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Court-Connected Mediation Compared: The Cases of Argentina and the United States

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COURT-CONNECTED MEDIATION COMPARED: THE CASES OF ARGENTINA AND THE UNITED STATES

*Timothy K. Kuhner**

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I. INTRODUCTION AND METHODOLOGY

This article presents and compares data collected in Argentina and the United States during each country's initial experience with court-connected mediation. An analysis of these data yields a case study on the beginning of two mandatory mediation experiences at the national level that will prove useful to countries contemplating the adoption of mediation laws or the reformation of existing ones.

Mediation, one of various "Alternative Dispute Resolution" (ADR) practices, has long been employed in societies around the world. In many countries today, ADR practices represent an alternative to litigation and, more generally, to adversarial ideology. Yet, this truism is coming into question. In the last twenty-five years, mediation has become a mainstream practice in the United States and, more recently, in Latin America, and in many cases is the first mode of dispute processing to be applied.

In the period between 1990 and 1999, Argentina and the United States began their experience with court-connected mediation and achieved notable results. Comparing these initial experiences is essential to gaining a clear view of what problems and advantages stem from the particular contours of each country's approach to court-connected mediation. In addition to insights derived from this comparison, however, this article uncovers surprising facts about the practical effects of mandatory mediation. For example, the data on settlement rates and administrative costs suggest that the courts—that is, the government—in each country save money through the operation of the mandatory mediation laws, but that this benefit to the courts comes at a financial and temporal cost to the majority of disputants.

The comparison undertaken in this article is functionalist in that it notes that mediation, although different in each country, serves similar purposes in each. But the primary, proclaimed function of a thing is often—and mediation is no exception—just one of many other functions. Accordingly, the comparison undertaken here is wide-reaching. It begins by analyzing mediation on paper—the rationales for mandatory mediation and the laws that provide for its institutionalization. Then, the analysis turns to mediation's effects in practice. This Article concludes with a discussion of larger issues affected by mediation, such as market liberalization and power dynamics between social classes. Consequently, the variables

compared fall on varying levels of abstraction, starting with each law's purpose and textual characteristics, passing through their direct effects, and finishing with macro change.

There are two points of departure for this comparison:¹ a tangible legal development common to both countries and an ideal or abstraction, also common to both countries, which motivated this development and continues to draw support for it. With regard to the former, both countries have passed federal laws that authorize mandatory mediation for a variety of cases. With regard to the latter, proponents of the laws and of mediation in both countries have made broad claims regarding its virtues, claims that elucidate particular views of efficiency and legal culture.

A key difference between the two countries lies in the fact that mediation developed organically within the United States, but only via transplantation in Argentina. Thus, in Argentina, complexity arises not only from the presence of a challenge to the litigation paradigm, but also from the fact that this challenge emanated from abroad. The challenge posed by mediation to the litigation paradigm is, however, the primary phenomenon to be analyzed. Although mediation was transplanted to Argentina, the larger and more profound transplant is that which has been effected upon the court system. A consensual and participatory dispute processing mechanism was implemented alongside its older, more authoritative brother. The purpose of this comparison is to elucidate not only the immediate effects of mediation, but also the greater significance and unintended consequences of its implementation in two very different countries.

The research leading up to this Article consisted of both fieldwork and a review of pre-existing data. I gathered data on mediation practice in the Argentine Federal Capital, Buenos Aires,² during a six-month field study in 1998-1999, the time period during which the initial data set on the mediation laws was emerging.³ During this time, I conducted thirty semi-structured interviews with lawyers, social scientists, Ministry of Justice

1. These form the *tertium comparationis* for my study. See John C. Reitz, *How to Do Comparative Law*, 46 AM. J. COMP. L. 617, 622 (1998) (discussing the importance of a common point of departure).

2. Until very recently, almost all mediation activity in Argentina was concentrated in the Federal Capital of Buenos Aires, a city with three million inhabitants. The name "Buenos Aires" sometimes includes the urban area that contains an additional 8 million people immediately beyond the Federal Capital's limit. For the purposes of this article, "Buenos Aires" refers only to the Federal Capital and its three million people.

3. This research was made possible by a fellowship awarded to me by the Thomas J. Watson Foundation, which enabled me to investigate first-hand the use of consensual dispute resolution practices in Argentina, Ecuador, and Costa Rica.

personnel, and mediators and observed 20 court-mandated mediations in Buenos Aires. All translations of Argentine legal texts and commentary are my own.⁴ For data on mediation practice in the United States, I have relied mostly on studies conducted by RAND.⁵ My analysis of the data from these studies is, however, original.

II. MEDIATION DESIGN: QUESTIONS OF THEORY AND INITIAL IMPLEMENTATION

From the standpoint of legal transplant postulates,⁶ the great irony of mediation is that it is not intended to “accord with the dominant ideology in host countries.”⁷ Rather, it is intended to change the dominant ideology responsible for a population’s propensity to litigate. The mediation institution in both countries encourages bargaining among parties to a lawsuit with the express goal of achieving settlement without incurring the financial and temporal costs associated with litigation. When exported to a country without mediation experience, however, a double change occurs: first, a change in legal procedure resulting from the mere fact of a transplant and, second, deeper changes promoted by the operation of the new law. This trajectory towards deeper change transcends the immediate importance of the new mediation procedures.

A. *Mediation in Theory*

It is said that legal culture “encompasses the epistemological assumptions regarding rationality, efficiency, and merit” and that these assumptions are “historically conditioned and deeply rooted . . . influenc[ing] the

4. This task has not been difficult, since a highly technical vocabulary is employed in the legal texts. Still, I have tried to minimize the risks associated with wholly literal translations. See MARGOT ASTROV, *AMERICAN INDIAN PROSE AND POETRY* 5 (Capricorn books 1962). (“Wholly literal translations would do little justice to the original In some way or other the translator has to translate not only the actual words of a myth, tale, or a song, but also the cultural matrix of which the verbal document to be translated is an organic part.” *Id.*)

5. RAND Corporation, at <http://www.rand.org/index.html> (last visited May 23, 2005).

6. It is unclear, contrary to Esin Öricü’s assertion, that “transplant” is an inaccurate term, since the “transplanted institution continues to live on in its old habitat as well as having been moved to a new one” Esin Öricü, *Law as Transposition*, 51 INT’L & COMP. L.Q. 205, 205 (2002). One can clip and transplant a section of a spider plant in a new locale without the original plant ceasing to exist. *Cf. id.*

7. John Gillespie, *Transplanted Company Law: An Ideological and Cultural Analysis of Market-Entry in Vietnam*, 51 INT’L & COMP. L.Q. 641, 645 (2002) (describing one of the “working postulates” synthesized from Otto Kahn-Freund: “Legal Ideology: Transplanted laws should accord with the dominant ideology in host countries”).

way bureaucrats and judges use law to find reality.”⁸ Although apparent in this quotation, it should be specified that legal culture encompasses and conditions a society’s notion(s) of justice. Mediation theory explicitly challenges these notions in Argentina and the United States.

Mediation has a relatively stable, agreed-upon meaning in both countries studied.⁹ It is considered a consensual dispute resolution practice in which a third-party with some claim to neutrality facilitates the negotiation, and perhaps resolution, of an issue between two or more parties. Mediation is considered less adversarial than litigation since—unlike litigation—no assumption is made that the parties cannot come to a mutually agreeable solution. Admittedly, mediations are often adversarial in flavor, but at the very least mediation does not posit a zero-sum game, as does litigation where it can generally be said that someone wins and someone loses. Indeed, mediators encourage parties to communicate, understand each other’s interests, and work together to solve a shared problem; however, deals may also be reached in an adversarial fashion through ‘hard bargaining.’ In either case, it is agreed that mediation procedures are “far less structured and more flexible than those of courts and of arbitration.”¹⁰ Thus, parties can exert great control over the mediation process and ‘take ownership’ of their dispute.

Similarly, mediation is considered consensual, since the mediator cannot bind the parties to a particular result. In fact, the parties must agree to a resolution before it can be adopted and become binding. This feature distinguishes mediation from adjudication or arbitration where the third party, here a judge or arbitrator, issues a ruling that the parties must

8. *Id.* at 645.

9. Argentine and U.S. writers agree on the definition of mediation. Regarding the former, *see* ENRIQUE M. FALCÓN, *MEDIACIÓN OBLIGATORIA EN LA LEY 24.573* [OBLIGATORY MEDIATION IN THE LAW 24.573], at 9–18 (Abeledo-Perrot 1996) (citing “voluntariness” as among the “elemental rules of mediation” and noting the general definition of mediation to be “a non-adversarial proceeding in which a neutral third party without power over the parties cooperatively helps the parties to find the point of harmony in the conflict”); JUAN PEDRO COLEIRO & JORGE A. ROJAS, *MEDIACIÓN OBLIGATORIA Y AUDIENCIA PRELIMINAR* [OBLIGATORY MEDIATION AND THE PRELIMINARY AUDIENCE] 10–11 (Rubinzal & Culzoni 1998) (“mediation is a type of negotiation in which a third party does not offer solutions; rather, the mediator works with the parties’ interests [as opposed to positions] so that the parties can consensually and voluntarily reach an agreement”). Regarding the latter, *see, e.g.*, SARAH R. COLE ET AL., *MEDIATION: LAW, POLICY, PRACTICE* § 1:1 (West 2003) (“Mediators are ‘third parties,’ not otherwise involved in a controversy, who assist disputing parties in their negotiations . . . mediation [can be distinguished from other dispute resolution processes] by the consensual character of its disposition Although sometimes the parties are compelled to participate in mediation and may be pressured toward settlement, any party nonetheless may choose not to settle and may pursue other remedies”).

10. COLE ET AL., *supra* note 9, at § 1:1.

follow.¹¹ Although parties may be forced by law to appear at the mediation session, they cannot—at least in theory—be forced to reach a resolution. It is the requirement of participating in the session that renders such mediation obligatory. Finally, several different schools of mediation exist, including: directive (where the mediator pushes towards settlement and often suggests or evaluates ideas for settlement); facilitative (where the mediator tries to maintain the communication flow and build a relationship between the parties, but is neutral regarding settlement); and transformative (where the mediator attempts to help parties become empowered and more empathetic, thereby transforming the conflict into an opportunity for personal growth).¹²

The context in which mediation occurs and the incentives operating in that context will determine what type of mediation is practiced. This practice is not an objective act, since people's perceptions of the act shape the meaning the act acquires. In this regard, a historical note on each country is required to elucidate the cultural starting point and political process from which mediation has been institutionalized.

B. *Mediation in Context: History and the Transplantation Process*

Mediation in the United States, as a formal legal practice on the federal level, was first implemented by Congress in 1898 to address conflicts between organized labor and management.¹³ Several federal agencies were created to address such disputes throughout the first half of the twentieth century, contemporaneous with varied state initiatives applying mediation to non-labor issues.¹⁴ Throughout the entire twentieth century, mediation manifested in many forms and contexts, including conciliation in domestic relations courts,¹⁵ mediation of civil rights disputes, community mediation, and finally in the federal courts starting in the 1970s.¹⁶

11. This statement is made for simplicity's sake. It is true, of course, that arbitration can be custom designed in any way that does not violate an applicable law, meaning that some arbitrations may contain rules that may limit the discretion of the arbitrator to a certain universe of outcomes agreed to in advance by the parties. If an arbitrator's decision is non-binding, however, then the process ceases to be arbitration and becomes a form of third party evaluation, a distinct type of dispute resolution.

12. See, e.g., ROBERT A. BARUCH BUSH & JOSEPH P. FOLGER, *THE PROMISE OF MEDIATION* (Jossey-Bass Publishers 1994).

13. COLE ET AL., *supra* note 9, at § 5:1–5:4.

14. *Id.* at § 5:1.

15. Conciliation is identical to mediation, except that the mediator is generally considered to play a more active role in suggesting outcomes. See *id.* at § 1:1.

16. See *id.* at § 5:1–5:2 (discussing each of these developments); Judge Dorothy Wright Nelson, *ADR in the Federal Courts—One Judge's Perspective: Issues and Challenges Facing Judges, Lawyers, Court Administrators, and the Public*, 17 OHIO ST. J. ON DISP. RESOL. 1 (2001) (describing the early stages of federal court ADR).

Argentina did not experiment with mediation throughout the twentieth century. Rather, it experimented with radically different forms of government. A conflict between social models raged, as radically different administrations, including those of moderate administrations, Juan Domingo Perón, and the various military coups, looked to institute models of government consistent with their views.¹⁷ Basic juxtapositions in this period were those constructed (and tested) between military versus civilian rule, non-violent versus violent methods of social change, and socialist versus capitalist models for structuring society. The most recent military dictatorship, which reigned from 1976-1983, attempted to put an end to these debates and to establish an orderly state of affairs where absolute power abided in the hands of a few military generals. This power found expression in the "dirty war," which levied the disappearance and murder of roughly 20,000-30,000 Argentines, and the torture and political persecution of countless more.¹⁸

When military rule ended in 1983, the tides of globalization washed over Argentina and modernization of the legal system entered the political agenda. In the period between 1987 and 1989, only five years after the return of democracy, news of alternative dispute resolution in the United States began to enter Argentina via academic journals.

Beginning around 1990, Argentine lawyers and judges traveled to the United States to receive training in mediation and import it to their country. A steady stream of United States mediation experts, most of whom praising mediation's utility for reducing court case loads, began to flow into Buenos Aires. Numerous training sessions were carried out and from all of this emerged the first pool of local experts, almost all of whom were lawyers with a court-connected vision for mediation's future. The Argentine federal government expressed a strong interest in mediation, as did the Agency for International Development (AID). Money came in and the National Argentine Mediation Plan was set in motion in Buenos Aires with the intent of institutionalizing mediation. The Ministry of Justice sponsored training sessions within its affiliated public and private institutions in which no one besides lawyers and psychologists were allowed to participate and created a list of official mediators, the only ones permitted to mediate. Approximately four thousand people were trained as mediators and this constituted a business opportunity for both lawyers and newly emerged training

17. See generally LUIS ALBERTO ROMERO, BREVE HISTORIA CONTEMPORÁNEA DE ARGENTINA [A BRIEF CONTEMPORARY HISTORY OF ARGENTINA] (Fondo de Cultura Económica [Econ. Culture Fund] 1994).

18. See KENNETH T. RIVERA, ARGENTINA: ISSUES, HISTORY, BIBLIOGRAPHY 48 (Nova Sci. Publishers 2002).

institutes.¹⁹ In 1993, a two-year trial period went into effect during which ten courts referred select cases to mediation. The Ministry of Justice recorded a settlement rate of approximately fifty percent and realized that mediation could indeed decrease the case flow.

Profound dissimilarities present themselves on all fronts in these brief comments on each country's history with dispute resolution. The largest difference relates to the social history of instability and the still recent killing of tens of thousands of people in Argentina.²⁰ Violence and social unrest occupy the opposite end of the spectrum from mediation and other non-violent, conciliatory modes of social change. As a participative process that gives decision-making powers to citizens, mediation contrasts starkly with the political and psychological rubble of military rule. An unstable history with little citizen control over daily affairs raises the potential for path dependency that would make the participatory and consensual mediation process incongruous, even outside of the legal sphere.

Two further dissimilarities derive from legal history, and concern the relative speeds with which mediation developed in each country and the nature of that development—organic in one country via transplantation in the other. Mediation developed organically in the United States, culminating in general federal laws after seventy years of experience, whereas Argentine mediation crossed the distance between non-existence and significant institutionalization in roughly five years. Aside from the host of issues this raises for the capacity of legal institutions to support it and citizens to engage in it, mediation's arrival on the wings of a foreign power triggers concerns about imperialism and self-determination. As legal reform in Argentina has often been coordinated through multilateral financial institutions, such as the World Bank and the AID, it is associated with controversial "neo-liberal" economic policies.²¹ Valid concerns in this area are discussed in Section V. For now, it should be noted that mandatory mediation in Argentina is far more imposing and sudden than its United States counterpart and that this raises concerns over path dependency and a

19. Interview with Miguel Gaya, arbitrator, mediator and member of the Confederación Económica de Argentina [Economic Confederation of Argentina] (Oct., 1998).

20. Although the United States of course has an extremely bloody history (consider the Revolution, the Civil War, the Native American genocide, and Hiroshima) it has not directed its military force inward in recent times and has never killed 25,000 of its own citizens, except in civil warfare, which must be distinguished from military rule and torture chambers. Those killed in Argentina were every-day people of an anti-fascist ideology and perhaps some connection to social organizing.

21. See generally DANIEL MUCHNIK, *ARGENTINA MODELO: DE LA FURIA A LA RESIGNACIÓN: ECONOMÍA Y POLÍTICA ENTRE 1973 Y 1998* (CUADERNOS ARGENTINOS) [ARGENTINIAN MODEL: FROM THE FURY TO RESIGNATION: ECONOMY AND POLITICS BETWEEN 1973 AND 1998 (ARGENTINE NOTEBOOKS)] (Manantial 1998) (detailing the historical sentiments regarding economic and political changes from 1973 to 1998).

corresponding hesitancy or inability to engage in consensual, participatory conflict resolution modes. As the following Section illustrates, however, Argentina's laws mandate mediation in a more categorical fashion than the equivalent laws in the United States. This can be seen as a logical choice by legislators, in light of the population's relative unpreparedness to choose mediation voluntarily.

III. MEDIATION AS INSTITUTIONALIZED BY FEDERAL LAW

A. *The Laws and Their Rationales*

In 1990, the United States Congress passed the Civil Justice Reform Act ("CJRA").²² It states that each United States District Court "shall consider . . . principles and guidelines of litigation management and cost and delay reduction,"²³ and allows the District Courts ". . . to refer appropriate cases to alternative dispute resolution programs . . . including mediation."²⁴ Congress made several findings justifying the law:

- 1) [C]ost and delay in civil litigation in any United States district court must be addressed in . . . both civil and criminal matters; and,
- 2) [T]he courts, the litigants, the litigants' attorneys, and the Congress and the executive branch, share responsibility for cost and delay in civil litigation and its impact on access to the courts, adjudication of cases on the merits, and the ability of the civil justice system to provide proper and timely judicial relief for aggrieved parties; and,
- 3) [S]olutions . . . must include . . . contributions by the courts, the litigants, the litigants' attorneys . . .²⁵

In short time, the United States Congress passed the Alternative Dispute Resolution Act of 1998 ("ADR Act"),²⁶ making a series of findings and ordering each District Court to authorize the use of alternative dispute resolution processes. Congress asserted that:

[A]lternative dispute resolution . . . has the potential to provide . . . greater satisfaction of the parties, innovative methods of resolving disputes, and greater efficiency in achieving settlements

22. Civil Justice Reform Act of 1990, Pub. L. No. 101-650 § 101, 104 Stat. 5089 (1990).

23. Civil Justice Reform Act § 473(a).

24. Civil Justice Reform Act § 473(a)(6).

25. Civil Justice Reform Act § 102(1-3).

26. Alternative Dispute Resolution Act of 1998, Pub. L. No. 105-315 § 1, 112 Stat. 2993 (1998).

... [and] certain forms of alternative dispute resolution ... may have potential to reduce the large backlog of cases now pending in some Federal courts throughout the United States, ... allowing the courts to process their ... cases more efficiently.²⁷

Congress concluded that "mediation had shown special promise and should be considered, in particular, for inclusion in each district's ADR program."²⁸

In 1995, the Argentine Legislature enacted the "Mediation and Conciliation Law,"²⁹ which requires almost all types of litigants in the Federal Capital of Buenos Aires to attend mediation. Among the greatest official rationales for the passage of this law were:

- 1) The exorbitant quantity of cases that, in continual increase, threaten to collapse the legal system; and,
- 2) To change the litigious culture; and,
- 3) The inability of the state to provide justice.³⁰

The law states in article 1 that mandatory mediation will "promote direct communication between the parts for the extra-judicial solution of the controversy."³¹

The following year, the Argentine Legislature put into effect the "Obligatory Labor Conciliation Instance Law"³² in the Federal Capital, this time to mandate mediation for labor and employment disputes.³³

Both countries have premised their mediation laws on the need to relieve the negative effects of high caseloads on the courts. The United States laws specifically reference high costs and delays and that ADR can

27. Alternative Dispute Resolution Act § 2(1-3).

28. Alternative Dispute Resolution Act § 2(3) ("the continued growth of Federal appellate court-annexed mediation programs suggests that this form of alternative dispute resolution can be equally effective in resolving disputes in the Federal trial courts; therefore, the district courts should consider including mediation in their local alternative dispute resolution programs").

29. Ley de Mediación y Conciliación [Mediation and Conciliation Law], Law No. 24.573, Oct. 25, 1995, [28258] Boletín Oficial [B.O.] 1 (Arg.).

30. See SENATOR BRANDA, LA LEY, ANTECEDENTES PARLAMENTARIOS [THE LAW, PARLIAMENTARY ANTECEDENTS] 259, 267 (1995) (the third rationale is attributed to Representatives Durañona and Vedia; *id.* at 315), cited in FALCÓN, *supra* note 9, at 13.

31. Mediation and Conciliation Law, art. 1.

32. Ley de Instancia Obligatoria de Conciliación Laboral [Obligatory Labor Conciliation Law], Law No. 24.635, Apr. 26, 1996, [28387] B.O. 1 (Arg.).

33. The difference between mediation and conciliation is theoretical. It is thought that the conciliator has greater leeway than a mediator to suggest solutions and apply pressure to the parties. See COLEIRO & ROJAS, *supra* note 9.

solve these problems. Only the Argentine rationale refers to the goal of changing legal culture, while only the second United States law claims substantive advantages to ADR, those that go beyond its efficiency—such as party satisfaction and innovations. Finally, the first United States law explicitly assigns responsibility for the courts' problems to the other two branches of government, as well as to the parties and their lawyers. Still, each country's rationales are substantially similar.

B. Institutionalization—Degrees of Compulsion and Centralization

Both Argentine laws mandate categorical attendance at mediation. Article 1 of the mediation law states that mediation "of obligatory character . . . [shall] precede all adjudication."³⁴ Article two excludes various types of cases from the law's reach,³⁵ including claims controlled by the Ministry of Labor.³⁶ Such claims involve labor disputes that are subject to the broad scope of the conciliation law: "All individual or group claims involving a conflict of law within the jurisdiction of the National Labor Commission, prior to being filed as a lawsuit, are obligated to pass before the administrative agency created by this law."³⁷ Thus, mediation is mandatory and applies to most types of civil cases.

In the United States, the ADR Act does not mandate mediation, but rather requires that District Courts offer ADR: "Each United States district court shall authorize, [not "mandate"] by local rule adopted under section 2071(a), the use of alternative dispute resolution processes in all civil actions."³⁸ Each of the ninety-four District Courts, however, may mandate mediation via their local rules.³⁹ The Law further authorizes each Court to exempt "specific cases or categories of cases in which use of alternative dispute resolution would not be appropriate," but requires that they consult a member of the bar including the United States attorney for their district.⁴⁰ Thus, most everything is left to the District Courts' discretion, except

34. Mediation and Conciliation Law, art. 1.

35. Among the cases per se excluded are: criminal; divorce, separation, and other family-related proceedings; those in which the state or any of its decentralized entities is a party; habeas corpus and other challenges to the legality of detention; and inheritance claims. Mediation and Conciliation Law, art. 2.

36. Mediation and Conciliation Law, art. 2 (1–10).

37. Obligatory Labor Conciliation Law, art. 1. The agency in question, the Obligatory Labor Conciliation Service, is named in article 4.

38. Alternative Dispute Resolution Act § 3(b).

39. Alternative Dispute Resolution Act § 4(a) ("Any district court that elects to require the use of alternative dispute resolution in certain cases may do so only with respect to mediation, early neutral evaluation, and, if the parties consent, arbitration").

40. Alternative Dispute Resolution Act § 4(b).

whether or not they offer ADR at the outset. Over half of all districts offered mediation prior to 1998,⁴¹ indicating that the ADR Act may have relatively little effect on mediation beyond that already obtained by the CJRA. As of 1999, "mediation programs [were] the most . . . frequently authorized ADR program. Nearly eighty district courts have authorized or established at least one court-wide ADR program."⁴² The level of compulsion placed on litigants, therefore, depends on the local rules in each district.

Accordingly, four districts that employ mediation will be examined—the Southern District of New York ("NY"), Eastern District of Pennsylvania ("PA"), Western District of Oklahoma ("OK"), and Southern District of Texas ("TX"). At the time, PA mandated mediation categorically, while the other three districts allowed for mandatory referrals with varying degrees of input from the judge assigned to the case, the parties, and an ADR administrator. This sample produces data on a mix of mediation program types, which increases its representativeness.⁴³ These programs may have been modified since 1996, when the data were finalized. Nevertheless, the data remain useful for analyzing the beginning of mandatory mediation in the United States and the scope of local variations under the applicable federal laws.

Half of all civil cases filed in PA are randomly selected for mediation, with a number of exceptions.⁴⁴ One exception includes any case that a judge determines to be unsuitable for mediation.⁴⁵ In NY, mandatory referral to mediation is permitted in cases involving no issue besides liability for damages.⁴⁶ The judge and a staff attorney review the case and discuss mediation with the parties during an initial conference.⁴⁷ Parties

41. See ELIZABETH PLAPINGER & DONNA STIENSTRA, FED. JUD. CTR. [FJC], ADR AND SETTLEMENT IN THE FEDERAL DISTRICT COURTS: A SOURCEBOOK FOR JUDGES & LAWYERS 4 (1996), a joint project of the Federal Judicial Center and the CPR Institute for Dispute Resolution, available at http://www.fjc.gov/public/home.nsf/autoframe?openform&url_r=pages/556&url_l=index.

42. *New Law Authorizes ADR In All District Courts*, 31 THE THIRD BRANCH, No. 2, Feb. 1999, at <http://www.uscourts.gov/ttb/feb99ttb/newlaw.html>.

43. Although the precise ratio of mandatory to optional mediation in all the districts is unknown, it is known that both types exist. Accordingly, the sample I have selected is more representative of court-connected mediation in the United States than an all-voluntary or all-mandatory sample. The data are dated, however, having been collected from 1992 to 1995. More recent statistical data concerning the use of mediation by district courts could not be found.

44. See PLAPINGER & STIENSTRA, *supra* note 41 at 241 (detailing types of cases excluded from mediation, including "Social Security cases, cases in which a prisoner is a party . . . asbestos cases, or any case a judge determines is not suitable for mediation").

45. *Id.*

46. *Id.* at 199.

47. *Id.*

may make an ad hoc appeal to the court for exclusion from mediation.⁴⁸ Such an appeal is unnecessary in the OK program where, despite mandatory referral power, referrals typically require the consent of all parties.⁴⁹ This consent can be given at the pretrial scheduling conference where the judge, ADR administrator and counsel “discuss whether mediation is appropriate for the case.”⁵⁰ In TX, lawyers on both sides are required to discuss ADR with their clients and each other before the initial scheduling conference.⁵¹ Parties then inform the court of the results of this discussion, at which time the assigning judge may require that the case be mediated.⁵² Parties are permitted to request a referral to mediation.⁵³

1. Is mediation still part of “Alternative” Dispute Resolution?

Both countries’ federal laws are fundamentally similar, in that they formally institutionalize mediation into the justice system and allow for mandatory attendance. Mediation now operates alongside litigation as a mechanism through which the state resolves the conflicts brought by its citizens. A kind of mixed judicial system now exists in Argentina and the United States. Accordingly, mediation hardly deserves to be included in the ADR grouping due to the inaccuracy of the word “alternative” as applied to it. It is now an alternative only in the sense that it is used instead of something else, not because its usage takes the conflict to an informal domain outside the realm of state power. Moreover, in Buenos Aires and those United States districts mandating mediation, it is not “alternative” at all, but rather the dominant mode of dispute processing for many types of cases. Accordingly, for those cases selected for mediation, litigation now plays the role of an alternative dispute resolution mechanism.

Despite mediation’s dominance, a sliding scale of compulsion is evident in the various case selection processes employed. The first type of rule can be termed ‘mediation by legislative fiat.’ Argentina has established a categorically obligatory rule that leaves no discretion to judges, parties, or administrators.⁵⁴ The second-most compulsory rule presumes that mediation will occur, but allows for opt-out by the judge and can be termed ‘presumption with judicial opt-out.’ In this sense, the PA rule comes close to Argentina’s degree of across-the-board compulsion, but allows the

48. *Id.*

49. PLAPINGER & STIENSTRA, *supra* note 41, at 234.

50. *Id.*

51. *Id.* at 271.

52. *Id.*

53. *Id.*

54. Part of its categorical nature lies in specifying *ex ante* which cases shall not be mediated.

assigned judge to remove a case at her own discretion. Finally, the mediation procedures in NY, OK, and TX establish a rule of "consultation before mediation," yet all districts maintain mandatory referral power. Thus, each district consults with the parties and their attorneys regarding the suitability of their case for mediation, but may in the end require mediation, despite objections. If, in practice, judges in NY, OK, and TX routinely mandated mediation over objections by the parties and their lawyers, the resulting rule might be labeled "mediation by judicial fiat," rather than consultative. The various rules differ most in terms of the degree to which they allow the parties and their lawyers to influence the type of process to which their cases will be subjected. Those that allow for greatest party input are the most consensual, and, non-trivially, maintain greatest consistency with mediation theory.

2. On the likelihood of cultural acceptance

The establishment of a mixed system via compulsion raises concerns over fairness, justice, and popular perception. These concerns are least acute in the United States where mediation has not only a long history, but also a decentralized implementation process that allows for input by parties and lawyers. At the very least, parties have a chance to be heard in three of the four sampled United States programs before mediation is mandated for their case. But in Argentina, where the legal and social culture can be expected to be least accustomed to or, in the worst of cases, least welcoming of mediation, parties have no chance to be heard. This is essentially a catch-twenty-two, in that not having a chance to be heard is in fact consistent with Argentine legal culture. Still, the fact that mediation is of foreign pedigree and was established with significant input from foreign experts and multilateral financial institutions bodes against acceptance by Argentine social culture, in which foreign influence is almost universally thought to be self-interested and historically unjust.⁵⁵ Additionally, Argentines distrust their own elites who, as a social class, are infamously corrupt.⁵⁶

55. See, e.g., EDUARDO GALEANO, *LAS VENAS ABIERTAS DE AMÉRICA LATINA* [THE OPEN VEINS OF LATIN AMERICA] (1974). During the recent economic collapse in Argentina, even members of the World Bank and International Monetary Fund [IMF] decried their institutions' application of standard recipes without care for local conditions.

56. This statement would be a proper subject of "judicial notice," as there are few more obvious elements of Argentine culture. For example, mere mention of Carlos Menem, who served as President during the 1990s, will trigger the word "robber" in almost every local response. Moreover, that response would be technically correct. See, e.g., Uki Goni, *Menem Bows Out of Race for Top Job*, *GUARDIAN* UNLIMITED, May 15, 2003, at <http://www.guardian.co.uk/argentina/story/0,11439,956213,00.html> (describing the current president's

That notwithstanding, Gladys Alvarez and Elena Highton, two judges instrumental in the importation of mediation from the United States and the design of the mediation law, predicted that mediation's virtues would breed acceptance in the populace: "[W]hen the people of Argentina comprehend what mediation is . . . [evidently] it will no longer be necessary for mediation to be obligatory; rather it will be voluntary."⁵⁷ The same idea was espoused by a significant figure behind mediation in the United States: "I believe there is a clear distinction between coercion into mediation and coercion in mediation . . . [T]he former, in my view, is . . . a temporary solution for the problem created by the fact that when people use mediation, they are very pleased with it . . . but because our system is so court-and adjudication-oriented, people do not know about the benefits of mediation and hence do not use it enough voluntarily."⁵⁸ The comments of influential mediation advocates from both countries evince a faith in the process of mediation itself, in its value and the likelihood that people in each country will perceive that value. Thus, both arguments take a paternalistic form, advocating not only the desirability of top-down legal change, but also the inevitability that people will come to their senses once forced to behave in the desired fashion.

The following Section evaluates whether either type of rationale for mandatory mediation—principally, efficiency and changing legal culture—are achieved in practice. Further, the use of numerical data allows for a view of what other effects are achieved.

IV. MEDIATION IN PRACTICE: INCENTIVES AND THEIR CONSEQUENCES

Both countries' laws were intended to ease court dockets and promote efficiency in dispute processing. This Section shows that both countries have achieved these objectives in a narrow sense. They have diverted a significant number of cases from the adjudicatory path. However, efficiency is an insufficiently disaggregated concept. Any definition of efficiency contains implicit assumptions. Accordingly, it must be asked, "For whom is the law efficient?" and "For what specific purpose (or values) is the law efficient?" This Section shows that mediation changes the balance of power between disputants and is efficient for the courts. What follows is a commentary on what type of efficiency is achieved, how it is achieved,

statement that "big business . . . had 'devastated' the country under Mr. Menem's corrupt 10-year presidency . . .").

57. Elena I. Highton & Gladys S. Álvarez, *Métodos RAD—La Mediación Obligatoria en la Ley 24.573 [ADR Methods—The Obligatory Mediation in the 24.573 Law]*, LIBRA No. 6, at 14 (Spring 1997).

58. Frank E. Sander et al., *Judicial (Mis)Use of ADR? A Debate*, 27 U. TOL. L. REV. 885, 886 (1996).

and what immediate unintended consequences flow from achieving efficiency in this manner.

A. One Type of Efficiency—Serving the Courts

Recall the degree to which the justification for mandatory mediation in both countries hinged almost entirely on reducing court costs and delay.⁵⁹ Though statistics are unavailable for Argentina, studies on United States districts dispute the claim that court costs and delay were acute in the period in which Congress made its initial findings regarding the bulging court docket. First even as of 1990, nearly ninety-five percent of civil cases filed in federal court settled before trial.⁶⁰ Second, the number of civil and criminal cases filed each year in federal court decreased by 36,000 from 1985 to 1993.⁶¹ Third, and most telling for legislative rationales of judicial overcrowding, the number of cases per federal judge per year has declined even more sharply in the same period, moving from 476 to 354.⁶² The decrease in the number of trials per judge has also been significant, falling from the upper forties in the 1970s to thirty-one in 1992.⁶³ Finally, in terms of court delay, the "average time from filing to disposition" decreased from nine to eight months in the same period.⁶⁴

Assuming Congress was aware of these statistics, then the word "costs" should be emphasized in assessing its support for mediation on the basis that "costs and delay . . . must be addressed."⁶⁵ Similarly, Argentine legislative history referenced an "exorbitant quantity of cases that, in continual increase, threaten to collapse the legal system."⁶⁶ The proximate cause of any such collapse would ultimately be monetary in nature. Otherwise, why not hire more judges and build more courtrooms? As is shown below, both countries' mediation laws succeed in diverting cases and saving money for the state.

59. See Section IIIA, *supra*.

60. Ellen J. Pollack & Edward Felsenthal, *Private Civil Cases in Federal Courts Rarely Reach Trial*, WALL ST. J., June 27, 1990, at B2.

61. Sander et al., *supra* note 58, at 889.

62. *Id.*

63. *Id.*

64. *Id.*

65. See Civil Justice Reform Act § 102(1).

66. See FALCÓN, *supra* note 9, at 13 citing BRANDA, *supra* note 30.

1. Settlement rates under the mediation laws

In April of 1995, the Argentine mediation law went into effect. Between then and October of 1998, 103,421 cases were presented for mediation at the Ministry of Justice, the regulatory authority in this matter.⁶⁷ The total number of cases mediated in this 3.5-year time period was 69,275. Of these 69,275 cases, 29,951 (43%) reached a mediated settlement and 39,324 (57%) did not. The larger statistic is that 29% of the total cases diverted from the court and presented at the Ministry of Justice were resolved in mediation (29,951 cases settled out of 103,421 presented).⁶⁸ The conciliation law resulted in essentially the same settlement rate: 31%, or 10,677 cases settled of the 34,887 mediated from 1997-1998.⁶⁹

Higher settlement rates were obtained in the United States, ranging from 21%-60% in the four United States districts surveyed.⁷⁰ The average of these four rates is 47%.⁷¹ That minority of litigants who settle in mediation do not appear to save money or time. In two of the four mediation programs studied, mediation caused an increase in lawyer work hours (twenty-five hours in one program and fifteen hours in the other) as

67. Of the total number of cases presented, 34,146 cases (33% of the total) were not mediated due mainly to absence of the defendant (17,015 cases) and difficulty of notifying the parties of the mediation session (9,417 cases). Other reasons for the failure of these obligatory proceedings to take place were absence of the plaintiff (1,785 cases), decision of the plaintiff or defendant to not participate (1,405 and 1,539 cases, respectively), and absence of legal counsel for the parties (421 cases). The statistics up until this point come from MINISTERIO DE JUSTICIA, DIRECCIÓN NACIONAL DE MEDIOS ALTERNATIVOS DE RESOLUCIÓN DE CONFLICTOS, INFORME ESTADÍSTICO, MEDIACIONES OFICIALES [MINISTRY OF JUST., NATIONAL ADMINISTRATION OF CONFLICTS RESOLUTION ALTERNATIVE MEANS, STATISTICAL REPORT, OFFICIAL MEDIATIONS] (no year or page numbers are listed in the document, which was given to me during my visit to the Ministry of Justice) (on file with author).

68. Unfortunately, there is no complete information regarding disputant satisfaction with the process or with the settlements; however, the basic consensus regarding the settlements themselves is that they are almost entirely monetary in nature.

69. An agreement was reached in 13,519 of the total number of cases (34,887), and out of those 13,519 agreements, 10,677 were given legal status by the Ministry of Labor. Two thousand eight hundred and forty two of them, it seems, ignored basic legal norms. Therefore, the settlement rate for this one year time period was 39%, but 2,842 of these were ruled illegal and thus the settlement rate was ultimately 31%. See *Acuerdos Laborales* [Labor Agreements], CLARÍN DIGITAL, Sept. 16, 1998, at Economía, at <http://old.clarin.com/diario/98/09/16/>.

70. The individual settlement rates were: 21% in PA, 48% in OK, 59% in TX and 60% in NY. See JAMES S. KAKALIK ET AL., AN EVALUATION OF MEDIATION AND EARLY NEUTRAL EVALUATION UNDER THE CIVIL JUSTICE REFORM ACT (Rand Corp. 1996).

71. Although significantly higher than the Argentine settlement rate, the number of cases in the U.S. sample is significantly lower: Total cases referred to mediation in 1996 were 100 in NY, 150 in OK, 300 in TX and 500 in PA. See *id.* Even if these data were extrapolated to the 3.5-year period measured in Argentina, the numbers cannot compare to those in Argentina..

compared with litigation. This increase was balanced out by nearly identical decreases in the other two programs.⁷² In keeping with these numbers, cases referred to mediation took, on the whole, just as much time to resolve as did comparable cases that were litigated.⁷³

With regard to preventing the supposedly impending collapse of the judicial system in Argentina, mediation proved capable of resolving roughly 40,000 cases and diverting even more that would otherwise have gone to court. Therefore, mediation did save some time for the courts and reduce the backlog that they are rumored to suffer. The same is evidently true for the United States districts since they have ad hoc control over their referral power. If they begin to experience backlog, they need only refer more cases to mediation. The mechanism is entirely self-regulating and discretionary.

2. High settlement rates do not imply efficiency for the parties

The figures discussed above also speak to the laws' effects on delays and costs experienced by disputants forced to attend mediation. Despite reducing court backlog, mediation in Argentina and the United States districts surveyed has served to complicate the plight of 69-70% and 53%,⁷⁴ respectively, of the cases that come under their jurisdiction. This signifies a financial and temporal loss for those involved in the dispute and a general increase in bureaucracy for most participants, especially in Argentina. Mediation in Argentina might save time and money for the minority of parties who settle in mediation and reduce the amount of cases heard in court by at least that percentage (and probably more), but it does not save time or money for the parties who mediate their disputes in the United States districts sampled here.⁷⁵ A significant portion of those cases not settled by mediation in either country probably do not proceed to court, since some parties exhaust their financial and temporal resources in arriving at and participating in the mediation proceedings. Still others may yet reach settlement after the mediation but before the court date. Such added bureaucracy is a grave cause for concern in both countries, but especially in Argentina where poverty is more severe than in the United States.⁷⁶

72. *Id.* at 36.

73. *Id.* at 34.

74. These percentages refer to the cases that do not settle in mediation. The inference I draw is weakened by the possibility that some of these cases settle as a result of mediation, but not during the mediation session itself. Such tardy resolutions would not be reflected in the data relied upon thus far.

75. See note 79, *infra*.

76. Consider, for example, that 10% of those employed in Buenos Aires and Gran Buenos Aires make 110 dollars a month, and 80% of the most recently created jobs are temporary and pay an

3. Mediation saves money for the courts

The data show that United States courts are saving money—lots of it. Information such as that which follows would certainly have proven persuasive to Argentina and would likely prove persuasive for any other country contemplating the reception of mediation. Out of the four United States districts surveyed, the highest total cost per case referred to mediation was \$490, a mere 3–10% of the cost of litigation per litigant, which ranges from \$5000 to \$17,000.⁷⁷ The four districts surveyed refer an average of 360 cases per year to mediation. At the average settlement rate of 47%, 169 cases settle in mediation. Assuming average litigation costs of \$10,510 per litigant, the districts save \$1,776,190 per year. In cases that do not settle and proceed to litigation, the court presumably expends an extra \$490 dollars (on top of litigation costs per case). The relevant question, then, is how many cases referred to mediation must come to an agreement in order for the courts to save money. Even if a mere 5% of cases settled in mediation, the court would save roughly \$13,000 per year, despite having to pay for mediation and litigation costs in the remaining 95% of cases.⁷⁸ Furthermore, some degree of attrition among cases certainly exists, given the time and money spent in mediation. Although these calculations do not incorporate the cost of setting up and maintaining a mediation program, startup costs were negligible, averaging just \$33,250 (roughly equivalent to the cost to the courts of litigation for three litigants) in the districts surveyed. Maintenance costs are unknown, but presumably low.

Despite United States disputants' reasonable statistical odds of reaching a settlement in mediation, the average time and money spent in mediation by the parties does not vary significantly from the average time and money they would spend in litigation.⁷⁹ Thus, parties who do not settle in

average of 176 dollars a month. Yet, the cost of living is readily comparable to any major US city. See Diego Schurman, *Grave Situación de los Carenciados: Pobres los Pobres*, PÁGINA 12, Jan. 11, 1999, at 3, available at <http://old.pagina12web.com.ar/1999/99-01/99-01-11/pag03.htm> (citing data from a work by the consultant group EQUIPOS DE INVESTIGACIÓN SOCIAL [EQUIS] [SOCIAL RESEARCH GROUPS], ENCUESTA PERMANENTE DE HOGARES DEL INDEC DEL PRIMER TRIMESTRE DEL AÑO 1998 SOBRE DISTRIBUCION NACIONAL DE INGRESOS [PERMANENT SURVEY OF INDEC HOMES OF THE FIRST TRIMESTER OF THE YEAR 1998 ON NATIONAL DISTRIBUTION OF INCOME], on national distribution of income).

77. KAKALIK ET AL., *supra* note 70, at 39.

78. Five percent of 360 is 18. Avoiding litigation costs in 18 cases translates to a savings of \$180,360 (subtract the cost of litigating those cases – \$189,180 – from the cost of mediating them – \$8,820). The cost of mediating the remaining 342 cases is \$167,580. \$180,360 – \$167,580 = about \$13,000 (close enough for my purposes).

79. KAKALIK ET AL., *supra* note 70, at 34–36 (comparing the median days to disposition and average lawyer hours in cases mediated in PA, OK, TX, and NY with comparison cases litigated in the same districts).

mediation and proceed to litigation expend roughly twice as many financial and temporal resources as parties who proceed directly to litigation. Some parties, however, can be expected not to litigate even though they did not reach an agreement in mediation. Thus, it is economically rational for United States courts to require mediation as long as the settlement rate plus the attrition rate add up to at least four or five percent of total cases on the docket.

If one assumes that the primary goals of the mediation laws are to save time and reduce backlog, as reflected in the legislative histories, then we can say that obligatory mediation has been efficient for the courts' purposes. If one assumes, however, that the courts exist to ensure high quality, efficient justice for the citizens they serve, then the conclusion is not quite so clear. However, the fact that agreements were not reached in the majority of cases does not necessarily signify that the process itself did not help the disputants to understand each other and facilitate a future resolution to their conflict. Yet, studies suggest this is unlikely.⁸⁰ In sum, we are left to ponder the ways in which courts and parties have competing interests, and to ask whether the optimal balance between those competing interests has been struck.

4. Courts and parties as actors with juxtaposed interests

The United States calculation exposes the inherent economic tension between courts and disputants, since a system in which 95% of litigants had to attempt mediation before gaining access to litigation would impose a disproportionate temporal and financial burden on litigants. The reality is of course less disastrous than this, given the forty-seven percent settlement rate. Given the economic calculus above, however, one must intuit tremendous good faith to the courts to believe that they would only select for mediation cases that are likely to benefit from it. The courts' economic incentives would bode for indiscriminate and plentiful referrals to mediation. Argentina's categorical laws exemplify such a scheme.

Even if all cases referred to mediation reached a settlement, however, this says nothing of the satisfaction of non-economic values—such as, the quality of justice received, the maintenance of free will, or presence of externalities, positive or negative, not incorporated into the economic calculation. These non-economic values surface through an examination of the mechanisms that produce high settlement rates in both countries.

80. See *infra* Section IV (B).

B. *Achieving High Settlement Rates*

Although the courts in both countries save money even if relatively few cases are settled, they presumably intend to save as much money as possible. Their savings increase, of course, in direct proportion to the number of cases that settle in mediation.

1. Mediator incentives—neutrality lost

In Argentina, the payment schedule governing mediator compensation provides a powerful incentive for directive mediation—that is, for mediator behavior aimed at producing a settlement between the parties. The pay scale for mediators depends both on the amount of money involved and on whether the parties reach a settlement.⁸¹ In the case of settlement, the parties split the costs and must pay the mediator at the mediation session.⁸² If the parties do not reach an agreement, the mediator, in order to receive her pay, must wait until the trial concludes and then present herself to receive payment from the losing party, who is also responsible for paying both sides' lawyers fees.⁸³ Mediators may receive a nominal compensation of fifteen dollars from a special fund established under the law.⁸⁴ Once the conflict is resolved through litigation, the mediator has the responsibility to request payment for the services they rendered sometime in the potentially distant past. Several mediators commented that they had experienced problems collecting their fee under such circumstances. On multiple occasions, I witnessed the mediator counsel parties reluctant to participate in the mediation that a trial can last years and that a mediated agreement is in their best interests for that reason alone. Questions of factual accuracy aside, such advice must be scrutinized given the mediators' financial interests. And thus, a question arises as to how far mediators are willing to go to secure participation and settlement.

81. Payment schedules for mediators in the conciliation law are far more neutral. Obligatory Labor Conciliation Law, arts. 12–13.

82. \$150 in suits in which the claim is \$3,000 or less, and \$300 where the claim exceeds \$3,000. More recently, a third pay scale was added: \$600 if the case settles for more than \$6,000. See Decreto del Presidente sobre Mediación y Conciliación [Presidential Decree on Mediation and Conciliation] Decree No. 1021/95, Dec. 28, 1995, [28301] B.O. 8, at art. 26 (Arg.). That the parties must pay the mediator at the close of a mediation session that has produced a settlement is established by article 21.4 of the Mediation and Conciliation Law.

83. Presidential Decree on Mediation and Conciliation, art. 26; Mediation and Conciliation Law, art. 21.3.

84. Presidential Decree on Mediation and Conciliation, arts. 26 & 28; Mediation and Conciliation Law, art. 21.

In the United States districts, mediator pay scales do not bode in favor of settlement. In fact, the hourly payment scheme in OK⁸⁵ and TX⁸⁶ gives mediators an incentive to prolong the mediations, but is neutral as to settlement. The mediators in NY⁸⁷ and PA⁸⁸ serve pro bono and, therefore, may seek to dispose of the mediation quickly, whether through settlement or through encouraging the parties to consider litigation. Only the former is realistic. A reputation for settling many cases bestows great prestige on a mediator and it is rational to assume that those who volunteer to mediate hold favorable views of the process. Therefore, only a modest incentive for settlement emanates from mediator pay scales in the United States courts surveyed. Similarly, the fact that in some instances only lawyers are permitted to mediate does not necessarily imply high pressure on the parties to settle.⁸⁹

A greater source of settlement pressure may be exerted by judges assigned to the cases that are referred to mediation. The American Bar Association Model Code of Judicial Conduct states that “[a] judge should encourage and seek to facilitate settlement, but parties should not feel coerced into surrendering the right to have their controversy resolved by the courts.”⁹⁰ Studies and court rulings suggest that judges routinely overstep these boundaries in shocking ways, including sanctioning parties for “failure to settle by a deadline . . . [or] make a settlement offer” and issuing various types of admonitions during settlement talks.⁹¹ One study found that roughly ten percent of judges responding to a survey admit to “‘inter-ven[ing] aggressively—through the use of direct pressure’ in settlement.”⁹² Although a judicial settlement conference is a separate procedure from mediation, this behavior should raise concerns for how judges manage cases sent to mediation. Considering that “[c]ourt-connected mediation now

85. PLAPINGER & STIENSTRA, *supra* note 41, at 235–36.

86. *Id.* at 273.

87. *Id.* at 200.

88. *Id.* at 242.

89. See Mediation and Conciliation Law, art. 16. Legal training would ostensibly cause mediators to frame the conflict in legal, rather than psychological or other terms. It is unclear whether a focus on legal rights and concrete facts would lead to greater settlement than a focus on underlying issues. In any case, the mediation training received by all lawyers who become mediators might counteract this tendency towards legalism to some extent.

90. Commentary to Canons 3A(5) & 3B(8) (2000), cited in Nancy A. Welsh, *The Thinning Vision of Self-Determination in Court-Connected Mediation: The Inevitable Price of Institutionalization?*, 6 HARV. NEGOT. L. REV. 1, 64 (2001).

91. *Id.* at 64–66.

92. See *id.* at n. 270, citing Daisy Hurst Floyd, *Can the Judge Do That? – The Need for a Clearer Judicial Role in Settlement*, 26 ARIZ. ST. L.J. 45, 53–54 (1994).

often bears 'an uncanny resemblance to the judicially-hosted settlement conference,'"⁹³ it may be viewed as having the same purpose by judges. It would be possible, for example, before the case entered mediation for a judge to encourage the parties to settle.

Thus, the politics of judicial expediency have led to mediation processes biased by design—especially so in Argentina—which, in turn, suggests that mediation's facilitative and transformative functions will be under-represented in practice. Given their incentives, it cannot be said that mediators in Argentina are neutral. Although not necessarily biased in favor of one party or the other, their own financial interest necessarily predisposes them to encouraging settlement, regardless of the terms through which it is achieved. In the United States, only mild pressures toward settlement are exerted by mediators, but judges may influence the process through their relationship to parties and through the act of referring the case to mediation. If they do not settle in mediation, parties and their lawyers may feel that they are defying or disappointing the judge who assigned them to mediation, and, accordingly, that their odds of prevailing in litigation decline.

Coercion into mediation is one thing; coercion in mediation is another.⁹⁴ Mandatory mediation forces the parties to sit face to face and see whether a basis for an amicable solution exists between them. Although this may seem superfluous, many parties to a dispute may not have taken the time or made the effort to see if litigation is necessary. Assuming few cultural supports for making such an effort, coercion into mediation seems a valid exercise of legislative power—simply encouraging settlement talks, but not requiring parties to reach an agreement. Coercion in mediation, however, goes further. This type of coercion affects free will and may cause parties to lose sight of their rights or goals, to undervalue the same, or to be convinced to settle on the basis of exaggerated or false information. This risk is heightened in situations where coercion by the mediator or judge exists alongside external factors—such as, corruption and poverty—that exert pressure in the same direction. Both risks are most severe in Argentina.

2. Parties' incentives—a Faustian compromise

Does the mediation forum prove conducive to settlement because of outside temporal or financial pressures? Are rights compromised in exchange for expediency? This sub-section discusses Argentina almost

93. Nancy A. Welsh, *Making Deals in Court-Connected Mediation: What's Justice Got to Do With It?*, 79 WASH. U. L.Q. 787, 796 (2001).

94. Sander et al., *supra* note 58.

exclusively, since I have found no factual reports of such factors in the US—and logically so. Since mediations are confidential and a record of the proceedings is typically not maintained, reports of actual mediation dynamics are scarce. Still, concern in the United States districts over such outside pressures would be misplaced. Mediation often requires as many lawyer hours and takes as much time as litigation. Also, court congestion is decreasing. Parties have few incentives to settle in mediation, beyond those inherent in being sent there by the judge and the prospect of having to finance mediation and litigation, as opposed to just mediation. In Argentina, however, mandatory mediations—especially in the labor and employment context—frequently pit plaintiff's principles against their need to survive.

Seventy-five percent of all mandatory labor mediations involve the claim of a fired worker for indemnization by his or her employer.⁹⁵ Often times, details of illegal actions are discovered in the mediations, but are not reflected in the written agreement that becomes public. This, according to a prominent journalist who requested anonymity, is especially common in cases involving corporate wrongs in the labor or environmental arena. Workers bringing suit against companies tend to realize that they would receive more money in court; however, they also understand that court proceedings can be delayed years and that such a scenario prevents them from receiving much needed compensation in the present. When faced with this dilemma, many opt for an economic compromise: some money now is better than more money later if one cannot afford to wait.

Cecilia Rico, a full-time mediator and labor conciliator, summed up the strategic calculation made by employers:

The company tries to get the best deal they can. This is to say that if they legally owe you \$1000, they figure that they can get you off their back for \$300 or so. They're not interested in the worker, law, or what the worker is legally due. Therefore, I think that the workers should be able to unite to say that there is injustice here.

Several cases that I observed brought to light issues of broad import—such as, under-the-table employment, employee rights, and discrimination—and the mediated settlements reflected this trade-off of nominal compensation based on necessity, not standards. Under law, a company that employs a worker “under the table” must pay them an additional 25% on

95. See *Acuerdos Laborales*, *supra* note 69.

top of their indemnization.⁹⁶ This additional 25%, however, only appears to be paid when a judgment so orders. "Since the mediation precedes trial," Ms. Rico stated, "people usually negotiate and pay the indemnization, but leave the extra 25% aside." This strategic calculation, present in each of the fifteen cases I observed, appears to be a function of the additional money and time required in order to proceed to trial.

Court backlog existed before the mandatory mediation laws. In the labor context, it is unclear whether mandatory mediation aggravates an existing deprivation of rights or simply makes an unjust process more efficient. Another mediator, who spoke on the condition of anonymity, expressed the latter view:

Before, when the law didn't exist, after a trial had been going on for about a year, one lawyer would call the other and strike a bargain. The employee didn't get what he or she deserved in this process either. They would receive between 50 and 70% of what they were due. Questions such as working conditions, safety concerns, etc. are not and were not typically dealt with. Workers are content just to have a job, but if they do demand better conditions, they're the first to be let go.

These comments illustrate the different social contexts in which mediation operates in Argentina and the United States. Although we might surmise that mediations often settle in the United States for what would amount to a fair estimation of a court award minus the costs of a full-blown litigation to the plaintiff, under-the-table employment is not as much a staple of the United States economy. In other words, though disputes arise in both countries, I routinely observed that Argentine workers lacked the financial ability to press forward on a claim, often lacked an attorney, rapidly agreed to compromise their rights in order to receive in the present a fraction of what they were legally due, and, even before being fired, had been denied their rights to employee benefits.

It is doubtful that my observations are unrepresentative of labor mediations as a whole. The 2,842 agreements denied legal status by the Ministry of Labor suggests that illegality on the face of an agreement is common.⁹⁷ However, it does not stand to reason that all illegalities will be reflected in the written agreement. Just the opposite—most parties would

96. Ley de Empleo [Employment Law], Law No. 24.013, Dec. 5, 1991, [LI-D] A.D.L.A. 3873 (Arg.). Under-the-table employment is routine in Argentina. It allows employers to avoid certain taxes and to forgo offering benefit packages to the employees in question.

97. See *Acuerdos Laborales*, *supra* note 69.

be expected to obscure the illegalities, offering more favorable terms to the opposing party if necessary to keep their misdeeds off the record.

In sum, mediation exerts some settlement pressure on disputants in each country by design, although elevated financial pressures on the part of mediators and parties in Argentina can be expected to add even greater settlement pressure. Thus far, it is clear that mediation saves the courts money and reduces their caseload; however, questions regarding mandatory mediation's more qualitative—and, unfortunately, less measurable—effects remain. These are examined in the following Section.

V. SOCIAL CHANGE AND MEDIATION'S MACRO CORRELATES

Mandatory mediation in the United States and Argentina belongs to an institutional change of global proportions. These countries have altered their dominant mode of dispute processing, placing a consensual, interest-based newcomer alongside a compulsory rule-oriented pillar of the legal order.⁹⁸ From an apolitical legal perspective, a significant structural change has occurred in the legal architecture. From a comparative perspective, one observes differing social implications flowing from this changed architecture. Both angles deserve attention.

A. *Legal Culture Changes Mediation, Not Vice-Versa*

Recall that prominent individuals, instrumental in institutionalizing mediation or encouraging support for it, made claims about mediation's value for parties and society, including that mediation would not need to be mandatory for long.⁹⁹ Leaving aside the possibility that parties might value mediation for its ability to apportion quick, albeit low, monetary payments or to avoid court delays, the question becomes whether mediation is changing legal culture.

Although legal culture is difficult to measure, the qualitative sense in both countries is that legal culture is co-opting mediation. A key indicator of this is that the lawyers are more active in the mediations than the parties. More than half of the mediators I observed treated the lawyers as primary participants, relegating the parties to a secondary, less participatory role. Lawyers not only held a powerful position in determining whether the clients should accept the result of the mediation proceedings, but in addition

98. Court connected mediation has spread to most countries in Latin America and Europe. See, e.g., ALTERNATIVE DISPUTE RESOLUTION – EUROPEAN COMMISSION, SETTLING OUT OF COURT – DEVELOPING ALTERNATIVE METHODS TO RESOLVE CIVIL AND COMMERCIAL DISPUTES IN THE EUROPEAN UNION, at http://europa.eu.int/comm/justice_home/fsj/civil/dispute/wai/fsj_civil_dispute_en.htm (last visited May 23, 2005).

99. See Highton & Álvarez, *supra* note 57; Sander et al., *supra* note 58.

they exercised influence over the character and direction of the mediations themselves. The parties' lawyers often argued with each other incessantly and thus framed the conflict in legalistic, antagonistic terms. In most occasions, the mediators attempted to involve the parties by asking them questions directly or informing their lawyers that this process was designed to encourage party participation. However, with the exception of two cases, the parties yielded to the lawyers either freely or under pressure. One mediator repeatedly told me, "it's incredibly difficult to deal with interests or any other aspect of a conflict beyond positions with the lawyers present." My observations regarding lawyer influence receive significant support from Argentine social scientists, including Coleiro and Rojas. They note that "[i]t frequently happens that the lawyer, as a zealous protector of his client, attempts to explain to the mediator the facts of the case as if he were dealing with a lawsuit, thereby suppressing the spontaneity of his client and the search for his true interests."¹⁰⁰

The same observations dominate United States research on court-connected mediation:

Recent research suggests that this dispute resolution procedure increasingly resembles a traditional bilateral negotiation session between attorneys Attorneys dominate the mediation sessions, while their clients play no or minimal roles . . . a surprisingly small percentage of the settlements produced by these mediation sessions are creative or even non-monetary.¹⁰¹

Thus, mediations often convert into small trials, albeit without the presence of a judge or jury and without the possibility to set a precedent or make the proceedings known to the outside world. An important lesson

100. COLEIRO & ROJAS, *supra* note 9, at 14. These authors continue on to say that "[f]or this reason, Bianchi (1996, p. 162) points out that the lawyer should adapt to this new process in which there is great potential for professional and human development . . . in general lawyers are skillful in developing a defense linked to a given solution or position, and it is possible that they will classify alternative solutions as right or wrong, or that they will formulate options to which one can only respond yes or no Mediators can reduce the antagonism by treating the lawyers as legal representatives, but not as prime negotiators." *Id.*

101. Welsh, *supra* note 91, at 778-79, citing Deborah R. Hensler, *A Research Agenda: What We Need to Know About Court-Connected ADR*, DISP. RESOL. MAG., Fall 1999, at 15, 17 (observing that anecdotal data and empirical studies "suggest that mediation of civil lawsuits in practice is evaluative rather than facilitative, and yields distributive outcomes. In other words, court mediation is a lot like a settlement conference."); Deborah R. Hensler, *ADR Research at the Crossroads*, 2000 J. DISP. RESOL. 71, 76 n.23 (observing that "[i]n a . . . review of empirical literature examining court-ordered mediation practices, [she] found few examples of facilitative mediation of civil damage suits" and was "unable to identify any significant differences in case outcomes between . . . courts that adopted more facilitative mediation approaches and courts that adopted more evaluative approaches").

emerges from Argentina and the United States for countries that wish to adopt a type of mediation that could potentially change legal culture. If mediation is desired to achieve any benefits besides easing the courts' financial and caseload pressures, then mediation should be administered in a more autonomous fashion. To gain more autonomy, several components would be required: First, mediator pay scales should not increase if settlement is reached. Second, the judge who helps select cases for mediation should not be the same judge that presides over the case if it goes to trial. This would prevent parties from feeling that the judge might "take his revenge" at trial for their failure to live up to his expectations. Third, if lawyers are to be present at mediation, then the mediator need not be a lawyer (although it is arguable that any agreement reached should be scrutinized for legality by an attorney associated with the court). Rights should be protected at least at a minimum level, but lawyer mediators do not generally protect rights. Rather, they stress a legalistic view of conflict that may or may not be responsive to the underlying dynamics—emotional, financial, relational, etc.—that may fuel the variety of conflicts that come to mediation. Mediators should be skilled at facilitating communication, not advocating the virtues of settlement. Fourth, all litigants forced to mediate should be fully informed of their right not to settle and of the basic ways in which mediation differs from adjudication. One of these ways is that, given the confidentiality and non-binding nature of mediation, parties should know that it is safe for them to take an active role in the mediation, with the caveat that what they say can help shape the other party's litigation strategy.

There is, however, a competing hypothesis (independent from the administrative and logistical factors alluded to in the foregoing paragraph) that responds to the apparent reality that mediation is changing legal culture less than legal culture is changing mediation. Inadvertently, this hypothesis provides an answer to the curious fact of inadequate voluntary participation in mediation, which was pondered by each country's mediation pioneers and motivated the mandatory mediation schemes.

B. Questions About the Timing of the Remedy and the Nature of the Disputes

In both countries, mediation is mandated only once a lawsuit has been filed. Notwithstanding the difficulty or horror of imagining a system where the government intervened in a dispute before that dispute was brought to the attention of the state by the disputants, the fact that only mature disputes are funneled into mediation deserves attention. Although the data are lacking, it stands to reason that voluntary and meaningful participation in mediation is unrealistic by the time attorneys have been obtained, a lawsuit has been filed, and partisan perceptions have flourished. If any community

mechanisms for or pressures towards settlement existed where the dispute took place, they would have already been applied without success. The same could be said of attempts by the parties to reach a negotiated settlement, although if both societies in question are indeed quite litigious, then it might be the case that such attempts were never made. Regardless, it is the case that under both systems the parties gear up for a fight, only to be told that they need to sit down and talk. It is hardly surprising that their dealings with each other at this point would be infused with legal culture and that mediated dialogues that occurred would lack the good faith, full participation (by the parties), and creative problem solving that one wishes to see.

There is an additional reason, however, why creative problem solving (which mediation is said to facilitate) does not frequently occur. A great number of the conflicts mediated in Argentina and the United States arise out of impersonal relationships typical of an industrialized, pluralistic society. Such conflicts often have a known settlement value—that is, there have been many such disputes before (auto accidents, for example) and it is known what they will settle for in court. In this sense, mandatory mediation applies to fungible and commonplace disputes. Moreover, the lack of repeat play among disputants in a populous and diverse society suggests that mediation procedures administered at any point in the lifetime of the dispute will be met with the adversarial, distributive bargaining characteristic of legal culture. Creative, value-added solutions to conflict are, quite logically, most feasible and attractive where the parties have an ongoing relationship. Such a relationship could provide for medium and long-term benefits from amicable resolution, as well as motivate the resolution of the underlying factors causing the dispute so that the cost of future disputes between these same parties could be avoided.

Significantly, the relevant authorities in both countries have failed to address these factors and have not explained why it makes sense from the litigants' perspective to mandate mediation.¹⁰² Recall that influential mediation advocates in each country claimed, essentially, that people simply do not know the benefits of mediation and must therefore be forced to use it until they (or legal culture generally) come to understand those benefits.¹⁰³ The mechanism through which forcing certain litigants to mediate would change future litigants' or, more generally, society's understanding of mediation's benefits was not specified. Perhaps many litigants forced to mediate will voluntarily mediate their future disputes. Maybe they will praise mediation's virtues to their friends and colleagues.

102. A possible exception is the Argentine Legislature's reference to the state's inability to provide justice. *See supra* note 30 and accompanying text.

103. *See supra* notes 57 and 58 and accompanying text.

Possibly, after accompanying their clients to mandatory mediation sessions, lawyers will begin counseling their clients to mediate voluntarily before filing suit. Despite all these possibilities, only one mechanism through which mandatory mediation could change legal culture is readily apparent: economic incentives.

As discussed above, mandatory mediation laws increase the expected costs faced by parties for submitting their dispute for resolution by the state. Assuming that citizens of Argentina and the United States are aware of this, it can be said that mandatory mediation has changed the cost-benefit calculus faced by anyone contemplating a lawsuit that would fall under the mediation laws' purview. This altered calculus applies to potential defendants as well as potential plaintiffs, since the former ought to know that if they fail to resolve the aggrieved party's concerns they will likely be hauled not only into court, but into mediation as well. Thus, mandatory mediation provides incentives for increased efforts on behalf of parties to resolve disputes prior to their entrance into the state's domain.

A strange consequence of this cost-benefit calculation is that the economic incentive of tax payers not involved in any dispute to intervene informally (*i.e.*, exert community pressure towards resolution) decreases in light of the mandatory mediation laws. This is because mandatory mediation laws increase the costs faced by disputants and decrease the costs of judicial administration as a whole. If a perceived likelihood of being a party to a dispute is widely experienced by most members of a society, however, then it would be in the interest of all such members to strengthen community dispute resolution mechanisms. Regardless, however, of whether both present and future disputants would recognize their heightened economic interest in resolving disputes prior to submitting them to the state, the question remains whether economic incentives can translate into increased efforts at informal dispute resolution. In terms of informal pressure to settle a dispute prior to filing a lawsuit, it is doubtful that community members decide to intervene informally in a dispute on the basis of how many tax dollars will be expended to fund a given dispute's formal resolution by the state.

In terms of disputants' personal economic incentives, however, it does follow that an increase in the direct financial costs (as well as temporal costs) to be born by each litigant would help ensure that the parties attempt to negotiate before submitting their conflict to the state. In this sense, mandatory mediation may well respond to the commonly-held but quite debatable notion that both countries have litigious cultures. What better way to quell litigiousness than by increasing the costs of proceeding to litigation?

The final issues arising in conjunction with mandatory mediation speak to social change and unintended consequences. These suggest special risks associated with transplanting mandatory mediation to developing countries.

C. *On Inequality and the Effects of Legal Transplants*

No transplanted component of a legal system operates in a vacuum. Rather, it exists in a particular socio-political context. Mediation in both countries has been shown to divert cases from the courts and to save money for the state. Besides these primary, intended effects, researchers in the United States have suggested that mediation's lack of evidentiary and procedural rules puts certain types of disputants at risk. Specifically, they have shown that women, minorities, and any individual bargaining against a corporation tend to achieve worse outcomes than they might otherwise achieve in court.¹⁰⁴ Professor Nader has suggested that "changes in the handling of civil cases . . . functioned to suppress the realities of class, gender, and racial antagonisms in the United States, while affording efficiency and often cheaper dispute resolution for business."¹⁰⁵

These risks are increased in Argentina, where ongoing market reforms are often linked to corrupt practices, windfalls for corporations, and the general disenchantment of the citizen body.¹⁰⁶ Mandatory mediation serves as a component of economic and social reforms, increasing Argentina's attractiveness to highly mobile multinational corporations. Mediation is properly described in these terms since it stresses settlement, confidentiality, and bargaining. These attributes are attractive to corporations, which are known to value predictability in damages awards and confidentiality in settlement terms. Dominant notions of fairness present in both countries' legal cultures, on the other hand, might question whether these values are appropriate in certain contexts, such as where a party is 'right on the facts and right on the law'¹⁰⁷—and therefore deserves better than negotiated compromise—or where an important social principle is at stake.

104. See Trina Grillo, *The Mediation Alternative: Process Dangers for Women*, 100 YALE L.J. 1545, 1600–07 (1991); Laura Nader, *Controlling Processes in the Practice of Law: Hierarchy and Pacification in the Movement to Re-Form Dispute Ideology*, 9 OHIO ST. J. ON DISP. RESOL. 1 (1993) [hereinafter Nader, *Controlling Processes in the Practice of Law*]; LAURA NADER, HARMONY IDEOLOGY: JUSTICE AND CONTROL IN A ZAPOTEC MOUNTAIN VILLAGE (Thorsons Publishers 1991).

105. Nader, *Controlling Processes in the Practice of Law*, *supra* note 104, at 5.

106. See, e.g., Jason Morgan-Foster, *The Relationship of IMF Structural Adjustment Policies to Economic, Social, and Cultural Rights: The Argentine Case Revisited*, 24 MICH. J. INT'L L. 577, 589–91 (2003).

107. Sander et al., *supra* note 58, at 892 (asking whether such a person "[s]hould be forced to run through a number of hoops to settle this case out of economic need").

Some economically disadvantaged disputants may be amenable to such terms, given their lack of alternatives, even if they do not receive what they are legally due. The policy decision inherent in mandatory mediation is that the state should make that decision for each individual plaintiff. A suggestion emerging from this comparative analysis is that those exporting or facilitating the introduction of mediation into new host countries should consider the extent to which mandatory mediation could worsen existing power imbalances and decrease already scant protections offered to marginalized groups. It would also be appropriate for legislatures considering mandatory mediation laws to contemplate the unintended effects of diverting cases from litigation to mediation. They might find, for example, that mandatory mediation relegates due process or equivalent legal protections from a legal requirement to a discretionary practice. The underlying lesson is quite simply that the viability of legal transplants needs to be contemplated with reference to the particular social conditions of the host country. Similarly, success stories from other countries should not be considered persuasive without reference to the same.

VI. CONCLUSION

In both Argentina and the United States, a model of mediation has prevailed that benefits the courts and businesses, and allows disadvantaged parties to receive some compensation sooner rather than later. No signs of cultural rejection among disputants could be found. The primary path dependencies noted in this paper relate to lawyers, legislators, and judges. Lawyers behave as if mediation were litigation, thereby converting the mediation into an adversarial settlement conference. Legislators and judges, not particularly interested in the intangible benefits of mediation—such as creative outcomes and party empowerment—have legislated and administered a narrow version of mediation.

A comparative insight arises from this: Countries that institutionalize mediation via the courts should expect significant co-option of mediation by adversarial values.¹⁰⁸ Furthermore, such countries should take care to minimize the extent to which governmental goals further threaten the benefits offered by mediation. The extent to which these adversarial values and governmental goals are shared by (or provide benefits to) citizens forced to mediate could vary widely and it is this that compromises the integrity of the process. Accordingly, legislatures considering the passage of mandatory mediation laws or considering what type of mediation laws to adopt should think critically about their vision for dispute processing and

108. I am assuming here that the courts of these countries will in fact be steeped in adversarial values. This of course is not necessarily the case.

whether that vision accords with disputants' interests and, more generally, their countries' fundamental concepts of justice. Assuming a well-founded and coherent vision for dispute processing, attention must be paid to the potential for divergence between the operation of mediation laws and the ends those laws were intended to achieve. Here, the means have thus far proved to be somewhat incongruous with the vision itself, and the vision, in turn, has not been shown to be well-founded or coherent. It is for these reasons that scrutinizing the practice of mandatory mediation in Argentina and the United States has yielded surprising results.

VII. TABLE OF AUTHORITIES

THE POLITICS OF INFORMAL JUSTICE: THE AMERICAN EXPERIENCE (Richard Abel ed., Acad. Press 1982)

A.B.A., REPORT ON THE NATIONAL CONFERENCE ON MINOR DISPUTES RESOLUTION, MAY 1977 (A.B.A. Press 1978)

Acuerdos Laborales, CLARÍN DIGITAL, Sept. 16, 1998, at Economía, <http://old.clarin.com/diario/98/09/16/>

Alternative Dispute Resolution Act of 1998, Pub. L. No. 105–315, 112 Stat. 2993 (1998)

ALTERNATIVE DISPUTE RESOLUTION—EUROPEAN COMMISSION, SETTLING OUT OF COURT—DEVELOPING ALTERNATIVE METHODS TO RESOLVE CIVIL AND COMMERCIAL DISPUTES IN THE EUROPEAN UNION, http://europa.eu.int/comm/justice_home/fsj/civil/dispute/wai/fsj_civil_dispute_en.htm

GLADYS S ÁLVAREZ ET AL., *MEDIACIÓN Y JUSTICIA* (1996)

MARGOT ASTROV, *AMERICAN INDIAN PROSE AND POETRY* 5 (Capricorn books 1962)

ROBERT A. BARUCH BUSH & JOSEPH P. FOLGER, *THE PROMISE OF MEDIATION* (Jossey-Bass Publishers 1994)

GERMÁN J. BIDART CAMPOS, *THE ARGENTINE SUPREME COURT: THE COURT OF CONSTITUTIONAL GUARANTEES* (William J. Brisk trans., Allende & Brea 1984)

Senator Branda, *La Ley, Antecedentes Parlamentarios* (1995)

EDGARDO BUSCAGLIA & MARIA DAKOLIAS, *JUDICIAL REFORM IN LATIN AMERICAN COURTS: THE EXPERIENCE IN ARGENTINA AND ECUADOR* (World Bank Publ'ns 1996)

Civil Justice Reform Act of 1990, Pub. L. No.101–650, 104 Stat. 5089 (1990)

SARAH R. COLE ET AL., *MEDIATION: LAW, POLICY, PRACTICE* § 1:01 (West 2003)

JUAN PEDRO COLEIRO & JORGE A. ROJAS, *MEDIACIÓN OBLIGATORIA Y AUDIENCIA PRELIMINAR* (Rubinzal & Culzoni 1998)

Decreto del Presidente sobre Mediación y Conciliación, Decree No. 1021/95, Dec. 28, 1995, [28301] B.O. 8, at art. 26 (Arg.)

EMERGING ADR ISSUES IN STATE AND FEDERAL COURTS, 1991 A.B.A. SEC. LITIG.

ENRIQUE M. FALCÓN, MEDIACIÓN OBLIGATORIA EN LA LEY 24.573 (Abeledo-Perrot 1996)

EDUARDO GALEANO, LAS VENAS ABIERTAS DE AMÉRICA LATINA (1974)

Interview with Miguel Gaya, arbitrator, mediator and member of the Confederación Económica de Argentina (Oct., 1998)

John Gillespie, *Transplanted Company Law: An Ideological and Cultural Analysis of Market-Entry in Vietnam*, 51 INT'L & COMP. L.Q. 641 (2002)

Uki Goni, *Menem Bows Out of Race for Top Job*, Guardian Unlimited, May 15, 2003, <http://www.guardian.co.uk/argentina/story/0,11439,956213,00.html>

Trina Grillo, *The Mediation Alternative: Process Dangers for Women*, 100 YALE L.J. 1545 (1991)

Deborah R. Hensler, *ADR Research at the Crossroads*, 2000 J. DISP. RESOL. 71

Deborah R. Hensler, *A Research Agenda: What We Need to Know About Court-Connected ADR*, DISP. RESOL. MAG., Fall 1999

Elena I. Highton & Gladys S. Álvarez, *Métodos RAD – La Mediación Obligatoria en la Ley 24.573*, Libra No. 6, at 14 (Spring 1997)

Daisy Hurst Floyd, *Can the Judge Do That? The Need for a Clearer Judicial Role in Settlement*, 26 ARIZ. ST. L.J. 45 (1994)

JAMES S. KAKALIK ET AL., AN EVALUATION OF MEDIATION AND EARLY NEUTRAL EVALUATION UNDER THE CIVIL JUSTICE REFORM ACT (Rand Corp. 1996)

Ley de Empleo, Law No. 24.013, Dec. 5, 1991, [LI-D] A.D.L.A. 3873 (Arg.)

Ley de Instancia Obligatoria de Conciliación Laboral, Law No. 24.635, Apr. 26, 1996, [28387] B.O. 1 (Arg.)

Ley de Mediación y Conciliación, Law No. 24.573, Oct. 25, 1995, [28258] B.O. 1 (Arg.)

MINISTERIO DE JUSTICIA, DIRECCIÓN NACIONAL DE MEDIOS ALTERNATIVOS DE RESOLUCIÓN DE CONFLICTOS, INFORME ESTADÍSTICO, MEDIACIONES OFICIALES

Jason Morgan-Foster, *The Relationship of IMF Structural Adjustment Policies to Economic, Social, and Cultural Rights: The Argentine Case Revisited*, 24 MICH. J. INT'L L. 577 (2003)

DANIEL MUCHNIK, ARGENTINA MODELO: DE LA FURIA A LA RESIGNACIÓN: ECONOMÍA Y POLÍTICA ENTRE 1973 Y 1998 (Cuadernos Argentinos) (Manantial 1998)

Laura Nader, *Controlling Processes in the Practice of Law: Hierarchy and Pacification in the Movement to Re-Form Dispute Ideology*, 9 OHIO ST. J. ON DISP. RESOL. 1 (1993)

LAURA NADER, HARMONY IDEOLOGY: JUSTICE AND CONTROL IN A ZAPOTEC MOUNTAIN VILLAGE (Thorsons Publishers 1991)

New Law Authorizes ADR In All District Courts, 31 THE THIRD BRANCH, No. 2, Feb. 1999, <http://www.uscourts.gov/ttb/feb99ttb/newlaw.html>

Esin Örüçü, *Law as Transposition*, 51 INT'L & COMP. L.Q. 205 (2002)

ELIZABETH PLAPINGER & DONNA STIENSTRA, FED. JUD. CTR. [FJC], ADR AND SETTLEMENT IN THE FEDERAL DISTRICT COURTS: A SOURCEBOOK FOR JUDGES & LAWYERS (1996)

Ellen J. Pollack & Edward Felsenthal, *Private Civil Cases in Federal Courts Rarely Reach Trial*, WALL ST. J., June 27, 1990, at B2

RAND Corporation, <http://www.rand.org/index.html>

John C. Reitz, *How to Do Comparative Law*, 46 AM. J. COMP. L. 617 (1998)

KENNETH T. RIVERA, ARGENTINA: ISSUES, HISTORY, BIBLIOGRAPHY (Nova Sci. Publishers 2002)

NANCY A. ROGERS AND CRAIG A. MCEWEN, MEDIATION: LAW, POLICY, PRACTICE (2nd ed. 1994)

LUIS ALBERTO ROMERO, BREVE HISTORIA CONTEMPORÁNEA DE ARGENTINA (Fondo de Cultura Económica 1994)

Frank E. Sander et al., *Judicial (Mis)Use of ADR? A Debate*, 27 U. TOL. L. REV. 885 (1996)

Diego Schurman, *Grave Situación de los Carenciados: Pobres los Pobres*, PÁGINA 12, Jan. 11, 1999, <http://old.pagina12web.com.ar/1999/99-01/99-01-11/pag03.htm>

Nancy A. Welsh, *Making Deals in Court-Connected Mediation: What's Justice Got to Do With It?*, 79 WASH. U. L.Q. 787 (2001)

Nancy A. Welsh, *The Thinning Vision of Self-Determination in Court-Connected Mediation: The Inevitable Price of Institutionalization?* 6 HARV. NEGOT. L. REV. 1 (2001)

Judge Dorothy Wright Nelson, *ADR in the Federal Courts—One Judge's Perspective: Issues and Challenges Facing Judges, Lawyers, Court Administrators, and the Public*, 17 OHIO ST. J. ON DISP. RESOL. 1 (2001)

