THE LEGITIMACY CRISIS AND THE FUTURE OF COURTS

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ABSTRACT

There is an overall legitimacy crisis in courts. The sources of this crisis have, to a large extent, been misconstrued. While there has been significant writing depicting the diminished quality, effectiveness, and fairness of courts, these phenomena have, for the most part, been viewed as distinct problems that warrant discrete solutions. This article shows that these problems are all manifestations of an overall legitimacy crisis that stems from the blurring of the originally stark distinctions between courts and alternatives. Traditionally, formal and informal dispute resolution processes had their own sources of legitimacy, each grounded in their respective distinctive (often opposing) characteristics. In the case of informal dispute resolution, where processes were flexible and individually tailored, legitimacy stemmed from their consensual and voluntary nature. By contrast, in formal processes, legitimacy was derived from the certainty and predictability that came with detailed fixed procedures, which leave little room for discretion. To a large extent, this description no longer reflects the reality of courts. As courts have become more flexible and ADR procedures have been institutionalized within courts, traditional sources of legitimacy have lost their vigor and new sources of legitimacy need to be conceptualized for courts, as for informal processes. This article develops a fresh framework for legitimacy in an age of blurred distinctions by applying the principles developed in the emerging field of "dispute systems design" ("DSD"). Drawing on several case studies, this Article analyzes the ways in which the principles of DSD can be employed to design more effective and fair dispute systems, which in turn, can generate broad legitimacy in courts and in alternative forums.

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I. INTRODUCTION

Legitimacy is the lifeblood of dispute resolution.[1] Courts depend on legitimacy to function and thrive. The same is true for alternative dispute resolution ("ADR" or "alternative processes") avenues. Legitimacy is what makes disputants trust a process, what stimulates complainants to bring their disputes before a particular dispute resolution mechanism, and what makes the parties accept and respect resolutions reached through a given dispute resolution avenue.

In recent decades, we are experiencing a legitimacy crisis in courts, as well as informal avenues.[2] Indeed, this crisis is a product

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[1] As a multivalent concept, "legitimacy" is amenable to various interpretations, even when applied only in the restricted context of the courts. *See*, *e.g.*, the heated debate surrounding the legitimacy of the Supreme Court's decision in Bush v. Gore, 531 U.S. 98 (2000); *Compare* John C. Yoo, *In Defense of the Court's Legitimacy*, 68 U. CHI. L. REV. 755 (2001), *with* BUSH V. GORE: THE QUESTION OF LEGITIMACY (Bruce Ackerman ed., 2002). Out of the several attempts made in the literature to dispel the confusion surrounding the concept, the distinction between "descriptive" and "normative" legitimacy has been particularly influential. The first "kind" of legitimacy, most readily associated with Max Weber, is sociological; relating to the general popular acceptance—read actual acceptance—of authority. *See* MAX WEBER, ECONOMY AND SOCIETY, Vol. 1, 19–22, 215–16 (Guenther Roth & Claus Wittich eds., Ephraim Fischoff et al. trans., 1978). The second, normative "kind" of legitimacy relies on some standard of legality or morality. Useful here is Richard Fallons's tripartite division into sociological legitimacy (which corresponds to the just-mentioned first kind), legal legitimacy (i.e., whether the decision at hand is "wrong/right" as a matter of law?) and moral legitimacy (i.e., whether it conforms to reasonable moral standards?). *See* Richard H. Fallon, Jr., *Legitimacy and the Constitution*, 118 HARV. L. REV. 1787 (2005); *but see* David A. Strauss, *Legitimacy and Obedience*, 118 HARV. L. REV. 1854 (2005) (a response to Fallon, arguing that legitimacy is "a moral claim . . . having to do with obedience"). Viewed against this backdrop, the legitimacy crisis discussed in this Article is essentially sociological in its nature—it concerns the growing sense of *lack*-of-acceptance of existing forms of dispute resolution.

[2] There is no article or book, to the best of my knowledge, proclaiming an overall "legitimacy crisis" spanning formal and informal dispute resolution, with the exception of Carrie Menkel-Meadow's piece, which focuses on the relationship between the degree of formality of dispute resolution processes and such processes effectiveness, fairness and legitimacy, and questions "whether <semi-formal> processes can legitimately operate in a space between the transparency and presumed consistency of formal justice, and the confidentiality, flexibility and self-determination of informal processes." Carrie Menkel-Meadow, *Regulation of Dispute Resolution in the United States of America: From the Formal to the Informal to the 'Semi-formal'*, *in* REGULATING DISPUTE RESOLUTION: ADR AND ACCESS TO JUSTICE AT THE CROSSROADS 419 (Felix Steffek et & Hannes Unberath, eds. 2013) [hereinafter Menkel-Meadow Report]. There are, however, numerous articles decrying the state of both formal justice and informal dispute resolution, referring to problematic practices, lack of assurance of quality, low trust, negative impact on disempowered groups, and the like. For such critiques of both courts and ADR processes on these and similar grounds, see Owen Fiss, *Against Settlement*, 93 YALE L.J. 1073 (1984) (critiquing settlements in general, in advancing the need for the courts to fulfill their public function in resolving disputes); LAURA NADER, NO ACCESS TO LAW: ALTERNATIVES TO THE AMERICAN

of the blurring of boundaries between formal and informal processes and the rise of "semi-formal" dispute resolution.[3] For this reason, we cannot understand the legitimacy crisis in courts without studying the difficulties that informal processes now face and vice versa.

Traditionally, formal and informal dispute resolution processes had their own sources of legitimacy, each grounded in the distinctive (and often opposing) characteristics of each of these process types. In the case of informal dispute resolution, where processes are flexible and individually tailored, legitimacy stemmed from their consensual and voluntary nature.[4] By contrast, formal processes of dispute resolution, which tend to be associated with strict and detailed rules, enjoy a low level of consent and their legitimacy was derived from the certainty and predictability that come with detailed fixed procedures that leave little room for discretion.[5] To a large extent, this description no longer reflects the landscape of dispute resolution, as "[w]e now also have a more hybrid set of processes which can be called <semi-formal> forms of dispute resolution, which utilize both public and private processes with increasingly structured and formal aspects of process, even if there is little recourse to more formal adjudication or appellate review."[6] As we can see, the formal-informal distinction has been

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JUDICIAL SYSTEM (1980) (uncovering the inequalities that color consumer third party complaint handling processes); CHRISTINE B. HARRINGTON, SHADOW JUSTICE: THE IDEOLOGY AND INSTITUTIONALIZATION OF ALTERNATIVES TO COURT (1985) (revealing the depoliticizing impact mediation has had while extending the reach and control of the state over mediated conflicts); CIVIL JUSTICE IN CRISIS (Adrian Zuckerman, ed. 1999); Trina Grillo, *The Mediation Alternative: Process Dangers for Women*, 100 YALE L.J. 1545 (1991) (critiquing mediation's potentially destructive impact on women); Richard Delgado et al., *Fairness and Formality: Minimizing the Risk of Prejudice in Alternative Dispute Resolution,* 1985 WIS. L. REV. 1359 (describing the ways in which informal justice can harm minorities); David Luban, *Settlements and the Erosion of the Public Realm*, 83 GEO. L.J. 2619 (1995) (focusing on the role of courts in fulfilling public goals through litigation); Bobbi McAdoo & Nancy A. Welsh, *Look Before You Leap and Keep on Looking: Lessons from the Institutionalization of Court-Connected Mediation*, 5 NEV. L.J. 399, 412–16 (2004/2005) (questioning whether court-connected civil mediation fulfills its goals of substantive, procedural and efficient justice); Judith Resnik, *Managerial Judges*, 96 HARV. L. REV. 374, 378 (1982) (describing the dangers associated with a wide range of judicial practices in the pre-trial stage that are aimed at promoting court efficiency, being performed without proper guidance, inconsistently, in an undocumented fashion and therefore not subject to meaningful review); Elizabeth G. Thornburg, *The Managerial Judge Goes to Trial*, 44 U. RICH. L. REV. 1261 (2010) (extending Resnik's critique of managerial judging to the trial stage); CIVIL JUSTICE IN CRISIS (Adrian Zuckerman, ed. 1999).

3 Menkel-Meadow Report, *supra* note 2.

4 MARTIN SHAPIRO, COURTS: A COMPARATIVE AND POLITICAL ANALYSIS 2 (1981).

5 *Id*. at 1, 7–8.

6 Menkel-Meadow Report, *supra* note 2, at 425.

blurred and with it the traditional sources of legitimacy have lost their strength.

With the expansion of ADR in the 1970s and 80s, several attributes of both formal and informal processes began to erode. Mediation and arbitration were institutionalized in the legal system, and parties filing suit were asked to consider resorting to alternative processes, and later were in fact required to do so.[7] In the next phase, alternatives expanded beyond the courts as more and more workplaces established internal dispute resolution mechanisms, which served as a preliminary forum for raising complaints and disputes prior to filing suit. In several cases, employees and customers were required under standard contracts to seek redress through the internal dispute resolution mechanisms of large institutions, or through dispute resolution service providers affiliated with such institutions.[8] At the same time, court procedures have become increasingly flexible as traditional courts seek to eliminate backlogs and address heavy caseloads;[9] and as new forms of problem solving courts emerge, foregoing traditional roles and procedures in an attempt to offer deeper, more effective root-cause problem-solving.[10]

As courts become more flexible and ADR procedures more formalized, new sources of legitimacy need to be developed and conceptualized. The novel forms of "flexible courts" and "institutionalized alternatives" have blurred the stark distinction between formal and informal dispute resolution avenues making neither the existence of "consent" nor "predetermined rules" a sufficient basis for legitimacy. Instead, this Article offers the principles developed in the field of dispute systems design DSD[11] as a framework for

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[7] Ettie Ward, *Mandatory Court-Annexed Alternative Dispute Resolution in the United States Federal Courts: Panacea or Pandemic?*, 81 ST. JOHN'S L. REV. 77, 79–89 (2007).

[8] Jean R. Sternlight, *Panacea or Corporate Tool?*: *Debunking the Supreme Court's Preference for Binding Arbitration*, 74 WASH. U. L. Q. 637 (1996); Thomas Stipanowich, *Arbitration: "The New Litigation"*, U. ILL. L. REV. 1, 36–39 (2010).

[9] Resnik, *supra* note 2, at 378; Carrie Menkel-Meadow, *For and Against Settlement: Uses and Abuses of the Mandatory Settlement Conference,* 33 UCLA L. REV. 485 (1985); Thornburg, *supra* note 2.

[10] Bruce J. Winick, *Therapeutic Jurisprudence and Problem-Solving Courts,* 30 FORDHAM URB. L.J. 1055, 1056 (2003); Greg Berman & John Feinblatt, *Problem-Solving Courts: A Brief Primer*, 23 L. & POL'Y 2 (2001); *see also* Mae C. Quinn, *Revisiting Anna Moskowitz Kross's Critique of New York City's Women's Court: The Continued Problem of Solving the "Problem" of Prostitution with Specialized Criminal Courts,* 33 FORDHAM URB. L.J. 665, 666 (2006) (comparing modern-day problem-solving community court to the NY women's court established in 1910).

[11] *See, e.g.*, WILLIAM B. URY ET AL., GETTING DISPUTES RESOLVED: DESIGNING SYSTEMS TO CUT THE COSTS OF CONFLICT (1988); CATHY COSTANTINO & CHRISTINA MERCHANT, DE-

generating legitimacy in courts as well as ADR, based on the recognition that the formal-informal divide has lost much of its strength.

The field of DSD grew out of the broader context of ADR at the end of the 1980s.[12] The central thought had been that when informal processes are used in a closed setting (such as between employees at a workplace, or between a company and its customers), there is great significance in the design of the procedures and the knowledge gleaned from the information shared in the course of the process and its results.[13] At first, DSD served as a functional tool for practitioners in designing institution-wide conflict resolution systems. The literature in the field conceptualized the appropriate process for designing various mechanisms for resolving disputes in an institutional environment. However, over time, DSD became a meaningful tool for addressing critiques of the expanded use of ADR, as proper design was viewed as a means of ensuring more effective and fair processes in an era of increasing privatization of the dispute resolution realm.[14] In the early 21st

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SIGNING CONFLICT MANAGEMENT SYSTEMS: A GUIDE TO CREATING PRODUCTIVE AND HEALTHY ORGANIZATIONS 4 (1996); Frank J. Barrett & David L. Cooperrider, *Generative Metaphor Intervention: A New Approach for Working with Systems Divided by Conflict and Caught in Defensive Perception*, 26 J. APPLIED BEHAV. SCI. 219 (1990); Lisa B. Bingham, *Self-Determination in Dispute System Design and Employment Arbitration*, 56 U. MIAMI L. REV. 873 (2002); John P. Conbere, *Theory Building for Conflict Management System Design*, 19 CONFLICT RES. Q. 215 (2001); Cathy A. Costantino, *Using Interest-Based Techniques to Design Conflict Management Systems*, 12 NEGOT. J. 207 (1996); Deborah M. Kolb & Susan S. Silbey, *Enhancing the Capacity of Organizations to Deal with Disputes*, 6 NEGOT. J. 297 (1990); Mary P. Rowe, *The Ombudsman's Role in a Dispute Resolution System*, 7 NEGOT. J. 353 (1991); Karl A. Slaikeu, *Designing Dispute Resolution Systems in the Health Care Industry*, 5 NEGOT. J. 395 (1989); LIPSKY ET AL., EMERGING SYSTEMS FOR MANAGING WORKPLACE CONFLICT: LESSONS FROM AMERICAN CORPORATIONS FOR MANAGERS AND DISPUTE RESOLUTION PROFESSIONALS (2003) (drawing on a wide scale empirical study of Fortune 1000 companies' corporate conflict strategies conducted by the authors and analyzed among other things, the proliferation of internal dispute resolution systems, the sources of such growth and future developments).

12 Ury, Brett & Goldberg's "Getting Dispute Resolved," is seen as marking the birth of the field. S*ee generally* URY ET AL., *supra* note 11; Ury, Brett & Goldberg's "Getting Dispute Resolved," is seen as marking the birth of the field.

13 DSD literature emphasizes the significance of improvement and learning through the study of patterns of disputes. *See, e.g.*, CONSTANTINO & MERCHANT, *supra* note 11, at 96–100.

14 What constitutes an optimal decision is a controversial issue among scholars in the field. That said, scholars agree that there is a link between the design of the dispute resolution process and the existence of certain parameters viewed as a desirable result thereof. Thus, Ury, Brett and Goldberg, the authors of the field's pioneer book, focus on the following criteria: transaction costs, satisfaction with the outcome, preservation of the relationship between the parties and recurrence of the dispute. *See* URY, ET AL., *supra* note 11, at 11–13. Bingham, Hallberlin, Walker and Chung, on the other hand, insist on the connection between certain design components and the subjective fairness of the result of the dispute resolution processes. Lisa Blomen-

Century, DSD also began to be implemented in the design of formal processes, including judicial proceedings.[15] This expansion occurred due to the weakening of some of the traditional mechanisms of monitoring and supervision of judicial intervention with the rise of the phenomenon of managerial judges,[16] and in light of the emergence of new and more flexible practices by judges in traditional court settings,[17] as well as more flexible structures of new types of courts.[18]

By focusing on the design stage of dispute resolution processes as a central pillar in generating legitimacy, the emphasis shifts from the existence of "predetermined rules" or consent to design choices relating to third parties, their authority and the role of the parties, the values and goals that are promoted by choices made and the manner in which power asymmetries and potential biases are dealt with through process design.[19]

While literature on ADR, DSD, and courts has described some of the challenges faced by such mechanisms in terms of legitimacy, these problems have typically been described "per process," linked to specific practices employed in courts or particular ADR processes,[20] discussing questions of "quality,"[21] "fairness,"[22] "professionalism,"[23] "neutrality,"[24] or "efficiency,"[25] but without tying

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gram Bingham et al., *Dispute System Design and Justice in Employment Dispute Resolution: Mediation at the Workplace*, 14 HARV. NEGOT. L. REV. 1, 3, 8–9 (2009) [hereinafter *Dispute System Design and Justice*].

15 Carrie Menkel-Meadow, *Are There Systemic Issues in Dispute System Design? And What We Should [Not] Do About It: Lessons from International and Domestic Fronts*, 14 HARV. NEGOT. L. REV. 195, 201 (2009) [hereinafter *Systematic Issues*]; Orna Rabinovich-Einy, *Beyond Efficiency: The Transformation of Courts through Technology*, 12 UCLA J.L. & TECH. 1 (2008).

16 *See infra* notes 49–52.

17 *See infra* notes 53–62.

18 *See infra* notes 63–71.

19 *See infra* Part II.B.

20 Jonathan T. Molot, *An Old Judicial Role for a New Litigation Era*, 113 YALE L.J. 27, 90 (2003) (discussing the dangers of settlement conferences); Bingham, *supra* note 11 (underscoring the difficulties associated with mandatory arbitration in uniform contracts); Carrie Menkel-Meadow, *Pursuing Settlement in an Adversary Culture: A Tale of Innovation Co-opted or "The Law of ADR"*, 19 FLA. ST. L. REV. 1 (1991) [hereinafter *Pursuing Settlement in an Adversary Culture*] (describing the problems associated with court-annexed mediation programs).

21 McAdoo & Welsh, *supra* note 2; *Pursuing Settlement in an Adversary Culture*, *supra* note 20.

22 McAdoo & Welsh, *supra* note 2, at 412–16 (questioning both substantive and procedural fairness).

23 Michael L. Moffitt, *The Four Ways to Assure Mediator Quality (and Why None of Them Work)*, 24 OHIO ST. J. ON DISP. RESOL. 191 (2009).

24 Lawrence Susskind, *Environmental Mediation and the Accountability Problem*, 6 VT. L. REV. 1 (1981); Joseph B. Stulberg, *The Theory and Practice of Mediation: A Reply to Professor*

such developments to the deeper impact they have had on the broader issue of the legitimacy crisis of courts and alternatives.[26]

This Article analyzes the sources, significance and impact of what can be termed the "legitimacy crisis" under the following structure. Section II describes the traditional sources of legitimacy for both formal and informal mechanisms, and uncovers the developments that have brought about the legitimacy crisis. As formal and informal dispute resolution processes become more similar, legitimacy can no longer be grounded in each of their distinct characteristics, drawing fierce critique and loss of trust. Section III portrays the contours of an alternative source of legitimacy that operates across the formal-informal divide and is grounded in the area of "dispute systems design," a sub-field of ADR whose scope has expanded in recent years as the divisions between alternatives and courts have blurred. Drawing on several case studies of varying dispute systems that differ in their level of formality, process type employed and additional components, the article analyzes the ways in which the principles of DSD can be employed to design more effective and fair dispute systems, which in turn, can generate broad legitimacy. Section IV addresses the sweeping changes that the DSD field itself is undergoing, with an eye towards preventing another potential legitimacy crisis. Section V concludes.

II. The Legitimacy Crisis in Courts and ADR

A. *Varying Sources of Legitimacy of Courts versus Informal Dispute Resolution Processes*

The literature on the topic of dispute resolution processes distinguishes between the formal process, which takes place in the courts, and informal processes, also known as alternative dispute resolution processes, or ADR.[27] Support for the distinction be-

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Susskind, 6 Vt. L. Rev. 85 (1981); Sara Cobb & Janet Rifkin, *Practice and Paradox: Deconstructing Neutrality in Mediation*, 16 L. & Soc. Inquiry 35 (1991); Bernard S. Mayer, Beyond Neutrality: Confronting the Crisis in Conflict Resolution (2004).

25 McAdoo & Welsh, *supra* note 2, at 416–18; Lisa Bernstein, *Understanding the Limits of Court-Connected ADR: A Critique of Federal Court Arbitration Programs,* 141 U. Pa. L. Rev. 2169 (1993).

26 *See supra* note 2 for a more comprehensive reference of some of the principal writings that have critiqued the operation of courts and alternatives in recent decades on various grounds.

27 Carrie Menkel-Meadow et al., Dispute Resolution: Beyond the Adversarial Model XXXV (2d ed. 2011). More recently, Professor Menkel-Meadow offered a distinction

tween formal and informal process as the distinction between the judicial process and ADR processes finds expression early on. According to Fuller, dispute resolution carried out by a particular institution has a unique social function, purpose and integrity,[28] conveying an "essentialist" view of the various dispute resolution processes.[29] In his analysis of different processes (including, among others, mediation, arbitration and adjudication), Fuller found that each process possessed its own "moral integrity,"[30] which ultimately shaped their substantive outcome as well as their legitimacy.[31]

In the 1980s, the literature that accompanied the roots of the institutionalization of alternative processes in the courts tended to distinguish between judicial processes on the one hand and alternatives (as a group) on the other hand. As Richard Abel wrote of informal dispute resolution processes in the seminal book he edited, *The Politics of Informal Justice*:

> Such institutions as these are informal to the extent that they are nonbureaucratic in structure and relatively undifferentiated from the larger society, minimize the use of professionals, and eschew official law in favor of substantive and procedural that are vague, unwritten, commonsensical, flexible, ad hoc, and particularistic.[32]

In every case in which an informal process is employed, Richard Abel tells us, some of the above characteristics will be found to a certain degree, but no process will entail all of them to their full extent.[33] In fact, as will be described later in this Article, with the institutionalization of the ADR processes in the courts, they took

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among formal, informal, and semi-formal dispute resolution; *see also* Menkel-Meadow Report, *supra* note 2.

28 Robert. G. Bone, *Lon Fuller's Theory of Adjudication and the False Dichotomy between Dispute Resolution and Public Law Models of Litigation*, 5 B.U. L. REV. 1273 (1995). Fuller's views were extremely influential in the ADR field, shaping, among others, Sander's functionalist approach, evidenced in his multidoor courthouse proposal. *See* Frank E.A. Sander, *Varieties of Dispute Processing*, *in* THE POUND CONFERENCE: PERSPECTIVES ON JUSTICE IN THE FUTURE (A. Levin & R. Wheeler eds. West 1979).

29 Carrie Menkel-Meadow, *Mothers and Fathers of Invention: The Intellectual Founders of ADR*, 16 OHIO ST. J. ON DISP. RESOL. 1, 14 (2000).

30 Carrie Menkel-Meadow, *Peace and Justice: Notes on the Evolution and Purposes of Legal Processes*, 94 GEO. L.J. 553, 561 (2006) [hereinafter *Peace and Justice*].

31 *Id.* at 576.

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

33 *Id. See also* Menkel-Meadow Report, *supra* note 2, at 429, 433–34 (listing various features of formal justice and of informal processes).

on some of the professional-bureaucratic characteristics identified with the judicial process.[34] The distinction, therefore, between the formal and informal processes is not dichotomous, but rather reflects the range of possibilities that is influenced by their degree of institutionalization, and reflects the deeper disparities related to the features of the processes and the involvement of the parties.

Modern ADR processes are described as processes that are controlled by the parties and are characterized by flexibility on both the procedural and substantive levels—processes that may be designed and "tailored" by and for the parties, and whose outcomes are limited only by the parties' "remedial imagination."[35] In contrast with the flexible and sporadic procedure that is typical of alternative processes, the judicial process is thought to be a structured process, full of rules, which leaves a relatively narrow opening for flexibility and for differentiation between cases.

One can learn about the procedures involved in the judicial process from Martin Shapiro's influential book, *Courts*.[36] The prevailing view of the courts' operations, according to Shapiro, is that they operate according to a certain prototype. The prototype he describes includes the following four components: the courts are (1) independent institutions, (2) that engage in adversarial proceedings, and (3) apply existing rules (4) based on which dichotomous rulings are made according to an "all or nothing" formula.[37] These components are largely absent from the way in which alternative processes operate. Indeed, the description of alternative processes is generally the mirror image of the judicial archetype of which Shapiro speaks.

Nevertheless, as Shapiro illustrates, oftentimes the reality in the courts does not align with the definition of the judicial prototype. Shapiro's thesis is that despite the prevailing view that the courts are quite different from alternative processes, in reality judges frequently act similarly to other third parties (such as arbitrators or mediators). In fact, Shapiro explains, the courts act in a way that is much more reminiscent of our understanding of ADR

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34 *See infra* notes 81–88.

35 On the "remedial imagination," see *Pursuing Settlement in an Adversary Culture*, *supra* note 20, at 3. The description of ADR processes is based in part on the competing prototype that we proposed in a previous article, Orna Rabinovich-Einy & Roee Tsur, *The case for greater formality in ADR: Drawing on the Lessons of Benoam's Private Arbitration System,* 34 VT. L. REV. 529 (2010).

36 SHAPIRO, *supra* note 4, at 1.

37 *Id.*

processes.[38] This is evident, *inter alia*, in the way in which the legal system seeks to gain the consent of the parties at various stages of the judicial proceeding, while at the same time endeavoring to refrain from exercising authority or power in order, among other reasons, to preserve its fragile legitimacy.[39]

How then can we explain the survival of the judicial prototype, given the disparities between it and reality on the ground? Shapiro would respond that the courts are concerned with the preservation of the prototype as they have a need for this image in order to sustain their legitimacy.[40] He explains that there is a fundamental tension in dispute resolution processes derived from their "triadic" structure—there are two parties and the third party is supposed to decide the dispute (or at least aid the parties in resolving it). Thus, there is a constant danger that the triad will collapse into a structure of two against one, once the third party decides the case.[41]

In alternative processes, consent prevents the collapse of the triangle and ensures the preservation of legitimacy, as the parties have chosen the third party and consented to the standards by which the dispute will be resolved.[42] In the judicial process, the elements of consent and choice are absent, as the judge is dictated to the parties and the applicable norms are preexisting and typically not subject to party choice.[43] Therefore, a prototype emerges that allows a judge to present her decision as inevitable, while disguising the element of discretion in her decision, thereby preserving the legitimacy of her decision and indirectly, of the entire system.[44] Indeed, as Shapiro tells us, the moment we institutionalize the dispute resolution process, and "law" and "office" substitute for choice of third party and norms, we need a detailed procedure that will limit the discretion of the third party and enhance the appearance of the decisions as necessary outcomes of the set of existing rules.[45]

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38 *Id.*

39 *Id.* at 1–64. Naturally, one can think of other good reasons why a court would seek consent of the parties. That said, the overall picture and the measures taken by the court attest to the fact that the desire for legitimacy is a significant factor, albeit not exclusive, which guides the courts.

40 *Id.* at 7–8.

41 *Id.* at 1–2.

42 SHAPIRO, *supra* note 4, at 2.

43 There is of course consent in the wider sense, in that all citizens choose to live in the state in which these are the laws. *Id.* at 6. However, there is no true consent in the sense of choice of third party and the norms to be applied to the particular dispute.

44 *Id.* at 6.

45 *Id.* at 5–6.

In other words, according to Shapiro, the differences between the judicial process and ADR processes are actually not as profound as they are presented in the prevailing discourse and their dichotomous presentation is intended to preserve the legitimacy of the courts. In the decades that have passed since Shapiro's book was written, the processes have undergone significant changes due to the growing institutionalization of alternative processes on one hand, and the changes introduced to the judicial processes on the other. With these changes, the formal-informal distinction has become increasingly blurred and the judicial prototype has come under increased pressure. As we will explore in the following section, this transformation has resulted in a legitimacy crisis, making it necessary to locate new bases of legitimacy for the entire spectrum of dispute resolution processes, operating across traditional dichotomies.[46]

B. *The Transformation of the Courts and ADR*

Traditional mechanisms of control and legitimacy of the judicial processes are derived from the existence of rules that guide the actions and decisions of the judges, and from the ability to examine in retrospect the actions of judges based on the documentation of the case and the transparency of proceedings and outcomes, both of which allow for quality control through the appeal mechanism or public opinion.[47] Clearly an element of discretion exists on the part of the judges, but as Shapiro's prototype demonstrates, there is an attempt to reduce this freedom through the existence of a structured process. The characteristics of the formal process have granted it its legitimacy. They are also in the tension with the fundamental properties of the majority of informal processes—flexibility and confidentiality—and thus in many cases, they cannot be implemented (or there may be reluctance towards implementing them) in ADR processes.[48]

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[46] Menkel-Meadow Report, *supra* note 2, at 434–41 (discussing the problematic aspects, as well as the appeal of, "semi-formal" processes).

[47] Orna Rabinovich-Einy, *Technology's Impact: The Quest for a New Paradigm for Accountability in Mediation*, 11 HARV. NEGOT. L. REV. 253 (2006).

[48] *Id*. Despite the fact that confidentiality does not require an absence of documentation, the general practice in the field over the years has been not to record the content of the proceedings in order to ensure confidentiality and to prevent the subpoena of transcripts or private recordings by the court. Regarding detailed decisions, this is of course irrelevant in mediation, but in arbitration the parties often elect not to record for the sake of efficiency.

New developments in the judicial process have expanded discretion and placed further pressure on the traditional model of legitimacy. During the last decades of the 20th Century, the judicial practice began to shift with the rise of what is known as, "managerial judging."[49] In that framework, the role of the judges was altered dramatically from the perception of them as passive and distant figures, to actors who take an active part in managing the proceeding. Such procedural activism found expression in the exercise of new authority in the preliminary stages of trial and in their attempts to render the process more efficient, both by promoting settlement and in their interpretation of the various procedural rules.[50] Managerial judges' practices vary, but what unites them is the rhetoric that says that the current method does not work, that it needs to be fixed, and that the way to do that is through procedural activism.[51] Critics of managerial judging have claimed that such activism has barred the parties from raising substantive claims, as in many cases such practices shelter judges from supervision and intervention.[52] As the phenomenon of judicial settlement conferences expanded, the debate over the appropriateness of such measures and the dangers associated with them—mainly their inconsistent application by different judges and the impossibility of review on appeal—have become commonplace.[53] Nevertheless, such practices have, to a large extent, become an accepted part of the contemporary judicial landscape.[54]

Over the years, these developments have extended beyond the scope of pre-trial stages and have generated managerial practices throughout the trial as well, subjecting these latter stages to the same type of critiques managerial judging was subject to in the early trial phases.[55] Thus, Professor Thornburg impressively demonstrates how judicial decisions made during the course of the trial over such matters as consolidation or bifurcation, voir dire, or time for presenting case, number of witnesses and the requirement to submit written statements in lieu of oral testimony are often driven

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49 Resnik, *supra* note 2, at 378.

50 *Id*.

51 Elliott, E. Donald, *Managerial Judging and the Evolution of Procedure*, 53 U. CHI. L. REV. 306, 309 (1986); Thornburg, *supra* note 2, at 1294.

52 Thornburg, *supra* note 2, at 1270.

53 Jeffrey A. Parness, *Improving Judicial Settlement Conferences*, 39 U.C. DAVIS L. REV. 1891, 1892–98 (2006).

54 Donald, *supra* note 51, at 314; Thornburg, *supra* note 2, at 1319.

55 Thornburg, *supra* note 2.

by managerial, rather than substantive, concerns.[56] As such, they are applied inconsistently across cases,[57] are subject to individual judges' perception of the significance of the matter at hand,[58] compromise judicial neutrality,[59] are not accompanied with a reasoned decision,[60] are often undocumented,[61] and are de facto not subject to review on appeal.[62]

Parallel to the judiciary's shift in role in the overall system, novel forms of courts began to emerge in US courts toward the end of the 1980s called "problem-solving courts,"[63] rooted in "therapeutic jurisprudence."[64] Problem-solving courts are similar in many ways to alternative processes. They are not intended to decide which of the parties is in the right, which version of the facts is the correct one, or what legal implications flow from such a determination. Rather, these courts are designed to deal with larger social issues, such as drug addiction or domestic violence.[65] Such deep-seated problems translate into repeated criminal behavior with which the standard criminal justice system is unequipped to deal in an effective manner.[66]

Of the various problem-solving courts, drug courts are the most common.[67] The drug court replaces the adversarial criminal process with a rehabilitative one in which defendants are placed under the supervision of a therapeutic committee headed by a judge, which formulates a personalized treatment plan for them.[68] The treatment plan establishes a gradual system of rewards and sanctions according to the degree of progress or regress made by defendants in treatment, where the ultimate sanction is the imposition of a prison sentence.[69] Indeed, the judicial process and the

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56 *Id.* at 1296–98, 1301–07.

57 *Id*. at 1270, 1298, 1301–11.

58 *Id*, at 1307.

59 *Id*. at 1287.

60 Thornburg, *supra* note 2, at 1292.

61 *Id.* at 1293.

62 *Id*. at 1270, 1311–1315.

63 *See supra* note 10.

64 Winick, *supra* note 10.

65 *Id.* at 1057–60; Victoria Malkin, *Community Courts and the Process of Accountability*, 40 Am. Crim. L. Rev. 1573 (2003).

66 Berman & Feinblatt, *supra* note 10, at 6; Winick, *supra* note 10, at 1056; Malkin, *supra* note 65, at 1575.

67 Timothy Casey, *When Good Intentions are Not Enough: Problem-Solving Courts and the Impending Crisis of Legitimacy*, 57 SMU L. Rev. 1459, 1459 (2004).

68 U.S. Department of Justice, Defining Drug Courts: The Key Components 15–19 (2004).

69 *Id.* at 23–24.

traditional roles of its participants undergo a major transformation in problem-solving courts. Instead of a judge and lawyers that represent the different parties, there is a single treatment team, which collaborates in the development of a system of sanctions and rewards to incentivize the defendant to undergo the rehabilitation process. Alongside the studies that attest to the success of these courts in decreasing recidivism, they have also been subjected to scathing criticism challenging their legitimacy.[70] Among the critiques is the claim that these proceedings, which are conducted without regulated procedures and by abandoning the adversarial model, deny defendants their due process rights.[71] Despite the critiques, there has been discussion of the possibility of applying the problem-solving model to traditional courts, rendering such critiques potentially relevant to a wider court base.[72]

While problem-solving courts are a still marginal phenomenon, the practices of managerial judging and phenomena of procedural flexibility in U.S. courts more generally have become widespread and pose a real challenge to the legitimacy of the formal process. As was mentioned above, the traditional bases of legitimacy of the judicial process were the combination of rules that limit the judges' discretion and control via documentation and transparency. The new practices present judges with great leeway and flexibility in light of the absence of strict rules and the lack of full documentation, thereby frustrating effective quality control and monitoring.[73]

Alongside the challenge to the legitimacy of courts, the institutionalization of ADR challenged such processes' traditional bases of legitimacy. The 1960s and 70s in the United States heralded the rise of ADR processes, namely mediation and arbitration.[74] It is

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70 Steven Belenko, *The Challenges of Integrating Drug Treatment into the Crminal Justice Process*, 63 ALB. L. REV. 833, 850 (2000); John S. Goldkamp, *The Drug Court Response: Issues and Implications for Justice Change*, 53 ALB. L. REV. 923, 959–60 (2000).

71 Casey, *supra* note 67; Winick, *supra* note 10, at 1060–61; Michael C. Dorf & Jeffrey Fagan, *Problem-Solving Courts: From Innovation to Institutionalization*, 40 AM. CRIM. L. REV. 1501, 1510 (2003); Tamar M. Meekins, *Risky Business: Criminal Specialty Courts and the Ethical Obligations of the Zealous Criminal Defender*, 12 BERKELEY J. CRIM. L. 75, 84–85, 90–92 (2007); Eric Lane, *Problem-Solving Courts and Therapeutic Jurisprudence: Due Process and Problem-Solving Courts*, 30 FORDHAM URB. L.J. 955, 962, 967–70 (2003); Malkin, *supra* note 65, at 1579.

72 Francine Byrne, *Applying the Problem-Solving Model Outside of Problem-Solving Courts*, 89 JUDICATURE 40 (2005).

73 Thornburg, *supra* note 2, at 1319–24.

74 *See* LIPSKY, ET AL., *supra* note 11, at xiv–xv; Deborah R. Hensler, *Our Courts, Ourselves: How the Alternative Dispute Resolution Movement Is Re-Shaping Our Legal System*, 108 PENN. ST. L. REV. 165, 170–80 (2003).

customary to attribute the spread of informal processes to a variety of sources. In several cases, the shift was inspired by a desire for community empowerment through the independent resolution of disputes according to local norms.[75] In other cases, alternative processes solved the institutional need to reduce the overload on the court system by serving as an efficient and accessible channel for settling disputes.[76] Additionally, proponents of ADR emphasized the advantages of alternative processes in cases where the parties to the dispute are in a long-term relationship. In most cases, these processes, in contrast with the judicial process, enable the preservation of the relationship, both because of the method of examining the dispute and because of the wide and creative range of possible resolutions that the process offers.[77]

Each of the rationales for adopting ADR processes emphasized the processes' various traits and set different goals for their uses: personal and community empowerment, the closure of cases and increased procedural efficiency in the courts, or the introduction of a new culture of dispute resolution. Despite their differences, these processes were lumped together under the same title, highlighting their main shared trait—they all offered a different channel than the judicial process. As opposed to a lawsuit, ADR processes allowed a higher degree of control by the parties, direct participation, procedural flexibility, confidentiality, creative solutions, expertise, efficiency, and future cooperation.[78]

The advantages attributed to the ADR processes, alongside the increasingly problematic operation of the courts, led to the institutionalization of ADR processes in the courts beginning in the last quarter of the 20th century in the United States.[79] At first, alternative processes were institutionalized in a voluntary manner, which allowed parties to a dispute to choose whether they wished to have their disputes resolved through an alternative process or to continue to have their disputes heard through a formal court pro-

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75 *See* Hensler, *supra* note 74, at 170–73.

76 Robert A. Baruch Bush, *Mediation and Adjudication, Dispute Resolution and Ideology: An Imaginary Conversation*, 3 J. CONTEMP. LEGAL ISSUES 1, 11–12 (1989); MENKEL-MEADOW ET AL., *supra* note 27, at 6.

77 ROBERT H. MNOOKIN, ET AL., BEYOND WINNING: NEGOTIATING TO CREATE VALUE IN DEALS AND DISPUTES 100–01 (2000); Hensler, *supra* note 74, at 171.

78 *See* articles providing various justifications for the formation of an alternative dispute resolution system: LIPSKY, ET AL., *supra* note 11, at 76–78; MENKEL-MEADOW ET AL., *supra* note 27, at 6–13; Carrie Menkel-Meadow, *When Dispute Resolution Begets Disputes of Its Own: Conflicts Among Dispute Professionals*, 44 UCLA L. REV. 1871, 1872–75 (1997).

79 Menkel-Meadow Report, *supra* note 2, at 98.

ceeding. Later on, the institutionalization in the courts in many cases transformed into a process in which there was some level of obligation, depending on the formula of institutionalization chosen.[80]

The institutionalization of ADR in the courts increased in the 1990s following the adoption of legislation, which led to the establishment of internal departments for dispute resolution in courts and federal agencies.[81] These departments dealt primarily with disputes based on discrimination between employees.[82] Over time, the phenomenon of "internal dispute resolution" ("IDR")[83] expanded within the private sphere as well, as private-business institutions too began to establish internal departments to handle problems and disputes, as a result of a wide range of changes that the American workforce had undergone, ranging from globalization to technological, regulatory, cultural and social developments.[84]

The institutionalization of alternative processes was met with significant criticism, both from within the ADR community and externally. Supporters of the institutionalization of ADR processes decried that the transformation alternative processes underwent as a result of their adoption in the courts and due to the significant role that lawyers and judges played in the delivery of such processes. In a famous article, Professor Carrie Menkel-Meadow referred to this process as the "co-opting" of ADR processes by the legal system.[85] Whereas mediation processes (the most widespread alternative process in the courts) are described as those that allow the parties to exercise control over the process and its results, experience direct participation, and be able to reach creative solutions tailored to the characteristics of the dispute and their own preferences. However, the reality of mediation institutionalized in the legal system has differed dramatically. Studies show that mediators tend to be evaluative while providing assessments of the prospects of the lawsuit and the optimal resolution to the dispute,

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80 *Id.* at 101; MENKEL-MEADOW, ET AL., *supra* note 27, at 351–61; Ward, *supra* note 7.

81 Pub. L. No. 101–650, 104 Stat. 5089 (1990) (codified at 28 U.S.C. §§ 471–82 (2000)); Pub. L. No. 105–315, 112 Stat. 2993, 2993–98 (1998) (codified at 28 U.S.C. §§ 651–58 (2000)); Menkel-Meadow Report, *supra* note 2, at 102.

82 LIPSKY ET AL., *supra* note 11, at 293–95.

83 Lauren B. Edelman et al., *Internal Dispute Resolution: The Transformation of Civil Rights in the Workplace*, 27 L. & SOC'Y REV. 497 (1993).

84 LIPSKY ET AL., *supra* note 11, at 29–73.

85 *Pursuing Settlement in an Adversary Culture*, *supra* note 20, at 6.

and lawyers tend to play a central role, at the expense of parties who are pushed aside and oftentimes not even present.[86]

What is more, the extent of control and choice possessed by the parties is often limited even outside of the courts, when alternative processes are institutionalized in organizations and institutions. Such processes are not tailored ad hoc, according to the circumstances and characteristics of the parties, but rather are typically pre-determined at least for one of the parties.[87] At times, the mere participation in this sort of process is forced upon one of the parties, such that the consent to cooperate with an ADR process, usually arbitration, is embedded in the terms of a standard contract.

Opponents of the institutionalization of ADR processes have focused on other aspects that relate predominantly to the increasing privatization of the justice system. They emphasized the fact that once we enter the realm of the institutionalized system of dispute resolution processes we cannot be content with the case closure rate or reduction of caseload in the courts, or even with the settlement of the dispute to the satisfaction of the parties.[88] The main concern expressed by opponents is the erosion of the role of the courts, as the authority charged with developing the law, establishing precedents, and declaring the fundamental values and rights protected by the legal system.[89] Critics particularly warned of the negative influence of informal processes on the rights of marginalized groups, both due to the fact that their disputes undergo depoliticization in ADR and lose their hidden potential to spur social change through law,[90] and because of the confidential and flexible nature of ADR processes that allows strong parties to obtain favorable settlements and to keep them discreet from future litigants.[91]

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86 MENKEL-MEADOW, ET. AL., *supra* note 27, at 406–09 (addressing the various implications of mediation on court orders); McAdoo & Welsh, *supra* note 2, at 407–08; Jacqueline Nolan-Haley, *Mediation as the New Arbitration*, 17 HARV. NEGOT. L. REV. 61, 73–89 (2012); Nancy A. Welsh, *The Current Transitional State of Court-Connected ADR*, 95 MARQ. L. REV. 873, 874 (2012).

87 Orna Rabinovich-Einy & Ethan Katsh, *Technology and the Future of Dispute Systems Design*, 17 HARV. NEGOT. L. REV. 151, 159 (2012).

88 Fiss, *supra* note 2, at 1078.

89 *Id.* at 1085–87. Recently, Professor Hazel Genn voiced similar concerns following the experience of the British civil justice system with ADR. *See* Hazel Genn, *What is Civil Justice For? Reform, ADR, and Access to Justice*, 24 YALE J.L. & HUMAN. 1 (2012).

90 Fiss, *supra* note 2, at 1076–78; NADER, *supra* note 2; HARRINGTON, *supra* note 2; Edelman et al., *supra* note 83; Grillo, *supra* note 2.

91 *See* Delgado et al., *supra* note 2, at 1359, 1367–75; NADER, *supra* note 2, at 99.

These critiques, from within and without, signal an important message about the legitimacy of ADR processes. If in the past, the legitimacy of these processes was rooted in the elements of choice, consent, and control by the parties to the dispute, then the foundation of legitimacy has been undermined by the institutionalization of alternative processes. Moreover, the external critics clarify that once the processes operate as an institutionalized system, rather than processes implemented on an ad hoc basis by individuals, parties' consent no longer can, nor should it, serve as an adequate basis for legitimacy; some guarantee of fairness and effectiveness of the processes is required, similar to that which we expect from the formal legal system. But therein lies the rub, as the features of the ADR processes do not allow for dependency on control mechanisms such as those found in the courts.

The result is a situation in which, on the one hand, the courts and judges are operating in new ways, in an attempt to promote different goals than in the past, and along the way they too are losing the grounds on which they relied in the past for their legitimacy; on the other hand, alternative processes are taking on an increasingly central role, yet at the same time they have lost the element of consent as a basis for their legitimacy. Under these circumstances, we can see that both arenas, the formal and the informal are moving closer together and consequently also need to move toward new sources of legitimacy. Such new sources can be found in process design. Rather than rely on the procedure itself as a source of legitimacy, the grounds for legitimacy become a second-order procedure—the process of procedural design. As we shall explore in the coming section, the mere appeal to the field of dispute systems design reflects the blurring of the distinction between "formal" and "informal" processes, and the field of DSD, too, constitutes an additional arena in which the blurring of the boundaries between these process types is further enhanced.

C. *Dispute Systems Design and Legitimacy*

1. Background: The Rise of DSD

The birth of the field of DSD is associated with the publication of the book, *Getting Disputes Resolved*, by Ury, Brett and Goldberg in the late 1980s.[92] Their main finding was that within a

[92] Rabinovich-Einy & Katsh, *supra* note 87, at 155.

closed environment, such as the workplace, certain patterns of disputes emerge and, thus, the institutionalization of dispute resolution channels enables the resolution of conflicts in a more satisfactory and efficient manner than ad hoc dispute resolution because it presents an opportunity to learn from those repetitive patterns within disputes and prevent them from developing in the future.[93]

The field of DSD constituted a secondary phase in the spread and institutionalization of alternative processes. In the primary phase, alternative processes were perceived as ad hoc channels arising after the emergence of a dispute and in order for specific parties to resolve the dispute between them. As such, these processes were institutionalized within the framework of the courts and within communities, out of the hope that in the future, parties to disputes would seek redress via these bodies prior to filing suit.

In the secondary phase, and to a large extent due to legislation obligating federal agencies to adopt ADR systems for disputes involving their employees, internal-institutional dispute resolution systems began to emerge within both public institutions and private corporations.[94] The DSD field dealt with the procedures for designing procedures, the objective being to distill principles for the design of dispute resolution systems, based on a profound understanding of the wide variety of procedures that exist for preventing, adjudicating, and resolving disputes.

The model proposed by Ury, Brett, and Goldberg arose out of research conducted in the U.S. mining industry. Having studied the illegal strikes held in that sector, the researchers came to understand that not all mines suffered from the same intensity of illegal strikes. The mines that successfully handled conflicts were those that conducted interest-based processes between the management and the miners, negotiations that were launched not only after the outbreak of a dispute, but also in a productive and continuous manner.[95] This discovery gave rise to what became known as Ury, Brett and Goldberg's classic distinction between interest, rights and power-based processes.[96] The typology distinguishes not

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93 *Id.*

94 *See supra* notes 81–84 and accompanying text.

95 URY ET AL., *supra* note 11, at 43.

96 *Id*. at 4–10 (Interest-based processes are those which are intended to meet the needs and interests of disputing parties. Rights-based processes decide to what each party is eligible according to law or another rules-based system; and, finally, in power-based processes, the focus is not placed on the needs (interests) of the parties or their rights, but rather on what they are able to obtain given their power to cause the other party to act according to their preferences. The

only between the various types of processes, but also declares the interest-based processes, the preferred processes, as they are the most efficient, the most satisfactory to the parties, the best at preserving relationships, and likely to produce the most stable agreements.[97] Therefore, the authors proposed a framework for the design of dispute resolution systems, which, among other things, relies significantly on interest-based processes, while leaving room for other types of processes.[98]

In addition to Ury, Brett and Goldberg's model of internal-institutional system design, new books and articles on the topic began to enter the scene, developing both the practical aspects and the theoretical issues involved in designing dispute resolution systems of that sort.[99] Constantino and Merchant published the second seminal work in the field of DSD.[100] Their book focused attention on identifying patterns of disputes, with an emphasis on prevention, rather than simply on resolving disputes in retrospect. The authors also highlighted the importance of cooperation in the design process between the various players in the environment for which the dispute resolution system is designed,[101] as well as in the actual dispute resolution process, emphasizing the need for the parties to be involved in the choice both of which process to implement and what type of third party should conduct it.[102]

The spread of internal dispute resolution systems and the rise of the field of DSD were simultaneously the subject of criticism over the increasing privatization of the world of dispute resolution, and the answer to that very criticism. Critics viewed the propagation of internal systems as a further expansion of the dangerous trend of privatizing justice[103] through the adoption of confidential and flexible processes that operate for the benefit of the stronger players and are liable to harm members of marginalized groups.[104] Alongside the criticisms were those who utilized the insights provided by the field in order to expose the variety of choices in de-

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term "power" does not necessarily refer to the exertion of physical power, but rather to older negotiation tactics (seating a party on a short chair, facing the sun, etc.), strikes or boycotts).

97 *Id*. at 10–15.

98 *Id*. at 41–64.

99 *Supra* note 11.

100 CONSTANTINO & MERCHANT, *supra* note 11.

101 *Id.* at 49.

102 *Id.* at 121.

103 For the main criticisms of ADR based on the privatization of justice, see references to such writings of Professors Fiss, Delgado, and Grillo, *supra* note 2.

104 Edelman et al., *supra* note 83.

signing procedural systems such as these—the hubs of power, the design alternatives and their ramifications on the various parties, and the link between procedural choices and substantive outcomes in order to envision processes of a new kind, which challenge the traditional distinctions between formal and informal, private and public, enjoying the benefits of both worlds while sustaining legitimacy.[105]

Over the years, the DSD field expanded beyond the institutional context in which it arose. Indeed, DSD principles were applied in judicial processes,[106] management and compensation funds,[107] constitution drafting processes,[108] and in the international arena.[109] The central insight that led to this expansion was that in all of the aforementioned contexts, information must be transferred between the parties as part of the decision-making process (whether the background to the conflict is the existence of a dispute or the issue is reaching an agreement that is not under dispute). The recognition that the principles of DSD are not limited to processes related to disputes or processes carried out only between parties in an informal and local environment led to the implementation of these principles in a range of instances in which process design was needed for the transfer and processing of information between different parties and in a variety of settings.

In 2009, a special volume of the Harvard Negotiation Law Review was dedicated to the topic of dispute systems design marking the 20th anniversary of Ury, Brett & Goldberg's pioneering book on the topic. The various contributions to the volume were authored by leaders in this area who addressed new developments and challenges as the field of dispute systems design matured and needed to address second generation issues, such as control over design,[110] ethical dilemmas,[111] and the development of an analytic

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105 Bingham et al., *supra* note 14; Susan Sturm & Howard Gadlin, *Conflict Resolution and Systemic Change*, 2007 J. DISP. RESOL. 1 (2007); Rabinovich-Einy, *supra* note 47.

106 *See Systematic Issues*, *supra* note 15.

107 Robert M. Ackerman, *The September 11th Victim Compensation Fund: An Effective Administrative Response to a National Tragedy*, 10 HARV. NEGOT. L. REV. 135 (2005); Ehud Eiran, *Politics and the 2005 Gaza and North West Bank Compensation and Assistance Facility*, 14 HARV. NEGOT. L. REV. 101 (2009).

108 *Systemic Issues*, *supra* note 15, at 219.

109 Andrea K. Schneider, *The Intersection of Dispute Systems Design and Transitional Justice*, 14 HARV. NEGOT. L. REV. 289 (2009).

110 *Dispute System Design and Justice*, *supra* note 14.

111 *Systematic Issues*, *supra* note 15.

framework for such activities,[112] as well as opportunities and hurdles that arise in the various contexts in which such activities are conducted.[113]

Most recently, a comprehensive book on dispute systems design has come out, reflecting the changes that the field has undergone over the last three decades, in its broad view of what constitutes dispute systems design, which extends well beyond the original framework of addressing conflicts within an organization, institution or industry.[114] DSD is defined as the "intentional creation of a system or a process to achieve some end or set of goals."[115] Drawing on a rich base of case studies, the book explores the various stages of DSD: the involvement and initiative of the designer, a diagnosis of the existing state of affairs, creation of new processes and systems, and implementation of the design.[116] These stages, despite seeming linear, involve circular activity, with ongoing evaluation, learning and change.[117]

What have the extensive experience and literature in the DSD area taught us about design activities, or as succinctly worded by Carrie Menkel-Meadow: "[i]s the act of 'designing' processes sufficiently coherent and uniform to allow general principles, even if the processes designed are themselves different or pluralistic?"[118] Admittedly, as stated in the DSD literature, "it is difficult to come up with many useful generalizations,"[119] but several broad themes can be extracted from the writing on DSD.

One overarching principle that comes across clearly from the various writings in the field is that "one size or one process does not and cannot fit all,"[120] and designers should be wary of importing systems or processes developed for a particular context to another setting, as is.[121] There are no pre-made quick solutions. The success of the end product is strongly linked to the process through which it was produced, ensuring the involvement of a broad range

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112 Stephanie Smith & Janet Martinez, *An Analytic Framework for Dispute Systems Design*, 15 HARV. NEGOT. L. REV. 123 (2009).

113 *See, e.g.*, Francis E. McGovern, *Dispute Systems Design: The United Nations Compensation Commission*, 14 HARV. NEGOT. L. REV. 171 (2009).

114 NANCY H. ROGERS ET AL., DESIGNING SYSTEMS AND PROCESSES FOR MANAGING DISPUTES (2013).

115 *Id*. at 5.

116 *Id*. at 6.

117 *Id*. at 16.

118 *Systematic Issues*, *supra* note 15, at 213.

119 ROGERS ET AL., *supra* note 114, at 5.

120 *Systematic Issues*, *supra* note 15, at 228.

121 *Id.* at 215–16; ROGERS ET AL., *supra* note 114, at 30.

of stakeholders,[122] whose interests are uncovered, articulated and addressed through process choice and structure.[123] In addition, systemic goals, values and interests need to be articulated,[124] and potential conflicts (between the various systemic goals on the one hand, and systemic goals and individual interests on the other) need to be managed through the design of the dispute system.[125] Furthermore, process design must be attuned to the specific relational,[126] cultural,[127] and legal[128] environment into which the system is being introduced, as well as to the power[129] and incentive[130] structure such environment creates. Designers and third parties involved must meet predefined professional and ethical standards, criteria and principles, and uphold predefined values and goals.[131] Finally, the system must be committed to ongoing assessment, learning, and improvement, so as to ensure that the system meets its goals, while performing in a fair and efficient manner (which may require revisiting and refining some of these goals in light of the system's performance).[132]

The following section provides an analysis of three dispute resolution systems from a DSD perspective so as to uncover DSD principles that can help generate legitimacy in courts and ADR processes. The three case studies handle disputes of various natures and represent different types of processes that express a different pattern of institutionalization and reflect varying levels of informality and formality. Indeed, the mix of characteristics of each system chosen greatly contributes to the blurring of the distinction between the formal and informal realms, demonstrating

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122 *Systematic Issues*, *supra* note 15, at 229–30; ROGERS ET AL., *supra* note 114, at 20 (referring to "those people whom a conflict affects or could affect implementation as 'stakeholders'"); Smith & Martinez, *supra* note 112, at 131 (stating that "Stakeholders may be the immediate parties in conflict, individuals or entities subsidiary to or constituents of those parties, or others directly or indirectly affected by the dispute's outcome" and that "it is usually best to identify as many stakeholders as possible").

123 *Systematic Issues*, *supra* note 15, at 229–30; ROGERS ET AL., *supra* note 114, at 20; Smith & Martinez, *supra* note 112, at 129–33.

124 Smith & Martinez, *supra* note 112, at 129; ROGERS ET AL., *supra* note 114, at 74–79.

125 ROGERS ET AL., *supra* note 114, at 22–24, 79–84.

126 Smith & Martinez, *supra* note 112, at 130.

127 *Systematic Issues*, *supra* note 15, at 229–30; ROGERS ET AL., *supra* note 114, at 23, 31–35, 86–91.

128 *Systematic Issues*, *supra* note 15, at 229–30.

129 *Id.*; ROGERS ET AL., *supra* note 114, at 110; Smith & Martinez, *supra* note 112, at 131–32.

130 Smith & Martinez, *supra* note 112, at 131.

131 *Systematic Issues*, *supra* note 15, at 229–30; ROGERS ET AL., *supra* note 114, at 62–63.

132 *Systematic Issues*, *supra* note 15, at 229–30; ROGERS ET AL., *supra* note 114, at 352–53; Smith & Martinez, *supra* note 112, at 132–33.

the need for alternative legitimacy bases and the potential of DSD to provide such grounding.

2. The Connection between DSD and Legitimacy: Lessons from the Field

a) The USPS Mediation System

In 1994, following the painful experience of a class action suit brought against it, which was successfully resolved through a mediation process a decade later, the United States Postal Service ("USPS"), at the initiative of Cindy Hallberlin, established an internal system for handling employee complaints of discrimination. The program, which was termed REDRESS (Resolve Employment Disputes Reach Equitable Solutions Swiftly), began as a pilot in the State of Florida and was gradually expanded to all of the United States.[133] These days, the system provides redress to over 800,000 employees via some 1,500 mediators.[134] All of the mediators underwent training by the USPS according to the transformative model of mediation, a unique model which emphasizes empowerment of the parties (through their free choice throughout the entire process and the lack of intervention by the mediator) as well as acknowledgement by each party of the other (from willingness to listen to them, to expressing recognition of the feelings and needs of the other, to willingness to respond to them).[135]

The choice of this model is unorthodox in the world of IDR and is especially interesting given the "cooptation" of the mediation process by the judicial process and the unchallenged dominance of "evaluative mediation" practices over institutionalized mediation programs in the judicial system.[136] Evaluative mediation implies a mediation process whose objective is to guide the parties toward a quick settlement. To that end, the mediator gives her opinion as to the likely outcome in a judicial proceeding or what an "appropriate" outcome would be, and attempts to direct the parties toward an agreement that reflects such evaluation.[137]

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133 *See* US POSTAL SERVICE, about.usps.com/what-we-are-doing/redress/about.htm.

134 Symposium, *Addressing the "REDRESS":* A Discussion of the Status of the United States Postal Service's Transformative Mediation Program, 2 CARDOZO J. CONFLICT. RESOL. 3 (1999) [hereinafter *Addressing the REDRESS*].

135 The transformative model was developed by Bush and Folger. *See* ROBERT A. BARUCH BUSH & JOSEPH P. FOLGER, THE PROMISE OF MEDIATION: THE TRANSFORMATIVE APPROACH TO CONFLICT 73, 81 (2005).

136 *See supra* notes 85–86.

137 Leonard L. Riskin, *Understanding Mediators' Orientations, Strategies and Techniques: A Grid for the Perplexed*, 1 HARV. NEGOT. L. REV. 7, 26–27 (1996).

In the framework of the program, as soon as an employee files a complaint of discrimination by the USPS, they have the option to have their complaint adjudicated via the transformative mediation process instead of the formal administrative process. Should they choose the mediation process, a meeting will take place within two to three weeks, a significantly shorter time period than the timeline within the formal process.[138] The mediation meeting takes place at the workplace or nearby, during work hours, and at no cost to the employee,[139] and while the mediation through REDRESS is optional for the employee, it is mandatory for the employer.[140]

Since its establishment, the USPS dispute resolution program has received much praise.[141] The program was accompanied by an array of extremely impressive research and monitoring efforts under the supervision of Professor Lisa Bingham, a leading researcher in the field of dispute resolution. The vast degree of the program's expansion, and its adherence to collecting and documenting data, gave rise to unique conclusions about the operations of this specific system as well as about the principles of DSD in general.[142] The data gathered on the system's operations clearly indicate a high level of faith in the system, given the high percentage of users of a process which is voluntary, and the fact that the amount of formal complaints decreased following the introduction of the REDRESS system.[143] This finding is not trivial, as this is an internal dispute resolution system. Such a system is founded on a basic tension—the institution charged with designing the dispute resolution system and which pays the salaries of the mediators is a party to (or at least has an interest in) the dispute that the internal system is intended to resolve.[144]

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138 *Addressing the REDRESS*, *supra* note 134 (describing this component as a central planning component in the success of the program).

139 *All you need to know about REDRESS*, UNITED STATES POSTAL SERVICE, about.usps.com/what-we-are-doing/redress/programs.htm (last visited June 14, 2015).

140 R.J. Ridley-Duff & A.J. Bennett, *Mediation: Developing a Theoretical Framework for Understanding Alternative Dispute Resolution,* BRITISH ACADEMY OF MANAGEMENT, 14–16 2010 (submitted).

141 Although it has been noted that the REDRESS studies do not compare satisfaction with satisfaction with court proceedings. *See id*. at 6.

142 *See generally* Addressing the REDRESS, *supra* note 134. For a list of academic articles on this system, see US POSTAL SERVICE, about.usps.com/what-we-are-doing/redress/bibliography.htm.

143 *Addressing the REDRESS*, *supra* note 134.

144 Sturm & Gadlin, *supra* note 105, at 11 (the potential for a conflict of interest on the part of the dispute resolvers is particularly strong in the context of internal dispute resolution systems, as the majority of internal dispute resolution programs are guided by the interests of the management and are motivated by a desire to reduce the extent of litigation.).

How then can the potential for conflict of interests be overcome when it is built into the definition of the internal-institutional dispute resolution system? The answer is that, given proper system design, the tension can be minimized and legitimacy of the system enhanced. One of the most important decisions in this context was the choice to rely exclusively on the transformative mediation process; it was clear to the designers that the process of evaluative mediation, in which the mediator gives her opinion about the case's likelihood of success would not gain the trust of employees. The data regarding the formal process revealed that in ninety-five percent of cases, employees' cases of discrimination were dismissed based on the fact that they could not establish the necessary legal grounds or were not adequately founded. As evaluative mediation operates in the "shadow" of the formal system, this meant that in ninety-five percent of the cases, the mediators would opine that there was "no case."[145] Given the voluntary nature of the system, employees would back out of the process.

In contrast, the objective in transformative mediation is not to "close the case," but rather to achieve empowerment and recognition by the parties to the dispute—and thus there is a greater chance that the mediator will be perceived as neutral despite the fact that her salary is paid by the same institution that is either directly or indirectly a party to the dispute. Indeed, USPS did not set the closure of cases or the reduction of complaints as a goal, but instead focused on the level of participation in the system. This objective was accomplished when the system passed its goal of seventy percent participation. Two significant byproducts of the high participation rate were that eighty percent of complaints that went through mediation were successfully resolved, and the number of formal complaints filed on discrimination grounds decreased.

The choice of transformative mediation was based on an additional rationale (and advantage): it allowed USPS to identify the improvement of the workplace environment as a goal and use the mediation system towards realizing such end. As an institution that had been associated in the past with the term "going postal," the institutionalization of the internal dispute resolution system represented an important turning point in the improvement of the atmosphere and work relations there.[146]

Another central component in ensuring the legitimacy of the process was the choice of a model that employs "external"

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145 *Id.*

146 Pam Zuczek *in Addressing the* REDRESS, *supra* note 134.

mediators. Such mediators are "external" in the sense that they are not employees of the institution that work from within its physical office spaces, but rather are part of a closed pool of professional mediators that deal with disputes as they arise as independent agents working for a fee. Despite the fact that they receive pay from the institution, the potential for conflicts of interest is reduced compared to an internal mediator model in which the mediators are more likely to be perceived by the parties as associated with the institution, and the mediators themselves identify to a greater extent with their employer.[147]

Finally, the success and confidence awarded to the USPS system is to a large extent the result of the design steps taken in order to ensure the professionalism of the specific mediators and the system as a whole. Within this framework, USPS took it upon itself to train the entire staff of mediators through transformative mediation training. Additionally, managers and key stakeholders of the system were given training, employee assembly meetings were held and special tapes were prepared, all in order to prepare the organization for a major change in its dispute resolution culture.[148]

In parallel to the training, USPS used extraordinary monitoring methods in order to guarantee the quality of the process. Again, USPS chose not to mark "closure" of complaints or reduction in their number as a superior objective, but rather monitored this data as an additional dimension of evaluating the system's activities.[149] Instead, the evaluation process focused on examining the quality of the mediation process. Using an exceptionally large database, including tens of thousands of questionnaires, Professor Bingham and her team examined to what extent the objectives of "empowerment" and "acknowledgment" were achieved (via their translation of detailed sub-questions), whether the mediators' intervention matched the principles of transformative mediation, and the level of satisfaction of the parties (based, among other things,

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147 Sturm & Gadlin, *supra* note 105, at 48–49 (referring to the tension and the potential for bias accompanying the insider-outsider role of an internal ombudsman). Indeed, studies of REDRESS, comparing the pilot stage in which internal mediators were used, with later phases in which external ones were used, found that external mediators, perceived as more neutral, were associated with higher levels of confidence in and satisfaction with the process. *See* Ridley-Duff & Bennett, *supra* note 140, at 6.

148 Zuczek, *supra* note 146.

149 Jonathan F. Anderson & Lisa B. Bingham, *Upstream Effects from the Mediation of Workplace Disputes: Some Preliminary Evidence from USPS*, 48 LAB. L. J. 601, 610 (1997). On the principles of procedural justice in mediation, see Nancy A. Welsh, *Making Deals in Court-Connected Mediation: What's Justice Got to do With It*? 79 WASH. U. L. Q. 787, 817 (2001).

on measuring the parameters that attest to the realization of the principles of procedural justice, particularly the parties' ability to express themselves and to tell their stories to a third party that listens and treats them fairly and respectfully).[150] The results showed an impressive correlation between the goals of the system and its actual implementation, as well as very high satisfaction among participants.[151] The findings even showed success of broader goals of improving the work atmosphere and the inculcation of tools allowing employees to successfully address future disputes on their own.[152]

b) The ICANN Domain Name System

In August 1999, the Internet Corporation for Assigned Names and Numbers ("ICANN") established a system for resolving disputes over registration of domain names.[153] Domain names are the equivalent of physical addresses on the virtual sphere. Each web page has a unique IP address, which is a numerical sequence. Domain names substitute the numerical sequence with language that we can memorize.[154] Specifically, domain names are comprised of several parts—the particular word chosen as a name for the site coupled with one of several recognized endings—".com, .edu, .gov" etc. ("top level domain name" or "TLD").[155] This way, if we want to reach a particular site, we can type the name of the site and memorize its TLD instead of having to memorize and look up the numerical sequence that makes up its IP address. To a large extent, the significance of domain names has diminished with the development of sophisticated search engines like Google, but in the past, securing a particular domain name was significant and could have substantial financial consequences.[156]

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150 Lisa Bingham *in Addressing the REDRESS, supra* note 134; *see also* James R. Antes, *Transforming Conflict Interactions in the Workplace: Documented Effects of the USPS REDRESS Program*, 18 HOFSTRA LAB. & EMP. L.J. 429 (2001). On the principles of procedural justice in mediation, see Welsh, *supra* note 149, at 817.

151 Zuczek, *supra* note 146.

152 *Id.*

153 ICANN Consensus Policy, http://www.icann.org/en/resources/registrars/consensus-policies (last visited Feb. 27, 2015).

154 A. Michael Froomkin, *Wrong Turn in Cyberspace: Using ICANN to Route Around the APA and the Constitution,* 50 DUKE L.J. 17, 37–38 (2000).

155 *Id.* at 39.

156 Jude A. Thomas, *Fifteen Years of Fame: The Declining Relevance of Domain Names in the Enduring Conflict between Trademark and Free Speech Rights*, 11 JOHN MARSHALL REV. OF INTELL. PROP. LAW 1, 49–50 (2011).

Originally, domain names were assigned on a first-come, first-served basis allowing those who were quick to recognize the potential economic value of domain names to get a head start in securing their domain name of choice.[157] Since domain names require exclusivity, this presented a problem for those who were late to register their desired domain names.[158] As the ban on commercial activity online was lifted only in early 1990s, large corporations and familiar brands were often late bloomers in the virtual environment. In fact, by the time well known corporations (and individuals) turned to register their trademark or name as a domain name, they were surprised to discover that it was already taken.[159] As a result, McDonald's and even Madonna found themselves in a dispute over the ownership of www.mcdonalds.biz[160] or www.madonna.com.[161]

In some cases, those who registered the domain name were amenable to sell it, even at a fair price. In other cases, owners claimed a legitimate right to register such domain name, underscoring the differences between trademarks and domain names, and the diverging rationales that guide intellectual property laws and Internet infrastructure. In another group of disputes, registrants of domain names purposefully registered domain names that were similar to well known trademarks so as to confuse users or to extract large sums of money in exchange for the transfer of the domain name to the trademark holder. It is the latter phenomenon, called "cybersquatting," that the domain name system was established to address.[162]

Prior to ICANN, Network Solutions, Inc. ("NSI") handled these disputes.[163] NSI had a dispute resolution policy that allowed trademark holders to freeze use of domain names that were allegedly in violation of their trademark.[164] This was in line with earlier approaches towards such matters, which attempted to evade the

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157 Froomkin, *supra* note 154, at 56.

158 *Id.* at 41.

159 *Id.* at 59–61.

160 Debrett Lyons, *Administrative Panel Decision,* WIPO Arbitration and Mediation Center, http://www.wipo.int/amc/en/domains/decisions/html/2006/d2006-1142.html (last visited Jan. 27, 2015).

161 *Id.*

162 For a definition of "cybersquatting," see Tenesa S. Scaturro, *The Anti-Cybersquatting Consumer Protection Act and the Uniform Domain Name Dispute Resolution Policy: The First Decade: Looking Back and Adapting Forward*, 11 Nev. L.J. 877, 880 (2011).

163 Froomkin, *supra* note 154, at 59.

164 *Id.*

trademark question and leave the parties to resolve the matter independently.[165]

The domain name system established by ICANN was adopted following a long period of consultations, involving U.S. and international bodies, experts and interested parties.[166] The debate over an appropriate framework for addressing these issues was heated, grounded in diverging ideologies on the role that intellectual property laws can and should play online and in very different visions of the Internet and its regulation. In addition to this challenge, the system would have to overcome the difficulties associated with the administration of a global resource by an American not-for-profit enterprise.[167] Many of the domain name disputes involved individuals and entities located in different parts of the world. Given these challenges, how could a dispute resolution system offer an accessible, effective and fair process? How could the system offer a quick and effective resolution in the face of dispersed parties and divergent legal norms? Should the process be rights-based, and, if so, what norms should guide the resolution? What remedies would the process provide and how would they be enforced? Would the process displace local dispute resolution avenues or would they remain available? These and other questions had to be addressed in the design process. The scheme that was developed sought to offer a quick and enforceable decision that would address those cases in which domain name registration was done in bad faith.[168]

More specifically, ICANN set up a decentralized dispute resolution system made up of providers that were accredited by ICANN. The arbitration is not subject to the law, but is governed by the "Uniform Dispute Resolution Policy" (the "UDRP") which together with the Rules for Uniform Domain Name Dispute Resolution (the "Rules") define the types of complaints that can be brought before the providers, the available remedies, and a loose normative framework for deciding the cases.[169] Specifically, the UDRP provides that a complainant must prove three elements in order to win her case: (1) the domain name must be identical or confusingly similar to the complainant's trademark, (2) the domain name registrant has no legitimate interest in the domain name, and

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165 *Id.* at 56.

166 *Id.* at 62–72.

167 *Id.* at 23.

168 Thomas, *supra* note 156, at 24.

169 *See generally*, UDRP, http://www.icann.org/en/help/dndr/udrp/policy (last visited Jan. 27, 2015) [hereinafter UDRP Rules]; Thomas, *supra* note 156, at 22.

(3) the domain name has been registered and is being used in bad faith.[170] Each of the UDRP providers offers a non-binding compulsory online arbitration process.[171] The complaints are filed online by a complainant to a provider of her choice.[172] The process is document-based in that no sessions are held and the arbitrator decision is based exclusively on party submissions.[173] A complainant can request one of two remedies—cancelation or transfer of domain name registration, but no monetary award can be given.[174] The process does not restrict parties from approaching the court system, but allows parties to challenge an award by a court within ten days of the arbitrator's decision.[175] The process adheres to a strict and swift timetable, which ends in a decision of the arbitrator(s) shortly after its appointment,[176] typically within sixty days of the filing of the complaint.[177] The process costs approximately $1,500 for a single-arbitrator deciding on up to five domain names (and approximately $4000 if decided by a panel of arbitrators), paid by the complainant, unless the respondent requested that the case be heard before an expanded panel of three.[178] All decisions by ICANN providers are published online and are accessible to the general public.[179]

There are currently five providers that are based in different regions and offer services in various languages.[180] In the fifteen years since the establishment of the system, tens of thousands of cases have been resolved,[181] over ninety percent of which have

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170 *See id.* at ¶ 4(a).

171 Thomas, *supra* note 156, at 22.

172 *Id.* at 22.

173 UDRP Rules, *supra* note 169, at ¶ 15.

174 *See id.* at ¶ 3.

175 *Id.* at ¶ 4(k).

176 *Id.* at ¶ 6(f).

177 Thomas, *supra* note 156, at 23.

178 UDRP Rules, *supra* note 169 at ¶ 6(c).

179 *Id.* at ¶ 16.

180 *See id.*

181 *Internet Corporation for Assigned Names and Numbers*, UDRP STATISTICS, http://archive.icann.org/en/udrp/proceedings-stat.htm (last visited Jan. 27, 2015) (for UDRP statistics up to 2004); *UDRP Statistics 2012*, SKETCHLEX INFOGRAPHIES JURIDIQUES. For French provider statistics referring also to general statistics, see SKETCHLEX INFOGRAPHIES JURIDIQUES, http://sketchlex.com/03/02/2013/infographies/udrp-statistics-2012-year-of-french-touch/ (last visited on Jan. 27, 2015)(to see French statistics referring to general statistics).

been decided in favor of the complainants,[182] and with a significant portion being decided ex-parte.[183]

Over the years, the ICANN process has been received with mixed, and at times contradictory, views. On the one hand, the process and the UDRP were seen as a positive development, introducing an efficient, well-planned structured process that could offer certainty and effective enforcement in the face of lawless conduct online. Proponents of the UDRP underscored the limited mandate arbitrators had in terms of types of complaints and remedies offered; the high level of expertise possessed by arbitrators, and the preservation of access to courts.[184] All of these allowed trademark holders formerly forced to negotiate with cybersquatters, to regain use of their trademark in the virtual arena quickly and at a reasonable cost (when compared with the prospect of international litigation), before their trademark was diluted and their reputation harmed.

On the other hand, critics highlighted the fact that outcomes were predominantly in favor of claimants, i.e. trademark holders, questioning the fairness of the UDRP process and outcomes.[185] In particular, the possibility for choice of forum by complainant was viewed as problematic. The combination of two design features of the system—complainants' freedom to turn to the arbitration provider of their choice and the publication of arbitration decisions under the UDRP, allowed sophisticated complainants to carefully study the history of decision-making by the various providers and choose their providers accordingly. Transparency also proved ineffective as a quality control measure because it covered only arbitral decisions, without party submissions, which were often necessary in order to understand the particulars of the case.[186] The frequent reliance on a limited group of arbitrators from the large selection available cast doubts on the criteria for arbitrator selection employed by providers.[187] Inherent power asymmetries between what

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182 *See UDRP Statistics 2012, supra* note 181.

183 Thomas, *supra* note 156, at 23 (citing a WIPO report according to which in 2008 85% of complaints were decide in favor of the complainant); Froomkin, *supra* note 154, at 99–100 (noting that the UDRP does not require actual notice, as well as the short time frame for respondents to respond); Michael A. Froomkin, *ICANN'S "Uniform Dispute Resolution Policy" Causes and (Partial) Cures*, 67 BROOK. L. REV. 605, 704–05 (2002) [hereinafter *ICANN's UDRP*].

184 Nicholas Smith & Eric Wilbers, *The UDRP: Design Elements of an Effective ADR Mechanism*, 15 AM. REV. INT'L ARB. 215 (2004).

185 Froomkin, *supra* note 154, at 96–101.

186 *ICANN's UDRP*, *supra* note 183, at 709.

187 *Id.* at 710–11.

were often large corporation-complainants and individual-respondents further exacerbated differences and made tight time frames and costs more difficult to cope with on the respondent's end, and the possibility of turning to the court system highly unlikely.[188] On the substantive level, concerns were raised regarding arbitrators' tendency to view every monetary benefit as coloring the registration with bad faith. Critics were particularly troubled by the fact that eResolution, a provider whose arbitrators were found to rule less frequently in favor of claimants went out of business as a result of a dwindling caseload.[189]

Over the years, some revisions have been introduced to the UDRP, but the principal provisions have remained, continuing to draw loud criticism from a group of sophisticated stakeholders.[190] These concerns were reinforced by ICANN's own legitimacy deficit, as a private U.S.-based corporation administering what was increasingly viewed as a public resource belonging to the international community as a whole.

c) The September 11th Victim Compensation Fund

Fewer than two weeks after the terror attack on the "Twin Towers," Congress enacted legislation establishing the "September 11th Victim Compensation Fund."[191] Unlike the two previous systems, this was a formal-administrative system that was established through an Act of Congress. The fund was created in order to provide fair and quick compensation without proof of fault to those injured and the families of those killed in the attack, while endeavoring to protect airline companies from a wave of suits that could have put them out of business.[192] Additionally, Kenneth Feinberg, who was appointed "special master," established detailed regulations for implementing the legislation and was given the responsibility of managing the fund and its distribution.[193] Claimants were

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188 Froomkin, *supra* note 154, at 100–01; Thomas, *supra* note 156, at 24; *ICANN's UDRP*, *supra* note 183, at 705–06.

189 *ICANN's UDRP*, *supra* note 183, at 718.

190 *See Uniform Domain-Name Dispute-Resolution Policy*, ICANN, http://www.icann.org/en/help/dndr/udrp (last visited Jan. 27, 2015) (for revisions introduced); *see also Uniform Domain-Name Dispute-Resolution Policy Revisions Suggested*, DOMAIN REGISTRATION SERVICES, http://www.domainregistration.com.au/news/udrp-revisions-recommended.php (last visited Jan. 27, 2015) (for suggested revisions based on critical study of the UDRP database).

191 Ackerman, *supra* note 107, at 143.

192 Janet Cooper Alexander, *Procedural Design and Terror Victim Compensation*, 53 DEPAUL L. REV. 627, 630–31 (2003).

193 Michal Alberstein, *ADR and Collective Trauma: Constructing the Forum for the Traumatic Fuss*, 10 CARDOZO J. CONFLICT RESOL. 11, 35 (2008).

given a choice between bringing a no-fault claim to the fund and filing suit in court. That said, the lawsuits filed in court in these cases were limited by statute in a number of aspects, including by setting an upper limit to the amount of compensation that could be awarded.[194]

In what way did the procedural design contribute to the legitimacy of the process in this case? It was not a simple task, as the process, as mentioned, was intended to suppress the victims' option of filing personal lawsuits through the legal system, a more attractive channel, at least for many of the victims.[195] Those who wished to file suits for damages wanted to do so not only for financial reasons, but also in order to expose information about the circumstances of their injury in a public forum. Adjudication of their claims through such a process, the victims hoped, would impose liability on the relevant parties and effect change.[196] For some of the victims' families, the uniform formulas developed for calculating compensation from the fund only added to a sense of alienation and commodification of the lives of their loved ones killed in the attack.[197] As research has shown, money did matter to claimants, but was not all that mattered.[198] To a large extent, money was important because the amount of compensation given was perceived

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194 Ackerman, *supra* note 107, at 143. As such, this reaction was similar to the means of dealing with large-scale disasters that occurred in the past, in which personal lawsuits were either blocked or limited. *See* Lawrence M. Friedman & Joseph Thompson, *Total Disaster and Total Justice: Responses to Man-Made Tragedy*, 53 DEPAUL L. REV. 251, 286 (2003).

195 Although there were clearly significant benefits associated with choosing the fund option, such as being "relieved of the uncertainty of prevailing on liability and damage claims against uncertain defendants" and being "relieved of the vagaries and possible inconsistencies of jury determinations," as well as being "spared years of discovery and litigation" and "the considerable transaction costs." *See* Linda S. Mullenix, *The Future of Tort Reform: Possible Lessons from the World Trade Center Victim Compensation Fund*, 53 EMORY L.J. 1315, 1343 (2004). Indeed, those that did file suits faced substantial hurdles due to lengthy, contentious and high cost litigation, which put both sides in a difficult position. *See* Michael A. Cardozo, *The Aftermath of 9/11: Reflections of Michael A. Cardozo*, 56 N.Y. L. SCH. REV. 1105, 1108 (2011/12).

196 Alberstein, *supra* note 193, at 38; Ackerman, *supra* note 107, at 199 (for some of the victims' families choosing to submit a claim to the fund was a betrayal of their loved ones, as they felt obligated to open proceedings that would lead to an "investigation of the truth" and would reveal who was responsible for harming them).

197 Ackerman, *supra* note 107, at 202; Gillian K. Hadfield, *Framing the Choice between Cash and the Courthouse: Experiences with the 9/11 Victim Compensation Fund*, 42 L. & SOC'Y REV. 645, 647–48 (2008) (showing that for many potential claimants, choice of forum was made based on a difficult "trade-off between money and a host of nonmonetary values that respondents thought they might obtain from litigation . . . includ[ing] information from otherwise inaccessible sources . . . ., accountability . . ., and responsive policy change. . .").

198 Deborah R. Hensler, *Money Talks: Searching for Justice through Compensation for Personal Injury and Death*, 53 DEPAUL L. REV. 417, 452 (2003) [hereinafter *Money Talks*].

as reflecting society's view of the value of the deceased's life.[199] For other claimants, giving up their day in court (literally) and its conversion to a more flexible administrative process were not perceived as granting the events the significance and respect they deserved.[200] Yearning for a more narrative process, allowing claimants to tell their stories was another source of critique.[201] Notwithstanding the various criticisms, Feinberg's procedural scheme eventually earned broad support, with ninety-seven percent of families of those killed opting to file their claims to the fund.[202]

Many scholars emphasize the balance attained through the procedural design of the fund between efficiency and justice, which engendered a sense of "rough justice" that was sufficient to grant the process legitimacy.[203] On the one hand, considerable emphasis was placed on efficiency by setting a relatively short timetable for filing and processing claims,[204] developing a standard claim form,[205] creating compensation tables,[206] the waiver (in many cases) of holding a hearing,[207] and the absence of an appeal mechanism.[208] On the other hand, the design of the fund included components fitting the definition of justice and fairness in a dispute resolution system. As such, the guarantee of transparency at the systemic level[209] and the desire to engender uniformity in decision-making[210] are consistent with basic concepts of justice. In fact, Feinberg's decision to deviate from the standardized compensation tables in individual cases strengthened the sense of substantive justice,[211] particularly given the reputation he had earned.[212]

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199 *Id.* at 438, 452.

200 Ackerman, *supra* note 107, at 219.

201 *Systematic Issues*, *supra* note 15, at 213.

202 Alberstein, *supra* note 193, at 40; *see also* Ackerman, *supra* note 107, at 180. Nevertheless, critics have pointed out that "nearly half of the claims were filed in the last month of the two years the fund was open for claims." Hadfield, *supra* note 197, at 646. Critics also pointed out that for many claimants, the decision to pursue a claim through the fund was a negative one, driven by real financial need, describing their "choice" as being "bought off," *see id.* at 665, 667.

203 Ackerman, *supra* note 107, at 153.

204 *Id.*

205 *Id.* at 220–21.

206 *Id.* at 151.

207 *Id.* at 155–56.

208 *Id.* at 156; Alexander, *supra* note 192 at 683.

209 Ackerman, *supra* note 107, at 214–15.

210 *Id.* at 216.

211 *Id.* at 150; Michele Landis Dauber, *The War of 1812, September 11th and The Politics of Compensation*, 53 DEPAUL L. REV. 289, 341 (2003).

212 Ackerman, *supra* note 107, at 212–13.

Furthermore, several characteristics of the process—the opportunity for claimants to have voices, the fact that a third party heard their concerns, opinions and evidence, and treated them in a respectful, balanced, and equal manner in the framework of a fair process—all correspond with the principles of procedural justice.[213] Particularly important in this context is the aspect of choice before claimants, such as the choice of whether to file their claim with the fund or through a legal proceeding; as well as whether to hold a hearing or engage only in a paper-based process. The significant opportunity it presented allows them to participate in the process of setting the regulations that would dominate the procedures of the fund. These principles may compensate to a certain extent for the waiver of an appeal mechanism and the lack of a requirement that decisions made by the fund be reasoned,[214] although critics questioned the extent of choice claimants actually had.[215]

An additional aspect contributing to trust of the process was its ability to function differently than the judicial one, rather than simply presenting an alternative to it. For instance, the fund related to the claimants as a group, which empowered them and served a healing and unifying function, in addition to the individual objective of compensation and "closing a circle" on a personal level.[216] The broader goal was realized, among other ways, through the holding of public hearings in the process of formulating the rules for administering the fund and in the decision to adjudicate claims in meetings made open to the public.[217] Finally, unlike in

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213 *Id*. at 219–20. Several scholars were critical toward the fund specifically regarding its procedural justice aspects; *see* Stephen Landsman, *A Chance to Be Heard: Thoughts about Schedules, Caps, and Collateral Source Deductions in the September 11 Victim Compensation Fund*, 53 DEPAUL L. REV. 393, 411–12 (2003); Tom R. Tyler & Hulda Thorisdottir, *A Psychological Perspective on Compensation for Harm: Examining the September 11th Victim Compensation Fund,* 53 DEPAUL L. REV. 355, 382–87 (2003); however, a later empirical article provides a basis for the notion that the claimants who turned to the fund were satisfied with it from a procedural justice perspective. *See* Brian H. Bornstein & Susan Poser, *Perceptions Of Procedural and Distributive Justice in The September 11th Victim Compensation Fund*, 17 CORNELL J.L. & PUB. POL'Y 75, 95–96 (2007). Interestingly, some of the research questions whether claimants were after procedural justice, as most of the comments to Feinberg's proposed rules did not touch on these issues and to a large extent expressed more concern over the end-result than on their "day in court." *Money Talks*, *supra* note 198, at 448–49.

214 Ackerman, *supra* note 107, at 220; *but see*, Alexander, *supra* note 192, at 683 (claiming that the lack of an appeal is not problematic in this case due to the lenient criteria for receiving compensation and its calculation, however it is likely to be problematic in other cases).

215 Hadfield, *supra* note 197, at 665.

216 Alberstein, *supra* note 193, at 36.

217 *Id.* Indeed, the Fund's public nature was negated with the current opaque state of torts law, which is dominated by private settlements; *Money Talks*, *supra* note 198, at 453.

the standard legal proceeding, Feinberg and his team were able to come up with creative solutions to some of the more complex cases through the fund's process,[218] such as in cases in which there was an issue as to which family member was eligible to file a claim.[219] On this level as well, Feinberg himself played a significant role in engendering trust in the system that he, to a large extent, created.

Despite criticism, the fund is generally perceived as a successful scheme. This is especially impressive, given the significant challenges to legitimacy posed by the design aspects of the fund, namely the hasty legislation granting Feinberg's original mandate, the lack of an appeal mechanism, and the compensation mechanisms Feinberg set up, which did not correspond with prevailing tort law principles of corrective justice.[220] Despite these characteristics, the process gained the confidence of a large number of claimants, as well as that of the public at large. At the same time, more emphasis on the diverse goals that claimants seek in these circumstances, forgoing the requirement to waive the right to sue as a condition for compensation under the fund, and enhancing the narrative character of the process under the fund, could have gone a long way in terms of remedying some of the claimants' discomfort with the process created.

d) Insights on DSD and Legitimacy from the Case Studies

The three case studies of dispute resolution systems analyzed above demonstrate the importance of system design in generating legitimacy of formal and informal systems. Each of the systems described above is distinct from the others. In each, different processes were institutionalized (transformative mediation /arbitration /administrative processes); they were implemented in varying arenas (as an alternative to the court or operating alongside the litigation route), in order to handle disputes of different types (discrimination/intellectual property/personal injury), that arise among radically different populations (employees/ trademark holders /individual disaster victims) and were adopted through different avenues (legislation/bottom up, at the initiative of a large institution/a contractual obligation upon registration of the trademark).

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218 Alberstein, *supra* note 193, at 36; Ackerman, *supra* note 107, at 203 (describing, for example, how Feinberg and his team mediated agreements according to which the family of the deceased would share the compensation with his spouse in exchange for altering the formula for calculating the compensation, such that it would take into account the existence of the relationship).

219 Ackerman, *supra* note 107, at 203.

220 *Id.* at 139.

In light of these significant variances, it is not surprising that one of the more important lessons that may be drawn from these experiences is the *lack of a uniform, trans-substantive formula* for systems design. The systems reflect the shift from a bi-polar dispute resolution landscape of formal vs. informal avenues to one that is based on "*process pluralism*."[221] Under such approach, each process has its own unique "moral integrity,"[222] shaped by its characteristics, the values it reflects, and the goals it promotes. The design and degree of each system's success are a function of the ways in which such procedural components and traits interact with the specific context and the characteristics of the environment and the parties for which the dispute system is being designed. The challenge in all of these environments and systems is to cope with conflicts of interest (actual or potential) and imbalances of power among the parties, as well as between the parties on the one hand and the dispute resolution provider (or designer) on the other hand, so as to ensure an efficient and fair dispute resolution process, and to generate trust among participants in the system.

Notwithstanding the differences between the systems discussed above, several common traits can be identified on the design level. First, it is significant that all three entailed a *careful and meticulous design process*, with varying levels of stakeholder involvement, in which serious thought was invested regarding the needs and interests of those involved, the types of disputes and the advantages of various procedural options and choices. In the preliminary stage of design, the designers identified the system's goals and translated them into the type or types of processes that will be offered. They then turned to design more elaborately the specific system so as to ensure equity, efficiency, and the professionalism of both the system as a whole and of those operating within it.

All of the systems that were examined, despite their varying levels of formality, aspired to achieve goals that extend *beyond the resolution of individual disputes*—giving voice to the parties, healing, improvement of workplace environment, and norm elaboration; it was the specific design of each system, through a mix of traits chosen for it, that led to the realization of such goals. Also, in all three systems, *stakeholder involvement* was sought in the design process and in certain instances helped shape important design features. In the ICANN case; however, a vocal critique was that the interests of certain stakeholders were given substantially more

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221 *Peace and Justice*, *supra* note 30.

222 *See supra* notes 28–31 and accompanying text.

weight in designing the system than those of other groups, ultimately detracting from the system's legitimacy.

The designers of the UDRP chose a system based on online arbitration proceedings in order to advance the goals of certainty, predictability, and efficiency, by using clear rules and by relying on professional decision-makers and the efficient enforcement of arbitration decisions. This would allow, it was hoped for norm elaboration and enforcement on the cross-jurisdictional, "law-less" virtual environment. Other features of the system, the absence of detailed rules that would ensure consistency, claimant's ability to choose providers, and the lack of clear and unbiased rules for arbitrator assignment—have detracted from ICANN's ability elaborate consistent norms that produce widely-accepted outcomes.

In the case of the USPS, the objective of improving workplace climate along with handling complex problems of discrimination was advanced by choosing transformative mediation as the anchor of the system. This process is not based on fixed and unequivocal rules, nor is it necessarily inexpensive or speedy; rather, it is a process that encourages rich discourse between the parties in order to teach them about themselves and the other. Dialogue of this sort is particularly suited to the exposure of the complex dynamics found at the core of a discrimination complaint. Systemic features such as choice of external mediators and the voluntary nature of the process on the employees' end have helped mitigate concerns over mediator neutrality and independence as well as power imbalances and protection of legal rights.

In the context of the September 11th Victim Compensation Fund, a central goal was to create a mechanism that would provide victims and their families with fair compensation without bankrupting the airline companies. The choice of a public, adjudicatory process based on uniform criteria was intended to provide a sense of justice and acknowledgment of the extent of harm suffered by the victims of the attack. Alongside these goals, the existence of a relatively quick process, which left room for flexibility, was designed to ensure unity and healing, both for the direct victims and for American society as a whole. The fact that this was a newly designed process with unique traits enhanced the feeling that it was meant to address an unprecedented event, so much so that even the remedy offered was distinct from compensation offered in other personal injury claims. Nevertheless, the systemic goal for efficiency and protection of the airline companies was intent with some of the claimants' individual interests and needs. For those

interested in outcomes other than monetary compensation, who associated an opportunity for voice and the dignity of their loved ones with a judicial process, Feinberg's uniform schemes with their often unpredictable and inconsistent flexible adjustments, were no panacea.

Another important feature that typifies all three systems is their ability to create an *institutionalized system while preserving its flexible and dynamic nature*. Each of these systems acknowledges the importance of rules and their consistent application in the system's operations, while also acknowledging the need for flexibility so as to address individual circumstances and diverging interests, values and goals on both individual and systemic levels.

This combination of uniformity and uniqueness, consistency and flexibility, is perhaps most strongly evidenced in the design of the September 11th Victim Compensation Fund. On the one hand, the attempt to establish clear predetermined rules and the adoption of general compensation tables was significant. On the other hand, Feinberg decided in certain cases to stray from the rules in order to guarantee fair compensation to the claimants even at the cost of deviating from the rules and detracting from the system's uniformity. For some, the balance reached by Feinberg enhanced legitimacy; for others, it was a source of critique.

In the case of the USPS, flexibility was engrained in the choice of process—transformative mediation, but consistency was ensured through rigorous development of standards and practices for mediators and ongoing monitoring and evaluation of mediator interventions. While the research conducted seems to support REDRESS's success in these efforts, concerns voiced in other contexts over the complexity of performing transformative mediation may cast a shadow on the system's commitment to this model.

ICANN's system sought to strike a balance between consistency and the need for flexibility by developing simple, general principles for determining bad faith registration that would be applied globally, by expert arbitrators. The generality of the principles was supposed to leave room for local and contextual interpretations and applications, while sustaining a uniform core understanding of the phenomenon.

Another important feature that is evident is the need for ongoing *evaluation, learning and improvement*. In all three systems, these features exist, but follow different models, and have generated varying levels of satisfaction and legitimacy. The ability to detect problems and craft appropriate solutions over time can be

key in successfully resolving individual disputes, preventing similar problems from arising in the future, and enhancing the system's legitimacy and appeal.

The Fund allowed for evaluation and learning both in a structured way by allowing for broad input on the proposed rules, as well as more sporadic change during the life of the fund as Feinberg sought to address some of the concerns and critiques that were voiced against the fund's operation and the outcomes reached through it.

In the case of USPS, there was a great deal of structured learning that was conducted in a scientific manner, with the involvement of both academics and practitioners. The system itself was implemented in stages, first as a pilot, and it later expanded, while applying the lessons learned from stage to stage. The monitoring of and learning from the system were an ongoing part of an improvement process whose lessons continue to be integrated.

Lastly, the UDRP and the Rules allowed for discretion and interpretation by each panel. In addition, transparency of arbitrator decisions allowed for external monitoring and critique of the system. While the UDRP revisions failed to address some of its features that opened the door for abuse of the system, potential for such change existed.

The identity of those who carried out the monitoring and supervision, and the incentive for learning in each of the cases varied—personal reputation and public scrutiny in the case of the fund, academic research and ethical-professional obligation in the case of the USPS, and the economic and professional interests of the system's developers in addition to the involvement of a group of sophisticated and strong stakeholders in the case of the UDRP.

Two of the systems were designed to minimize *structural biases* related to potential conflicts of interest between dispute resolvers and the parties employing their services, and/or *imbalances of power* among parties to the disputes. Thus, in the case of USPS, the choice of the transformative mediation process, in which the third party does not opine on the desired outcome, allows the mediator to operate independently and in a balanced manner and to be perceived as such by the parties. In fact, the reliance on external mediators also reduced the likelihood of conflicts of interest between the mediators and the parties. No less important, the system was voluntary for employees but mandatory for the employer. Furthermore, USPS focused on a mediation model whose declared goal is empowerment of the parties and recognition of the other,

and therefore is supposed to minimize imbalances of power among disputing parties. The question of course remains to what extent transformative mediation actually accomplishes this goal, but the founders of this school assert that there is empirical basis to support their claims.[223]

The independence of the September 11th Victim Compensation Fund was guaranteed by the fact that it—like courts—was established and appointed by statute, and that Feinberg, through the rules he established and the discretion he exercised, sought to treat claimants equally, but at the same time to ensure that parties with lesser means receive fair compensation in spite of the fact that the basis for calculating their compensation would have been significantly lower than that of well to do victims. In the Fund's case, the system's transparency and Feinberg's reputation played a key role in ensuring trust in the system, as did the direct involvement of the public in the process of formulating the rules. Nevertheless, claimants' socio-economic status was a significant factor in their decision whether to file a claim through the fund or litigate, detracting significantly from their sense of "choice," and, consequently, impacting the fund's legitimacy.

In the case of the UDRP, questions of balance of powers and fairness of the system were raised from its inception. Given the inherent imbalance of power between what were often individual registrants and trademark holders who were typically strong corporate entities, the short timetables, the costs of preparing a response and/or requesting an expanded panel and of challenging an arbitral decision in court, proved prohibitively difficult for respondents. Furthermore, a claimant's ability to choose a provider combined with the lack of clear rules for arbitrator assignment and the partial transparency afforded by the process, cast a shadow over the system's perceived legitimacy and opened the door to claims of forum shopping and favoritism.

Finally, these cases demonstrate to what extent the *involvement of particular individuals who possess leadership skills and charisma* in the design of the dispute resolution system can make a tremendous difference in terms of both being able to set up a dispute resolution system and in terms of ensuring the system's legitimacy in the eyes of its users. Thus, in the case of the USPS system, Cindy Hallberlin, who was exposed to the mediation process during a traumatic class action suit, was the key figure both in propos-

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223 Antes, *supra* note 150.

ing the establishment of an internal dispute resolution body and in designing its central features. Similarly, Kenneth Feinberg, the special master of the September 11th Victim Compensation Fund, determined the fund's *modus operandi* and extended his positive reputation to color the fund's activities. In the case of the USPS, it seems that the debate over ICANN's mandate and role in controlling a public international resource colored the debate over the legitimacy of the dispute resolution system it administered as well.

Over recent years, both the judicial process and alternative processes have undergone significant changes that have challenged the traditional sources of their legitimacy: the judicial process is conducted in a manner that leaves more and more room for discretion at the expense of clear and fixed rules, and alternative processes can take place without the consent and choice of the participants. Given this situation, in which in both formal and informal processes (albeit to varying degrees) and procedures are becoming increasingly lax, the third party exercises relatively broader discretion and the consent of the parties is limited, the process of systems design becomes a central tool in engendering formal and informal systems' legitimacy.

The field of DSD provides insight into how a careful and meticulous planning process can create fair and efficient dispute resolution systems that earn the trust and support of actual and potential users. As the case studies reveal, such a process includes the identification of system's goals and the analysis of dispute types and disputant characteristics. These attributes will determine the kind of process(es) chosen for the system and their particular design, so as to ensure the fairness of third parties and the balance of power between disputing parties. It is the combination between a tailored, context-specific mix of features within the system and the institution of the ongoing monitoring of the process. Its results ensure a dispute resolution system's fairness and effectiveness, and, consequently, its legitimacy.

The three systems of dispute resolution presented in this chapter were established between the mid-1990s and the beginning of the 21st century. Since their establishment, the DSD field has experienced significant changes, in light of various technological and social-cultural developments that have threatened to weaken some of the fundamental characteristics of the field. The following chapter will discuss these developments and examine whether they are sufficient to undermine the status of the DSD field as a basis for legitimacy in formal and informal dispute resolution systems.

e) Towards Another Crisis? Preserving DSD as a Source of Legitimacy in the Face of Shifting Boundaries

A deeper examination of DSD reveals that the field, at least at the outset, was based on a logic of boundaries. These boundaries operate on a professional, physical, and conceptual level, and they have served a central role in ensuring the legitimacy of the design process itself, and, consequently, of the dispute resolution systems that emerged through such design principles.[224]

On the professional level, the field generated a new profession of dispute resolution system designers, as well as internal dispute resolution professionals (ranging from court ADR coordinators, through corporate complaint bodies to "in-house" mediators).[225] The system designers were mostly trained in institutional development or dispute resolution and had actual experience in conducting assessments of the institutional culture of disputes, which is at the heart of design and evaluation of an internal-institutional dispute resolution system. While "DSDers" and internal dispute handlers did not reach the status of a formal independent profession, such as lawyers or doctors, practice in the field came to be understood as one that requires training, study, and hands-on experience in one of several relevant disciplines.[226]

On the physical level, those in charge of dispute systems design and of delivering dispute resolution services in-house, have sought to establish distance from other parts of the organization (management in particular, but others as well), in order to be perceived as neutral and preserve their legitimacy.[227] This separation, which often operates on a metaphorical level, has also been translated to the physical realm and real space. The recognition that the internal-organizational dispute resolution department handles disputes to which the institution or its management may be a party has made such physical separation necessary. Confidentiality, typically perceived as an essential element in ADR so as to generate trust in the third parties operating in the dispute resolution department, cannot be ensured without physical separation between organizational units, employees, and databases. The need for confidentiality has therefore been translated into a set of practices

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224 Rabinovich-Einy & Katsh, *supra* note 87, at 157–62.

225 *Id.* at 158.

226 *Systemic Issues*, *supra* note 15.

227 Howard Gadlin & Elizabeth W. Pino, *Neutrality: A Guide for the Organizational Ombudsperson*, 13 NEG. J. 17–35 (1997); Mary P. Rowe, *The Corporate Ombudsman: An Overview and Analysis*, 3 NEG. J. 127, 128–29 (1987).

aimed at limiting documentation of the operations of the dispute resolution department, which, in turn, has rendered effective monitoring and supervision of such unit's operations difficult, if not outright impossible.[228]

Lastly, on the conceptual level, the DSD field was based at the start on a strict dichotomy between formal and informal proceedings, according to which it focused on ADR processes and in the framework of that category adopted the conceptual distinctions advanced by Ury, Brett and Goldberg between interest, rights, and power-based processes.[229] These distinctions were critical to the field in order to illustrate its contribution as an alternative to the formal system. Using this conceptual language, the advantages of deliberate design of internal dispute resolution systems could be emphasized, as well as the flexibility and freedom of choice that they provide to a wide variety of settings. Sharp distinctions were made between interest-based and rights-based processes, and within each category the various processes tended to have fairly fixed characteristics. Thus, while the mediation process was described in the literature as a flexible process, tailored to the context and to the preferences of the parties and limited only by the imagination of the parties, ultimately, a uniform and commonly accepted practice was developed for the operation of the mediation process. The practice was conducted in a predetermined, uniform manner, and as such, lost many of the advantages that had been attributed to the mediation process over the judicial alternative.[230]

To a large extent, we are currently in a new stage of this field's development, in which we can see on the one hand the expansion of the DSD field into new planes, and on the other the undermining of the boundaries that have defined the field on a professional, physical and conceptual level. On the professional level, we see the rise of dispute resolution systems that have been designed by people from a variety of disciplines and specialties and who are not

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228 Howard Gadlin, *The Ombudsman: What's in a Name?*, 16 NEG. J. 41(2000).

229 Rabinovich-Einy & Katsh, *supra* note 87, at 158–59.

230 *See* Nancy A. Welsh, *You've Got Your Mother's Laugh: What Bankruptcy Mediation Can Learn from the Her/History of Divorce and Custody Mediation*, 17 AM. BANKR. INST. L. REV. 427, 432–41 (2009) (describing various practices that fall under the definition of mediation, which are likely to blur the strict distinction between mediation and other processes of dispute resolution). Nonetheless, as another study by Welsh showed, the majority of mediation processes that take place in a judicial environment (which also constitute the majority of mediation proceedings in Israel and the US), tend to fit one specific pattern. S*ee, e.g.*, Leonard L. Riskin & Nancy A. Welsh, *Is That All There Is? The "Problem" In Court-Oriented Mediation*, 15 GEO. MASON L. REV. 863, 864 (2008).

necessarily trained in the field of dispute resolution. The new technologies and the Internet in particular, with the opportunity that they offer ordinary users to create user generated content, expropriate the field of DSD from professional hands repeatedly and with great success.[231] For instance, as part of its dispute resolution system, the Wikipedia website offered (among many other options) a mediation process described as "informal mediation," and called "mediation cabal." This process was designed by lay participants, and therefore perhaps not surprisingly, does not correspond to the prevailing accepted mode with since all of the mediations that take place within its framework are public.[232] In addition to the advantages in involving participants in the process design, new technologies contain their fair share of dangers as well. Technology is not neutral and any choice made in the design of a dispute resolution system promotes a certain mixture of values, which is likely either to advance or to harm the fairness of the system.[233] Therefore, it may be the case that the importance of professionals, as those who can expose or neutralize in advance biases and barriers, will actually increase. The background, training and capabilities of such professions may, however, be very different from and much more diverse than those accepted in the field today.

Furthermore, the new arenas in which disputes arise and the new mechanisms through which they are being addressed underscore the need for increased specialization, broad knowledge and new tools among dispute resolution system designers and those who resolve disputes in the current era, and in particular technological expertise.[234] The most significant threat posed by new technology to the traditional dispute resolution is perhaps the appearance of automatic processes in which software replaces the

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231 Rabinovich-Einy & Katsh, *supra* note 87, at 195–98.

232 For details on the various dispute resolution processes on the Wikipedia site, including this process, see Wikipedia: Dispute Resolution, WIKIPEDIA, https://en.wikipedia.org/wiki/Wikipedia:Dispute Resolution (last visited June 15, 2015).

233 Helen Nissenbaum, *Values in Technical Design*, *in* 1 ENCYCLOPEDIA OF SCIENCE TECHNOLOGY AND ETHICS lxvi, lxvi–lxx (Carl Mitcham ed., 2005) (discussing the challenges of integrating values into the design of technology).

234 Thus, for instance, when a group of researchers from the University of Massachusetts developed an online process for dispute resolution for a certain federal body, they did so in collaboration with computer science researchers. The computer science researchers played a very significant role, which extended beyond translation of the ADR people's requests regarding the characteristics of the system, as they constantly questioned the assumptions behind the stated goals of the system and the means of realizing them. *See* ETHAN KATSH & LEAH WING, *Ten Years of Online Dispute Resolution (ODR): Looking at the Past and Constructing the Future,* 38 UNIV. OF TOLEDO L. REV. 19, 3–35 (2006).

third party. In various contexts, automated online negotiation processes have been launched in which the program not only serves as a platform for negotiation, but also rephrases what the parties have written and changes the order in which their statements appear, in a manner similar to in-person mediator interventions.[235] On the one hand, this appears to be a direct negotiation process between the parties without the involvement of a third party. On the other hand, the process influences communication between the parties and assists them in transferring and processing the information exchanged between them, and thus resembles mediation. We find that these new processes challenge traditional categorization in ADR. While today the scope of disputes to which these programs apply is limited, it seems likely that in the future we will see their increased popularity at the expense of human mediators and arbitrators, due to the development of richer technologies as well as changes in our conception of what constitutes a dispute resolvable via automatic means.[236]

On the physical level, creating a barrier, or "Chinese wall," between the dispute resolution department and the institution in which it operates seems less and less possible and largely undesirable. These days, the various departments within an institution are digitally connected. It is increasingly difficult to preserve the confidentiality of information, especially when it has been documented digitally.[237] That said, the diminishing of confidentiality actually opens the door for enhanced legitimacy because it allows for more effective monitoring and quality control over third parties' interventions and the system's overall fairness and effectiveness. The documentation that is associated with the current era allows learning to take place on recurring patterns of disputes, success stories, and failed interventions, in ways that were impossible in the past. This will become even truer as our social perceptions on privacy continue to undergo far-reaching changes.[238]

Finally, on the conceptual level, we have seen that the DSD field is based on a sharp distinction between formal and informal processes as well as sub-distinctions within the ADR sphere be-

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235 Rabinovich-Einy & Katsh, *supra* note 87, at 162 & n.46.

236 Orna Rabinovich-Einy & Ethan Katsh, *Lessons from Online Dispute Resolution for Dispute Systems Design*, *in* ONLINE DISPUTE RESOLUTION: THEORY AND PRACTICE 51 (Mohamed Abdel Wahab, Daniel Rainey & Ethan Katsh, eds. 2011).

237 JEFFREY ROSEN, THE UNWANTED GAZE: THE DESTRUCTION OF PRIVACY IN AMERICA 7 (2000).

238 D.M. Moscardelli & C. Liston-Heyes, *Teens Surfing The Net: How Do They Learn To Protect Their Privacy?*, 2 J. BUS. & ECON. RES. 43, 51 (2004).

tween various types of processes, where each process is associated with a distinct set of characteristics.

In the last several decades, as was described above, the implementation of the DSD field expanded to the courts. This was a development, which undermined the conceptual boundaries on which the field of process design was founded. The changes that occurred in the courts over the last few decades, which increased their flexibility, as well as the changes made to the alternative processes via their institutionalization, to a large extent dulled (though did not entirely void) the distinction between those arenas.[239] Again, even within the framework of ADR processes, new types of processes emerged in recent years, such as automated negotiation processes. These processes include a variety of software-based equivalents to the negotiation process that are familiar to us from the physical environment. For instance, in some cases, online processes aid the parties in exchanging information about the problem that has arisen and steer them toward mutually agreeable solutions.[240] In other cases in which the dispute is monetary (or quantitative), the program can verify whether there is a sum on which the parties are willing to compromise by receiving confidential proposals from each of the parties.[241] A deep examination of these processes reveals that they defy the classic distinction between direct negotiation and a third party-facilitated process. The automated process creates a new space in which there is no involvement of a human third party, but the software—very much like the human mediator processes the information and intervenes in the communication process between the parties.

One would assume that the challenges posed to the field by the blurring of physical, conceptual and professional boundaries would undermine its status as a basis for the legitimacy of both formal and informal processes. However, closer examination reveals that the changes that the field of DSD is undergoing are, in fact, likely to strengthen it as the basis of the legitimacy of dispute resolution processes.

A broader array of experts from new fields, along with laypeople, both in alternative process design and as dispute resolvers, could actually boost the field and the confidence in it and in the

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239 *See supra* Part IIB.

240 *See, e.g.*, WIKIPEDIA: DISPUTE RESOLUTION, *supra* note 232; *see also* Dispute Resolution Overview, EBAY, pages.ebay.com/services/buyandsell/disputeres.html (last visited June 15, 2015).

241 CYBERSETTE http://www.cybersettle.com/about-us (last visited on Jan. 27, 2015).

dispute resolution systems that it generates. Similarly, the accessibility, greater openness and willingness on the part of dispute resolution units to share information (even if partial, aggregate and/or anonymous), also hold the potential to engender faith in the system as they mitigate concerns of conflicts of interest and ensure the fairness of the system. Finally, the loosening of conceptual boundaries, by challenging the types and characteristics of processes on which dispute resolution processes have tended to focus, is shifting the center of gravity from distinctions between process types to questions regarding the central features that span the various dispute resolution processes, formal and informal.

Among the questions with which dispute resolution system designers must cope in order to preserve the legitimacy of the products of their design, one can point to the following: (1) What would users of the system like to achieve and which processes would best meet their needs? (2) What are the potential conflicts of interest during the design and intervention phases, and how can they be mitigated? (3) What are the power dynamics among potential users of the system, and how can fairness and efficiency be guaranteed in light of them? (4) How will monitoring and quality control over the system be conducted? (5) How will the system preserve its flexibility and its ability to learn from experience? The process of DSD that will address these questions may serve as a basis of legitimacy for both courts and ADR processes, even in an era of blurred boundaries and challenges to the underlying principles of the field, as they were developed several decades ago.

III. Conclusion

Legitimacy is the basis for the existence of courts, as well as its alternatives. Without it, quarrelling parties would not bring their matters before dispute resolution bodies, nor would they abide by the decisions or agreements attained through them. In the past, various processes of dispute resolution drew their legitimacy from different, distinct sources: the formal processes relied on elaborate procedures that limited judges' discretion and allowed effective supervision through the appeal process, whereas informal bodies relied on the consent of the parties and their participation in the process (and thus they were more tolerant of flexibility and the exercise of discretion by the third party). In other words, legitimacy of dispute resolution processes depended on the opposing na-

ture of formal and informal processes; it was the contradictory nature of these processes that generated legitimacy.

Over the years, these sources of legitimacy were challenged for both formal and informal processes, as the distinctions between these process types became less polarized. The judicial process became more flexible, as the rules lost their power as a restraining influence and as a standard for evaluating the judicial interventions and decisions after the fact. Alternative processes, too, underwent significant changes with their institutionalization into the formal system, as parties found themselves pressured or obligated to turn to ADR processes, undermining consent as a basis for such processes' legitimacy. Because of these changes, the source of legitimacy of both courts and alternatives is shifting from the nature of the mechanisms themselves to the process of their design. Indeed, dispute systems design has become a field in and of itself, cutting across the formal-informal divide.

The literature and the practical experience in the field of DSD have generated principles of design of dispute resolution systems, whose goals are dispute resolution, management and prevention. The field of DSD has exposed the choices available in the design of procedural systems and in the connection between such choices and substantive outcomes. While initially, process design principles emerged from (and were further developed for) the informal sphere, in recent years, they are also being applied to courts. Rather than drawing legitimacy from the antithetical nature of formal versus informal dispute resolution structures, DSD focuses our attention on the primary contextual factors relating to the types of disputes that arise, the characteristics, goals and interests of the parties involved, and the systemic goals such setting seeks to promote. By acknowledging the unique features of the various processes and the plethora of procedural options that are now available, and by engaging in a rigorous and collaborative design process, the dispute systems that emerge may be better situated to address plural ends, values, and interests, as well as to tackle power imbalances and other potential and actual barriers towards fair and effective dispute resolution. The future of courts therefore lies, not in restoring formality and reducing discretion, but in instituting design processes and quality control mechanisms that meet the principles described above.

With the many changes that the field of dispute system design is currently experiencing, particularly as the distinction between the formal and informal becomes less and less relevant, the ques-

tions that dispute resolution system designers need to address must also change. In order to guarantee a reliable system, they must focus primarily on the characteristics of likely users of the system, on identifying the power dynamics, and on ensuring ongoing monitoring over the process and its results. Such approach would not only allow us to overcome the current legitimacy crisis, but would also save the dispute resolution field from yet another deep challenge to its fresh legitimacy base.