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TILTING THE JUSTICE SYSTEM:
FROM ADR AS IDEALISTIC MOVEMENT
TO A SEGMENTED MARKET IN
DISPUTE RESOLUTION

Bryant G. Garth*

INTRODUCTION

This conference is evidence that one form of the Alternative Dispute Resolution (ADR) movement is under some attack—the movement toward mandatory arbitration created through take-it-or-leave-it employee/employer or consumer/business contracts. The major concerns in the literature include the fairness of the processes and the relationship of the processes to consumer protection and to the enforcement of various statutory rights—securities laws, antidiscrimination, and antitrust. The attack is mainly on contractual

* Director and Research Fellow, American Bar Foundation. J.D., Stanford Law School. Ph.D., European University Institute, Florence, Italy. This Article was prepared in conjunction with the Symposium, “Ethics in a World of Mandatory Arbitration,” hosted by the Georgia State University Law Review on February 14, 2002.


arbitration, but it has spilled over into court-required arbitration and mediation programs,\(^3\) although the concerns are somewhat different.\(^4\) The attack has to some extent put mandatory ADR on the defensive. While ADR continues to get very strong backing from the courts, there are increasing numbers of cases challenging some aspects of an ADR procedure—especially a mandatory ADR or one where one party in effect has no choice.\(^5\) From this perspective, the future appears to be a trend toward the further formalization of ADR. The debates tend to concern how far to go toward “legalizing” the processes of the various forms of ADR.

This Article seeks to place those developments in a larger context. The Article begins with the premise that both arbitration and mediation can be explored as a tale of “legal innovation co-opted,” or “an ironic tale of the unintended consequences of social change and

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5. See, e.g., Green Tree Fin. Corp. v. Randolph, 531 U.S. 79 (2000) (enforcing agreement to arbitrate, though four justices focused on procedural fairness); Circuit City Stores v. Adams, 279 F.3d 889 (9th Cir. 2002) (deeming a contract to arbitrate too “one-sided” to enforce under California law despite Supreme Court decision in same case that the Federal Arbitration Act supported enforcement); Penn v. Ryan’s Family Steak Houses, Inc., 269 F.3d 753 (7th Cir. 2001) (refusing to enforce employee arbitration agreement because the company forced the employee to negotiate directly with the provider); Hooters of Am., Inc. v. Phillips, 173 F.3d 933 (4th Cir. 1999) (focusing on costs of arbitration to invalidate the contractual reference); Cole v. Burns Int’l Sec. Servs., 105 F.3d 1465 (D.C. Cir. 1997) (enforcing contract to arbitrate but discussing “minimal standards of procedural fairness”); Armendariz v. Found. Health Psychcare Servs., Inc., 6 P.3d 669 (Cal. 2000) (listing as factors bearing on lawfulness of mandatory arbitration discovery availability, neutral arbitrators, relief available, costs, and written award); Engalls v. Permanente Med. Group, Inc., 938 P.2d 903 (Cal. 1997) (refusing to enforce contract to submit to internal machinery controlled by Kaiser Permanente).
legal reform." Menkel-Meadow suggests that the therapeutic and relatively informal processes envisioned by the early ADR proponents have mutated into more formal and even adversarial proceedings. A similar argument can be made about mandatory arbitration, which also gained support from idealistic academic studies—here promoting "procedural justice." The idea was that arbitration allows individuals to tell their stories, and therefore litigants perceive the process as a more legitimate form of justice than the usual result of litigation—a negotiated settlement. Both mediation and arbitration contain a tradition—now seemingly muted—that the results are supposed to be better than strict enforcement of the law. We can therefore suggest two ways to go for reform—a return to the roots of the pure alternative processes, or an effort to infuse more law and due process into the "alternatives." As suggested above, the latter approach is gaining momentum.

Both potential directions for reform ignore the profound changes that have taken place in the private and public justice systems over the past twenty-five years. Many of the arguments appear almost timeless—law enforcement versus ADR, public rights versus private justice. Some of those leading the charge to formalize are indeed the same people who resisted the movement to ADR in the first place. But it is not a matter of rolling back the clock to an earlier era. The entire system has been transformed. Therefore, I want to try to get behind a history buried in legal and ADR terminology—and questions about the purity of ADR—and look instead at what actually

8. Yves Dezalay and I have noted the ways that processes with a given name—litigation, arbitration, mediation—can change quite dramatically over time. Yves Dezalay & Bryant Garth, Fussing about the Forum: Categories and Definitions as Stakes in a Professional Competition, 21 LAW & SOC. INQUIRY 285, 292-93 (1996).
9. See, e.g., Edwards, supra note 2, at 293.
happened both in terms of the players and the processes found in the various kinds of dispute resolution.

My main argument, which I offer as a hypothesis that requires more research, is that we have created a very segmented and hierarchical system of justice as outlined roughly in Figure 1. There is a very special elite group of judges, retired judges, commercial courts, mediators, and arbitrators who provide tailor-made justice geared specifically to large business disputes—a category that includes the new wave of large class actions. This elite has its own sets of lawyers as well, and this relatively small group dominates the agenda for federal court reform as well as the elite ADR market.\(^\text{10}\) If we look closely at the Federal Rules Advisory Committee or the groups that come together to discuss discovery abuse or class actions, we will see this elite—most of whom know each other even as they fight in court. This group helps to negotiate rules that favor their clients and themselves, such as the tobacco industry settlements on the one hand, and on the other hand, ADR that holds down conflict and expense. In this sense it resembles and parallels the system of transnational commercial arbitration—a small world of elite and cosmopolitan arbitrators—and helps to put in place a deluxe *lex mercatoria* to serve the needs of merchants and those who live off of them.\(^\text{11}\)

This legal system of *lex mercatoria* for high-stakes business cases is also a means for those with market value as high-end dispute professionals—including judges—to cash in on that market value. The private and public are very close in this domain, even though the cases handled “privately”—by people whose careers and status frequently have come from their public positions—are often kept

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10. *See* Bryant Garth, *Two Worlds of Civil Discovery: From Studies of Cost and Delay to the Markets in Legal Services and Legal Reform*, 39 B.C. L. REV. 597, 597 (1998). At times, even in the conference at which this paper was presented, the mechanism for shaping the system for the elite involves forums where the plaintiffs’ class action lawyers and the elite defense lawyers vehemently criticize each other—drawing attention to the issues that affect only these co-dependent adversaries.

Figure 1: A Justice Hierarchy: The Pyramid of Players and Institutions

The groups of lawyers and dispute providers shrink dramatically as we move up on the scale, and the move up also is consistent with a whiter, older, and more male-dominated set of players.

**High Stakes Business Disputes**
(top class action and corporate lawyers, top fees)
- federal courts
- commercial courts
- internat'l commercial arb.
- tailor made, negotiated,
distinctive processes,
adversarial ADR
- federal judges
- select state judges
- retired federal and elite
- state judges
- legal notables
- ex-government officials
- AAA elite list
- CPR elite lists
- elite of the ADR providers

**Low to Medium Stakes – repeat players**
(personal injury plaintiffs and defense, niche markets;
securities, labor, family, discrim; modest fees)
- regular courts
- court-mandated ADR
- emphasis on settlement
- contract-imposed ADR
- emphasis on settlement
- and satisfaction
- and satisfaction
- regular judges
- relatively few popular
- individuals
- major ADR provider
- organizations
- major ADR provider
- organizations and a few
- popular individuals

**Low to Medium Stakes - one shotters**
(generalist lawyers)
- regular courts
- court mandated ADR
- emphasis on settlement
- and mass justice
- regular judges
- pot luck neutrals, aspiring
- to be popular
secret from the general public. In contrast to some of the literature, therefore, my point is not that the courts are losing important cases and left with those clients who cannot afford luxury ADR. It is that the elite have a full array of alternatives, including the federal courts, which they can use for tactical and other reasons. This elite sphere is difficult to enter as a lawyer or as a neutral; the sphere is relatively small, but the impact on the rest of the system is quite strong. With justice now rationed according to the market, much of the system is allocated to this group, and those occupying lower rungs typically aspire to move up to this higher stakes, higher status, higher rewards level (and often act accordingly).

We have also, therefore, created a low-end justice for the rank and file. It is no longer evidenced only by the fact that the typical state court judge is not as qualified as a federal judge, but now also through processes that push ordinary litigants into settlement-oriented ADR processes dominated by quick-and-dirty arbitration and by mediation conducted by private individuals accountable neither through review processes nor appeal. I have divided these low and middle stakes claims into two rough categories—repeat players and one-shotters—since the system appears very different depending on familiarity with the players—the “neutrals”—and the need for the players to satisfy a knowledgeable constituency of lawyers, and to some extent, clients. The repeat players clearly dominate and create the market for the leading neutrals and provider organizations. For the rest, the system provides essentially a parallel (and rather sloppy) justice system dominated by a potluck of court-appointed neutrals.

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12. Some commentators have feared a division akin to that between private and public schools in urban areas. See Jack B. Weinstein, Some Benefits and Risks of Privatization of Justice Through ADR, 11 OHIO ST. J. ON DISP. RESOL. 241, 262 (1996). That is not the situation that I believe has emerged. Both the public and the private retool to favor high-stakes business disputes.

13. They aspire if they are close enough to a position where they might plausibly move up. If they are considered too “liberal,” anti-business, or identified too closely with a “special interest” or minority group, the odds are not so good. See infra Part II.
This “ADR” has very little in common with anything described in the ADR textbooks.\footnote{14}{One indicator of the quality of state court neutrals is a recent case where a reluctant arbitrator in Arizona sued on the grounds that to force him to serve as arbitrator constituted a taking under the Fifth Amendment; ultimately, he lost in the Ninth Circuit. Scheehle v. Justices of the Supreme Court of the State of Ariz., 257 F.3d 1082 (9th Cir. 2001).}

Finally, and as I will suggest later, this highly segmented system operates with a built-in tilt toward those with the highest stakes cases in the first instance and those who are the repeat players in the second. It is not the simplistic bias of decision-making structured for the employers or companies to win. Instead, the bias is found in a system in which only a few constituencies are comfortable making their arguments and confident that their concerns will be understood, even if they lose some cases. The bias is also in a process that selects neutrals who will be safe for the leading lawyers and clients—whoever controls the selection—and rejects those who appear too political, too unreliable, or too risky even on the basis of cultural stereotypes. The process also encourages ambitious neutrals or even public judges who want to gain the rewards of ADR to position themselves so that leading lawyers and clients will see them as safe and legitimate.

This characterization of a highly segmented process is meant to be provocative. Before trying to justify my perspective, however, it is useful to examine the current wave of criticisms more closely. My analysis will seek to place the current wave in a context that shows just what it accepts and what it chooses to attack.

I. CRITICIZING MANDATORY ADR AND ESPECIALLY ARBITRATION

The issues that surface most vehemently in the critical literature and cases involve fairness of the processes and the extent to which they provide access to enforce legal rights and, especially, important federal rights. As noted before, these criticisms are often combined with a challenge to the voluntariness of any consent to such
proceedings. Presumably the more voluntary the process, the lesser the need for procedural formalities.

Much of the literature, for example, has taken up the issue raised in a very different social context by Marc Galanter in 1974—the advantages of “repeat players” versus “one-shot” parties to the process. One argument is that regular users of arbitration have greater familiarity with the arbitrators and their respective points of view, aiding in arbitrator selection—thereby gaining an advantage over one-shot parties who typically lack access to that kind of information. Further, arbitrators themselves have an interest in pleasing the repeat players in order to gain future appointments as arbitrators. Put in the most extreme form, the arbitrators are charged with favoring the side that pays them. On the other hand, if there are repeat players on both sides, as in disputes between labor unions and management, there is no great concern. The key issue, moreover, is less the parties and more the lawyers, who are the ones that typically select the neutrals. To the extent that specialized groups of lawyers develop on both sides, as they may have at least in the securities and labor arenas, the force of this criticism is diminished. The neutrals must prove their worth to both sides.

A variation of this argument that potentially applies to mediation as well as arbitration involves contractual arrangements that give the dispute resolution business to one provider—for example, JAMS, or even the not-for-profit American Arbitration Association. In such a case, the argument goes, the provider has a particular interest in retaining the dispute resolution business and therefore may make special efforts to please the company that hires it.


16. For a recent discussion of the repeat player issue in labor relation cases, see Lisa B. Bingham, Employment Arbitration: The Repeat Player Effect, 1 EMPLOYEE RTS. & EMP. POL’Y J. 189 (1997).
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The general issue of repeat players has produced a renewed emphasis on the disclosure of potential conflicts of interest.\footnote{We find requirements of disclosure in various reforms designed to build a code of behavior for neutrals in court-appointed programs. See Sharon Press, \textit{Ethics for Provider Organizations}, in ETHICAL ISSUES IN DISPUTE RESOLUTION (Phyllis Barnard & Bryant G. Garth eds., forthcoming). Relevant codes include \textit{Principles for ADR Provider Organizations}. See CPR-GEORGETOWN COMM\'N ON ETHICS AND STANDARDS OF PRACTICE IN ADR, \textit{Principles for ADR Provider Organizations} (Draft, Dec. 2001).} The repeat players themselves have also taken action to reinforce their credibility. In particular, with the development and consolidation of the dispute resolution market, the leading providers and promoters—including especially JAMS, the American Arbitration Association, and the CPR Institute for Dispute Resolution—have themselves moved to bolster the due process guarantees available to consumers placed in their hands through essentially mandatory contractual provisions.\footnote{See NAT\'L ACADEMY OF ARBITRATORS, GUIDELINES ON ARBITRATION OR STATUTORY CLAIMS UNDER EMPLOYER-PROMULGATED SYSTEMS, DUE PROCESS PROTOCOL FOR MEDIATION AND ARBITRATION OF STATUTORY DISPUTES ARISING OUT OF THE EMPLOYMENT RELATIONSHIP (1997).}

The other criticisms point in the direction of legal formalism. For example, there is increasing attention to a lack of discovery available in arbitration and perhaps also mediation.\footnote{For a thoughtful discussion of the various procedural criticisms, see generally Stipanowich, \textit{supra} note 2.} The criticism is that the basic tools that parties need to establish their rights are perhaps missing in the more informal arbitral proceeding. This point is especially strong when critical evidence (for example, of discrimination) is in the hands of the opposing party.\footnote{See, e.g., Sabatino, \textit{supra} note 4, at 1309-10.}

The lack of appeal from arbitration is another way to challenge mandatory reference to binding arbitration. Since the legal grounds to challenge are very demanding, with a strong presumption in favor of the arbitrator’s decision, the lack of appeal can appear to be another hindrance to rights enforcement. Arbitrators’ decisions have long been thought to contain compromises of one sort or another. Interestingly, when the courts themselves implemented mandatory
arbitration, due process grounds required there be a de novo appeal in the courts. The state could not take away the right of judicial appeal unless the parties specifically agreed to accept the result of arbitration (or now, mediation). Now there is a strong effort to allow parties to provide for judicial review of certain arbitrations on legal grounds.21 A related concern, also deviating far from traditional arbitration, is whether the arbitrators must provide written opinions and reasoned decisions.22

With respect to mediation, there are similar questions revolving around the relationship between a mediated result and the legal rights of the parties. Some of these questions arise in the debates about whether mediation is “the practice of law,” with the implication that lawyer-mediators may be more likely to bring about a mediation that keeps in mind the relative rights of the parties. There is also the question about the voluntariness of a decision to settle a case, given the lack of appeal that goes with the idea of a consensual settlement.23 More generally, as stated by Nancy Welsh,

even as most mediators . . . continue to name party self-determination as the “fundamental principle” underlying court-connected mediation, the party-centered empowerment concepts that anchored the original vision of self-determination are being replaced with concepts that are more reflective of the norms and traditional practices of lawyers and judges, as well as the courts’ strong orientation to efficiency and closure of cases through settlement.24

22. See, e.g., Armendariz v. Found. Health Psychcare Servs., Inc., 6 P.3d 669, 685 (Cal. 2000) (stating that to provide for adequate—albeit limited—judicial review, “an arbitrator . . . must issue a written arbitration decision that will reveal, however briefly, the essential findings and conclusions on which the award is based”).
24. Welsh, supra note 4, at 5.
These criticisms reveal a march toward formalization and away from some of the initial ideals of arbitration and mediation—and the debates about the relative merits of the two. Many judicial decisions provide evidence of this undercurrent, despite the fact that courts have continually held valid those contracts and procedures mandating ADR.\textsuperscript{25} Other indicators of the formalization process include the emphasis on the litigation skills necessary to win mediations and to avoid letting a mediation undermine a posture in litigation,\textsuperscript{26} the requirement to mediate in good faith that courts increasingly impose,\textsuperscript{27} and even potential requirements to police the quality of settlements.\textsuperscript{28} Commentators seemingly agree that "[l]itigation-oriented principles of procedural fairness . . . have reemerged in ADR."\textsuperscript{29} Virtually every one of these criticisms harkens back to the attitude of the courts prior to the line of cases that began with \textit{Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.}\textsuperscript{30} That attitude was that the informality of arbitration placed obstacles in the way of enforcing rights.\textsuperscript{31} As suggested above, the situation today is nevertheless very different than it was prior to \textit{Mitsubishi}.

II. \textsc{Another Dimension of Criticism: A Closer Look at the Players}

The process of formalizing the informal to protect the litigants and give them access to judicial machinery capable of enforcing their

\textsuperscript{25} See cases cited supra note 5.
\textsuperscript{26} Lawrence Fox, \textit{Mediation Values and Lawyer Ethics: For the Ethical Lawyer, the Latter Trumps the Former, in Ethical Issues in Dispute Resolution} (Phyllis Barnard & Bryant G. Garth eds., forthcoming).
\textsuperscript{28} See generally Welsh, supra note 4.
\textsuperscript{29} Sabatino, supra note 4, at 1292.
\textsuperscript{30} 473 U.S. 614 (1985).
\textsuperscript{31} Wilko v. Swan, 346 U.S. 427, 435-38 (1953) (holding, by a 7 to 2 margin, that an arbitration clause in a securities contract was void due to the lack of explanation of the arbitration award, the lack of a complete record of the arbitration proceedings, and the lack of judicial review of the arbitrator's interpretation of the law).
rights appears to be a return to the arguments of the pre-\textit{Mitsubishi} era. There is a counter-attack against the most aggressive supporters of alternative dispute resolution—those who sought to build alternatives antithetical to adversarial litigation.\textsuperscript{32} Underneath the story of formalism and informalism, public and private justice, legal rights versus alternatives, however, is a more fundamental story of contests about the appropriate people—including juries—for the resolution of disputes brought to the courts. It is about which cases will be channeled in which directions, and about who is accountable to whom for the results and reputation of the providers. As suggested in the discussion of Figure 1, the situation has become quite segmented in terms of lawyers and neutrals. It is useful here to look more carefully at the relationship between the neutrals and judges and their potential constituencies.

At the lowest level, we have the ordinary courts and, most frequently, mandatory mediation. Mediation allows courts to dump some cases that judges do not want, and it also makes a place for relatively marginal members of the legal profession to be deputized as mediators. These individuals succeed in going through a training session and getting on an appropriate list. There is often an oversupply of such mediators, and they are willing or coerced to work for very little material reward. For lawyers who are not frequently involved in similar cases—for example personal injury—it is difficult to know just who might be a good or bad mediator for a particular case. If there is more general accountability, it must come from the courts themselves or provider organizations that participate. As Wayne Thorpe suggested at this conference, however, providers such as JAMS do not want these relatively small cases.\textsuperscript{33} Small cases do not justify the fees the provider organizations must charge. Better


\textsuperscript{33} Wayne Thorpe, Remarks at the Symposium, "Ethics in a World of Mandatory Arbitration," hosted by the \textit{Georgia State University Law Review} (Feb. 14, 2002) (transcript on file with the \textit{Georgia State University Law Review}).
research and monitoring could improve these low-end cases, but it involves neutrals at the low end of the professional hierarchy and provides very little incentive for them to do well.

There is some incentive to try to move up, but there are many fewer places at the next level of neutral. Where choice is permitted, evidence shows that a relatively few individuals gain the vast majority of the business of court-referred mediation and contractual arbitration. These must be people acceptable to the parties who are repeat players or more particularly to the lawyers who provide repeat business. They must maintain some equilibrium between businesses (especially insurance defense) and personal injury claimants, but few others will have enough repeat business to have much input in the reputations of the "best" dispute settlers. Further, as the business of providing mediators and arbitrators consolidates around a relatively few companies, we have to ask who the people are who get invited to and succeed in JAMS and other similar entities. No research that I know of answers those questions, but those who have market value for the providers tend to be those who are broadly acceptable to the repeat players. We can also surmise that the group of star providers is older and more male-dominated than the profession at large, and probably also more so than the state judiciaries.

Part of the evidence concerning the development of the system is the evolution of personal injury lawyers' attitudes. The struggle between business lawyers and personal injury lawyers tends to revolve around access to the jury system, which helps account for the hostility of plaintiffs' lawyers to mandatory arbitration programs that deprive their clients of juries. But the court programs help the personal injury lawyers sort out which cases have high enough stakes

34. I have many informal sources for this statement, which also fits the world of international commercial arbitration. Dezalay & Garth, supra note 11, at 58-59. Phil LaPorte at the conference suggested that ten percent of labor arbitrators do ninety percent of the arbitrations. Phil LaPorte, Remarks at the Symposium, "Ethics in a World of Mandatory Arbitration," hosted by the Georgia State University Law Review (Feb. 14, 2002) (transcript on file with the Georgia State University Law Review).
to justify full treatment—perhaps even a trial—and those which do not. There is evidence, for example, that trial lawyers who at first opposed mandatory mediation in Texas now support it as a way to get a quick settlement of cases that probably are not worth trying. They are notable repeat players, and the “mediators” provide a service to both sides in the personal injury cases in favor of quick and efficient disposal of cases that represent relatively little economic value to plaintiff or defense lawyers. The mediators that become the stars are those who serve the collective interests of plaintiff and defense lawyers in finding quick compromise settlements. Other lawyers can also try to draw on the services of these notables, but it is important to remember that there are many litigants in this segmented system who are served potluck.

It is worth comparing this system briefly with the traditional urban court system. There, judges were appointed for their connections to the political establishment and not their potential market value; they were supposed to translate general political values into legal decision-making. They were assigned to cases randomly, so that no litigant, no matter how privileged, could buy a special justice; relatively poor litigants might draw first-rate judges. Litigants from particular neighborhoods could figure that they might get a judge from their own particular racial or ethnic group. Certainly lawyers rationed their energies according to the stakes of each case; we should not idealize the generally low level and relatively informal system that most courts operated, but decision-makers were not rationed strictly according to the stakes of the cases and the interests of the repeat-player lawyers.

At the top of the emerging segmented system is a special high end that not only commands the best talent and the most resources, but also orients the entire system toward its definitions of excellence and

35. Communication from Stephen Daniels and Joanne Martin of the American Bar Foundation on the basis of their studies of the Texas plaintiffs' bar.
36. We can see this world in ADAM COHEN & ELIZABETH TAYLOR, AMERICAN PHARAOH: MAYOR RICHARD J. DALEY: HIS BATTLE FOR CHICAGO AND THE NATION (2000).
high status. The high end is composed of the federal judiciary, which has now concentrated judicial resources on high stakes, "bet-the-company" business cases, and a new group of very high-end mediators, arbitrators, and others who provide dispute resolution services to businesses and to courts needing special masters and the like. This high end serves major business litigants and a small group of leading class action lawyers in antitrust, securities, and products liability. The individuals who succeed in moving to this level as decision-makers or dispute professionals must, in the first place, be safe for the players of this business world, and they profit because of what businesses will pay them in the dispute resolution market.

The key question is how someone gets to be the person who will be entrusted with major business cases. When the stakes are high, the parties will necessarily want someone who is well known. That does not, however, necessarily mean the parties want bias. In this relatively small world they can only use a biased arbitrator or mediator once. Instead, they want someone who can be counted on to listen sympathetically to a story, understand the context, and produce a reasonable set of outcomes that will not upset the general order of things. How does someone get to be known and trusted in this sense by this business world? To campaign too strongly is to appear to be opportunistic. The approach must be subtle. It helps to come from a strong corporate law firm, to produce strong writings on corporate law issues, to have friends or colleagues who will refer "starter" cases to a trusted novice, or to have served as a judge with a reputation as safe for business—a reputation far easier to establish coming from a traditional white male background. As Yves Dezalay and I

38. Someone recently told me that the fees for leading JAMS/Endispute neutrals are $6000-$8000 per day, some of which, of course, goes to the entity.
39. DEZALAY & GARTH, supra note 11, at 34-44.
40. Id. at 35-38. One of our interviewees in the 1990s stated that "[w]hat the law firms are doing [with ADR] is saying we need a panel of appropriate judges. We need to be able to say to our clients, we can get you the kind of judge that is the kind of judge you think about when you think about going
suggested in our study of international commercial arbitration, "third world" arbitrators had to work twice as hard as those from countries such as Switzerland or the Netherlands to prove that they could be "neutral." The fear, based on internalized stereotypes, is that those from third world countries will inevitably be biased against the West, rather than vice versa. In the same way, those who come from the business world do not have great difficulty showing that they will not be biased against those who sue businesses, but those from different backgrounds have to work hard to show that they are not antibusiness.

For those on the bench attracted by the potential rewards of private judging or other forms of ADR, it is vital they gain access to courts and forums where they can campaign for this kind of reputation. The incentives encourage them to dump cases that have low stakes (except for the litigants) or are argued by lawyers whose opinions do not count in assessments of who is worthy of selection for private ADR. That is not to say that judges everywhere are consciously conducting campaigns; however, judges who want to excel will follow the patterns of behavior of those who are recognized and rewarded. Despite the lack of research documenting this potential pattern, it is clear the incentives exist.

Again, to suggest that this set of incentives is not inevitable, we can compare this pattern to an earlier era where judges gained their prestige from the quality of their judicial opinions or perhaps from their role in cleaning up or facilitating opportunity at major public or private institutions. In the civil rights era, it is not surprising that judges gained rewards for playing a role in implementing activist governmental policies. They naturally bent to the values of the time. They do the same today in an era where everyone wants to be rich, and business is at the top of the occupational hierarchy.  

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41. Id. at 219-49.
This system, as stated before, makes it rational for judges to dump low economic value cases in favor of cases with higher business stakes through mandatory ADR or jurisdictional limits, and it makes it rational to gain a reputation that combines both quality and business safety. Too much bias toward business would disqualify, but any hint of antipathy toward business would be even worse. Those who have the talent and potential platform to go private can often be expected to follow these incentives. Since large business cases inside or outside the courts are considered the most challenging and attract the best lawyers, it makes double sense to have the high-stakes system shaped for business and for the business of business disputes. It also suggests that those who are again arguing that the federal courts have some special obligation to enforce federal rights in civil rights or securities cases might be missing the most important point—the federal courts do not want those cases. They are potentially too numerous and the judiciary wants to save its resources for the cases that the press, the academy, the major law firms, and legal peers perceive as more important.\footnote{See Robert J. Niemic et al., Federal Judicial Center, Guide to Judicial Management of Cases in ADR 20-37 (2001) (reviewing "types" of ADR cases appropriate for federal review).}

There is very little criticism in the literature of this segmentation, which carves out a litigation and ADR system with its own judges—public and private—and its own lawyers.\footnote{Weinstein, supra note 12, at 246, 262.} It devotes considerable resources to a relatively small number of players who can select from a menu of elite players and approaches to handle major disputes. Top lawyers can use all their skills before judges and other neutrals selected for their ability to understand and respond to the arguments of the leading business lawyers.

It is easy to see the allocation of resources toward the top. The discussion of the people suggests, in addition, that there is a tilt to the system. It is not, as many critics assert, that the neutrals are biased in favor of big business or other repeat players; rather, it is that the
ambitious neutrals from top to bottom seek to move into the elite sector, and that the processes of selection into that elite sector reward those with whom the elite players are comfortable. Comfort, to repeat, does not mean that the elite business lawyers at the top expect to win all their cases or gain all their goals from mediation or arbitration. It means that the top of the system is heavily dominated by individuals whose background and experiences predispose them to listen to those arguments with sympathy and to produce results that will at least make sense to the lawyers and businesses that select them. Individuals from outside that system—for example, minorities—are not so likely to be comfortable making their arguments and proposing solutions, and indeed what they say is far less likely to “make sense.” The tilt is thus not so much about who wins and loses, but about what kinds of arguments and solutions are plausible.

III. EXPLAINING THE CONSTRUCTION OF SEGMENTED JUSTICE—SLOPPY ADR FOR THE MASSES AND TAILOR-MADE BUSINESS JUSTICE FOR THE ELITES

One way to make sense of the current system is to go beyond criticisms and seek to understand how we came to the current situation. I start with a somewhat simplified portrait of the litigation landscape in the 1960s and 1970s, a period when the legal profession worked hard to be part of the team in support of the activist state.\footnote{45. See Bryant Garth & Joyce Sterling, \textit{From Legal Realism to Law and Society: Reshaping Law for the Last Stages of the Social Activist State}, 32 \textit{Law & Soc'y Rev.} 409, 412-14 (1998).} Within the domain of scholars studying the courts, especially the federal courts, the focus was on public interest law, “public law litigation,” “institutional reform litigation,” and more generally civil rights.\footnote{46. Abram Chayes, \textit{The Role of the Judge in Public Law Litigation}, 89 \textit{Harv. L. Rev.} 1281 (1976); Owen M. Fiss, \textit{Foreword: The Forms of Justice}, 93 \textit{Harv. L. Rev.} 1 (1979).} Law professors, and the emerging law and society movement, invested their scholarship in finding ways for courts and
lawyers to participate in social reform. 47 Owen Fiss suggested that, indeed, the courts really existed only to promote the development and implementation of public values, and that other matters—the realm of the private—could safely be assigned to arbitration, where the only issue was getting the matters resolved. 48 The reigning Supreme Court doctrine stressed, moreover, the need for the courts to ensure that matters of public concern not be assigned to private arbitration, for in the arbitral context there could be no guarantee that the public law—antidiscrimination, securities protection, antitrust—would be effectively enforced. 49

Businesses did not sue businesses, according to this paradigm, except perhaps to collect debts and to try to assert claims parallel to those of the welfare state—franchisees, for example, seeking to gain rights against the companies that governed them. Business litigation in the leading law firms was almost exclusively a matter of defending the cases that came from civil rights lawyers and from others representing individuals or classes of individuals. The claims were for the most part consistent with the state’s social reform agenda, or its antitrust agenda, then being used for similar purposes. 50

The problems of ordinary people within this paradigm were the concern of reformers who emphasized access, delay in the courts, the workings of small claims courts, and the entire processes for making and appealing claims for civil rights and welfare, which culminated in active scrutiny by the federal courts. Galanter’s major article on why the “haves” come out ahead, published in 1974, was very much part of this era. 51 Galanter assumed as a matter of general consensus that the courts existed to take an autonomous role different than, but consistent with the state’s social reform agenda, and that we should

47. Garth & Sterling, supra note 45, at 413-14.
48. Fiss, supra note 46, at 1289-98.
50. See Marc Galanter, The Life and Times of the Big Six: Or, the Federal Courts Since the Good Old Days, 1988 Wis. L. Rev. 921; DEZALAY & GARTH, supra note 11, at 153.
be troubled by the ways in which repeat-player litigants could use the courts to play for favorable rules. His analysis of the advantages of repeat players, however, intended to show ways that a tilt toward the “haves” could be overcome by encouraging innovative reforms—such as public interest law—that would redress the imbalance.52

When this paradigm began to fall apart in the 1980s, the social reformers in the legal academy and elsewhere complained that ADR and case management threatened the fundamental role of the courts.53 ADR had no place when public values and rights were at stake, and even in private cases there was the danger that ADR would fail to overcome the inequalities in power that allowed the haves to come out ahead despite the formal autonomy of the law. As suggested earlier, some of these voices still resonate, but the context today is quite different.

In retrospect, lawyers probably underestimated the extent to which they were built into a particular conception of politics and the state. Moderate reformism was the ideology of the day, and corporate America was very much tied into that project. The class action and antidiscrimination cases were simply extensions of regulation coming from within the government itself.54 Corporations could negotiate their potential disputes, support the many government programs that channeled resources to business, and pass on any regulatory costs in a business environment that was not especially competitive in today’s sense. In the cities, similarly, the political machines, the judges linked to them, and the insurance companies all allowed the liability explosion to move ahead with very little opposition, since it was consistent with the activist state; the insurance companies could easily pass on additional costs as premium increases. In the law

52. Id. at 144-51.
schools, not surprisingly, the teaching of this paradigm went without such political realism. Professors taught it as a simple matter of the role of the courts, the values of access, and the importance of enforcing the law.

There was no place for the topics of arbitration or mediation in the legal establishment except in the relatively confined places where they already existed. Arbitration was considered fine for businesses with private disputes, no matter what the stakes (but usually with relatively small stakes), but it was to be avoided when important rights or inequalities of bargaining power were evident. The question is, how did the academy find a way to move away from this common sense when the consensus in favor of the activist state broke down?

There is an internal story of change. Beginning especially in the 1970s, a group of pioneers in the legal community, drawing on psychology and therapeutic concerns, argued on behalf of “better justice through ADR,” a theory capable of providing win-win ideas and offering a procedural justice that gave the parties satisfaction and granted legitimacy to the system, even if it did not lead to substantive changes. 55 Academics deployed these ideas to challenge the welfare state ideal of the courts and to promote the new ADR. At the same time, the Mitsubishi Court dramatically upgraded the image of arbitration in part by drawing on the image of international commercial arbitration and reminding the Supreme Court Justices that they might themselves move into that elite private market. 56 For the Supreme Court, the important federal rights of the welfare state suddenly were not so important that they could be used to trump a contractual arbitration clause. The concerns about increasing caseloads, including criminal cases sent by Congress, also pushed the courts to revise their opinion upward in favor of once depreciated alternatives. The two-pronged attack—that is, idealism for less

55. For the histories of ADR see DEZALAY & GARTH, supra note 11, at 151-81; Carrie Menkel-Meadow, Mothers and Fathers of Invention: The Intellectual Founders of ADR, 16 OHIO ST. J. ON DISP. RESOL. 1 (2000).
56. DEZALAY & GARTH, supra note 11, at 158-59.
conflict in disputes involving individuals and realism about caseloads—helped overcome the opposition of those who worked so hard to align the courts with the activist state. ADR, in short, provided the ammunition to kill a welfare state orientation that was being undermined from many sides, including Chicago neo-liberal economics and rational choice theories.

Suddenly, mandatory ADR in mediation and arbitration flourished with considerable debate about which processes were better and which were more cost- and time-efficient. At the upper levels, there were the elite panels of CPR and the AAA, and at lower levels various court-annexed programs, industry-mandated securities arbitration, as well as employment arbitration even of discrimination cases, and the like. From a certain perspective, it appeared there was an emerging golden age of ADR organized around the idealistic theories of ADR promoted by scholars: empowerment, therapy, and others. The win-lose categories of litigation for a time appeared hopelessly reactionary and out of tune with the possibilities of state-of-the-art mediation.

Meanwhile, however, something else was developing. We can see in retrospect an increase in business competition, largely through the entry of new competitors from Japan and Europe; inflation was taking a toll on the economy; and businesses were beginning to resist the costs that the regulatory state was placing on them. Businesses began to sue other businesses as part of increased competition, which made the new litigious practices of Skadden Arps and others gain a growing market share and spark imitation. The oil crisis of the early 1970s increased the pressure even more on business complacency; petro and Euro dollar markets also fueled further business consolidation and competition. As Marc Galanter pointed out in another seminal article, the new litigiousness was businesses suing businesses, and no one

complained any more that such cases did not belong in the courts.\textsuperscript{58} This big business litigation in the 1970s and 1980s built a core of top litigators in large law firms and, eventually, a growing body of combatants willing to fight high-stakes cases on the plaintiffs' side. The elite group also proved itself willing to adopt ADR when corporate counsel questioned the cost-benefit ratio of some litigation.

ADR thus remained relevant to this new kind of business litigation, but the elite litigators were able to turn ADR to their own advantage. They built a cohort of neutrals suitable for their interests, formalized the various processes to allow incorporation into general litigation strategies, developed complex advocacy tools, and in general, used ADR as an arrow in the quiver of available legal strategies to pursue on behalf of their corporate clients. The proliferation of a literature on "winning ADR strategies" helped to fuel the response of ADR advocates asserting that the original aims of ADR were being subverted. What can be seen in fact, however, is that the elite litigators added a menu of alternatives allowing easy manipulation of the process to the type of claim, the goals of the company, the stakes, and the timing of the dispute. They built a special justice system that allowed them to use elite "neutrals" whose background and the selection process ensured they would be able to understand and handle large business disputes.

What happened at the low end, however, was more significant than the question of whether the original aims of ADR were being subverted. First, the proliferation of ADR programs helped dump a significant number of cases from the courts, no doubt helping to curb the perceived litigation explosion; also, more importantly, ADR expansion allowed the courts to handle the preferred cases, that is, the new generation of business disputes and high-stakes personal injury and plaintiffs' federal practice. Those preferred cases are also the ones that allowed judges to compete to gain the rewards of business dispute processing.

\textsuperscript{58} See generally Galanter, supra note 50.
Second, it does not appear that the idealized vision of ADR played a strong long-term role in the court-annexed programs used by ordinary people and their lawyers. Neither the pool of mediators or arbitrators, nor the demands of time and money, nor the needs of the major constituencies—for example, insurance defense and personal injury—promoted more than quick and dirty settlement negotiations. There was considerable debate about evaluative versus facilitative mediation, but the low end did not have, or choose to devote, the resources in people or funding to embrace the academics’ idealized mediation.

We now see a new stage responding to the academic criticisms that began to proliferate about these procedures and the biases of the individuals called upon to serve as mediators or arbitrators. One approach involves a return to the roots of the ADR movement, with respect to either mediation or arbitration. We could trumpet the advantages of either in opposition to the formal law, or continue the earlier debate about which of the alternatives is best for which kind of disputes. What is remarkable, however, is that we find very little attention given to these kinds of debates. The momentum for reform appears grounded elsewhere.

The momentum tends to echo the arguments of the 1960s and 1970s, kept alive by those convinced that the role of the courts in that era remains the correct one today. The promoted recipes include disclosing conflicts of interest, allowing more pretrial discovery, allowing some appeal from arbitration, and insisting the provisions for waiving litigation rights be more explicit and voluntary. As suggested before, these recipes received support as part of an effort to ensure that the rights of the consumers and others in these proceedings will be seriously taken into account when producing a settlement. These procedural shields promote legal ideals of fairness and put more law back into a process that was initially seen as anti-law.

The issue, which has received little attention, is that the context of the 1990s and beyond is radically different from the 1960s and 1970s. We have created a segmented and hierarchical system skewed
dramatically toward business litigants and a few other players—notably a few sectors of the personal injury bar. Our recipes for reform seek to formalize the segments, but the question of whether we want to have such a segmented system is not debated.

CONCLUSION: A FUTURE OF JUDICIALIZED BUT SEGMENTED JUSTICE

There is considerable debate about mandatory arbitration and mandatory mediation today, evidenced by proposed remedies in the literature and a growing number of court cases focusing on the fairness of such dispute resolution. Most of the criticism suggests measures that would formalize the processes toward more legalization. There are no doubt a few, however, who want to bring back the purity of an ADR that was initially antilegalization, but I do not think this approach has many adherents. My larger point, however, is that these debates have obscured the real changes that exist in the shape of civil justice, the incentives built into the new system, the constituencies the process serves, and the resultant tilt in the products the system markets—highly informal and ad hoc for the masses, tailor-made for the litigation elite.

We should not be surprised by this stratification and segmentation, which brings the justice system in line with developments in the general world of law and business. In a seminal study of Chicago lawyers published in the early 1980s, John Heinz and Edward Laumann argued the legal profession could be separated into two "hemispheres": one that served business and another that served individuals. The two groups generally came from different ethnic backgrounds, went to different law schools, and differed greatly in prestige. The legal profession is no doubt more meritocratic now, but that means that it is even more likely that the best talent will serve business entities rather than individuals. At the time of the first study

of Chicago lawyers, however, the Democratic Party, the political machine, and litigators in private practice and in the government dominated the judicial system in Chicago. The federal courts were much more elite but, as mentioned before, focused on implementing federal policies that often required opposition to the established party machines.

Taking a similar approach in a very different context today, Gillian Hadfield highlights disproportionate investment in the legal system depending upon the ability of clients to pay.\(^{60}\) Lawyers (and other professionals for that matter) expect to be rich, and they expect even their public service to pay dividends at some point if it has a market value. They have shaped a system now where instead of the more subtle rewards that politics once provided for those who built a name for themselves as a public servant or judge, people expect cash, whether they are on the Supreme Court writing books and giving speeches or whether they are local state court judges.

The way to gain that market value in the world of elite business justice is to build a career that demonstrates both a certain quality and a safety for the business constituencies essential to build a strong position in the marketplace. Of course, it is easier to build that reputation if one comes from a major corporate law firm as a partner, and it is much more difficult for someone who comes from a minority background or political or legal career associated with what can be termed antibusiness activity. If the 1960s and 1970s tilted toward justice aligned with the activist state, today it tilts toward justice aligned with a market dominated by large business entities. This tilt includes a pecking order that dictates the kinds of cases allowed into the courts.\(^{61}\)


\(^{61}\) Of course, external political crises can produce changes that rally against the hierarchies favored by the judiciary. Congress could decide, for example, to reassign securities broker-dealer disputes to the courts.
TILTING THE JUSTICE SYSTEM

It is tempting at this point to simply note that, once again, law has slowly adapted to fit the changing national context—here, from the social activist state toward a market and market-power-oriented state. It is also tempting to say that the wave of criticisms urging more procedural formalism for the mass justice institutions of ADR is somewhat beside the point. In fact, the suggested procedural reforms are not irrelevant, just far less significant than their proponents might think. So the question is what other policy recommendations might follow, other than those grounded in new versions of traditional legal principles.

My suggestion, which I have made before, is simply to focus on the mediators and arbitrators at all levels of the process. One agenda is to study how they operate and perhaps how to improve them. Another, which is more sociological, is to research the worlds in which they operate and what kind of behavior is rewarded or not—speed of processing cases, settlement results, knowledge and credibility in business issues, perhaps political savvy, or expertise in the techniques of ADR. I am not suggesting that the current recipes are wrong, nor am I suggesting that the immediate future will be other than this objection to the informal aspects of ADR. But for future reformers, it may also be important to see that we have made major but almost unnoticed changes toward a very hierarchical and segmented justice system where the resources and rewards favor large business concerns. We need more research to understand both how we got here and the implications of where we stand.