows that may lead to a lasting and satisfactory peace.").

[133] *See* nn. __ *supra*.

[134] Roscoe Pound, *The Canons of Procedural Reform*, 12 A.B.A. J. 541, 543 (1926).

[135] Roscoe Pound, *The Causes of Popular Dissatisfaction with the Administration of Justice*, 40 AM. L. REV. 729, 738 (1906).

See generally Stephen N. Subrin, *How Equity Conquered Common Law: The Federal Rules of Civil Procedure in Historical Perspective*, 135 U. PA. L. REV. 909 (1987).

[136] In the Law courts it was the *technicality* of the rules that created the problem. In contemporary

exploitation was the same (and with lawyers to blame).[137] Like ADR centuries later, Equity sought to relocate dispute resolution away from an emphasis on procedure, and toward a consideration of the underlying merits.

> The Common Law made a fetich of procedure. Obviously, this was to put the cart before the horse. In any satisfactory system of law, procedure must always remain a means, not an end. It must always be subordinate to the purpose of the process, which is to right wrong. Glanville, and Bracton, and Littleton, and Coke forgot this. They became so interested in forms that they allowed the substance to escape.[138]

With neither forms of action nor technical pleading rules Equity focused instead on the merits of the dispute.[139] Although "form" is not itself a pejorative,[140] one could fairly conclude that "law deal[t] with form, equity

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adjudication, it is (allegedly) their *generality* that is exploited. Add cites discussing the writs and forms of action. Add cites discussing the dimensions of transsubstantive and non-transsubstantive procedure.

[137] *Compare* Bryant Garth, *From Civil Litigation to Private Justice: Legal Practice at War with the Profession and its Values*, 59 BROOK. L. REV. 931, 938-945 (discussing "scorched earth litigation" and "Rambo tactics" by litigators in a search of a competitive advantage in high stakes litigation); William M. Howard, *Arbitrating Employment Discrimination Claims: Do You Really Have To? Do You Really Want To?*, 43 DRAKE L. REV. 255, 289 (1994) (suggesting that many formal court actions are extended unnecessarily by lawyers who exploit or abuse judicial procedures, especially liberal rules for pretrial discovery); Geoffrey C. Hazard, Jr., *Discovery Vices and Trans-Substantive Virtues in the Federal Rules of Civil Procedure*, 137 U. PA. L. REV. 2237, 2240 (1989) ("Discovery of documents in cases involving the conduct of business or government often proceeds by a vicious game in which the respondent has every incentive to trim and cheat. Highly developed dialectical skills have evolved.") *with* nn. ___, *supra*.

[138] George Palmer Garrett, *The Heel of Achilles*, 11 VA. L. REV. 30, 31 (1924-1925). *Compare* Robert W. Gordon, *The Independence of Lawyers*, 68 B.U. L. REV. 1, 10 (1988) (Lawyers "are expected and even encouraged to exploit every loophole in the rules, take advantage of every one of their opponents' tactical mistakes or oversights, and stretch every legal or factual interpretation to favor their clients. The guiding premise of the entire system is that maintaining the integrity of rights-guarding procedures is more important than … enforcing the substantive law against its violators.").

[139] Howard L. Oleck, *Historical Nature of Equity Jurisprudence*, 20 FORDHAM L. REV. 23, 40 (1951) ("[T]he plaintiff set forth his cause in a 'bill.' Then the chancellor would issue a 'subpoena,' in the king's name, to summon the opposing party, who could demur, enter a plea, or file an 'answer.").

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

Robert L. Severns, *Nineteenth Century Equity: A Study in Law Reform*, 12 CHI.-KENT L. REV. 81, 89 (1934).

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

EDWIN B. MEADE, LILE'S EQUITY PLEADING AND PRACTICE § 95 at 59 (3rd ed. 1952). *See generally* Thomas O. Main, *Traditional Equity and Contemporary Procedure*, 78 WASH. L. REV. 429, 457-58 (2003).

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

Sir William Jones' Works. Prefatory Discourse to the Speeches of Isæus, IV. 34. (f.) IX. 50, 51 (8 vo.). *See also Robinson v. Rayley*, 1 Burr., at p. 319 (Mansfield, J.) ("the substantial rules of pleading are founded in strong sense and the soundest and closest logic."); HALE, COMMENTARIES ON THE COMMON LAW 212 (comparing pleading rules to the roots of an equation).

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

with substance."[141] Chancery "had the power to look beyond the form to the substance and may lend his power in aid of a person wronged to see that the wrong does not go without a remedy."[142]

Blaming the legal education and training for much of the distortion, both Equity and ADR promise an alternative that elevates the merits of the disputes over the forms and modes of its adjudication.[143] ADR and Equity thus can both be cast as an escape from systems where the formalized means for protecting rights themselves become the barriers to the effective redress of grievances.[144]

Lawyers may be drawn to ADR for reasons other than savings of cost or time.[145] Privacy is one component of the procedural flexibility that makes ADR attractive to some.[146] Unlike formal adjudication, pleadings (if any) need not publicly filed; hearings are neither known nor available to the public; there may exist no transcript; and even the decision need not be

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rules.

FREDERICK POLLOCK & FREDERIC WM. MAITLAND, 2 THE HISTORY OF ENGLISH LAW 561 (___). *See also id.* ("Had they aimed at a different end, they would have "received" the plausibly reasonable system of procedure which the civilians and canonists were constructing, and then the whole stream of our legal history would have been turned into a new channel. For good and ill they made their choice.")

[141] Edward Robeson Taylor, *The Fusion of Law and Equity*, __ U. PA. L. REV. 17 (___).

[142] Robert L. Severns, *Nineteenth Century Equity: A Study in Law Reform*, 12 CHI.-KENT L. REV. 81, 90 (1934).

[143] For a discussion of how form was the focus of both the practice and the study of the Law, *see* THEODORE F. T. PLUCKNETT, A CONCISE HISTORY OF THE COMMON LAW 380-81 (5th ed. 1956) (discussing efforts of Glanville, Bracton and Littleton.); JOHN H. BAKER, AN INTRODUCTION TO ENGLISH LEGAL HISTORY ___ [49-52??](4th ed. 2002); S. F. C. MILSOM, HISTORICAL FOUNDATIONS OF THE COMMON LAW 59 (2d ed. 1981) (explaining that procedure dicatated how the law existed and how lawyers thought); JOSEPH H. KOFFLER & ALISON REPPY, COMMON LAW PLEADING (1969) ("the Law was required to express itself through the Limited System of Writs and Forms of Action sanctioned by precedent"). HENRY SUMNER MAINE, DISSERTATIONS ON EARLY LAW AND CUSTOM 389 (1883) (noting that common lawyers could see the law "only through the envelope of its technical forms.").

Compare Laura Nader & Linda R. Singer, *Dispute Resolution: What are the Choices?*, CALIF. ST. BAR J. 281, 314-15 (July 1976):

> Law schools rarely teach the essential skills of negotiation and mediation; rather their concentration on the dissection of appellate court cases emphasizes the escalation of disputes rather than their prevention or early settlement. Heavy dependence on the case method, with its focus on individual problems, makes unlikely any systematic approach to resolving mass problems. The dearth of interdisciplinary study makes it difficult for lawyers to perceive alternative ways of dealing with different types of existing disputes and those likely to arise from emerging technologies.

[144] *Compare* THOMAS E. CARBONNEAU, ALTERNATIVE DISPUTE RESOLUTION: MELTING THE LANCES AND DISMOUNTING THE STEEDS 1 (1989) (__) *with* Coleridge, *The Law in 1847 and the Law in 1889*, __ THE CONTEMPORARY REVIEW 797, 798 (June 1890) ("[T]ruth was quite unable to force its way through the barriers erected against its opposite."). *See also* FREDERIC WILLIAM MAITLAND, EQUITY AND THE FORMS OF ACTION 12-22 (Chaytor ed. 1909); JOHN SALMOND, JURISPRUDENCE 1-5 (13th ed. 1906) (suggesting that the true and original distinction between law and equity is one, not between two conflicting bodies of rules, but between a system of judicial administration based on fixed rules and a competing system governed solely by judicial discretion); JAMES FOSDICK BALDWIN, THE KING'S COUNCIL IN ENGLAND DURING THE MIDDLE AGES 64 (1913) (referring to equity as a court "of indefinite powers and unrestricted procedure").

[145] Gerald F. Phillips, *Is Creeping Legalism Infecting Arbitration?*, 58 APR DISP. RESOL. J. 37, 39 (Feb.-Apr. 2003) (highlighting the values of selecting a decision maker, secrecy and flexibility in scheduling).

[146] *See* Jacqueline M. Nolan-Haley, *Court Mediation and the Search for Justice Through Law*, 74 WASH. U. L.Q. 47, 54 (1996); Edward J. Costello, Jr., *ADR: Virtue or Vice?*, 54 May DISP. RESOL. J. 62 (1999); Robert F. Blomquist, *Is Environmental Alternative Dispute Resolution Working in America?*, 30 ENVTL. L. REP. 10661, 10666 (2000).

released to anyone other than the interested parties.[147] The informality and flexibility of Equity made those proceedings similarly "private," at least in certain respects. For example, in early Equity many proceedings were initiated not by a recorded bill, but by word of mouth.[148] And because there was no notion of precedent in early Equity, the reporting of Chancery proceeding was sporadic and largely unnecessary.[149] Moreover, similar to the ADR forum-of-choice, a private conference room or hotel suite,[150] Chancery "could sit anywhere, even in the chancellor's private house."[151] Of course ADR and Equity suffered criticism for this informality and secrecy.[152]

Part of the allure of ADR may be that system's ability to alter the procedure to identify a procedurally neutral site. Formal adjudication tends to locate the suit in the "home" court of one party or the other. Because both sides have the same home court instinct, the only neutral forum on which they can agree is ADR.[153] This is especially an issue in international

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[147] Stephen J. Ware, *Default Rules From Mandatory Rules: Privatizing Law Through Arbitration*, 83 MINN. L. REV. 703, 721-23(1999).

[148] *See* JOHN H. BAKER, AN INTRODUCTION TO ENGLISH LEGAL HISTORY 103 (4th ed. 2002).

[149] *See* Garrard Glenn & Kenneth Redden, *Equity: A Visit to the Founding Fathers*, 31 VA. L. REV. 753, 763 (1945) ("there were no regular reports of the cases that were decided"); 73 SELDEN SOCIETY, NOTTINGHAM'S CHANCERY CASES VOL. 1, Introduction, xlii & n.3 (D.E.C. Yale, ed.1957); Vidal v. Girard's Exrs., 2 How. 127, 193 (1844) (Story, J.) (equity decisions had no precedential effect because the rulings were contained in reports that were "shadowy, obscure and flickering").

> Bacon's desire to systematize the practice of the Court of Chancery is also illustrated by his plea for equity law reports, contained in his "Proposition touching the Compiling and Amendment of the Laws of England' addressed to james I during his attorney-generalship. In it he pays a rare tribute to Coke, when he observes that but for the reports of the great chief justice 'the law by this time had been almost like a ship without ballast,' and he urges the sovereign to appoint 'grave and sound lawyers' to be paid reporters in the courts. This suggestion bore fruit in 1617, for on October 20th (only a few months after Bacon had assumed office), the "Ordinance for the Constitution of the Reporters of the Law' was issued, two reporters, with a salary of £100 a year each being appointed. The size of the salary, unusual in those days, may be taken as an indication of the importance that Bacon attached to law reporting.

George W. Keeton, *Bacon as a Chancery Judge*, 17 IOWA L. REV. 476, 477-78 (1932-1933).

[150] STEVEN C. BENNETT, ARBITRATION: ESSENTIAL CONCEPTS 7 (2002). Richard S. Bayer & Harlan S. Abrahams, *The Trouble with Arbitration*, LITIG. Winter 1985, 30, 31 ("Often the room is a hotel suite sporting masonite folding tables positioned in an inverted "U." There is no gavel or bailiff, no robed figure sitting above the proceeding. Rather, there are one to three businessmen, seated comfortably at the top of the "U," chatting informally with the parties."). *See also* Judith Resnik, *Many Doors? Closing Doors? Alternative Dispute Resolution and Adjudication*, 10 OHIO ST. J. ON DISP. RESOL. 211, 248-49 (1995) (discussing the ADR empowerment thesis in the context of the informality of those proceedings).

[151] *See* JOHN H. BAKER, AN INTRODUCTION TO ENGLISH LEGAL HISTORY 103 (4th ed. 2002).

[152] *See* Edward Brunet, *Questioning the Quality of Alternative Dispute Resolution*, 62 TUL. L. REV. 1, 28 (1987) ("the absence of records and of written opinions make the pathology of ADR difficult."). In Equity the criticism was part of an attack on the overall arbitrariness of the system. *See, e.g.*, JOHN SELDEN, THE TABLE TALK 64 (The Legal Classics Library 1989) ("Equity is a roguish thing. For law we have a measure … equity is according to the conscience of himthat is Chancellor, and as that is larger or narrower, so is equity. Tis all one as if they should make the standard for the measure a Chancellor's foot."); 6 BULSTRODE WHITELOCK, COMMONS JOURNALS 373 (1650) ("The proceedings in Chancery are *secundum arbitrium boni viri*, and this *arbitrium* differeth as much in several men as their countenances differ. That which is right in one man's eyes is wrong in another's."); Robert Severns, *Nineteenth Century Equity: A Study in Law Reform*, 12 CHI.-KENT L. REV. 81, 82 (1934) (Mocking the jurisprudence of equity as "some sort of Philosopher's Stone by which injustice is whisked into justice by the simple method of preparing a form of petition lately called a 'bill'.").

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

disputes.[154] Here the analogy from Equity is rather loose. Although we know that Equity courts "could sit anywhere"[155] we have no reason to believe that the Chancellor opted for a neutral site.

An expert decision-maker is another component of the procedural flexibility that makes ADR attractive. In certain complex cases, litigants may wish to avoid a jury or judge in favor of a neutral with technical expertise.[156] Equity procedure may be considered analogous here only in that there were no juries.[157] Of course to the extent that the jurisprudence of Equity was but the jurisprudence of conscience,[158] the chancellor, often a trained ecclesiastic, was undoubtedly an "expert."[159]

And lastly, finality and the avoidance of an expensive and time-consuming appellate process is another claimed advantage of the flexibility of ADR.[160] As a result of the Federal Arbitration Act, and equivalent state statutes and international treaties, arbitration awards are final and can be as easy (or even easier) to enforce as decisions from judges and juries.[161] Again there is an equitable analogue: relief was enforced at once, and we understand that there were no appeals from Chancery until the seventeenth century.[162]

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

[155] *See* JOHN H. BAKER, AN INTRODUCTION TO ENGLISH LEGAL HISTORY 103 (4th ed. 2002).

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

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> [Common law courts] proceed to the trial of contested facts by means of a jury; and the evidence is generally to be drawn, not from the parties, but from third persons, who are disinterested witnesses. But courts of equity try causes without a jury; and they address themselves to the conscience of the defendant, and require him to answer upon his oath the matters of fact stated in the bill, if they are within his knowledge; and he is compellable to give a full account of all such facts, with all their circumstances, without evasion, or equivocation; and the testimony of other witnesses also may be taken to confirm, or to refute, the facts so alleged. Indeed, every bill in equity may be said to be, in some sense, a bill of discovery, since it asks for the personal oath of the defendant, to purge himself in regard to the transactions stated in the bill. It may readily be perceived, how very important this process of discovery may be, when we consider how great the mass of human transactions is, in which there are no other witnesses, or persons, having knowledge thereof, except the parties themselves.

1 JOSEPH STORY, COMMENTARIES ON EQUITY JURISPRUDENCE § 31 at 21 (12th ed. 1877).

[158] *See* nn. __,*supra* and accompanying text.

[159] *See* nn. __,*supra* and accompanying text.

[160] Kevin R. Case, *Alternative Dispute Resolution and Patent Law*, 3 FED. CIR. B.J. 1, 5 (1993); Stephen J. Ware, *Default Rules From Mandatory Rules: Privatizing Law Through Arbitration*, 83 MINN. L. REV. 703, 722-23 (1999).

[161] Stephen J. Ware, *Default Rules From Mandatory Rules: Privatizing Law Through Arbitration*, 83 MINN. L. REV. 703, 722-23 (1999).

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

3. Substantive Flexibility

Although the substantive law undoubtedly casts its "shadow" on ADR processes,[163] we may be skeptical of the significance of shadows.[164] In the more voluntary and less structured forms of ADR, such as mediation, where the ultimate authority belongs to the participants themselves, the parties (perhaps with the benefit of a third party facilitator) can fashion a unique solution that will work for them without being strictly governed by precedent.[165] Rigid adherence to legal formulae can frame debates in a zero-sum model that obscures parties' goals and overlooks a richer set of possible resolutions.[166]

> A formalist, rule-bound institution is ill equipped to recognize what is really at stake in its conflicts with the environment. It is likely to adopt opportunistically because it lacks criteria for rational reconstruction of outmoded or inappropriate policies…. The idea of legality needs to be conceived more generally and to be cured of formalism.[167]

ADR is attractive to some, then, because of the system's promise of "better" results that serve "the real needs of the participants or society."[168] These

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[163] *See* Robert Mnookin & Lewis Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 YALE L.J. 950 (1979).

[164] This is a reference to Plato's famous allegory about the prisoners in the cave. PLATO, REPUBLIC, 514A-521C.

[165] J. FOLBERG & A. TAYLOR, MEDIATION: A COMPREHENSIVE GUIDE TO RESOLVING CONFLICTS WITHOUT LITIGATION 10 (1984)

[166] Judith Resnik, *Many Doors? Closing Doors? Alternative Dispute Resolution and Adjudication*, 10 OHIO ST. J. ON DISP. RESOL. 211, 252 (internal footnotes omitted). HOWARD RAIFFA, THE ART AND SCIENCE OF NEGOTIATION 33-35 91982); Edward Brunet, *Questioning the Quality of Alternative Dispute Resolution*, 62 TUL. L. REV. 1, 15 (1987) (citing MARTIN DOMKE, DOMKE ON COMMERCIAL ARBITRATION § 25:01 (1984); JAY FOLBERG & ALISON TAYLOR, MEDIATION: A COMPREHENSIVE GUIDE TO RESOLVING CONFLICTS WITHOUT LITIGATION 10 (1984); Jethro K. Lieberman & James F. Henry, *Lessons from the Alternative Dispute Resolution Movement*, 53 U. CHI. L. REV. 424, 425, 529 (1986); Note, *Arbitrability of Claims Arising Under the Securities Exchange Act of 1934*, 1986 DUKE L.J. 548, 552). Deborah R. Hensler, *Our Courts, Ourselves: How the Alternative Dispute Resolution Movement is Re-Shaping Our Legal System*, 108 PENN. ST. L. REV. 165, 182 (2003). Of course suggesting that there is, in fact, a "right" answer presumes the superiority of the adversary ideal.

See, e.g., FISHER, URY & PATTON, *supra* note __, at 56-80 (encouraging exploitation of differences in time horizons or risk preferences).

> The dynamic of arbitrator self-interest has long been familiar in collective bargaining cases and is thought, for example, to provide one explanation for the apparently common practice of compromise awards. Repeat business for the arbitrator is likely only if he is able to retain the future goodwill of both union and management; the desire to do so may give him an incentive (in the hallowed phrase) to 'split the baby' in a single arbitration, or it may be 'reflected in a course of decisions by the same arbitrator which over time, taken together, appears to show a rough balance between awards favorable to labor and those favorable to management.

Alan Scott Rau, *Integrity to Private Judging*, 38 SO. TEX. L. REV. 485, 523 (1997) (critiquing arbitration by analyzing the self interest of arbitrators).

[167] PHILIPPE NONET AND PHILIP SELZNICK, LAW AND SOCIETY IN TRANSITION: TOWARD RESPONSIVE 77, 108 (1978).

[168] LEONARD L. RISKIN & JAMES E. WESTBROOK, DISPUTE RESOLUTION AND LAWYERS, ABRIDGED EDITION 2 (2d ed. 1998). *See also* STEPHEN B. GOLDBERG, FRANK E. A. SANDER, NANCY H. ROGERS & SARAH RUDOLPH COLE, DISPUTE RESOLUTION: NEGOTIATION, MEDIATION, AND OTHER PROCESSES 8 (4th ed. 2003) ("To encourage resolutions that were suited to the parties' needs; … To restore the influence of neighborhood and community values and the cohesiveness of communities").

results may or may not "follow the law," and it arguably does not matter because of the parties' voluntary acquiescence.

In those forms of ADR that more closely resemble formal adjudication, such as binding arbitration, ADR's relationship with the substantive law becomes much more nuanced. On the one hand, we view arbitration clauses as "forum selection clauses."[169] And in this regard we pronounce that "[b]y agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute," and also remind lawyers that arbitrators are obliged to "follow the law."[170] Yet on the other hand, we also anticipate, if not desire a certain amount of deviation.

> Soia Mentschikoff's seminal survey of arbitrators found that eighty percent of the studied commercial arbitrators "thought that they ought to reach their decisions within the context of the principles of substantive rules of law, but almost ninety percent believed that they were free to ignore these rules whenever they thought that more just decisions would be reached by so doing." A more recent survey of construction arbitrators found that twenty-eight percent of surveyed arbitrators reported that they do not always follow the law in formulating their awards. And among labor arbitrators, the "orthodox" position is that arbitrators should adhere to the collective bargaining agreement and "ignore the law." The widespread belief among arbitrators that they are under no duty to apply the law is consistent with standard expectations about arbitration because "we do not … expect that an arbitrator will decide a case the way a judge does. We do not expect that he will necessarily "follow the law"—or indeed apply or develop any body of general rules as a guide to his decision." Even courts have explicitly acknowledged that arbitrators often do not apply the law.[171]

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[169] *See* Lee H. Rosenthal, *ADR: One Judge's Perspective on Procedure as Contract*, 80 NOTRE DAME L. REV. 669 (2005).

[170] "The Court conceives of arbitration clauses as forum-selection clauses, but not as choice-of-law clauses. In the Court's view, then, an arbitration clause specifies the procedural law to be used in resolving a dispute, but not the substantive law to be used. With respect to substantive law, Mitsubishi indicates that arbitrators must apply the same substantive law a court would apply. Similarly, in *Shearson/American Express, Inc. v. McMahon*, 482 U.S. 220 (1987), the Court held that claims under the Securities Exchange Act were arbitrable because "although judicial scrutiny of arbitration awards necessarily is limited, such review is sufficient to ensure that arbitrators comply with the requirements of the statute. 482 U.S. 220, 232 (1987). The Court often says that "[b]y agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute." Id. at 229." Stephen J. Ware, *Default Rules From Mandatory Rules: Privatizing Law Through Arbitration*, 83 MINN. L. REV. 703, 717-18 (1999). *See also* Michael A. Scodro, Note, *Arbitrating Novel Legal Questions: A Recommendation for Reform*, 105 YALE L.J. 1927, 1946 (1996) (noting that the Supreme Court's view that arbitration does not alter substantive rights "is in keeping with the courts' expectation that arbitrators will follow applicable legal rulings.").

[171] Stephen J. Ware, *Default Rules From Mandatory Rules: Privatizing Law Through Arbitration*, 83 MINN. L. REV. 703, 719-20 (1999) (citing Soia Mentschikoff, *Commercial Arbitration*, 61 COLUM. L. REV. 846, 851, 867 (1961); Dean B. Thomson, *Arbitration Theory and Practice: A Survey of AAA Construction Arbitrators*, 23 HOFSTRA L. REV. 137, 154-55 (1994); JOHN S. MURRAY, ALAN SCOTT RAU & EDWARD F. SHERMAN, PROCESSES OF DISPUTE RESOLUTION 514, 636 (2nd ed. 1996); IV IAN MACNEIL, RICHARD E. SPEIDEL & THOMAS J. STIPANOWICH, FEDERAL ARBITRATION LAW § 40.5.2.4 at 40:47; Harry T. Edwards, "Arbitration of Employment Discrimination Cases: An Empirical Study," in PROCEEDINGS OF THE TWENTY-EIGHT ANNUAL MEETING OF THE NATIONAL ACADEMY OF ARBITRATORS 59 (1975); Patricia A. Greenfield, *How Do Arbitrators Treat External Law?*, 45 INDUS. & LAB. REL. REV. 683, 688 (1992); Edward Brunet, *Arbitration and Constitutional Rights*, 71 N.C. L. REV. 81, 85 (1992) ("The weight of authority permits an arbitrator to 'do justice as he sees it' and fashion an award that embodies the individual justice required by a given set of facts.")).

Inherent in the system of ADR is the notion that the arbiter or neutral is free to depart from the principles of substantive law whenever they think that more just decisions would be reached by doing so.[172] Judges in the formal courts, of course, enjoy no such leeway.[173]

The occasional need to depart from the strict law likewise animated the development of the system of Equity. And a similar noble lie is repeated. On one hand, one of the most famous maxims of Equity was Æquitas sequitur legem, or Equity follows the Law.[174] Yet on the other hand, the

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[172] Stephen J. Ware, *Default Rules From Mandatory Rules: Privatizing Law Through Arbitration*, 83 MINN. L. REV. 703, 721 n.83(1999) (emphasis added) (citing I GABRIEL M. WILNER, DOMKE ON COMMERCIAL ARBITRATION § 25.01 at 391 (rev. ed. 1995)). For a more negative characterization of arbitrators' failure to apply the law, *see generally* Heinrich Kronstein, *Arbitration is Power*, 38 N.Y.U. L. REV. 661 (1963) *as cited in* Stephen J. Ware, *Default Rules From Mandatory Rules: Privatizing Law Through Arbitration*, 83 MINN. L. REV. 703, 721-23(1999); Judith Resnik, *Many Doors? Closing Doors? Alternative Dispute Resolution and Adjudication*, 10 OHIO ST. J. ON DISP. RESOL. 211, 252 (commenting that ADR is typically "seen as focusing on issues, relaxing the law, and thus providing more 'just' results.").

Of course even those arbitrators who try to apply the law will sometimes fail, as they may make honest mistakes of law. In most cases in which an arbitrator does not apply the law, it will be virtually impossible for a court to discover that the arbitrator did not apply the law. Arbitrators generally do not write reasoned opinions explaining their decisions." Stephen J. Ware, *Default Rules From Mandatory Rules: Privatizing Law Through Arbitration*, 83 MINN. L. REV. 703, 721-22 (1999) (citing I MACNEIL, SPEIDEL & STIPANOWICH, *supra*, § 3.2.3, at 3:13; III *id.* § 37.4.1, at 37:10). Nor is it "common practice to make a record or transcript of the proceedings." Stephen J. Ware, *Default Rules From Mandatory Rules: Privatizing Law Through Arbitration*, 83 MINN. L. REV. 703, 721-22 (1999) (citing MURRAY, RAU & SHERMAN, *supra* note __, at 640). "Only in a few, specialized types of arbitrations do arbitrators routinely craft written decisions—labor arbitrations, international commercial arbitrations, and maritime arbitrations." Stephen J. Ware, *Default Rules From Mandatory Rules: Privatizing Law Through Arbitration*, 83 MINN. L. REV. 703, 721 n.85 (1999) (citing Edward Brunet & Charles B. Craver, ALTERNATIVE DISPUTE RESOLUTION: THE ADVOCATE'S PERSPECTIVE 324 (1997).

[173] *See generally* Ruggero J. Aldisert, *Precedent: What It Is and What It Isn't; When Do We Kiss It and When Do We Kill It?*, 17 PEPPERDINE L. REV. 605 (1990); RUGGERO J. ALDISERT, THE JUDICIAL PROCESS 313-375 (2d ed. 1996); 1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 69-70(___); BENJAMIN N. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 19-21 (1921); Roscoe Pound, *Remarks On Status of The Rule of Judicial Precedent*, 14 U. CIN. L. REV. 324, 328-32 (1940).

[174] *See* ELIAS MERWIN, THE PRINCIPLES OF EQUITY AND EQUITY PLEADING 60-64 (1895).

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

Commentators disagree about the extent to which Equity interfered with the Common Law or abated its rigors. Sir William Blackstone, citing instances where Equity did not interfere, concludes therefrom that Equity had no such power. His language is: "It is said that it is the business of a court of equity in England to abate the rigor of the common law. But no such power is contended for. Hard was the case of a bond creditor whose debtor devised away his real estate; rigorous and unjust the rule which put the devisee in a better condition than the heir; yet a court of equity had no power to interfere. Hard is the common law still subsisting that land devised or descending to the heir should not be liable to simple contract debts of the ancestor or devisor, although the money was laid out in the purchase of the very land; and that the father shall never immediately succeed as heir to the real estate of the son. But a court of equity can give no relief, though in both these instances the artificial reason of the law, arising from feudal principles, has long since ceased." 3 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND ___ (P. 430) (17__).

Professor Pomeroy's caustic response to Blackstone:

"The statement in this quotation that "equity had no power to interfere," is merely a gratuitous assumption; it certainly had the same *power* to interfere which it possessed and exercised in the case of an obligor who had paid the debt secured by his bond but had neglected to take a release. The most that can be truthful said is, that "equity did not interfere." Blackstone, being purely a common law, had little knowledge of equity, and his authority concerning its principles and jurisdiction was never great…. This is one example among many of Blackstone's utter inability to comprehend the real spirit and workings of the English law. That equity did to a large extent interfere with and prevent the practical operation of legal rules, and did thus furnish to suitors a corrective of the harshness and injustice of the common law, history and the very existing system incontestably show; and that the

very purpose of a separate system was to correct or to mitigate injustices caused by the rigor of the Common Law.[175] The root of Equity was the idea that the law should be administered fairly, not mechanically and the rigors of the common law were thus subject to the equitable principles of conscience, equity, good faith, and honesty.[176] Thus there are numerous cases in which equity appears as little more than a canon for the interpretation of the rules of Law.[177] In other case Chancery might use equity to render a verdict that compromised the Law, or "split the baby."[178] And in still other cases it would simply "correct" the Law.[179]

In ADR, as well, there may be significant variation from the underlying substantive law. Having already mentioned that neutrals are inclined to depart from the principles of substantive law to reach a more fair and just result,[180] it bears further noting that the right to vacate an arbitration decision is very limited.[181] Mere factual error, and even error of law,

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chancellors, from motives of policy or otherwise, refrained from exercising their reformatory function in certain instances, is not, in the face of the historical facts, any argument against the existence of the power." 1 JOHN NORTON POMEROY, A TREATISE ON EQUITY JURISPRUDENCE § 54 at 55-56 (2d ed. 1892).

Justice Story wrote of the varying interpretations of this maxim: "It may mean that equity adopts and follows the rules of law in all cases, to which those rules may, in terms, be applicable; or it may mean, that equity, in dealing with cases of an equitable nature, adopts and follows the analogies furnished by the rules of law. Now, the maxim is true in both of these senses, as applied to different cases and different circumstances. It is universally true in neither sense; or rather, it is not of universal application." 1 JOSEPH STORY, COMMENTARIES ON EQUITY JURISPRUDENCE § 64 at 54 (12th ed. 1877). *See also* NORMAN FETTER, HANDBOOK OF EQUITY JURISPRUDENCE § 15 at 33 (1895) (the maxim's chief use has been stated to be the anticipation of a hasty generalization on the part of the student that equity wantonly disregards the provisions of the common and statute law.").

[175] The Common Law reflected the primary importance of certainty in the administration of the law. Writs and forms of action created a determinate system that reflected the influence of ancient institutions, the motives of policy, and a felt necessity for rules that regulated those circumstances commonly present in typical human confrontations. 1 JOHN NORTON POMEROY, A TREATISE ON EQUITY JURISPRUDENCE § 66 at 68-70 (2d ed. 1892). The system recognized a finite number of wrongs, and permitted no deviation from the particular modes of procedure and proof. The Chancellor had "the right and the powers, in fact, to do as he likes, whatever hard law and still harder practice may dictate." Robert Severns, *Nineteenth Century Equity: A Study in Law Reform,* 12 CHI.-KENT L. REV. 81, 89 (1934). Sir Henry Maine wrote that equity is "one of the agencies by which law is brought into harmony with society."

[176] *See* 1 JOHN NORTON POMEROY, A TREATISE ON EQUITY JURISPRUDENCE § 385, at 524 (2d ed. 1892) ("[I]t is undeniable that courts of equity do not recognize and protect the equitable rights of litigant parties, unless such rights are, in pursuance of the settled juridical notions of morality, based upon conscience and good faith."); "Bona Fides," *Equity Imported into Common Law,* 69 SOLICITOR'S J. & WKLY. RPTR. 339, 339 (Feb. 14, 1925) (recognizing an "imaginary residuum of equitable principles, to secure redress of legal abuses").

[177] *See* J.L. Barton, *Equity in the Medieval Common Law, in* EQUITY IN THE WORLD'S LEGAL SYSTEMS: A COMPARATIVE STUDY 139, __ (Ralph A. Newman, ed. 1973).

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

1 JOSEPH STORY, COMMENTARIES ON EQUITY JURISPRUDENCE § 27 at 19 (12th ed. 1877).

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

This rather expansive view of Equity is typical of characterizations of the system of Equity prior to the Reformation. The expansiveness of Equity's authority is in fact the subject of considerable debate. *See* nn. ___ *supra* and accompanying text.

[180] *See*, nn. __, *supra* and accompanying text.

[181] The Federal Arbitration Act provides:

typically do not suffice to upset an award.[182] Under the Federal Arbitration Act, an arbitrator's determination is to be enforced absent a showing of "manifest disregard" of the law.[183]

Both of these alternative systems thus enjoy some flexibility in moderating the application of the substantive law to the parties that appear before them. Neither system, however, claims to override the law or judgments of their respective formal counterparts. By acting *in personam*, Equity could compel a person to perform a duty without directly challenging or altering the defendant's property rights (as determined otherwise by the Law) and without regard to any contrary judgment rendered in the Law courts.[184]

> Equity does not intend to set aside what is right and just, nor does it try to pass judgment on a 'strict Common Law rule' by claiming that the latter was not well made. It merely states that, in the interest of a truly effective and fair Administration of Justice, the 'strict Common Law' is not to be observed in some particular instance.[185]

> (a) In any of the following cases the United States court in an and for the district wherein the award was made may make an order vacating the award upon the application of any party to the arbitration—
>
> (1) where the award was procured by corruption, fraud, or undue means;
>
> (2) where there was evident partiality or corruption in the arbitrators, or either of them;
>
> (3) where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced; or
>
> (4) where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made….

9 U.S.C. § 10(a).

[182]

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

ALAN SCOTT RAU, EDWARD F. SHERMAN & SCOTT R. PEPPET, PROCESSES OF DISPUTE RESOLUTION: THE ROLE OF LAWYERS 731 (3rd ed. 2002). *Accord* IV IAN R. MACNEIL, RICHARD E. SPEIDEL & THOMAS J. STIPANOWICH, FEDERAL ARBITRATION LAW § 40.1.4 at 40:13 (1994) ("Over the years, the courts have taken a fairly uniform approach to awards: Awards should be confirmed and enforced as is unless there is clear evidence of a gross impropriety.")

[183] *Wilko v. Swan*, 34 U.S. 427, 436-37 (1953). *See also* Edward Brunet, *Questioning the Quality of Alternative Dispute Resolution*, 62 TUL. L. REV. 1, __ & n.136 (1987) (citing *Stroh Container Co. v. Delphi Indus., Inc.*, 783 F.2d 743, 750 (8th Cir.) (refusing to vacate arbitral award in case where "arbitrators' decision does not clearly delineate the law applied, nor expound the reasoning and analysis used"), *cert. denied*, 106 S. Ct. 2249 (1986); *Sobel v. Hertz, Warner & Co.*, 469 F.2d 1211, 1214-16 (2d Cir. 1972) (carefully distinguishing between mistaken constructions of law and manifest disregard of the law); *Swift Indus., Inc. v. Botany Indus., Inc.*, 466 F.2d 1125, 1131 (3d Cir. 1972) ("arbitrator's decision must be upheld unless it is 'completely irrational.'" (quoting *Lentine v. Fundaro*, 29 N.Y.2d 382 (1972)); *Sidarma Societa Italiana Di Armamento Spa., Venice v. Holt Marine Ind.*, 515 F. Supp. 1302, 1308-09 (S.D.N.Y.) (requiring difficiult to prove deliberate or intentional disregard of the law in order to come within manifest disregard review), *aff'd*, 681 F.2d 802 (2d Cir. 1981)).

Some courts will reverse an arbitrator's awards for straying outside the law. The Third Circuit recently refused to enforce an arbitrator's award that "comported with the arbitrator's view of fairness," rather than drawing its essence from the applicable collective bargaining agreement. *CITGO Asphalt Refining Co. v. Paper, Allied-Industrial, Chemical, and Eneregy Workers Intl. Union Local No. 2-991*, ____, No. 03-1503 (3d Cir. Oct. 14, 2004).

[184] EDMUND H.T. SNELL, THE PRINCIPLES OF EQUITY 40-43 (18th ed. 1920); ELIAS MERWIN, THE PRINCIPLES OF EQUITY AND EQUITY PLEADING 72-79 (1895)

[185] Anton Hermann Chroust, *The "Common Good" and the Problem of "Equity" in the Philosophy of Law*

Moreover, Equity's decision had no precedential effect even in Equity, much less in Law.[186]

Similarly, ADR stands in the shadow of the substantive law yet resorts to another regime to resolve the dispute among the parties before them.[187] Mediators, for example, "do not 'judge'; they aid the parties in ending a dispute."[188] Arbitrators, too, are informed by their "experience, knowledge of the customs of the trade and fair and good sense for *equitable* relief."[189] After all, the early definition of an arbitration is "a deciding, according to one's will or pleasure; uncontrolled or absolute decision."[190] An ADR neutral thus may facilitate or impose a resolution that neither comports with nor undermines the dominant substantive principles. And that resolution, too, has no precedential effect. While liberating, this ability to act "in personam" is also limiting. ADR cannot establish the precedential effect that may be useful in some circumstances.[191] Equity suffered the same infirmity.[192]

One final similarity bears mention. Both Equity and ADR recognized certain limits to their equitable competency. Equity didn't correct all injustices. In fact, Equity left untouched, in full force and operation, a great number of legal rules which were certainly as harsh, unjust, and unconscientious as any of those which they did attack.[193] In a similar way,

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of St. Thomas Aquinas, 18 NOTRE DAME L. REV. 114, 117 (1942–1943)

[186] *See* n. __ *infra* and accompanying text.

[187] Edward Brunet, *Questioning the Quality of Alternative Dispute Resolution*, 62 TUL. L. REV. 1, 26 (1987).

[188] Edward Brunet, *Questioning the Quality of Alternative Dispute Resolution*, 62 TUL. L. REV. 1, 26 (1987).

[189] Stephen J. Ware, *Default Rules From Mandatory Rules: Privatizing Law Through Arbitration*, 83 MINN. L. REV. 703, 721 n.83(1999) (emphasis added) (citing I GABRIEL M. WILNER, DOMKE ON COMMERCIAL ARBITRATION § 25.01 at 391 (rev. ed. 1995)).

See also Colin P. Campbell, *The Court of Equity—A Theory of its Jurisdiction*, 15 GREEN BAG 108, 111 (1903) (equity can "recognize and enforce principles which actually govern society in general, whether embodied in the so-called rules of law or not.").

[190] 1 OXFORD ENGLISH DICTIONARY 426 (1971) (quoting the "obsolete" definition). The contemporary definition is equally telling. It reads: "The settlement of a dispute or question at issue by one to whom the conflicting parties agree to refer their claims in order to obtain an *equitable* decision." *Id.* (emphasis added). In *Black's Dictionary*, the reference to a substantive baseline is conspicuously absent. *See* BLACK'S LAW DICTIONARY ___ (8th ed. 2004) ("A process of dispute resolution in which a neutral third party (arbitrator) renders a decision after a hearing at which both parties have an opportunity to be heard.").

Note the use of the word in arbitration in Professor Pomeroy's admonition about the dangers of a far-reaching jurisprudence of Equity:

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

1 JOHN NORTON POMEROY, A TREATISE ON EQUITY JURISPRUDENCE § 43 at 44 (2d ed. 1892).

[191] *See, e.g.*, Donald J. Friedman & Michael D. Broaddus, *Computer Contract Disputes in the 1990s: Choosing ADR or Litigation*, 5 No. 4 J. PROPRIETARY RTS. 2, 6 (1993).

[192] EDMUND H.T. SNELL, THE PRINCIPLES OF EQUITY 40-43 (18th ed. 1920); ELIAS MERWIN, THE PRINCIPLES OF EQUITY AND EQUITY PLEADING 72-79 (1895)

[193] 1 JOHN NORTON POMEROY, A TREATISE ON EQUITY JURISPRUDENCE § 50 at 50-51 (2d ed. 1892) ("It is absolutely certain from all the existing records, and from the result itself of their work, that they did not refrain from deciding any particular case, according to their views of equity and good conscience, merely because the doctrine which they followed or established in making the decision was inconsistent with the rule of law

the ADR movement has not suggested that every legal dispute has a non-judicial solution. Indeed, the ADR literature recognizes that some types of cases are not suited to resolution outside the courtroom, including particularly cases in which the plaintiff seeks a declaration of law by the court.[194]

4. The Reflection and Reinforcement of Community Norms

Another motive fueling interest in ADR is its ability to enhance "community involvement in the dispute resolution process."[195] This involvement takes two forms. First, ADR empowers neighborhoods to resolve disputes that are not cognizable in or are otherwise ignored by formal dispute resolution systems.[196] And second, ADR incorporates local values and norms into the decision-making calculus.[197] These values and norms tend to emphasize compromise, reconciliation and fairness.[198] Thus while formal adjudication can be "a fight unto death in which irreparable harm (economic, psychological, and spiritual) is done to parties," ADR respects "compromise and human growth" rooted in fundamental moral and spiritual principles.[199]

The excesses of adversarialism, the importance of reaching the merits, and a morally-infused understanding of justice have already been discussed in section A of this Part II and in previous subparts of this section B. The

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applicable to the same facts, nor because the law had deliberately and intentionally refused to acknowledge the existence of a primary right, or to give a remedy under those facts and circumstances. That this corrective authority was possessed by the chancellors, and freely exercised by them in the periods of which I am speaking, is recognized by the ancient writers."); 3 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 430 (noting that among the legal rules with which equity did not interfere: The doctrine by which the lands of a debtor were generally exempted from all liability for his simple contract debts); *Earl of Bath v. Sherwin*, 10 Mod. 4 ("A collateral warranty was certainly one of the harshest and most cruel parts of the common law, because there was no such pretended recompense (as in the case of a lineal warranty); yet I do not find that the court (of chancery) ever gave satisfaction.")

[194] *See* nn. __ and accompanying text, *infra*.

[195] LEONARD L. RISKIN & JAMES E. WESTBROOK, DISPUTE RESOLUTION AND LAWYERS, ABRIDGED EDITION 2 (2d ed. 1998). *See also* STEPHEN B. GOLDBERG, FRANK E. A. SANDER, NANCY H. ROGERS & SARAH RUDOLPH COLE, DISPUTE RESOLUTION: NEGOTIATION, MEDIATION, AND OTHER PROCESSES 8 (4th ed. 2003) ("To improve public satisfaction with the justice system; … To restore the influence of neighborhood and community values and the cohesiveness of communities.")

[196] *See generally* Carrie Menkel-Meadow, *Pursuing Settlement in an Adversary Culture: A Tale of Innovation Co-Opted or "The Law of ADR,"* 19 FLA. ST. U. L. REV. 1, 6 (1991) (recounting the history of neighborhood justice centers); ROMAN TOMASIC & MALCOLM M. FEELEY, NEIGHBORHOOD JUSTICE: ASSESSMENT OF AN EMERGING IDEA (1982); DANIEL MCGILLIS, COMMUNITY DISPUTE RESOLUTION PROGRAMS AND PUBLIC POLICY (1986).

[197] *See generally* Valerie A. Sanchez, *Back to the Future of ADR: Negotiating Justice and Human Needs*, 18 OHIO ST. J. ON DISP. RESOL. 669 (2003).

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

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

reflection and reinforcement of community norms also raises issues of access to courts; those issues are addressed immediately in subpart 5, *infra*.

5. Access to Justice

Proponents of ADR also emphasize the system's ability to broaden access to justice.[200] ADR initiatives can improve access to justice for individuals lacking the means and wherewithal to overcome the intimidating and confusing setting of courtroom or to navigate the formal rules of procedure and evidence.[201]

> The recourse to legal actors and proceedings is costly, emotionally debilitating, and potentially counterproductive. In many respects, justice has become an empty façade; the august wisdom and high-minded discipline of the law merely create an appearance of dispensing what is right and just among parties in dispute. Although adjudication provides coercive finality to conflicts, the pathway to justice is dehumanizing and riddled with abusive interpretations of the truth.[202]

ADR becomes the means for enabling "access to justice" when adjudication fails.[203]

Equity was similarly concerned with access issues, and asserted jurisdiction over claims by plaintiffs against defendants who were too powerful locally for justice to be obtainable against them by regular means.[204] Indeed, one commentator referred to this as "[t]he most important of the judicial functions of the Chancellor."[205] Access to Chancery was facilitated by a simple procedure.[206] And whereas Chancery charged a fee for obtaining writ, there was no fee in Equity.[207]

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[200] LEONARD L. RISKIN & JAMES E. WESTBROOK, DISPUTE RESOLUTION AND LAWYERS, ABRIDGED EDITION 2 (2d ed. 1998). *See also* STEPHEN B. GOLDBERG, FRANK E. A. SANDER, NANCY H. ROGERS & SARAH RUDOLPH COLE, DISPUTE RESOLUTION: NEGOTIATION, MEDIATION, AND OTHER PROCESSES 8 (4th ed. 2003) ("To provide accessible forums to people with disputes; To teach the public to try more effective processes than violence or ligiation for settling disputes").

[201] *See generally* Larry R. Spain, *Alternative Dispute Resolution for the Poor: Is It An Alternative?*, 70 N.D. L. REV. 269 (1994).

[202] THOMAS E. CARBONNEAU, ALTERNATIVE DISPUTE RESOLUTION: MELTING THE LANCES AND DISMOUNTING THE STEEDS 1 (1989).

[203] Judith Resnik, *Many Doors? Closing Doors? Alternative Dispute Resolution and Adjudication*, 10 OHIO ST. J. ON DISP. RESOL. 211, 244-45 (1995); Leonard S. Rubenstein, *Procedural Due Process and the Limits of the Adversary System*, 11 HARV. C.R.-C.L. L. REV. 48 (1976).

[204] J. L. Barton, *Equity in the Medieval Common Law*, in EQUITY IN THE WORLD'S LEGAL SYSTEMS: A COMPARATIVE STUDY 140, 145-46 (Ralph A. Newman ed., 1973).

[205] Robert L. Severns, *Nineteenth Century Equity: A Study in Law Reform*, 12 CHI.-KENT L. REV. 81, 93 (1934) ("Most of the early petitions seem to have originated in the fact that the defendant was so rich or so powerful that he could not be brought into court in the usual way. The phrase "he is of too great a maintenance" is often found in these bills. The early equity jurisprudence appears to have consisted of cases where, although there might have been a remedy at law, yet because the petitioner was poor and the defendant was rich and powerful, the legal remedy was not satisfactory."). *See also* Vance, *Law in Action in Mediaeval England*, 17 VA. L. REV. 1.

[206] *See* nn. __ *supra*.

[207] Robert L. Severns, *Nineteenth Century Equity*, 12 CHI.-KENT L. REV. 81, 88 (1934).

E.g., John Feyrewyn v. Richard the Carpenter, 30 SELDEN SOCIETY, SELECT BILLS IN EYRE 6 (1292). It is addressed to Sir John de Berewick (one of the King's Justiciars), "you who are put in the place of our Lord the King to do right to poor and rich." The plaintiff, of Shrewsbury, says that he paid the defendant six marks,

III. TRADITIONAL LAW AND EQUITY—THE DIALECTIC IN PRACTICE

Much of the grand history of Anglo-American law could be characterized as an epic struggle between the regimes of law and equity.[208] We revere law and the rule of law yet contrive to avoid legalism.[209] That the law must be applied uniformly may be "the most basic principle of jurisprudence."[210] Yet a right too rigid hardens into wrong.[211] Equity plays a strange role in the structure of law; separate from, and yet a part of the legal norms.[212] As complements and as rivals, separate systems of Law and Equity combined to administer the laws for centuries with both certainty and discretion.[213]

The king's courts and the Law courts could have maintained some flexibility and liberality by simply accepting the new writs that were issued

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> receiving in return the defendant's undertaking in writing to furnish plaintiff, who was getting ready to go to the Holy Land on pilgrimage, with board and loding meanwhile. But the wicked defendant will not keep his agreement; instead of which he only gives plaintiff occasionally a morsel of bread just as if plaintiff were a pauper begging alms for God's sake. Unless his Lordship helps the plaintiff before he (his Lordship) leaves town, plaintiff will never get his money back, for the defendant is clerk of the bailiff of Shrewsbury, and the rich folk of this town all work together to keep the poor from getting their rights. Plaintiff has no money to hire a pleader, but if his Lordship will graciously see to it that plaintiff gets his money back, the latter will set out for the Holy Land, and there he will pray for the King and for his Lordship also.

Garrard Glenn & Kenneth Redden, *Equity: A Visit to the Founding Fathers*, 31 VA. L. REV. 753, 760 n.17 (1945).

[208]. *See generally* ROSCOE POUND, AN INTRODUCTION TO THE PHILOSOPHY OF LAW 54 (rev. ed. 1954) ("Almost all of the problems of jurisprudence come down to a fundamental one of rule and discretion, of administration of justice by law and administration of justice by the more or less trained intuition of experienced magistrates"); KENNETH C. DAVIS, DISCRETIONARY JUSTICE: A PRELIMINARY INQUIRY 17 (1969) ("Every governmental and legal system in world history has involved both rules and discretion. No government has ever been a government of laws and not of men in the sense of eliminating all discretionary power. Every government has always been a government of laws and of men."); RICHARD A. POSNER, THE PROBLEMS OF JURISPRUDENCE 24–25 (1990) ("[F]or more than two millennia, the field of jurisprudence has been fought over by two distinct though variegated groups. One contends that law is more than politics and in the hands of skillful judges yields . . . correct answers to even the most difficult legal questions. The other contends that law is politics through and through and that judges exercise broad discretionary authority."). *See also* BARBARA J. SHAPIRO, PROBABILITY AND CERTAINTY IN SEVENTEENTH CENTURY ENGLAND: A STUDY OF THE RELATIONSHIPS BETWEEN NATURAL SCIENCE, RELIGION, HISTORY, LAW, AND LITERATURE 163-193 (1983).

[209] Lord Justice Evershed, *Equity After Fusion: Federal or Confederate*, THE JOURNAL OF THE SOCIETY OF PUBLIC TEACHERS OF LAW 171, 171 (1948).

[210]. Henry J. Friendly, *Indiscretion About Discretion*, 31 EMORY L.J. 747, 758 (1982). *See also* BENJAMIN CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 112 (1921); GIORGIO DEL VECCHIO, JUSTICE 173 n.13 (Edinburgh ed., 1952) ("the worst misfortune of a civilized people is doubt about the impartiality of justice") (internal citation and quotation omitted); GEOFFREY DE Q. WALKER, THE RULE OF LAW: FOUNDATION OF CONSTITUTIONAL DEMOCRACY 25–27(1988).

[211] Charles D. Frierson, *A Certain Fundamental Difference in Viewpoint Between Law and Equity as Illustrated by Two Maxims*, 22 CASE & COMMENT 403, 405 (1915). *See* JOHN SALMOND, FIRST PRINCIPLES OF JURISPRUDENCE 97-98 (1893); JOHN CHIPMAN GRAY, THE NATURE AND SOURCES OF LAW 303 (2nd ed. 1921); H. Jones, *Law and Morality in the Perspective of Legal Realism*, 61 Colum. L. Rev. 799, 809 (1961) ("Morality must form a part of our legal norms unless we are prepared to discard our moral convictions at the points of strain at which moral insights are most needed."); Harlan F. Stone, Book Review, 18 COLUM. L. REV. 97, 98-99 (1918).

[212] G. Radbruch, *Einführung in die Rechtswissenschaft* 75 (9th ed. 1952) ("The dilemma that equity is to be better than justice and yet not quite opposed to justice, but rather a kind of justice, has troubled men as early as Aristotle's famous chapter V 14 of the Nichomachean Ethics."). *See generally* Ralph A. Newman, *Introduction* in EQUITY IN THE WORLD'S LEGAL SYSTEMS: A COMPARATIVE STUDY 15, 15-16 (Ralph A. Newman ed., 1973).

[213]. *See* FREDERIC WILLIAM MAITLAND, EQUITY AND THE FORMS OF ACTION 17 (Chaytor ed. 1909) ("[F]or two centuries before the year 1875 the two systems had been working together harmoniously").

by the Chancery.[214] Had the Law courts accepted these necessary innovations, instead of becoming bemused by form and precedent, there may have been no need for the creation of a special, competing court and an alternative system of law.[215] Instead, the common law became a narrow, formalistic system, confined to the method of granting relief by the award of damages after an injury had been suffered.[216] Other, preventive or special relief was not available from the common law courts.[217] Practical circumstances demanded some adaptability and elasticity, and Chancery filled that void.

English law was thus split into dual systems, with equity and law flowing in separate channels. By requiring the specific performance of contracts, enjoining the repetition of a trespass or nuisance, appointing a receiver to prevent a defendant from destroying property that was the subject of an action, or ordering an accounting, Equity supplemented the Common Law.[218] These and many other remedies considered essential to the administration of any meaningful system of justice were simply unavailable in the Law Courts. By contrast, Equity had at its disposal a broad array of remedies to redress a given wrong.

> [C]ourts of common law cannot give the desired relief. They have no forms of remedy adapted to the objects. They can entertain suits only in a prescribed form, and they can give a general judgment only in the prescribed form.[219] From their very character and organization they are incapable of the remedy, which the mutual rights and relative situations of the parties, under the circumstances, positively require…. But courts of equity are not so restrained. Although they have prescribed forms of proceeding, the latter are flexible, and may be suited to the different postures of cases. They may adjust their decrees, so as to meet most, if not all, of these exigencies; and they may vary, qualify, restrain, and model the remedy, so as to suit it to mutual and adverse claims, controlling equities; and the real and substantial rights of all the parties."[220]

In this regard, Equity was but a useful "appendix" to the common law.[221]

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[214] *See* nn. __ *supra* and accompanying text.

[215] Howard L. Oleck, *Historical Nature of Equity Jurisprudence*, 20 FORDHAM L. REV. 23, 36 (1951). One commentator has suggested that the law-equity dialectic, though causal, was working in the opposite direction. *See* "Bona Fides," *Equity Imported into Common Law*, 69 SOLICITOR'S J. & WKLY. RPTR. 339, 340 (Feb. 14, 1925) ("The result of the growth of equity was that the equitable development of the Common Law was nipped in the bud.").

[216] *See* nn. __ *supra* and accompanying text.

[217] Howard L. Oleck, *Historical Nature of Equity Jurisprudence*, 20 FORDHAM L. REV. 23, 36 (1951).

[218]. *See* WILLIAM F. WALSH, A TREATISE ON EQUITY 28 (1930) (describing purpose of uses was to avoid the rigors of the common law which forbad testamentary gifts of land as well as *inter vivos* transfers except by livery of seisin); FREDERIC WILLIAM MAITLAND, EQUITY AND THE FORMS OF ACTION 4–7 (Chaytor ed. 1909); Sidney Post Simpson, *Fifty Years of American Equity*, 50 HARV. L. REV. 171 (1936).

[219] MITFORD, EQUITY PLEADING 3-4 (Jeremy, ed. ___); 1 WOODES., LECTURES vii, 203-206.

[220] 1 JOSEPH STORY, COMMENTARIES ON EQUITY JURISPRUDENCE § 27 at 19 (12th ed. 1877).

[221]. *See* FREDERIC WILLIAM MAITLAND, EQUITY AND THE FORMS OF ACTION 19 (Chaytor ed. 1 909) ("I do not think that any one has expounded or ever will expound equity as a single, consistent system, an articulate body of law. It is a collection of appendixes between which there is no very close connection.").

Yet the conflict between the two systems was palpable.[222] The very growth of equity, as long as it was in its formative period, was from its essential nature an antagonism to the common law, either by way of restraining the prosecution of actions at law, by adding doctrines and rules which the law simply did not contain, or by way of negating rights that the law had settled.[223] Of course, Equity did not restrain a judge or officer of the Law Courts.[224] Nor did Equity deny the operation of the rules of law.[225] It sought only to neutralize them by compelling the defendant to relinquish the benefits of those rules in accordance with its decree.[226] In this narrow sense, then, law and equity did not "conflict."[227] But in the broader sense it is not even "fairly open to question" that Equity summoned a higher law and adopted doctrines directly contrary to the Law courts.[228]

A. Equity's Reforming Influence on the Law Courts

Although Law and Equity operated as dual systems for centuries, Equity had an undeniable reforming influence on the Law courts.[229] This section offers many examples of instances where doctrines and rules that were once exclusively recognized and enforced by Chancery were incorporated into the Law whether by statute or by judicial decision. Indeed, over time the Common Law became increasingly "equitized."[230] The enumeration of several examples serves two purposes. First, from an evidentiary perspective, they illustrate the dialectic of law and equity in operation.

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[222] Conflicts of jurisdiction "went on, constantly increasing, till at last, they produced an explosion which shook Westminster Hall to its center." 2 CAMPBELL, LIVES OF THE LORD CHANCELLORS 317 (4th ed. 1856); *see also* JOHN NORTON POMEROY, EQUITY JURISPRUDENCE 44 (5th ed. 1941); BISPHAM, PRINCIPLES OF EQUITY 17-18 (7th ed. 1905); POTTER, HISTORY OF EQUITY 11, 13 (1931).

[223] 1 JOHN NORTON POMEROY, A TREATISE ON EQUITY JURISPRUDENCE § 48 at 49 (2d ed. 1892) ("It would be a downright absurdity, a flat contradiction to the plainest teachings of history, to deny that the process of building up the system of equity involved and required on the part of the chancellors an evasion, disregard, and even open violation of many established rules of the common law."); Harlan F. Stone, Book Review, 18 COLUMBIA L. REV. 97 (1918) ("[I]t seems extraordinary that any writer should ever have asserted broadly that there was no conflict between the doctrines of law and equity.") *See also* Leonard J. Emmerglick, *A Century of the New Equity*, 23 TEX. L. REV. 244 (1945); Hohfeld, *The Relation Between Equity and Law*, 11 MICH. L. REV. 537 (1913); Hohfeld, *Fundamental Legal Conceptions*, 26 YALE L.J. 710 (1917); SPENCE, THE EQUITABLE JURISDICTION OF THE COURT OF CHANCERY 326 (1846); BEALE, CONFLICT OF LAWS 151 (1916).

[224] *See* nn. __ *supra* and accompanying text.

[225] *See* nn. __ *supra* and accompanying text.

[226] *See* nn. __ *supra* and accompanying text.

[227] FREDERIC WILLIAM MAITLAND, EQUITY AND THE FORMS OF ACTION 16-18 (1920); Christopher Columbus Langdell, *Brief Survey of Equity Jurisdiction*, 1 HARV. L. REV. 58 (1887); James B. Ames, *Purchase for Value Without Notice*, 1 HARV. L. REV. 1 (1887).

[228] Harlan Fiske Stone, Book Review, 18 COLUM. L. REV. 97, 98 (1918). *See also* nn. __, *supra*.

[229] George Palmer Garrett, *The Heel of Achilles*, 11 VA. L. REV. 32 (1924-25) ("The Common Law has plagiarized many things from Chancery.").

[230] 7 WILLIAM SEARLE HOLDSWORTH, HISTORY OF ENGLISH LAW 74, 75 (1926). *See also* Brendan F. Brown, *Lord Hardwicke and the Science of Trust Law*, 11 NOTRE DAME L. REV. 325 (1935-1936); 1 JOHN NORTON POMEROY, A TREATISE ON EQUITY JURISPRUDENCE § 69 at 73-74 (2d ed. 1892).

Second, they illustrate the positive role that equity can play in the moral growth of the law.[231]

In the early stages of English law, certain agreements could be enforced only if the instrument sought to be enforced respected certain formalities, oftentimes a seal.[232] The formalities served channeling and cautionary functions,[233] but also served as a bright-line test for the early Law judges, who had very little discretion.[234] Promises that were not enforceable in Law, however, could be enforced in Equity.[235] Equity, "the sometimes moral policeman of the law," looked beyond the mere form of a transaction.[236] Recognizing the sanctity of contract, and the resulting moral obligation to honor one's promises, Equity could enforce the promise otherwise unenforceable.[237] In response to the more evolved position of Chancery, and in fear of losing a competitive advantage,[238] the Law courts ultimately developed and expanded the action of Assumpsit to enforce a range of promises, including unsealed and oral promises.[239]

The formalities of contract law had also bound the Law courts to a rule that allowed a creditor to recover a second time from a debtor who had paid his debt in full but had neglected to obtain a formal release or a surrender of the contract.[240]

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[231] E. Hocking, The Present Status of the Philosophy of Law and of Rights 2 (1926); O. Holmes, *The Path of the Law*, 10 Harv. L. Rev. 457, 459 (1897) ("The law is the witness and external deposit of our moral life. Its history is the history of the moral development of the race.")

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

[233] E. ALLEN FARNSWORTH, CONTRACTS § 2.16 at 86-87 (3d ed. 1999); Lon Fuller, *Consideration and Form*, 41 COLUM. L. REV. 799, 800-03 (1941).

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

[235] Charles D. Frierson, *A Certain Fundamental Difference in Viewpoint Between Law and Equity as Illustrated by Two Maxims*, 22 CASE & COMMENT 403, 412 (1915) ("Let us not forget the court of chancery was the first to ignore the absence of a seal…."). *See also* 5 WILLIAM SEARLE HOLDSWORTH, A HISTORY OF ENGLISH LAW 294-97 (7th ed. 1956); WILLARD T. BARBOUR, THE HISTORY OF CONTRACT IN EARLY ENGLISH EQUITY 16 (1914).

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

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

[238] Willard T. Barbour, *The History of Contract in Early English Equity in* 4 OXFORD STUDIES IN SOCIAL AND LEGAL HISTORY 54, 66 (Paul Vinogradoff ed. 1974) (reprint of 1914 edition) ("In fact, there can be little doubt that the eagerness displayed by certain judges to extend Assumpsit from misfeasance to nonfeasance was prompted by the strong desire to retain jurisdiction that was fast slipping away."); 2 WILLIAM SEARLE HOLDSWORTH, A HISTORY OF ENGLISH LAW 456 (noting that the "competition of chancellor" awakened "even the most conservative common law to the necessity of endeavouring to meet demands.")

[239] *See, e.g.*, *Slade's Case*, 4 COKE REPORT 92b, 76 ER 1074 (KB 1602) (presuming existence of a promise from the fact of a debt and allowing Assumpsit to be brought on a simple promise to pay money). *See generally* Note, *The Right to a Nonjury Trial*, 74 HARV. L. REV. 1176, 1182(1961); James Oldham, *Reinterpretations of 18th-Century English Contract Theory: The View from Lord Mansfield's Trial Notes*, 76 GEO. L.J. 1949, 1950-55 (1988); Arthur Allen Leff, *The Leff Dictionary of Law: A Fragment*, 94 YALE L.J. 1983, 2083 (1985); William F. Walsh, *Is Equity Decadent?*, 22 MINN. L. REV. 479, 493 (1937-1938); Warren B. Kittle, *Courts of Law and Equity—Why They Exist and Why They Differ*, 26 W. VA. L. Q. 21, 28-29 (1919-1920).

[240] 1 JOHN NORTON POMEROY, A TREATISE ON EQUITY JURISPRUDENCE § 70 at 74-75 (2d ed. 1892).

> If he had paid without either getting an acquittance or having his bond returned to him, he would have to pay again, not … because this result was in itself desired, but because "the general grounds of the law of England heed more what is good for many than what is good for one singular person only.."[241]

The Common Law rule was that a sealed instrument could be discharged only by another instrument of as high a character, or else by a surrender of it so that the creditor could make *profert* of the instrument.[242] A debtor facing this situation could seek relief in Equity. The Chancellor would issue an injunction against the creditor, enjoining him from enforcing the legal judgment.[243] Ultimately, the Law courts relaxed their jurisprudence to incorporate such defenses as accord and satisfaction; these reforms ensured a greater uniformity of results in Law as in Equity.[244]

Equity allowed recovery upon a lost instrument. Formalities in contract, again the doctrine of profert in particular, also precluded a creditor from enforcing an instrument that had been accidentally lost or destroyed.[245] By the formalities of the common law, the document *was* the debt;[246] hence there was no notion of secondary evidence of contents.[247] Because Equity could shape its remedial processes to meet any new emergency, it acquired jurisdiction in this class of cases, and for a long time all suits upon such lost negotiable paper were necessarily brought in equity. [248] The courts of Law ultimately abrogated the ancient requirement of profert and, as in Equity, allowed actions to recover a money judgment upon lost obligations or negotiable instruments to be brought in courts of law according to the legal modes of procedure.[249]

Equity introduced a moral view on the enforcement of penalties and forfeitures.[250] The Law courts rigidly exacted all penalties and enforced the forfeitures of bonds issued in amounts considerably larger than the sum borrowed unless the payment was done at precisely the time and in

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[241] S.F.C MILSOM, HISTORICAL FOUNDATIONS OF THE COMMON LAW 250 (2d ed. 1981) (quoting ST. GERMAIN, DOCTOR AND STUDENT, Dialogue I, c.12 (Selden Society, vol. 91, pp. 77-79)).

[242] Warren B. Kittle, *Courts of Law and Equity—Why They Exist and Why They Differ*, 26 W. VA. L.Q. 21, 32 (1919-1920).

[243] Warren B. Kittle, *Courts of Law and Equity—Why They Exist and Why They Differ*, 26 W. VA. L.Q. 21, 32 (1919-1920).

[244] 1 JOHN NORTON POMEROY, A TREATISE ON EQUITY JURISPRUDENCE § 70 at 74-75 (2d ed. 1892).

[245] 1 JOHN NORTON POMEROY, A TREATISE ON EQUITY JURISPRUDENCE § 72 at 76-77 (2d ed. 1892).

[246] Warren B. Kittle, *Courts of Law and Equity—Why They Exist and Why They Differ*, 26 W. VA. L.Q. 21, 32 (1919-1920).

[247] *See generally* Garrard Glenn & Kenneth Redden, *Equity: A Visit to the Founding Fathers*, 31 VA. L. REV. 753 (1945); FREDERIC WILLIAM MAITLAND, EQUITY AND THE FORMS OF ACTION 6–7 (Chaytor ed. 1909); William F. Walsh, *Is Equity Decadent?*, 22 MINN. L. REV. 479, 483–86 (1938) (discussing "the reforming influence of equity").

[248] James B Ames, *Specialty Contracts and Equitable Defenses in* LECTURES ON LEGAL HISTORY 104 (1913); 1 JOHN NORTON POMEROY, A TREATISE ON EQUITY JURISPRUDENCE § 70 at 74-75 (2d ed. 1892).

[249] 1 JOHN NORTON POMEROY, A TREATISE ON EQUITY JURISPRUDENCE § 71 at 76 (2d ed. 1892).

[250] 1 GEORGE SPENCE, THE EQUITABLE JURISDICTION OF THE COURT OF CHANCERY 630 (1845).

precisely the manner that had been stipulated.[251] Yet penalties and forfeitures of all types were avoidable in Equity.[252] Equity looked beyond the form of the transaction and to its substance.[253] It gave the creditor an amount that was just and equitable, usually principal, interest, and expenses incurred by the creditor, [254] but would "restrain the creditor from suing at law for the amount of the bond, on the ground that such a course was unconscientious and oppressive."[255] Equity gradually extended this doctrine to contracts other than those requiring the payment of money.[256] These equitable doctrines were slowly absorbed into the Common Law.[257]

Chancery assumed jurisdiction under any circumstances where the remedy at law was not plain, adequate and complete.[258] Hence there are many other cases where Equity would intervene. Doctrines with respect to fraud, undue influence, duress and mistake all originated in Equity.[259] Equity also created the remedies of cancellation, restitution, and specific performance.[260] The protection by injunction of public or social rights is derivative of Equity."[261] And the modern law of fiduciary duties, unfair competition, trademarks, and business rights was developed in the Chancery courts.[262]

Chancery also intervened when the procedures of the law courts were inadequate. For example, equity interfered in the name—and with the imprimatur—of efficiency to avoid the injurious effects of a multiplicity of actions.[263] Describing the contrast between law and equity in these instances, Professor Chafee wrote:

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[251] 1 JOHN NORTON POMEROY, A TREATISE ON EQUITY JURISPRUDENCE § 72 at 76-77 (2d ed. 1892).

[252] D.E.C. YALE, *Introduction*, 2 LORD NOTTINGHAM'S CHANCERY CASES 8-15 (SELDEN SOCIETY 1957).

[253] Two maxims of Equity were invoked here: "Equity looks on that as done, which in good conscience ought to be done" and "Equity looks rather to the intent than to the form." *See* CHARLES E. HOGG, EQUITY PRINCIPLES §§ 327-328 at 451-55 (1900).

[254] Warren B. Kittle, *Courts of Law and Equity—Why They Exist and Why They Differ*, 26 W. VA. L.Q. 21, 32 (1919-1920).

[255] NORMAN FETTER, HANDBOOK OF EQUITY JURISPRUDENCE § 9 at 23-24 (1895).

[256] NORMAN FETTER, HANDBOOK OF EQUITY JURISPRUDENCE § 9 at 24 (1895).

[257] THEODORE F. T. PLUCKNETT, A CONCISE HISTORY OF THE COMMON LAW 677-78 (5th ed. 1956); Warren B. Kittle, *Courts of Law and Equity—Why They Exist and Why They Differ*, 26 W. VA. L.Q. 21, 32-33 (1919-1920).

[258] *See* nn. __ *supra* and accompanying text. In fact, in order to deny the jurisdiction of equity the remedy at law had to be as "plain, certain, prompt, adequate, full, practical, just, final, complete, and efficient" as the remedy in equity. *See* Thomas O. Main, *Contemporary Equity and Traditional Procedure*, 78 WASH. L. REV. 429, 451 (2003) (citations omitted).

[259] Charles D. Frierson, *A Certain Fundamental Difference in Viewpoint Between Law and Equity as Illustrated by Two Maxims*, 22 CASE & COMMENT 403, 412 (1915); William F. Walsh, *Is Equity Decadent?*, 22 MINN. L. REV. 479, 483 (1937-1938); Sidney Smith, *The Stage of Equity*, 5 CAN. BAR REV. 308, 314 (1933).

[260] Sidney Smith, *The Stage of Equity*, 5 CAN. BAR REV. 308, 314 (1933).

[261] William F. Walsh, *Is Equity Decadent?*, 22 MINN. L. REV. 479, 493 (1937-1938).

[262] Leonard J. Emmerglick, *A Century of the New Equity*, __ TEX. L. REV. 244, 251 (citing Jones, *Historical Development of the Law of Business Competition*, 35 YALE L.J. 905 (1926); MUND, MONOPOLY: A HISTORY AND THEORY (1933); WATKINS, INDUSTRIAL COMBINATIONS AND PUBLIC POLICY (1927)); Deborah A. DeMott, *Beyond Metaphor: An Analysis of Fiduciary Obligation*, 1988 DUKE L.J. 879, 880-81 (1985) (discussing the equitable origins of fiduciary duties); L. S. SEALY, FIDUCIARY RELATIONSHIPS, 1962 CAMBRIDGE L.J. 69, 60 (1962) (same).

[263]. The reference to a "multiplicity of actions" can be confusing because equity exercised jurisdiction in

> A common-law action soon came to be a two-sided affair, usually with only one plaintiff and one defendant but sometimes with several plaintiffs or defendants tightly bound together as joint obligees or obligors, etc. Except in such joint situations, however, a dispute of one person against many persons usually had to come before the law courts, if at all, in the form of many separate actions. Hence it was far cheaper and more convenient to have a single suit in chancery, which was accustomed to handle polygonal controversies . . . . [I]t was an obvious waste of time to try . . . common question[s] of law and fact over and over in separate actions at law . . . . It was much more economical to get everybody into a single chancery suit and settle the common questions once and for all.[264]

Thus, a court of equity would hear a controversy to prevent a multiplicity of suits, even if the exercise of such jurisdiction called for adjudication on purely legal rights and to confer purely legal relief.[265] Moreover, when the number of plaintiffs or defendants were too numerous to join in a single suit, equity would permit a few of the litigants to represent the many in connection with an equitable bill of peace, the ancestor of the contemporary class action.[266]

In reforming the law of property, Equity recognized ownership in the beneficiary of a trust. At common law, title to tangible real property could pass only by livery of seisin, which generally required the physical presence of the parties on the land.[267] Thus, in a conveyance to A for the use of B, the Law courts denied any claim of title in B and refused to recognize that B

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four types of cases involving a multiplicity of actions—(i) where the nature of the wrong is such that at law it would be necessary for the injured party, in order to obtain complete relief, to bring a number of actions, arising from the same wrongful act against the same wrongdoer; (ii) where a party institutes, or is about to institute, a number of successive or simultaneous actions against another party, all depending upon the same legal questions and similar issues of fact; (iii) where a party claims a common right against a number of persons, the establishment of which would require a separate legal action brought by him against each of such persons, and which are of such a nature that they might be determined in a single suit in equity brought against all of such persons; and (iv) where a number of persons have separate and distinct rights of action against the same party, arising from the same cause, governed by the same legal rule, and involving similar facts, and the circumstances are such that the rights of all may be settled in a single suit. *See generally* 1 JOHN NORTON POMEROY, A TREATISE ON EQUITY JURISPRUDENCE, §§ 243–275, at 318–377 (2d ed. 1892). References herein to a "multiplicity of actions" refer to group (iv). *See also* HENRY L. MCCLINTOCK, HANDBOOK ON THE PRINCIPLES OF EQUITY § 178 (2d ed. 1948) ("the plight of a defendant at law, subjected to one hundred and ten separate actions arising from the same accident, many of the actions being brought in different counties and some of them set for trial in the different counties at the same time, so that it would be impossible for the witnesses for the defense to attend each trial, is one that calls for some sort of relief if it can be given") (citing S. Steel Co. v. Hopkins, 47 So. 274 (1908)).

[264]. ZECHARIAH CHAFEE, JR., SOME PROBLEMS OF EQUITY 200–01 (1950).

[265]. Thomas O. Main, *Traditional Equity and Contemporary Procedure*, 79 WASH. L. REV. 429, 492 (2003) (citations omitted).

[266]. *See* 1 JOHN NORTON POMEROY, A TREATISE ON EQUITY JURISPRUDENCE, § 269, at 367-68 (2d ed. 1892) ("[T]he jurisdiction may *and should be* exercised, either on behalf of a numerous body of separate claimants against a single party, or on behalf of a single party against such a numerous body, although there is no 'common title,' nor 'community of right' or of 'interest in the subject-matter,' among these individuals, but where there is and because there is merely a community of interest among them in the questions of law and fact involved in the general controversy, or in the kind and form of relief demanded and obtained by or against each individual member of the numerous body."). *See generally* STEPHEN C. YEAZELL, FROM MEDIEVAL GROUP LITIGATION TO THE MODERN CLASS ACTION (1987); ZECHARIAH CHAFEE, JR., SOME PROBLEMS OF EQUITY 200 (1950).

[267] Warren B. Kittle, *Courts of Law and Equity—Why They Exist and Why They Differ*, 26 W. VA. L.Q. 21, 32 (1919-1920).

had any right therein.[268] In fact, B could be sued at Law for trespass in taking the rents and profits. Equity, however, recognized B as the beneficial owner, held A to be a mere trustee for B, and would enjoin A from prosecuting any action at law against B. "This recognized the principles of trusts, which in its many phases equity has always fostered."[269] (Equity similarly respected a trust with regard to tangible personal property, and also the right to transfer title to intangible personalty, or choses in action.[270]) Equity's action in the development of uses practically eliminated most of the obsolete doctrines of feudalism after feudalism ceased to exist as an active social and governmental system. This led directly to the enactment of the Statute of Uses. Although aimed at restoring tax revenues to Henry VIII, the Statute made it possible to convey legal title by written deed, replacing conveyances by livery of seisin, and to create future executory estates impossible under the old law. The Statute also destroyed the power to devise land by will recognized by Equity, and resulted in the adoption of the Statute of Willis to restore such power.[271]

The theory of mortgages is a direct result of the carrying over into the law of the principles established by the Chancellor's Court in the early part of the seventeenth century. Equity, though recognizing the purely technical legal title of the mortgagee, enforced the real ownership of the mortgagor by establishing his equity of redemption, and by charging the mortgagee as a trustee if he exercised his legal right to take over possession of the mortgaged property and collected the rents and profits. Equity treated the legal title and right of possession as existing in the mortgagee only for the purpose of establishing and protecting his security for payment of the mortgage debt.[272]

B. The Ossification of Equity (or The Common Law's Reforming Influence on Equity)

What starts as a boon often ends as a boomerang.[273] Earnest, "[s]imple, inexpensive and speedy in its origins," by the eighteenth century Equity had

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[268] Warren B. Kittle, *Courts of Law and Equity—Why They Exist and Why They Differ*, 26 W. VA. L.Q. 21, 32 (1919-1920) (citing WILLIAM W. BILLSON, EQUITY IN ITS RELATIONS TO COMMON LAW 167 (1917); Kenelm E. DIGBY, HISTORY OF THE LAW OF REAL PROPERTY 320 (5th ed. 1897)).

[269] Warren B. Kittle, *Courts of Law and Equity—Why They Exist and Why They Differ*, 26 W. VA. L.Q. 21, 32 (1919-1920).

[270] Walter Wheeler Cook, *The Alienability of Choses in Action*, 29 HARV. L. REV. 816 (1916); Walter Wheeler Cook, *The Alienability of Choses in Action: A Reply to Professor Williston*, 30 HARV. L. REV. 449 (1917); William F. Walsh, *Is Equity Decadent?*, 22 MINN. L. REV. 479, 484 (1937-1938).

[271] William F. Walsh, *Is Equity Decadent?*, 22 MINN. L. REV. 479, 483 (1937-1938); GEORGE L. CLARK, EQUITY: AN ANALYSIS AND DISCUSSION OF MODERN EQUITY PROBLEMS § 246 at 327-28 (Stephens 1924) (1919); 1536, 27 Hen. 8, ch. 10; 4 WILLIAM SEARLE HOLDSWORTH, A HISTORY OF ENGLISH LAW 49 (1924).

[272] William F. Walsh, *Is Equity Decadent?*, 22 MINN. L. REV. 479, 484-85 (1937-1938).

[273] Robert L. Severns, *Nineteenth Century Equity: A Study in Law Reform*, 12 CHI.-KENT L. REV. 81, 106 (1934).

became idly corrupt, "exceedingly complicated, unbelievably slow, and inexcusably expensive."[274] When Chancery contracted the pathogens of strict law, it suffered a fate worse than that which plagued the Common Law.[275]

In the early seventeenth century, a process of systematization was underway.[276] For many centuries the sweeping jurisdiction of Equity had been untrammeled by any definite rule.[277] Equity was a successful competitor vis-à-vis the Law courts, and was doing useful things.[278] But this popularity also brought a craving for certainty; as soon as a system of law becomes reduced to completeness of outward form, "it has a natural tendency to crystallize into a rigidity unsuited to the free applications which the actual circumstances of human life demand."[279] Hence Chancery could not remain a "fountain of unlimited dispensations."[280] To reform the "heterogeneous medley of empirical remedies,"[281] Bacon issued one hundred rules of equity that were "wisely conceived, and expressed with the greatest precision and perspicuity."[282]

Continuing thereafter, particularly under the Chancellorships of Lord Nottingham and Lord Hardwicke,[283] the exercise of equity became more circumscribed and predictable.[284] Chancery no longer "decide[d] every

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[274] Bryant Smith, *Legal Relief Against the Inadequacies of Equity*, 12 TEX. L. REV. 112 (1934).

[275] CARLETON KEMP ALLEN, LAW IN THE MAKING 228-29 (1927) ("The situation was bad enough at law, but much worse in equity.")

[276]. Willard Barbour, *Some Aspects of Fifteenth-Century Chancery*, 31 HARV. L. REV. 834, 858-59 (1918) (dating "the change" in equity to the era of James I). *See generally* Jack Moser, *The Secularization of Equity: Ancient Religious Origins, Feudal Christian Influences, and Medieval Authoritarian Impacts on the Evolution of Legal Equitable Remedies*, 26 CAP. U. L. REV. 483 (1997); Timothy S. Haskett, *The Medieval English Court of Chancery*, 14 LAW & HIST. REV. 245 (1996).

[277]. *See supra* notes ___ and accompanying text. *See also* 1 JOHN FONBLANQUE, A TREATISE OF EQUITY § 3 (London, A. Strahan & W. Woodfall, 1st ed. 1793) ("So there will be a necessity of having recourse to natural principles, that what is wanting to the finite may be supplied out of that which is infinite. And this is properly what is called equity, in opposition to strict law . . . . And thus in chancery every particular case stands upon its own particular circumstances; and, although the common law will not decree against the general rule of law, ye chancery doth, so as the example introduce not a general mischief. Every matter, therefore, that happens inconsistent with the design of the legislator, or is contrary to natural justice, may find relief here.").

[278] *See* nn. __ *supra* and accompanying text.

[279] SHELDON AMOS, THE SCIENCE OF LAW 57 (1875).

[280]. Frederick Pollock, *The Transformation of Equity*, *in* FREDERICK POLLOCK, ESSAYS IN JURISPRUDENCE AND ETHICS 293 (1882) (Chancery became "as regular a court of jurisdiction as any other"); FREDERIC WILLIAM MAITLAND, EQUITY AND THE FORMS OF ACTION 9 (Chaytor ed. 1909) ("In the second half of the sixteenth century the jurisprudence of the court is becoming settled.").

[281]. Sidney Smith, *The Stage of Equity*, 11 CAN. B. REV. 308, 315 (1938).

[282]. 2 JOHN LORD CAMPBELL, LIVES OF THE LORD CHANCELLORS AND KEEPERS OF THE GREAT SEAL OF ENGLAND 134 (5th ed. 1868) ("They are the foundation of the practice of the Court of Chancery, and are still cited as authority.").

[283]. Lord Nottingham served as Lord Chancellor from 1673 to 1682. *See generally* 4 JOHN CAMPBELL, LIVES OF THE LORD CHANCELLORS AND KEEPERS OF THE GREAT SEAL OF ENGLAND 236–79 (5th ed. 1868). Lord Hardwicke served from 1736 to 1756. *See generally* 6 JOHN CAMPBELL, LIVES OF THE LORD CHANCELLORS AND KEEPERS OF THE GREAT SEAL OF ENGLAND 158-304 (5th ed. 1868).

[284]. *See* Walter E. Sparks, *The Origin, Growth and Present Scope of Equity Jurisprudence in England and the United States*, 16 W. JURIST 473, 477 (1882) ("as time passed on . . . opposition gradually diminished"). *See, e.g.*, Bond v. Hopkins, 1 Sch. & Lef. 413, 428 (1802) ("The cases which occur are various, but they are decided on fixed principles. Courts of equity have in this respect no more discretionary power than courts of law. They decide new cases, as they arise, by the principles on which former cases have been decided, and may then

individual case according to the result of a sort of ransacking search for the particular set of conscientious principles applicable to the case."[285] Chancery began to respect precedent.[286] And as Nottingham and Hardwicke "deliberately set out to reduce equity to a system of rules established by precedent,"[287] the jurisdiction of equity "crystallized."[288]

But one commentator's crystallization is another's ossification. As the jurisdiction of equity lost its youthful exuberance, so also its freedom, elasticity and luminance.[289] Equity lost religion and found procedure.[290] The administration of equity, much like the administration of law became "entangled in the intricacies of its own processes and broken down of its own weight."[291] Corruption made things worse.[292] For litigants, Chancery

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illustrate or enlarge the operation of those principles; but the principles are as fixed and certain as the principles on which the courts of common law proceed.").

[285]. H.G. Hanbury, *The Field of Modern Equity*, 45 L.Q. REV. 196, 205 (1929).

[286] As early as 1663, in an aggravated case of fraud Lord Clarendon dismissed the plaintiff's bill for lack of a precedent. *See Roberts v. Wynn*, 1 Chan.Rep. 236, 21 Eng. Rep. 560. *See also Cook v. Fountain*, 3 Swans. 585, 591 (1672) (discussing the logic of consistency); Brendan F. Brown, *Lord Hardwicke and the Science of Trust Law*, 11 NOTRE DAME L. REV. 319, 321-22 n.12 (1935-1936) (discussing *Cook* and noting that the tendency toward stare decisis increased in Chancery throughout the eighteenth century); George W. Keeton, *Bacon as a Chancery Judge*, 18 IOWA L. REV. 476, 476 (1932-1933) (suggesting that respect for precedent was not introduced in Equity until the eighteenth century); Bryant Smith, *Legal Relief Against the Inadequacies of Equity*, 12 TEX. L. REV. 112 (1934) (suggesting that Chancery was far more deeply in bondage to precedent than was the common law); 1 JOHN NORTON POMEROY, A TREATISE ON EQUITY JURISPRUDENCE § 59 at 59-60 (2d ed. 1892) (quoting Lord Keeper Bridgman, "Certainly, precedents are very necessary and useful to us, for in them we may find the reasons of the equity to guide us; and besides, the authority of those who made them is much to be regarded. We shall suppose that they did it upon great consideration and weighing of the matter, and it would be very strange and very ill if we should disturb and set aside what has been the course for a long series of time and ages.").

[287]. Robert Severns, *Nineteenth Century Equity: A Study in Law Reform*, 12 CHI.-KENT L. REV. 81, 105-06 (1934). Hardwicke "labored indefatigably to forge those positive precepts which in his estimation would best 'externalize the traditional philosophy of Chancery.'" Brendan F. Brown, *Lord Hardwicke and the Science of Trust Law*, 11 NOTRE DAME L. REV. 319, 319 (1935–1936); H.G. Hanbury, *The Field of Modern Equity*, 178 LAW QRTLY REV. 12 (Apr. 1929) (suggesting that Nottingham initiated the first transformation of equity "from a heterogeneous medley of isolated empirical reliefs into a stable and increasingly rigid system of rules")

Some commentators credit (blame?) Eldon for completing the process of defining and limiting Equity. *See* 1 WILLIAM SEARLE HOLDSWORTH, HISTORY OF ENGLISH LAW 468 (3d ed. 1922).

[288]. *See* H. G. Hanbury, *The Field of Modern Equity*, 45 L.Q. REV. 196, 205 (1929) (Nottingham "stiffened and rationalized old ideas and turned them to permanent and practical use."); *id.* at 196 (detailing "the transformation from a heterogonous medley of isolated, empirical beliefs into a stable and increasingly rigid system of rules."). *See also* James O'Connor, *Thoughts About the Common Law*, 3 CAMBRIDGE L.J. 161, 164 (1928) (referring to the "crystallized conscience" of equity). *See generally* FREDERIC WILLIAM MAITLAND, EQUITY AND THE FORMS OF ACTION 9 (Chaytor ed. 1909) (noting that during the sixteenth century, "[t]he day for ecclesiastical Chancellors is passing away"); Paul Vinogradoff, *Reason and Conscience in Sixteenth Century Jurisprudence*, 24 LAW Q. REV. 373 (1908); BARBARA SHAPIRO, PROBABILITY AND CERTAINTY IN SEVENTEENTH CENTURY ENGLAND: A STUDY OF THE RELATIONSHIPS BETWEEN NATURAL SCIENCE, RELIGION, HISTORY, LAW, AND LITERATURE (1983); 6 JOHN LORD CAMPBELL, LIVES OF THE LORD CHANCELLORS 158 (5th ed. 1868).

[289]. *See* Melvin M. Johnson, Jr., *The Spirit of Equity*, 16 B.U. L. REV. 345, 345 (1936) ("Equity became handcuffed by a rigorous body of rules and concepts."); *see also id.* at 351 ("The times were not suitable for reasoned discretion. The public demanded certainty.").

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

[291]. Bryant Smith, *Legal Relief Against the Inadequacies of Equity*, 12 TEX. L. REV. 112 (1934). *See* 1 WILLIAM SEARLE HOLDSWORTH, A HISTORY OF ENGLISH LAW 426 (5th ed. 1931) ("Firstly a suit in equity very often lasted very many years. This no doubt is true of some common law actions; but it is clear that the fact that

became a nightmare. Five years was a minimum for a creditors' bill to be disposed of, even where there was neither exception nor appeal.[293] Sometimes a case was delayed over thirty years.[294] Chancery thus became a *jus strictum* differing little from the common law except in point of identity of the judicial decisions it had made its own.[295] Indeed, by the first quarter of the nineteenth century, equity had become "so fixed, so certain, that lawyers could say, 'There is nothing new in equity.'"[296]

This legalization of Equity was happening simultaneously with the equitization of the Law described *supra*.[297] The alternative appearance of law and equity as the mutual checks and corrections of one another are lasting and not transitory phenomena. No longer "discrete conversants," the two systems had "begun to be 'integrated,' 'melded,' or 'collapsed' into each other."[298]

C. The Merger of Law and Equity

The merger of law and equity consummated the centuries-long relationship of cooperation and competition between the two systems.[299] With equity "legalized," it was assumed that the usefulness of the separate court was exhausted.[300] Differences between the systems were viewed as

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many equitable cases involved the taking of accounts and enquiries, necessarily made the proceedings more lengthy than the general run of common law actions, which turned on a clear cut issue of fact or law."); Charles Synge Christopher & Baron Bowen, *Progress in the Administration of Justice During the Victorian Period*, *in* 1 SELECT ESSAYS IN ANGLO-AMERICAN LEGAL HISTORY 516, 529 (1907) ("'No man, as things now stand,' says in 1839 Mr. George Spence, the author of the well-known work on the equitable jurisdiction of the Court of Chancery, 'can enter into a Chancery suit with any reasonable hope of being alive at its termination, if he has a determined adversary.'"). A vivid picture of the technicalities, delays, and expense involved in a suit in chancery is to be found in the case of *Jarndyce v. Jarndyce*, as related in Charles Dickens' BLEAK HOUSE (Houghton Mifflin Co. 1956) (1853). Some have suggested that Dickens' negative depiction is exaggerated. *See generally* WILLIAM SEARLE HOLDSWORTH, CHARLES DICKENS AS A LEGAL HISTORIAN (Yale Univ. 1929).

[292] Michael Lobban, *Preparing for Fusion: Reforming the Nineteenth-Century Court of Chancery, Part II*, 22 LAW & HIST. REV. 565 (2004); Bryant Smith, *Legal Relief Against the Inadequacies of Equity*, 12 TEX. L. REV. 109, 112-113 (1934).

[293] COOPER, PROCEEDINGS IN PARLIAMENT RELATIVE TO DEFECTS IN THE COURT OF CHANCERY 86 (1828) as quoted in 9 WILLIAM SEARLE HOLDSWORTH, HISTORY OF ENGLISH LAW 433 (1926).

[294] 9 WILLIAM SEARLE HOLDSWORTH, HISTORY OF ENGLISH LAW 375 (1926).

[295]. *See* Douglas M. Gane, *The Birth of a New Equity*, 67 THE SOLICITORS' JOURNAL 572, 572 (1923). *See also* Brendan F. Brown, *Lord Hardwicke and the Science of Trust Law*, 11 NOTRE DAME L. REV. 319, 325 (1935-1936) ("In the eighteenth century . . . not only was Chancery following the law, but the Common Law in turn was becoming more and more equitized."); 1 WILLIAM SEARLE HOLDSWORTH, A HISTORY OF ENGLISH LAW 74–75 (7th ed. 1956).

[296]. Robert Severns, *Nineteenth Century Equity: A Study in Law Reform*, 12 CHI.-KENT L. REV. 81, 106 (1934).

[297] Bryant Smith, *Legal Relief Against the Inadequacies of Equity*, 12 TEX. L. REV. 109 (1934) (tracing key elements of reforms in Law and Equity to the middle of the eighteenth century).

[298] Judith Resnik, *Many Doors? Closing Doors? Alternative Dispute Resolution and Adjudication*, 10 OHIO ST. J. ON DISP. RESOL. 211, 214 (1995) (referring to a theory about the evolution of the systems of ADR and formal adjudication).

[299] This story has been narrated. *See generally* Stephen N. Subrin, *How Equity Conquered Common Law: The Federal Rules of Civil Procedure in Historical Perspective*, 135 U. PA. L. REV. 909, ___ (1987); Thomas O. Main, *Traditional Equity and Contemporary Procedure*, 78 WASH. L. REV. 429 (2003).

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merely procedural, and a widespread and escalating contempt for procedure suggested that any distinctions were impractical and unnecessary.[301] There was little tolerance for the delays, the expense, and the technical complications that resulted from maintaining separate courts of law and equity. [302] Procedure could better fulfill its functional and secondary role if a single set of procedural rules facilitated the joint administration of the substantive principles of both law and equity.[303]

I have argued elsewhere that in merging the regimes of law and equity, reformers may have swept away part of the wisdom that guided the development and operation of dual systems.[304] One virtue of an autonomous system of equity was its authority to act in opposition to the strict law when the unique circumstances of a particular case demanded intervention.[305] The architects of the merger took great pains to sustain this virtue by preserving the substantive principles of both law and equity; only the procedure was modified, they insisted.[306] But even assuming that the antagonistic substantive regimes of law and equity can co-exist and be applied contemporaneously within a single unified procedural system, a fundamental flaw inheres in the procedural infrastructure of a merged system.[307] For in denying equity any structural autonomy, there remains no relief from the procedures of the merged system itself when the modes of proceeding in that system are inadequate.[308]

> Separate equity courts were given up because equity had been made into a body of rigid doctrines which were applied quite as mechanically as the strict common law. Equity had become a sterile system and showed a progressive decadence as an agency able to individualize justice. "The introduction of the common-law theory of binding precedents and the result case-law equity…that made equity a system must in the end prove fatal to it. In the very act of becoming a system it becomes legalized, and in becoming merely a competing system of law insures its ultimate downfall."

Leonard J. Emmerglick, *A Century of the New Equity*, 23 TEX. L. REV. 244, 246 (1945) (citing SNELL, PRINCIPLES OF EQUITY (1868).

[301] *See generally* Thomas O. Main, *Traditional Equity and Contemporary Procedure*, 78 WASH. L. REV. 429 (2003).

[302]. *See* William Searle Holdsworth, *Blackstone's Treatment of Equity*, 43 HARV. L. REV. 1, 7 (1928-1930). *See generally* Thomas O. Main, *Traditional Equity and Contemporary Procedure*, 78 WASH. L. REV. 429 (2003).

[303] *See* Charles E. Clark, *The Union of Law and Equity*, 25 COLUM. L. REV. 1 (1925)Thomas O. Main, *Traditional Equity and Contemporary Procedure*, 78 WASH. L. REV. 429 (2003).

[304] *See* Thomas O. Main, *Traditional Equity and Contemporary Procedure*, 78 WASH. L. REV. 429 (2003).

[305] *See* William Searle Holdsworth, *The Early History of Equity*, 13 MICH. L. REV. 293, 293 (1913) ("the root . . . of equity [is] the idea that the law should be fairly administered and that hard cases should as far as possible be avoided"). BENJAMIN N. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 65 (1921) (""[W]hen the social needs demand one settlement rather than another, there are times when we must bend symmetry, ignore history and sacrifice custom in the pursuit of larger ends."); Colin C. Campbell, *The Court of Equity—A Theory of its Jurisdiction*, 15 GREEN BAG 108, 110 (1903) (noting that principles of equity are a part of the larger concept of fairness and justice upon which all law must be based).

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

[307] *See* Thomas O. Main, *Traditional Equity and Contemporary Procedure*, 78 WASH. L. REV. 429, 476-495 (2003).

[308] *See* Thomas O. Main, *Traditional Equity and Contemporary Procedure*, 78 WASH. L. REV. 429, 495-514 (2003).

Moreover, the assumption that a merged court can apply the substantive principles of law and equity is an uncertain one. To be sure, many statutes and common law doctrines have incorporated the fundamental equitable principle of individualized justice. This principle is reflected in the evolution of broad principles as opposed to narrow rules,[309] broad grants of discretionary authority,[310] variable standards of conduct,[311] balancing tests,[312] lee ways of precedent,[313] and the acceptance of legal fictions.[314] That equity intervenes when there is *no adequate remedy at law* is a most familiar refrain.[315] Courts frequently exercise their broad discretion to award various equitable remedies. And courts have used the awesome power of equity to create entirely new rights.[316]

Yet the legacy of Equity could not be fully preserved in a merged system. Law and equity cannot be blended or homogenized because they are fundamental antitheses.[317] Each system has a function to perform which requires some freedom to act upon the other.[318] "To perform its high office, equity must be administered as a check upon strict law and in opposition to it. This requires for equity a selfhood."[319]

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[309]. *See generally* FREDERICK SCHAUER, PLAYING BY THE RULES: A PHILOSOPHICAL EXAMINATION OF RULE-BASED DECISION-MAKING IN LAW AND IN LIFE 98, 158–62 (1991); Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175 (1989); Robert F. Nagel, *The Formulaic Constitution*, 84 MICH. L. REV. 165 (1985).

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

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

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

[313]. *See generally* Ruggero J. Aldisert, *Precedent: What It Is and What It Isn't: When Do We Kiss It and When Do We Kill It?*, 17 PEPP. L. REV. 605 (1990); Michael J. Gerhardt, *The Role of Precedent in Constitutional Decisionmaking and Theory*, 60 GEO. WASH. L. REV. 68 (1991).

[314]. *See generally* LON FULLER, LEGAL FICTIONS 9 (1967); Louise Harmon, *Falling Off the Vine: Legal Fictions and the Doctrine of Substituted Judgment*, 100 YALE L.J. 1 (1990); HENRY SUMNER MAINE, ANCIENT LAW 17–36 (E.P. Dutton & Co. 1910) (1861).

[315]. *See generally* Douglas Laycock, *The Death of the Irreparable Injury Rule*, 103 HARV. L. REV. 687 (1990); Daniel J. Morrissey, *S.E.C. Injunctions*, 68 TENN. L. REV. 427 (2001).

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

[317] Percy J. Bordwell, *The Resurgence of Equity*, 1 U. CHI. L. REV. 741, 747 (1934) ("In an indiscriminate "fusing" or an indiscriminate borrowing, these principles are likely to be lost. They are likely to be lost even in the administration of equity itself by judges with only a legal point of view.").

[318] Leonard J. Emmerglick, *A Century of the New Equity*, __ TEX. L. REV. 244, 248 (__);

[319] Leonard J. Emmerglick, *A Century of the New Equity*, __ TEX. L. REV. 244, 255 (__).

IV. CONTEMPORARY DUAL SYSTEMS—THE DIALECTIC IN PRACTICE

ADR stepped into the breach by operating as a check upon the "strict law" that is now codified in the procedures of the merged system. ADR emerged to offer *procedural* flexibility and discretion.[320] And by channeling Equity's emphasis on the moral and ethical significance of individualized justice, it offered an alternative *substantive* vision.[321] But as Professor Resnik's Schwarz lecture details in full,[322] we should beware the boomerang.[323]

ADR was meant to challenge the adversarial system, but has instead been taken over by formal adjudication while, at the same time, itself becoming more formalized and adversarial.[324] First, the courts have been ADRized.[325] Proponents of ADR have succeeded in making it an integral part of our judicial system.[326]

> Via legislation, national and local rule making, and executive proclamation, every branch of the federal government has signalled [CQ] its support of ADR…. [A]pproval in theory of ADR has become commonplace.[327]

The irony of the institutionalization and co-optation by courts of a litigation *alternative* has been fully discussed.[328] Yet the path toward full integration

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[320] *See* nn. __ *supra* and accompanying text.

[321] *See* nn. __ *supra* and accompanying text.

[322] Judith Resnik, *Many Doors? Closing Doors? Alternative Dispute Resolution and Adjudication*, 10 OHIO ST. J. ON DISP. RESOL. 211, 253-54 (1995);

[323] *See* n. __.

[324] Judith Resnik, *Many Doors? Closing Doors? Alternative Dispute Resolution and Adjudication*, 10 OHIO ST. J. ON DISP. RESOL. 211, 253-54 (1995); Carrie Menkel-Meadow, *Pursuing Settlement in an Adversary Culture: A Tale of Innovation Co-opted or "The Law of ADR,"* 19 Fla. St. U. L. Rev. 1, 5, 13-16 (1991); Lucy V. Katz, *Compulsory Alternative Dispute Resolution and Voluntarism: Two-Headed Monster or Two Sides of the Coin?*, 1993 J. DISP. RESOL. 1, 5.

[325] Jeffrey W. Stempel, *Reflections on Judicial ADR and the Multi-Door Courthouse at Twenty: Fait Accomplis, Failed Overture, or Fledgling Adulthood?*, 11 OHIO ST. J. ON DISP. RESOL. 297, 300 (1996) (discussing the "ADRization" of the courts). *See* J. Clark Kelso & Thomas J. Stipanowich, *Protecting Consumers in Arbitration*, DISP. RESOL. MAG., Fall 1998, at 11.

[326] Jack B. Weinstein, *Some Benefits and Risks of Privatization of Justice Through ADR*, 11 OHIO ST. J. ON DISP. RESOL. __, 246-47 (1996); Judith Resnik, *Many Doors? Closing Doors? Alternative Dispute Resolution and Adjudication*, 10 OHIO ST. J. ON DISP. RESOL. 211, 213 (1995); Jeffrey W. Stempel, *Reflections on Judicial ADR and the Multi-Door Courthouse at Twenty: Fait Accomplis, Failed Overture, or Fledgling Adulthood?*, 11 OHIO ST. J. ON DISP. RESOL. 297, 302 (1996).

[327] Judith Resnik, *Many Doors? Closing Doors? Alternative Dispute Resolution and Adjudication*, 10 OHIO ST. J. ON DISP. RESOL. 211, 239-40 (1995).

[328] *See, e.g.*, Judith Resnik, *Many Doors? Closing Doors? Alternative Dispute Resolution and Adjudication*, 10 OHIO ST. J. ON DISP. RESOL. 211, 262-63 (1995) (citing Craig A. McEwen, Lynn Mather & Richard J. Maiman, *Lawyers in and Everyday Life: Mediation in Divorce Practice*, 28 J. L. & Soc., 149, 183 (1994) (Mediation of divorce in Maine as is used in "heavily litigated" cases, relies on "legal rules," serves as a "relatively formal adjunct to negotiation," and "strengthens … the ability of lawyers to influence decisions.")); Carrie Menkel-Meadow, *Pursuing Settlement in an Adversary Culture: A Tale of Innovation Co-opted or "The Law of ADR,"* 19 Fla. St. U. L. Rev. 1, 5, 13-16 (1991) (ADR was meant to "challenge" the adversarial system, but instead ADR has been taken over and changed by the system. Capture, "colonization," and co-optation have transformed ADR into "just another stop in the 'litigotiation' game); Lucy V. Katz, *Compulsory Alternative Dispute Resolution and Voluntarism: Two-Headed Monster or Two Sides of the Coin?*, 1993 J. DISP. RESOL. 1, 5 ("voluntary nature of alternatives has been eroded," and it is problematic for ADR to take on formalistic characteristics of adjudication). *See also* Thomas E. Carbonneau, *Arbitration and the U.S. Supreme Court: A Plea*

has been paved, and the road named.[329] "CDR," which stands for complementary dispute resolution,[330] quite literally takes the "alternative" out of ADR.

Meanwhile, the flexibility and informality of ADR is under siege. As ADR becomes increasingly popular,[331] there appears the inexorable desire to crystallize its processes.[332] This "creeping legalism" makes ADR more complex, costly, and time-consuming.[333] It should hardly surprise, then, that the contemporary empirical data fails to demonstrate conclusively that any forms of ADR are, in fact, faster or cheaper than formal adjudication.[334] Yet the commentators offer still more ideas adding layers of reforms.[335]

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for Statutory Reform, 5 J. Disp. Resol. 231, 233 (1990) (criticizing Supreme Court enforcement of agreements to arbitrate as undermining the volition critical to arbitration's integrity, and lauding arbitration for its capacity to provide "adjudicatory, self-determination"); Richard C. Reuben, *The Dark Side of ADR*, Cal. Law., Feb. 1994, at 53-54 (growing concern about the bills of court-appointed, court-annexed ADR providers); Susan S. Silbey, *Mediation Mythology*, 9 Negotiation J. 349, 353 (1993) (critiquing proposed "guidelines for selecting mediators" as both wrongly portraying the role and also restricting access to the profession). *Cf.* Edward Brunet, *Arbitration and Constitutional Rights*, 71 N.C. L. Rev.81 (1992) (calling for constitutional rights in private contractual arbitration to ensure due process fairness).

[329] Jeffrey W. Stempel, *Reflections on Judicial ADR and the Multi-Door Courthouse at Twenty: Fait Accomplis, Failed Overture, or Fledgling Adulthood?*, 11 OHIO ST. J. ON DISP. RESOL. 297, 308 (1996) (advocating adoption of more ADR practices).

[330] Jack M. Sabatino, *ADR as "Litigation Lite": Procedural and Evidentiary Norms Embedded Within Alternative Dispute Resolution*, 47 EMORY L.J. 1289, 1291 & n.3 (1998).

[331] *See* nn. __ *supra* and accompanying text.

[332] SHELDON AMOS, THE SCIENCE OF LAW 57 (1875).

[333] Gerald F. Phillips, *Is Creeping Legalism Infecting Arbitration?*, 58 APR DISP. RESOL. J. 37, 38 & n.1 (Feb.-Apr. 2003).

[334] *See generally* Deborah R. Hensler, *What We Know and Don't Know About Court-Administered Arbitration*, 69 JUDICATURE 270 (1986) (finding no significant, demonstrable savings in court-annexed ADR); Deborah R. Hensler, *RAND's Rebuttal: CJRA Study Results Reflect Court ADR Usage*, 15 ALTERNATIVES TO THE HIGH COST OF LITIGATION 79 (1997) (finding court-annexed arbitration had little effect on time to disposition or costs); James S. Kakalik et al., An Evaluation of Mediation an dearly Neutral Evaluation Under the civil Justice Reform Act 48-53 (RAND 1996) (arguing that arbitration, mediation, and early neutral evaluation produced no "statistically significant" reductions in time to disposition, the costs of litigation, perceptions of fairness, or client satisfaction); Deborah R. Hensler, *A Glass Half Full, A Glass Half Empty: The Use of Alternative Dispute Resolution in Mass Personal Injury Litigation*, 73 TEX. L. REV. 1587 (1995) ("Efficiency gains from court-annexed arbitration and court-mandated family mediation in custody suits appear mixed: The fiscal savings to courts from diverting cases from trial may be outweighed by the costs of running an efficient ADR program, and savings in lawyer time are often modest and not necessarily passed on to litigants through lower legal fees."); Deborah R. Hensler, *Taking Aim at the American Legal System: The Council on Competitiveness's Agenda for Legal Reform*, 75 JUDICATURE 244, 248 (1992) ("Mandated settlement conferences have been in use in state trial courts for at least four decades. Their effectiveness at saving costs has yet to be demonstrated empirically."); Lisa Bernstein, *Understanding the Limits of Court-Connected ADR: A Critique of Federal Court-Annexed Arbitration Programs*, 141 U. PA. L. REV. 2169, 2211 (1993) ("there is no conclusive evidence that [court-annexed ADR] programs reduce either the private or social costs of disputing"); Michael Heise, *Justice Delayed? An Empirical Analysis of Civil Case Disposition Time*, 50 CASE W. RES. L. REV. 813, 834 (2000) ("cases referred by courts to ADR activities … lasted longer, on average, than the mean for all cases"); Kim Dayton, *The Myth of Alternative Dispute Resolution in the Federal Courts*, 76 IOWA L. REV. 889, 889 (1991) (comparing districts with and without court-annexed ADR and finding that "ADR districts are neither more efficient nor less efficient in handling caseloads or inducing settlement than peer districts"); Carrie Menkel-Meadow, *Pursuing Settlement in an Adversary Culture: A Tale of Innovation Co-opted or "The Law of ADR"*, 19 FLA. ST. UNIV. L. REV. 1, 9 n.33 (1991) (collecting sources).

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

James Lyons, *Arbitration: The Slower, More Expensive Alternative?*, AM. LAWYER 107, 107 (Jan./Feb. 1985). *See*

For decades, practitioners have reported that arbitration is neither faster nor cheaper than more formal adjudication.[336] This is surely attributable, at least in part, to the fact that many of the procedural bells and whistles of formal adjudication have been incorporated into arbitration proceedings.[337] Arbitrators are often statutorily vested with broad judicial powers to

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also Richard S. Bayer & Harlan S. Abrahams, *The Trouble with Arbitration*, , LITIG. Winter 1985, at 30 ("Today's research confirms what Hart and Sacks saw twenty-six years ago: arbitration may be quicker than litigation, but it is not less expensive."); Richard J. Reuben, *The Dark Side of ADR*, CAL. LAW, Feb. 1994, at 54-55 (using anecdotal information to question whether arbitration is really cheaper than litigation); Thomas J. Stipanowich, *Rethinking American Arbitration*, 63 IND. L.J. 425, 452-76 (1988) (observing that many survey respondents disagreed that arbitration was faster and cheaper than litigation).

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

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

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

[335] Recent proposed protocols call for elements such as the right to a competent and impartial neutral, represenation, prehearing access to reasonably relevant information, full availability of remedies, and reasoned, written opinions. *See* Richard C. Reuben, *Constitutional Gravity: A Unitary Theory of Alternative Dispute Resolution and Public Civil Justice*, 47 UCLA L. REV. 949, 987-88 (2000); Carrie Menkel-Meadow, *Do the "Haves" Come Out Ahead in Alternative Judicial Systems?: Repeat Players in ADR*, 15 OHIO ST. J. ON DISP. RESOL. 19, 60 (1999). For a sample of reform efforts regarding the Uniform Model Mediation Act, *see, e.g.*, Symposium on Drafting a Uniform/Model Mediation Act, 13 Ohio St. J. on Disp. Resol. 787 (1998); Model Mediation law Effort Begins, Disp. Resol. Mag., Fall 1997, at 20; expanded judicial review of arbitration awards, *see, e.g.*, Kenneth R. Davis, *When Ignorance of the Law is No Excuse: Judicial Review of Arbitration Awards*, 45 BUFF. L. REV. 49, 124-29 (1997) (contending that parties should be allowed to incorporate a desired level of judicial review into their contract); Stephen A. Hochman, *Judicial Review to Correct Arbitral Error—An Option to Consider*, 13 OHIO ST. J. ON DISP. RESOL. 103, 11016 (1997) (arguing that parties ought to be able to contract for whatever level of judicial review will serve the parties' interests, but suggestinglimiting review to legal error to avoid substantial increased costs); Leanne Montgomery, Casenote, *Expanded Judicial Review of Commercial Arbitration Awards—Bargaining for the Best of Both Worlds:* Lapine Technology Corp. v. Kyocera Corp., *130 F.3d 884 (9th Cir. 1997)*, 68 U. CIN. L. REV. 529, 554 (2000) (reviewing the *Lapine* decision and concluding that contracting for increased judicial review may encourage continued use of arbitration)); personal liability for arbitrators, *see* Mark A. Sponseller, Note, *Redefining Arbitral Immunity: A Proposed Qualified Immunity Statute for Arbitrators*, 44 HASTINGS L.J. 421,421 (1993); Note, Gaar v. Tigerman: *An Attack on Absolute Immunity for Arbitrators!*, 21 CAL. L. REV. 564, 585 (1985); amending arbitration laws to protect the contracting process from corruption, *see* Steven Goering, *The Standard of Impartiality as Applied to Arbitrators by the Federal Courts and Codes of Ethics*, 3 GEO. J. LEGAL ETHICS 821, 832 (1990); oversight of arbitrators, Carrie Menkel-Meadow, *Ethics in Alternative Dispute Resolution: New Issues, No Answers from the Adversary Conception of Lawyers' Responsibilities*, 38 S. TEX. L. REV. 407, 408, 419 (1997); ethics reforms, *see* Carrie Menkel-Meadow, *Ethics and Professionalism in Non-Adversarial Lawyering*, 27 FLA. ST. U. L. REV. 153, 166-92 (1999); prohibiting ADR in certain cases, Jack B. Weinstein, *Some Benefits and Risks of Privatization of Justice Through ADR*, 11 OHIO ST. J. ON DISP. RESOL. __, 298 (1996). *See generally* Cameron L. Sabin, Note, *The Adjudicatory Boat Without a Keel: Private Arbitration and the Need for Public Oversight of Arbitrators*, 87 IOWA L. REV. 1337, 1362 (2002).

[336] *Creeping Legalism in Labor Arbitration*, 13 ARBITRATION J. 129 (1958); James Lyons, *Arbitration: The Slower, More Expensive Alternative?*, THE AMERICAN LAWYER 107, 110 (Jan./Feb. 1985) ("'I tell my clients,' one lawyer says, 'that it should cost just as much for a complex construction arbitration as it costs for litigation.'"); James Lyons, *Arbitration: The Slower, More Expensive Alternative?*, THE AMERICAN LAWYER 107, 110 (Jan./Feb. 1985) ("But, as one arbitration veteran warns, 'Once you get Wall Street lawyers in there, you might as well go to court.' The Kaiser/Condec arbitration is an extravagant—but not unique—deomnstration of the fact that the costs of arbitration rise dramatically if the parties hire big outside law firms, call large numbers of witnesses, and present elaborate technical arguments.").

[337] *See, e.g.*, American Arbitration Association, Commercial Arbitration Rules and Mediation Procedures, http://www.adr.org/sp.asp?id=22440 (last visited Jan. 15, 2005).

administer depositions[338] and discovery,[339] including subpoena[340] and sanction powers.[341] Arbitrators often write opinions,[342] and their cases grow increasingly complex through consolidation and intervention.[343]

The public, or at least lawyers, appear to want still more formalization.[344] The major ADR providers have voluntarily moved to bolster the "due process guarantees" of their processes.[345] And an advertisement for National Arbitration Forum in a recent issue of the ABA Journal reads:

> All Arbitration is Not the Same. Unlike the others, only the Forum offers a national panel of seasoned legal professionals and a *procedural code* requiring arbitrators to follow the law in making decisions and awards. To learn more about the National Arbitration Forum, log onto the world wide web at www.arbitration-forum.com.[346]

Professor Sherman's conclusion, in 1993, that ADR and formal adjudication had "a great deal in common" grows ever truer.[347]

V. MAKING THE CASE FOR EQUITY IN ADR

Equity is a metaphor for the commitment that the law will be readily adaptable for, and directed toward the achievement of justice. It is fortunate, then, that Equity enjoys a certain inevitability throughout history.[348] When the rigidity of the Law courts failed to keep pace with the growing wants of society, the discretionary and flexible system of Equity provided the sensible remedies.[349] Similarly, when the forms and modes of formal

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[338] *See* Unif. Arbitration Act § 7, 7 ULA 199; Cal. Civ. Proc. Code §§ 1283, 1283.05.

[339] *See* Unif. Arbitration Act § 7, 7 ULA 199; Cal. Civ. Proc. Code §§ 1283.05, 1283.1.

[340] *See* 9 U.S.C. § 7; Unif. Arbitration Act § 7, 7 ULA 199; Cal. Civ. Proc. Code § 1282.6.

[341] *See* 9 U.S.C. § 7; Unif. Arbitration Act § 7, 7 ULA 199; Cal. Civ. Proc. Code § 1283.05. *See also* Lucy V. Katz, *Compulsory Alternative Dispute Resolution and Voluntarism: Two-Headed Monster or Two Sides of the Coin?*, 1993 J. DISP. RESOL. 37-41.

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

[343] Jack M. Sabatino, *ADR as "Litigation Lite": Procedural and Evidentiary Norms Embedded Within Alternative Dispute Resolution*, 47 EMORY L.J. 1289 (1998).

[344] Professor Reuben argues that the surprisingly small amount of "voluntary" participation in ADR programs is attributable to the lack of formal due process protections. Richard C. Reuben, *Constitutional Gravity: A Unitary Theory of Alternative Dispute Resolution and Public Civil Justice*, 47 UCLA L. REV. 949, 987-88 (2000). *See generally* Wayne D. Brazil, *Institutionalizing ADR Programs in Courts*, Appdx. C. "Why 'Volunteer' ADR Programs are Likely to Attract Few Cases, and thus, Why Volunteer Programs are Not Likely to Contribute Significantly to Cost and Delay Reduction" in EMERGING ADR ISSUES IN STATE AND FEDERAL COURTS 52, 122 (ABA 1991).

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

[346] ABA JOURNAL __ (October 2004) (emphasis added).

[347] Edward F. Sherman, *Court-Mandated Alternative Dispute Resolution: What Form of Participation Should be Required?*, 46 SMU L. Rev. 2079, 2082-83 (1993).

[348] Garrard Glenn & Kenneth Redden, *Equity: A Visit to the Founding Fathers*, 31 VA. L. REV. 753, 753 (1945) (""Equity is a thing of continuous growth, and not the sort of Phoenix that dies ever so often").

[349] Warren B. Kittle, *Courts of Law and Equity—Why They Exist and Why They Differ*, 26 W. VA. L. Q. 21, 27 (1919-1920) ("Many cases arose in which all men of sense admitted that there should be a remedy provided,

adjudication became insufferable, ADR emerged to provide a sensible method of dispute resolution that was discretionary and flexible.[350] ADR offered a check upon the "strict law" that was codified in the procedures of formal adjudication and acted in opposition to it.[351] It generated experimental methods of dispute resolution with fresh perspectives on procedural and social justice.[352]

Yet the law's demand for certainty is Equity's foil. An ironic consequence of Equity's success was the ensuing effort to crystallize the jurisprudence of that court.[353] The gradual introduction of procedural rules and structural orthodoxy ultimately caused Equity to collapse under the weight of its own precedents and processes.[354] The legacy of Equity was preserved in those doctrines that had been adopted by the Law courts,[355] but equity was less dynamic and generative in the merged system.[356]

ADR reanimated the spirit of equity. But because of its tremendous popularity,[357] ADR now faces a wave of reforms that would transform its flexible and discretionary modes of resolution into a more systematic framework.[358] One might suggest, of course, that this transformation of ADR is inevitable in light of the ongoing dialectic between law and equity. Moreover, the inevitability of equity, too, will ultimately resurface thereafter in some form or another (as ADR succeeded Equity). Those suggestions, though accurate, do not justify inaction, however, because we can control the pace and trajectory of that progression.

The history of Law and Equity offers a cautionary tale about the benefits of systematization. To be sure, the lot of recent and proposed reforms to ADR are derived of noble intents and purposes.[359] However, we should be skeptical of that which introduces detail and complexity. Lord Hardwicke probably did not anticipate that by weaving "the strands of judicial decision into the indestructible fabric of equitable jurisprudence" he was crafting the cloth that would later asphyxiate his beloved Equity.[360]

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but which the narrow-minded judges denied.").

[350] *See* nn. __ *supra* and accompanying text.

[351] *See* nn. __,*supra* and accompanying text.

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

[353] *See* nn. __,*supra* and accompanying text.

[354] *See* nn. __,*supra* and accompanying text.

[355] *See* nn. __,*supra* and accompanying text.

[356] *See* nn. __,*supra* and accompanying text.

[357] *See* nn. __,*supra* and accompanying text.

[358] *See* nn. __,*supra* and accompanying text.

[359] *See* nn. __,*supra* and accompanying text.

[360] Brendan F. Brown, *Lord Hardwicke: Science of Trust Law*, 11 NOTRE DAME L. REV. 319, 337, (1935-1936). Because the quoted material is taken out of context, I would emphasize here that Professor Brown's account of Lord Hardwicke's indefatigable and worthy efforts on behalf of Equity is extremely favorable.

The moral growth of the law is the record of the slow emergence of equity into the mainstream of the law.[361] Dialectic requires dialogue, and it is through the interplay of law and equity that *both* are enriched.[362]

> Law and equity should be in continual progress, with the former constantly gaining ground upon the latter. Every new and extraordinary interposition is, by length of time, converted into an old rule. A great part of what is now strict law was formerly considered as equity, and the equitable decisions of this age will unavoidably be ranked under the strict law of the next.[363]

The certain and uniform application by courts of fixed general laws serves many functions beyond the resolution of disputes.[364] The symmetry and efficiency that strict law provides is essential not only to justice, but also to equity. Maitland said that a system of Equity without Law would be "anarchy" (the "castle in the air"); but less often quoted is his statement that a system of Law without Equity would be "barbarous, unjust, [and] absurd."[365] Justice thus requires certainty and predictability, on one hand, and the ameliorating exercise of discretion, on the other.[366] Neither Law nor Equity can perform the other's function; a merged system performs neither function particularly well, and tends to rigidify.[367]

ADR thus plays an important role in the growth of the law. Without that engine, "our law will be moribund, or worse."[368] Of course an Equity model for ADR requires one to accept that these cases may be decided in fora that do not offer all of the trappings of formal due process or the familiar characteristics of dispute resolution.[369] This prospect may be especially

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[361] Robert L. Munger, *A Glance at Equity*, 25 YALE L.J. 42 (1915) (discussing the history and progress of equity "from conscience to precedent"); Percy Bordwell, *The Resurgence of Equity*, 1 U. CHI. L. REV. 741, 750 (1934) ("The equity of today becomes the right of tomorrow."); FREDERIC R. COUDERT, CERTAINTY AND JUSTICE 1 (1914) ("On the one side is made an appeal to progress, on the other to precedent"); Ralph A. Newman, *Introduction* in EQUITY IN THE WORLD'S LEGAL SYSTEMS: A COMPARATIVE STUDY 15, 18 (Ralph A. Newman ed., 1973).

[362] Leonard J. Emmerglick, *A Century of the New Equity*, 23 TEX. L. REV. 244, 255 (1945).

[363] 2 JOHN MILLAR, AN HISTORICAL VIEW OF THE ENGLISH GOVERNMENT 358 (1789).

[364] "A court not only resolves disputes, but also allocates resources, confers legitimacy, administers other institutions, promulgates norms, allocates costs, and records statistics, to mention but a few of its more commonlaw recognized functions." Robert Cover, *Dispute Resolution: A Foreword*, 88 YALE L.J. 910, 911 (1978-1979) (internal citations omitted). *See also* DICKINSON, ADMINISTRATIVE JUSTICE AND THE SUPREMACY OF LAW 113 (1927).

[365] FREDERIC WILLIAM MAITLAND, EQUITY AND THE FORMS OF ACTION 19 (Chaytor ed. 1909).

[366] Leonard J. Emmerglick, *A Century of the New Equity*, 23 TEX. L. REV. 244, 246 (1945).

[367] *See* nn. __ *supra* and accompanying text.

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

See also 1 JOHN NORTON POMEROY, A TREATISE ON EQUITY JURISPRUDENCE ix (2d ed. 1892); Carrie Menkel-Meadow, *Pursuing Settlement in an Adversary Culture: A Tale of Innovation Co-Opted or "The Law of ADR"*, 19 FLA. ST. U. L. REV. 1. 39 (1991) (citing MARTIN SHAPIRO, COURTS: A COMPARATIVE AND POLITICAL ANALYSIS (1981) ("To what extent will courts lose their legitimacy as courts if too many other forms of case-processing are performed within their walls?").

[368] Percy Bordwell, *The Resurgence of Equity*, 1 U. CHI. L. REV. 741, 749 (1934).

[369] Dwight Golann, *Making ADR Mandatory: The Constitutional Issues*, 68 Or. L. Rev. 487, 493 (1989) (highlighting problems with ADR processes, including the right to a jury trial, separation of powers, due process

unsettling in light of the large numbers and broad types of disputes that courts send or litigants take to ADR.[370] But an Equity model suggests that the response to this phenomenon lies not with reforms to the system of ADR that is attracting (or receiving) these cases. Rather the answer suggests reforms to the formal system that is scaring (or sending) them away. After all, ADR must remain a "living, changing thing, forever adapting itself to new conditions."[371]

The Equity model would suggest that ADR should hear and decide only those types of cases where the formal courts fail to provide an adequate remedy.[372] Equity respected the authority of the Law courts and did not interfere in cases where the remedy was adequate.[373] Of course if the formal courts did not provide an adequate remedy and the case proceeded in ADR, the Equity model would counsel against interference by the formal system. Neutrals in the independent system of ADR would be free to adapt to the challenges of the case before them without obligation or duty to external statutes or rules. And it would be the repeated exercise of this kind of jurisdiction that would identify systemic failures of the formal system and, ultimately, have a reforming influence thereon.[374]

In this model, then, the courts and the legislature would be able to "prevent" any case from going to ADR by simply providing an adequate remedy. The adequate remedy might itself be an alternative method that had been incorporated into the courts. Procedural reform would continue to focus on a taxonomy or classification system for allocating particular types of disputes between ADR and different dispute resolution forms.[375] The target of those reforms, however, would be the "formal" adjudication process rather than the separate system of ADR.

An appreciation for the role of ADR in a dual system founded in principles of Law and Equity would transform courts and de-regulate ADR. Presumably courts and legislators would develop a set of jurisdictional principles that would delimit those areas, if any, in which it need not provide an adequate remedy. "To devise better court procedures, we must at some point determine what special role courts—in contrast to other

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and equal protection); *See also* Linda Silberman, *Judicial Adjuncts Revisited: The Proliferation of the Ad Hoc Procedure*, 137 U. Pa. L. Rev. 2131 (1989); Wayne D. Brazil, *Special Masters in Complex Cases: Extending the Judiciary or Reshaping Adjudication?*, 53 U. Chi. L. Rev. 394 (1986).

[370] *See* nn. __ *supra* and accompanying text.

[371] Howard L. Oleck, *Historical Nature of Equity Jurisprudence*, 20 FORDHAM L. REV. 23, 25 (1951).

[372] *See* nn. __ *supra* and accompanying text.

[373] *See* nn. __ *supra* and accompanying text.

[374] *See* nn. __ *supra* and accompanying text.

[375] *See generally* Robert A. Baruch Bush, *Dispute Resolution Alternatives and the Goals of Civil Justice: Jurisdictional Principles for Process Choice*, 1984 WIS. L. REV. 893; Frank E.A. Sander, *Alternative Methods of Dispute Resolution: An Overview*, 37 U. FLA. L. REV. 1 (1985).

agencies—can most usefully play in delivering justice to the people."[376] The reconceptualization exercise imagined here offers insight into that process.

CONCLUSION

A dialectic of law and equity can be traced from the dual traditional systems of Law and Equity to the contemporary systems of formal adjudication and ADR. The equitization of Law and the legalization of Equity led ultimately to the merger of Law and Equity. In contemporary adjudication we are experiencing, simultaneously, the ADRization of litigation and the litigization of ADR. The merger of Law and Equity offers a cautionary tale that discourages the trajectory of current ADR reforms. Instead, ADR should be de-regulated and the formal courts encouraged to develop more effective means and modes of dispute resolution.

[376] Maurice Rosenberg, *Devising Procedures That are Civil to Promote Justice That is Civilized*, 69 MICH. L. REV. 797, 798 (1970-1971).