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The Rise and Fall and Rise Again of Informal Justice and the Death of ADR

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Today, the field of alternative dispute resolution (ADR) is often conceptualized and taught as an apolitical, institutional practice designed to enhance the effective and efficient settlement of legal disputes. But this was not always the case. In the 1970s, scholars imagined mediation as a technique of social and political transformation: a practice that might enable people to resolve disputes without reproducing the inequalities that shaped the society in which they lived. That view of ADR has largely disappeared from the American legal academy. But, as this Article shows, it has not disappeared entirely. Outside the legal academy, prison and police abolitionists are turning to the tools of dispute resolution as an important mechanism of social change. This Article embeds today's movement for transformative justice in a longer genealogy of informal justice, and it revitalizes a sociolegal perspective that uses micro-level conflict as a critical framework through which to analyze macro-level transformations. The Article ventures that this sociolegal perspective can help respond to the disciplinary crisis that currently faces the field of ADR in American legal education, revealing ADR as a powerful tool for thinking through both the mechanisms and the difficulties of emancipating social and political change.

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AMY J. COHEN *

INTRODUCTION

In 2002, immediately after graduating from law school, I spent a year in Nepal engaged with projects advancing community mediation. I encountered an organization called the Centre for Victims of Torture (CVICT), which was formed in the aftermath of Nepal's 1990 democratic revolution to provide counseling and other services to victims of state torture. The organization quickly discovered that it often ended up with clients after police intervention in local community disputes. It accordingly decided to teach community mediation techniques to Nepali villagers to preempt the involvement of police and thus the state violence that frequently followed. As the CVICT director then told me:

> Many of the victims who came here were discussing [the fact] that the main reason for them to be tortured was when there were small disputes in the community and one of them went to the police. . . . So we thought: Can we do something to stop those people going to the police for a small dispute? . . . Basically, the idea [for community mediation] came out of directing people [not] to go to the police . . . . The idea was given by the torture victims themselves. . . . [T]his component—[the] prevention [of police] torture component—is very strong.[1]

My *fin de siècle* training in Alternative Dispute Resolution (ADR) at Harvard Law School, the law school that pioneered ADR as a field in legal education, did not once suggest that mediation might be a useful means of protecting communities from state violence. Nor did I have any inkling at the time that what someone was saying halfway around the world in Nepal

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[1] Amy J. Cohen, *Debating the Globalization of U.S. Mediation: Politics, Power, and Practice in Nepal*, 11 HARV. NEGOT. L. REV. 295, 324 n.100 (2006) [hereinafter Cohen, *Globalization*].

during a Maoist insurgency was exactly what organizers in the Movement for Black Lives would be saying in the United States nearly twenty years later. I was unprepared for CVICT mediation trainings that began with Nepali facilitators lighting candles for "martyrs of democracy" and victims of police abuse.[2] And for mediation trainings that encouraged women to combine into "pressure groups" so that they could attempt collectively to hold abusers in their villages to account without turning to law enforcement.[3]

ADR scholars were equally unprepared. When I came home and described these observations, many of my ADR colleagues could not believe that what CVICT was doing was, in fact, mediation. As Jean Sternlight explained, "some would disagree that the [CVICT] dispute resolution tool . . . was appropriately labeled 'mediation.'"[4] This was because, she elaborated, the CVICT tool "'is often public and coercive,' and purposely enunciates the political demands of members of the society."[5] As such, it disrespects liberal principles of mediator neutrality and party self-determination. These are principles that mean disputants may consent to any agreement they wish, free from third party or community impositions—and that today largely define mediation within the field of American ADR.

Yet in the broader history of dispute processing scholarship, it is relatively surprising that by the early 2000s, a dispute resolution practice organized around a normative and political critique of the state—and that otherwise involved third parties intervening in interpersonal conflict without the authority to issue binding decisions—appeared to ADR scholars as something other than mediation. For it was only a few decades earlier that the study of informal dispute processing had produced a spate of critical political and analytical questions that were simpatico with the questions my Nepali interlocutors wrestled with. For example: How could analysts study dispute resolution without a theory of society in which disputes play only a particular part?[6] Could left social movements use mediation to translate political aims into individually felt grievances and then link these grievances back to demands for collective self-determination?[7] And, as mediation becomes part of public governance, could analysts "see" how state power

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[2] *Id.* at 297.

[3] *Id.* at 341–44.

[4] Jean R. Sternlight, *Is Alternative Dispute Resolution Consistent with the Rule of Law? Lessons from Abroad*, 56 DEPAUL L. REV. 569, 579 n.56 (2007).

[5] *Id.* (quoting Cohen, *Globalization*, *supra* note 1, at 298).

[6] *See, e.g.*, Maureen Cain & Kalman Kulcsar, *Thinking Disputes: An Essay on the Origins of the Dispute Industry*, 16 LAW & SOC'Y REV. 375 (1981–82).

[7] *See, e.g.*, Boaventura de Sousa Santos, *Law and Community: The Changing Nature of State Power*, *in* 1 THE POLITICS OF INFORMAL JUSTICE: THE AMERICAN EXPERIENCE 249, 264 (Richard L. Abel ed., 1982); Roger Mathews, *Reassessing Informal Justice*, *in* INFORMAL JUSTICE? 1, 19 (Roger Mathews ed., 1988).

was changing by studying everyday dispute processing?[8] Answers to these and similar questions, by their nature, could scarcely hinge upon formal process definitions.

This Article recounts some of the discipline's transformation from the 1970s until now. It traces how, as ADR became a field in American legal education, complex sociolegal and political questions faded from its thinking, and it argues that it is time to revitalize the field by bringing these sociolegal and political questions again to the front and center. In recent years, the field has been marked by a pervasive sense of crisis. In blog posts, conferences, and papers, a range of scholars have argued that ADR is now dying, not as a set of practices or institutions, to be sure, but as an entrenched scholarly field of legal education. As Deborah Thompson Eisenberg summarized recently: "[S]ome are concerned, if not downright panicked, that the future of ADR in the legal academy . . . looks bleak."[9] I argue that ADR's march to instrumentalization—that is, its march to develop formal institutional procedures defined by a specific set of best practices to resolve conflicts—has left scholars constrained in the political, social, and economic questions that they can claim to explain why ADR should remain an important scholarly field in legal education.

But as readers already anticipate, I recall my fieldnotes from Nepal in a moment when prison and police abolitionist organizers are practicing their own versions of community mediation as an alternative to police torture and mass incarceration. Americans now, like Nepalis then, are asking how they can resolve local disputes and conflicts without turning to the police, in part because turning to the police risks introducing outsized responses of state violence. Thus, at the same moment that ADR is losing its status as an intellectually vibrant field within law, experiments in what is often called *transformative justice* or *community accountability processes* are proliferating in left-wing American social movement consciousness.

This Article argues that transformative justice renews one of the normative claims and critical questions that helped originate scholarly interest in mediation. The claim is this: democratizing control over dispute resolution is a meaningful part of achieving social transformations. Movements to achieve deep-structural change should proceed not only at the level of political and economic systems. They should also confront questions of interpersonal conflict, harm, and violence—and not least because interpersonal conflict and harm make people vulnerable to state power through institutions that

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[8] *See, e.g.*, Susan S. Silbey, *On the Relationship of State Theory to Sociolegal Research: The Example of Minor Disputes Processing*, 10 STUDS. L. POL. & SOC'Y 67 (1990) [hereinafter Silbey, *Minor Disputes Processing*].

[9] Deborah Thompson Eisenberg, *Beyond Settlement: Reconceptualizing ADR as "Process Strategy"*, *in* THEORIES OF CHANGE FOR THE DISPUTE RESOLUTION MOVEMENT: ACTIONABLE IDEAS TO REVITALIZE OUR MOVEMENT 53, 53 (John Lande ed., 2020) [hereinafter Eisenberg, *Process Strategy*].

advance punishment and the interests of capital. *But*—and this is the critical question—efforts to "take back" conflict from the state and professional adjudicators invariably confront a problem. In any society organized around inequalities—capitalism, racism, and patriarchy—how can people engage in informal, democratic practices of dispute resolution in ways that transcend rather than reproduce these inequalities without defaulting back to formal legality and state incorporation—the very institutions that compelled people to search for alternative processes?

This Article proceeds in two parts. In Part I, I describe some of how American ADR became the field it currently is. I trace its roots in left utopian politics; to its status as a subject of left critical sociolegal inquiry; to its establishment as a centrist and programmatic field in legal education as it became commonsensical for American law schools to devote faculty resources to ADR scholarship and teaching; to its experience of crisis today.

In Part II, I describe a return to left emancipatory politics among Black Lives Matter and prison and police abolitionist organizers advancing practices of nonstate justice. I illustrate how these organizers translate transformative politics into microsocial practices by teaching skills and designing conflict intervention processes meant to be egalitarian and radical. The pandemic meant that I could participate in webinars and Zoom trainings offered virtually throughout the summer and fall of 2020 by Black, Indigenous, and people of color (BIPOC) organizers and survivors, many of whom have been practicing and sharing skills in transformative justice for nearly two decades. These trainings were offered publicly, in a moment of heightened popular urgency, given the renewed spate of police violence and killings of BIPOC lives.[10]

I conclude by explaining why I wish to claim transformative justice as mediation—even as I know transformative justice organizers themselves do not adopt this label and, to the contrary, draw functional distinctions among processes.[11] It is because I wish to recover mediation as more than a specifically defined institutional practice but rather as an open-ended

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[10] In this Article, I include quotations only from presentations and training available online.

[11] For example, adrienne maree brown teaches that "transformative justice processes, where someone has caused harm and is being called into accountability, are a different task" than what she calls kitchen table mediation. "[Transformative justice processes] are usually more intense and deeper processes than those that a kitchen table mediation can or should hold. They often involve multiple support people, holding a harm that would otherwise involve the state, and possibly result in prison." ADRIENNE MAREE BROWN, HOLDING CHANGE: THE WAY OF EMERGENT STRATEGY FACILITATION AND MEDIATION 173 n.1 (2021). Likewise, Mariame Kaba and Shira Hassan distinguish between what the transformative justice movement calls community accountability processes, designed to support people to take accountability for a harm and meet survivor needs, and mediation. Community accountability processes are "not the same as mediation" because "[m]ediators do not try to determine what 'really' occurred, who is telling the truth or who is at fault." Instead, the "focus of a mediation session is on the future: what will happen from now on?" MARIAME KABA & SHIRA HASSAN, FUMBLING TOWARDS REPAIR: A WORKBOOK FOR COMMUNITY ACCOUNTABILITY FACILITATORS 86 (2019) [hereinafter KABA & HASSAN, WORKBOOK].

analytical category—one that sits between state adjudication and self-help or violence and that allows analysts to observe how people navigate and resist dominant social orders and envisage alternatives to them.[12]

I. THE RISE AND FALL OF INFORMAL JUSTICE AND THE RISE AND FALL OF ADR

In this Part, I recount the origins and development of the field of American ADR. But three provisos are in order. First, readers will observe that my narrative focuses on mediation, rather than on other non-adjudicatory dispute processes. In a historical moment when reformers were arguing about the limits of American adjudication, I think it was innovations in mediation that first enabled legal scholars to develop distinctive identities and claims to expertise.[13] Mediation also anchored field-defining debates about how people could use extrajudicial processes to participate in democratic self-government and individual and collective self-determination.

Second, and in this vein, readers will also observe that my description of mediation disrespects contemporary definitions of it as a neutral process oriented toward the efficient settlement of typically civil disputes. These transgressions are purposeful and reflect the Article's normative ambition: namely, to wrest the scholarly field of ADR apart from its near-complete identification with a set of institutional practices that often take place in courthouses and corporations; the procedural requirements that define these practices and the ideas and skills that support them; and questions about how best and how fairly to improve and rationalize them—and return the field to the realm of social inquiry.

Third, and to that end, in Part II, I ask readers to consider transformative justice as a kind of mediation in order to argue that the field of ADR need not be thought of in narrow institutional terms but can once again be theorized for how it opens up (complex and indeterminate) pathways for social change. Hence, I must make especially clear at the outset: the stakes of thinking with transformative justice for ADR are *not* therefore whether ADR can "take down the state," or if this particular normative version of transformational dispute practices will prove to be liberatory. My offer

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[12] *See* Carol J. Greenhouse, *Mediation: A Comparative Approach*, 20 MAN 90 (1985).

[13] To be sure, by the early 1980s, innovations in the theory and practice of legal negotiation combined, informed, and reinforced innovations in mediation—together capturing much of what appeared new and exciting about the modern field. For a twentieth century genealogy of American negotiation theory (and one grounded in labor struggles), see Amy J. Cohen, *A Labor Theory of Negotiation: From Integration to Value Creation*, 1 J.L. & POL. ECON. 147 (2020) [hereinafter Cohen, *Labor Theory*]. For a description of early texts and pioneering efforts to introduce negotiation as a course in legal education, see Carrie Menkel-Meadow, *Legal Negotiation: A Study of Strategies in Search of a Theory*, 8 AM. BAR FOUND. RSCH. J. 905 (1983).

instead is an attempt to use practice on the ground to reinject the field with intellectual vibrancy.

A. *The Left Transformative Turn to Informal Justice: 1970s–1980s*

In the 1970s, legal reformers interested in questions of criminology began to ask if informal justice could ameliorate some of the limitations and pathologies of state justice systems. Here is how Raymond Shonholtz, who pioneered an early neighborhood justice center,[14] described the problem to American lawmakers:

> If you look at low income people, they rarely use the police, and if they are of a racial background and low income, they very infrequently use the police. When they do use the police, it's to abate a situation and rarely to identify a second party. . . . If you go into any urban area in the country you will find, in particularly low income communities, a high incidence of tolerance, because there is no adequate forum to deal with the problem. No one will use the existing forum . . . because they don't trust it, it does not relate to their needs and it does not, in fact, give them anything.[15]

Shonholtz urged policymakers to "look at . . . systems that are not in the Western World" and to design a new procedure for conflict resolution—one that is "nonadversarial, nonadjudicatory, conciliation oriented, and sometimes called mediation."[16]

Early proponents of community mediation drew inspiration from legal anthropologists. Anthropologists had produced numerous studies that made disputing—not law—the central object of analysis and that treated rule-based legal systems as but one of many methods for handling social conflict.[17] For reformers, two features of this work appeared particularly salient. First, anthropologists observed that in many societies, mediation produced effective forms of social ordering. As Carol Greenhouse recalls, "[o]ne of the very earliest achievements of legal anthropology was to demonstrate that societies are capable of normative order in the absence of

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[14] See Justin R. Corbett, *Raymond Shonholtz: Community Mediation Visionary*, NAT'L ASS'N FOR CMTY MEDIATION (Jan. 9, 2012), http://blog.nafcm.org/2012/01/raymond-shonholtz-community-mediation.html [https://perma.cc/HZ4A-XCKJ].

[15] *Dispute Resolution Act: Hearing on S. 957 Before the Subcomm. on Cts., C.L. & the Admin. of Just. of the H. Comm. on the Judiciary*, 95th Cong. 131, 135 (1978) (statement of Raymond Shonholtz, Program Dir., Cmty Bd. Program, San Francisco, California).

[16] *Id.* at 135–36. In this progressive call for mediation, readers may nevertheless observe some troubling assumptions: that only some people are marked by a "racial background"; that to see conciliation-oriented processes, one must look outside the West rather than to Indigenous American legal and political systems. *Id.*

[17] For an excellent summary, see Francis G. Snyder, *Anthropology, Dispute Processes and Law: A Critical Introduction*, 8 BRIT. J.L. & SOC'Y 141 (1981).

laws or formal courts of law."[18] Second, reformers appreciated the normative character of this order. Informal mediative practices could popularize and collectivize conflicts and integrate disputants, whereas formal state law abstracted, individuated, and separated. What distinguishes "the legal-judicial approach," Tony Marshall observed, "from more informal systems studied by social anthropologists . . . is its alienative character. It is predicated on separating an 'offender' from the rest of society; opposing him/her to the 'good' victim or the state . . . and, in sentencing, [on] plac[ing] the whole blame for what has happened upon the offender . . . ."[19]

Hence the now largely forgotten point I wish to stress: in the 1970s, American interest in mediation was motivated, in no small part, by criticisms of modern penal systems. Let me elaborate this point with one example. In 1973, Richard Danzig published an article in the *Stanford Law Review* that posed the following question: "Despite the differences between a tribal culture and our own, isn't there a place for a community moot in our judicial system?"[20] Danzig reasoned that overcriminalization and overcentralization were mutually reinforcing problems, and he argued to decentralize control over the definition of crime and over law enforcement. Specifically, Danzig proposed that localities should be able to decide whether to "label prostitution, gambling, homosexuality, drunkenness, marijuana use, vagrancy, and disorderly conduct as 'crimes'" and, if so, with what potential sanctions.[21] Trained community residents could then assume social control functions. Without the power of arrest, they would respond to "a family fight, juvenile rowdiness, or . . . drunken vagrancy" according to the "community's definition of order."[22] These men would "remove their hats, sit down, make polite small talk and light a cigarette, and spend thirty minutes, an hour, or an hour and a half with the disputants, discussing their problems, moderating antagonisms, and ultimately making referrals to community welfare agencies or the community moot."[23] Without the power to compel attendance, the moot would emphasize social bonds among everyone present rather than impose distance between a judge and litigants. And rather than focus on legally cognizable issues, the moot would encourage broad discussion about troubled local social relations.[24] And, if community intervenors and moots failed to produce conciliation or if

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[18] Greenhouse, *supra* note 12, at 98.

[19] Tony F. Marshall, *Out of Court: More or Less Justice?*, *in* INFORMAL JUSTICE?, *supra* note 7, at 25, 46.

[20] Richard Danzig, *Toward the Creation of a Complementary, Decentralized System of Criminal Justice*, 26 STAN. L. REV. 1, 43 (1973).

[21] *Id.* at 17 (footnote omitted).

[22] *Id.* at 28.

[23] *Id.* at 34 (footnotes omitted).

[24] *Id.* at 42–43.

disputants preferred, residents could avail themselves of police, prosecutors, and the American penal system.[25]

In the 1970s, Danzig was writing in a moment when civil rights advocates were decrying the police for their role in conserving the social order. And a moment when New Left critics of the American penal state shared with early proponents of community mediation "[a] deep distrust of state power; a profound cynicism about professional motives; . . . [and] a concern for the 'self-determination' and 'empowerment' of the poor and minority groups."[26] Influenced by the communitarian movements of the 1960s and 1970s, scholars and organizers argued that through community mediation "poor people and minorities [can] increase their influence over the institutions and forces that shape their lives."[27] Against this backdrop, Danzig described community control as liberatory. "[A]ll the acts of oppression that must be performed in this society to keep it running smoothly," he quoted, "are pushed upon the police. . . . The police have become the repository of all the illiberal impulses in this liberal society . . . ."[28] He reasoned that by divesting police from low-level interventions—where they all too easily inject their class sensibilities and exacerbate conflict—community intervenors could practice order maintenance in ways that engage and serve local interests.[29]

Of course, in practice the opposite happened—broken windows ideology intensified the role of the state in policing low-level infractions.[30] But I nevertheless want readers to appreciate the terrain of this debate. Danzig aimed to relegitimate state institutions by shifting particular social control functions to communities. For this reason, he was challenged by scholars who found his proposal *not* too romantic or impracticable but rather too anemic. Eric Fisher, for example, faulted Danzig for failing to make the community moot the exclusive arbiter of the harms in its jurisdiction: "a true community court should be more than an adjunct to the existing system."[31] Dennis Longmire likewise argued that Danzig's proposal overly relied on a

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[25] *Id.* at 36–37, 48.

[26] DAVID GARLAND, THE CULTURE OF CONTROL: CRIME AND SOCIAL ORDER IN CONTEMPORARY SOCIETY 56 (2001).

[27] PAUL WAHRHAFTIG, COMMUNITY DISPUTE RESOLUTION, EMPOWERMENT AND SOCIAL JUSTICE: THE ORIGINS, HISTORY AND FUTURE OF A MOVEMENT 63 (2004).

[28] Danzig, *supra* note 20, at 28 (quoting PAUL CHEVIGNY, POLICE POWER: POLICE ABUSES IN NEW YORK CITY 280 (1969)).

[29] *Id.* at 28–32.

[30] George L. Kelling & James Q. Wilson, *Broken Windows: The Police and Neighborhood Safety*, ATLANTIC (Mar. 1982), https://www.theatlantic.com/magazine/archive/1982/03/broken-windows/304465/. Kelling and Wilson argued for the aggressive policing of low-level infractions because they reasoned that "at the community level, disorder and crime are usually inextricably linked, in a kind of developmental sequence." *Id.* For early normative and empirical criticisms, see BERNARD E. HARCOURT, ILLUSION OF ORDER: THE FALSE PROMISE OF BROKEN WINDOWS POLICING (2001).

[31] Eric Fisher, *Community Courts: An Alternative to Conventional Criminal Adjudication*, 24 AM. U. L. REV. 1253, 1287 (1975).

shadow of state coercion.[32] He wanted a community system that ideally will "negate the need for coercive social control agencies and will therefore suffice as a complete replacement for, rather than compliment to, the existing law enforcement system."[33]

Longmire reasoned that a basic principle of radical criminology is to advance changes in social control alongside changes in political economic systems.[34] Hence, the reason to replace "the bourgeois notion of criminal justice" with "the ideal of *popular justice*" is that liberal legality is subordinated to the logics of capital and therefore constitutes disputants as individuals destroying collectivity, equity, solidarity.[35] Longmire nevertheless proposed that movements to resolve community conflict based on people's own norms and values need not await "the successful overthrow of capitalism."[36] A regime committed to participatory democracy, he ventured, could nurture collective dispute resolution institutions that could progressively dissolve the state criminal system.

In sum, these writers were asking how community mediation could improve and legitimate—versus undermine and transform—the existing criminal legal system. Many had specific ambitions for the practice of mediation. Some hoped that users of community mediation would discover bases of social solidarity, such as working-class backgrounds and common experiences of subordination, and that they would use these solidarities to discover how what seem like individualized conflicts and harms often reflect broader community problems and therefore require collective action to resolve them.[37] Another strand of advocates, whose work would later coalesce under the banner of restorative justice, reasoned that through mediation offenders and victims could experience moral and relational transformations that could likewise catalyze broader social and political shifts. These scholar-practitioners reasoned that

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[32] Dennis R. Longmire, *A Popular Justice System: A Radical Alternative to the Traditional Criminal Justice System*, 5 CONTEMP. CRISIS 15, 22 (1981).

[33] *Id.* at 22.

[34] *Id.* at 20–21. *See generally* Tony Platt, *Prospects for a Radical Criminology in the United States*, 1 CRIME & SOC. JUST. 2 (1974). Platt elaborates principles of radical criminology: "Under a radical, human rights definition, the solution to 'crime' lies in the revolutionary transformation of society and the elimination of economic and political systems of exploitation." *Id.* at 6.

[35] Longmire, *supra* note 32, at 20 (quoting RICHARD QUINNEY, CLASS, STATE, AND CRIME: ON THE THEORY AND PRACTICE OF CRIMINAL JUSTICE 162 (1977)).

[36] *Id.* at 21.

[37] For examples of scholars who linked community mediation to the possibility of collective action, see Paul Wahrhaftig, *An Overview of Community-Oriented Citizen Dispute Resolution Programs in the United States*, *in* 1 THE POLITICS OF INFORMAL JUSTICE: THE AMERICAN EXPERIENCE, *supra* note 7, at 75, 93–94; Richard Hofrichter, *Neighborhood Justice and the Social Control Problems of American Capitalism: A Perspective*, *in* 1 THE POLITICS OF INFORMAL JUSTICE: THE AMERICAN EXPERIENCE, *supra* note 7, at 207, 243; Raymond Shonholtz, *Neighborhood Justice Systems: Work, Structure, and Guiding Principles*, 5 MEDIATION Q. 3, 29 (1984); JENNIFER E. BEER, FRIENDS SUBURBAN PROJECT, PEACEMAKING IN YOUR NEIGHBORHOOD: REFLECTIONS ON AN EXPERIMENT IN COMMUNITY MEDIATION (1986).

when people address their own conflicts in community, they can craft outcomes that feel both more just and more reparative than what they can receive from the state—including by deliberating about social responsibility alongside individual responsibility for conflict, violence, and harm.[38]

B. *Left Interpretive Questions: 1980s–1990s*

In the 1980s, as experiments in community mediation unfolded on the ground (several funded by the federal government),[39] sociolegal scholars produced a rich, interpretive literature. In this section, I briefly recount this literature. But to be clear: my aim is *not* to reproduce the well-established conclusion that many experiments failed to achieve radical ends.[40] Instead, I want to illustrate how mediation once served as a site for scholarly and political inquiry. To that end, I briefly summarize how sociolegal scholars used the practice of mediation to ask questions about state power and resistance.

In the 1980s, sociolegal scholars, often affiliated with the Amherst Seminar, viewed the left turn to informal justice with both sympathetic interest and skepticism.[41] Sally Engle Merry described how mediation in preindustrial societies maintained social orders precisely because mediators used coercions and sanctions made possible through robust hierarchical social relations—collective relations mostly unavailable under advanced

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[38] For a genealogy of the early American restorative justice movement and its roots in community mediation, see Amy J. Cohen, *Moral Restorative Justice: A Political Genealogy of Activism and Neoliberalism in the United States*, 104 MINN. L. REV. 889 (2019) [hereinafter Cohen, *Moral Restorative Justice*]. *See also* John Braithwaite, *Traditional Justice*, *in* RESTORATIVE JUSTICE, RECONCILIATION, AND PEACEBUILDING 214, 232 (Jennifer J. Llewellyn & Daniel Philpott eds., 2014) (elaborating this argument).

[39] CHRISTINE B. HARRINGTON, SHADOW JUSTICE: THE IDEOLOGY AND INSTITUTIONALIZATION OF ALTERNATIVES TO COURT 77–86 (1985); *see also* NAT'L INST. OF JUST., U.S. DEP'T OF JUST., NEIGHBORHOOD JUSTICE CENTERS FIELD TEST: FINAL EVALUATION REPORT: EXECUTIVE SUMMARY (1980); AMER. BAR ASS'N, SPECIAL COMM. ON ALT. DISPUTE RESOLUTION, DISPUTE RESOLUTION PROGRAM DIRECTORY (Larry Ray ed., 1983); DANIEL MCGILLIS & JOAN MULLEN, NEIGHBORHOOD JUSTICE CENTERS: AN ANALYSIS OF POTENTIAL MODELS (1977); Albie M. Davis, *Community Mediation in Massachusetts: Lessons from a Decade of Development*, 69 JUDICATURE 307 (1986); Robert C. Davis, *Mediation: The Brooklyn Experiment*, *in* NEIGHBORHOOD JUSTICE: ASSESSMENT OF AN EMERGING IDEA 154 (Roman Tomasic & Malcolm M. Feeley eds., 1982).

[40] For some well-known and oft-cited criticisms, see generally THE POSSIBILITY OF POPULAR JUSTICE: A CASE STUDY OF COMMUNITY MEDIATION IN THE UNITED STATES (Sally Engle Merry & Neal Milner eds., 1993); RICHARD HOFRICHTER, NEIGHBORHOOD JUSTICE IN CAPITALIST SOCIETY: THE EXPANSION OF THE INFORMAL STATE (1987); STANLEY COHEN, AGAINST CRIMINOLOGY 217–19 (1988); Richard L. Abel, *The Contradictions of Informal Justice*, *in* 1 THE POLITICS OF INFORMAL JUSTICE: THE AMERICAN EXPERIENCE, *supra* note 7, at 267.

[41] *See* Susan S. Silbey, *The Every Day Work of Studying the Law in Everyday Life*, 15 ANN. REV. L. & SOC. SCI. 1, 7 (2019) (describing the origins of the Amherst seminar: "Having originally met each other at the Law & Society Association annual meetings in 1980 and 1981, we realized that we were all, in one way or another, studying dispute processing—a popular subject at the time").

capitalism and liberalism.[42] Hence sociolegal scholars converged on the following question. In the United States, could community mediation reconstruct, or would it invariably reproduce, the power of the state and capital? Richard Abel put the query rather bluntly: do informal justice processes "expand or reduce state control?"[43]

Two generative strands of scholarship followed from this question. The first strand advanced a Foucauldian style inquiry. If informal justice expands state power by other means, then what can analysts learn specifically, nonreductively, about these means by studying mediation? Or, to put this another way, in a moment when analysts were only beginning to characterize neoliberal governance, sociolegal scholars used mediation to ask an analytically and politically pressing question: as the state delegates and privatizes its roles, how does it simultaneously proliferate its power?[44]

To engage with this question, scholars advanced a critical mode of empirical analysis that famously refused "the pull of the policy audience."[45] For example, Christine Harrington and Sally Engle Merry studied community mediation empirically *not* to measure how it achieves its stated policy ends but rather to illuminate how its material effects are produced through ideology.[46] They differentiated among community mediation's dominant narratives—service delivery, personal growth, and social transformation—and yet showed how all three narratives shared ambiguous symbols in common, such as "community" and "consensus."[47] Reformers, they illustrated, mobilized the meaning of community to popularize consensual dispute resolution and yet interpreted the meaning of consent to incorporate state mandates into mediation.[48] Other scholars used mediation to "see" the state and relations of power in interpersonal interactions and

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[42] *See* Sally Engle Merry, *The Social Organization of Mediation in Nonindustrial Societies: Implications for Informal Community Justice in America*, *in* 2 THE POLITICS OF INFORMAL JUSTICE: COMPARATIVE STUDIES 17 (Richard L. Abel ed., 1982) [hereinafter Merry, *Social Organization*].

[43] Richard L. Abel, *Introduction*, *in* 1 THE POLITICS OF INFORMAL JUSTICE, *supra* note 7, at 1, 6.

[44] *See, e.g.*, *id.*; Santos, *supra* note 7; HARRINGTON, *supra* note 39; Hofrichter, *supra* note 37; STANLEY COHEN, VISIONS OF SOCIAL CONTROL (1985) [hereinafter COHEN, VISIONS].

[45] Austin Sarat & Susan Silbey, *The Pull of the Policy Audience*, 10 LAW & POL'Y 97 (1988).

[46] Christine B. Harrington & Sally Engle Merry, *Ideological Production: The Making of Community Mediation*, 22 LAW & SOC'Y REV. 709, 710–11 (1988).

[47] *Id.* at 714–17.

[48] *Id.* at 717–23. *See also* COHEN, VISIONS, *supra* note 44, at 160. "Nobody running a community dispute mediation centre in New York," he argued, "actually believes that this recreates the conditions of a Tanzanian village court any more than 'house-parents' in a 'community home' believe that they are living in a family with their own children." *Id.* But these symbols, fictions, and myths are "very much grounded in the real world." *Id.* Like Harrington and Merry, Cohen advanced an ideological mode of analysis designed to make visible the morally ambiguous forms of power, interests, and language wielded by helping professionals—in a moment when incarceration rates were rising, even as or perhaps because the state was governing not only through command but also increasingly through "community." *Id.* at 161–96.

self-identities.[49] Whereas reformers asked how to protect mediation's legitimating values, such as individual consent and self-determination, these sociolegal scholars posed the inverse question.[50] They asked how, through mediation, a historically specific figure of a self-determining individual—a figure on which the liberal state depends—is cultivated and created.[51]

A second strand of scholarship investigated mediation's potential to build grassroots power and change state power's role in the process. Here, scholars reasoned that critical interpretative studies are necessary if one *also* wishes to ask about informal "counter-power" because these studies can show how mediation is neither outside of, nor reducible to, state control and how mediation depends upon, but does not determine, the figure of the individual.[52] For example, Stuart Henry studied how housing and worker cooperatives mediate conflicts through values associated with communalism, and he explored how, when cooperatives engage with dominant capitalist rule systems, "both the alternative system and the capitalist order are vulnerable to incremental reformulations."[53] In other words, Henry invited scholars to study *not* how mediation could replace existing institutions but rather how, over time and through practice, mediation could help incrementally rearrange them.[54]

Maureen Cain, by contrast, urged theorists to distinguish among dispute resolution institutions by classifying them according to the class interests they serve.[55] She described collective justice institutions where users share a working-class identification. In these institutions, users understand themselves as a collective subject with shared problems that could be

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[49] *See, e.g.*, Silbey, *Minor Disputes Processing*, *supra* note 8, at 69–70; Susan Silbey & Austin Sarat, *Dispute Processing in Law and Legal Scholarship: From Institutional Critique to the Reconstitution of the Juridical Subject*, 66 DENV. U. L. REV. 437, 472–96 (1989).

[50] *See* Peter Fitzpatrick, *The Impossibility of Popular Justice*, *in* THE POSSIBILITY OF POPULAR JUSTICE, *supra* note 40, at 453, 457–58 [hereinafter Fitzpatrick, *Popular Justice*] ("The individual's voluntary participation and willingness to adapt and enter into agreements are the foundation of the whole [alternative justice] process. . . . My analysis would reverse this mythic account. The individual is an effect of the power exercised in processes of popular justice.").

[51] George Pavlich, *The Power of Community Mediation: Government and Formation of Self-Identity*, 30 LAW & SOC'Y REV. 707, 728 (1996). *See also* Fitzpatrick, *Popular Justice*, *supra* note 50, at 457–58.

[52] Peter Fitzpatrick, *The Rise and Rise of Informalism*, *in* INFORMAL JUSTICE?, *supra* note 7, at 178, 185 [hereinafter Fitzpatrick, *Informalism*]; Fitzpatrick, *Popular Justice*, *supra* note 50, at 468–72.

[53] Stuart Henry, *Community Justice, Capitalist Society, and Human Agency: The Dialectics of Collective Law in the Cooperative*, 19 LAW & SOC'Y REV. 303, 324 (1985).

[54] *Id.* at 324 ("[S]hort of revolution, change towards socialist legality is more likely to be fostered by mechanisms of communal justice within institutions that do not challenge the basic premises of capitalism than through the development of more radical conflicting institutions.") *See also* Linda Mulcahy, *The Devil and the Deep Blue Sea? A Critique of the Ability of Community Mediation to Suppress and Facilitate Participation in Civil Life*, 27 J.L. & SOC'Y 133, 150 (2000) (analyzing community mediation for "everyday resistance to state powers undertaken in small measures, and the occasional dominance of local normative frameworks").

[55] Maureen Cain, *Beyond Informal Justice*, 9 CONTEMP. CRISES 335 (1985); Sally Engle Merry, *Sorting Out Popular Justice*, *in* THE POSSIBILITY OF POPULAR JUSTICE, *supra* note 40, at 31, 33 n.3 (summarizing Cain's argument).

formulated against classed opponents, and they pursue a broad range of strategies and processes "*accountable to the collectivity* (class) *they work for*."[56] Cain distinguished collective justice from professionalized justice, which depends on formal liberal legal principles and serves professional class practices and interests. She also distinguished collective justice from incorporated justice, where an agency of the state or of capital displaces professionalized dispute resolution in ways that serves its own, rather than working class, interests (Cain's example: mediation offered by the Better Business Bureau).[57] Cain reasoned that when scholars categorize informal justice institutions according to their class or other political interests, they help make collective justice less vulnerable to professionalization or incorporation—a politically useful task for the scholar because the radical nature of collective justice institutions in capitalist societies means, she ventured, that they will invariably lack legitimacy and resources.[58]

What united all of these sociolegal scholars was their effort to theorize mediation *both* as part of a larger assemblage of state governance *and* potentially as a disruptive practice that allows analysts to see how people attempt to resist and change the dominant system. Capturing this double inquiry, Boaventura de Sousa Santos predicted that, whereas state elites had previously used formal law to disorganize classes and individuate conflicts, "state-sponsored community organization" would replace formal law as the preferred technique of disorganization under late capitalism.[59] And *yet*, he continued, "[i]t would be a gross mistake" to think of informal justice "as sheer manipulation and state conspiracy."[60] Because mediation depends on symbols such as "participation, self-government, and real community," it is vulnerable to "an autonomous political movement of the dominated classes" who wish to unleash the liberatory potential of these symbols.[61]

As the next section describes, by the early 1990s, sociolegal scholars' political and analytical questions—as they pursued them through the study of mediation—faded just as ADR was consolidating as a field in legal education.

C. *The Rise of ADR as a Field in Legal Education: 1980s–2000s*

As left sociolegal scholars debated the possibilities of informal justice to advance progressive social change, the legal reformers who are today remembered as founding the modern field of ADR in law schools—think Chief Justice Warren Burger and Harvard law professor Frank Sander—were

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[56] Cain, *supra* note 55, at 346. For example, Cain described early twentieth century American labor courts. *Id.*

[57] *Id.* at 353. She also distinguished collective justice from populist justice. *Id.* at 360–64.

[58] *Id.* at 365.

[59] Santos, *supra* note 7, at 261.

[60] *Id.* at 264.

[61] *Id.*

engaged in a parallel but different conversation.[62] These reformers proffered criticisms of state adjudication *but not* criticisms of state power. In 1976, as the over-use of courts became understood by some as a national problem, Sander posed some general and, as it turned out, extremely generative questions about institutional competence. He criticized lawyers and law teachers for assuming that "courts are the natural and obvious dispute resolvers," and he asked if it was possible "to develop some rational criteria for allocating various types of disputes to different dispute resolution processes."[63] For example, Sander ventured that people experiencing low-level civil and family cases may experience more creative, efficient, pro-social resolutions if their cases are channeled into mediation rather than court adjudication.[64]

From this reformist perspective, asking, "how does the state extend its reach as it delegates its functions?" was just not a compelling research question. To the contrary, Sander found it simply "interesting to note that . . . most of the experiments to date [with community moots] have involved alternatives to the criminal courts."[65] "Is this the result of some *conceptual notion*," he pondered, "or, as I suspect, because, like the reputed response of Willie Sutton, the famed bank robber when asked why he robbed banks, 'that's where the money is'?"[66] Sander implied the answer was the latter, obscuring from view how earlier efforts to envisage community mediation were motivated and justified by a normative critique of state power. And, because he pioneered a version of ADR that was not only informal, but also pro-state, Sander along with his collaborators could establish it as a field in legal education.

In this section, my argument is as follows: in the mid-1980s, sociolegal scholars engaged Sander's institutional reform project, but their criticisms were largely unavailing. As ADR coalesced as a legal field, its practices and questions narrowed. ADR proponents, working in the tradition inspired by Sander, aimed to provide a flexible menu of process options *but* without reproducing more income, racial, or gendered inequalities than disputants would otherwise encounter in state adjudication. As they confronted legal feminists and critical race scholars who argued that mediation harms women and minorities, these ADR proponents ceded to state adjudication conflicts

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[62] Warren E. Burger, *Agenda for 2000 A.D.— Need for Systematic Anticipation*, 15 JUDGES' J. 27, 32 (1976); Frank E.A. Sander, Varieties of Dispute Processing, Address Delivered at the National Conference on the Causes of Popular Dissatisfaction with the Administration of Justice (Apr. 7–9, 1976), *in* 70 F.R.D. 79, 111 (1976) [hereinafter Sander, Address].

[63] Sander, Address, *supra* note 62, at 112–13.

[64] *Id.* at 118–20; *see also* Frank E. A. Sander, *Family Mediation: Problems and Prospects*, MEDIATION Q., Dec. 1983, at 3, 5–6.

[65] Sander, Address, *supra* note 62, 128 n.45

[66] *Id.* (emphasis added).

that they deemed to involve public political interests. For the private conflicts they retained, they proposed to import formal legality to address inequalities. And the more ADR proponents turned to legal formalism—a tool used to regulate more than upend an existing social order—the more they turned away from asking about the role of informal dispute resolution in advancing broad-scale social transformations.

In 1985, Sander along with Stephen Goldberg and Eric Green published the first ADR casebook *Dispute Resolution*,[67] a sign, Carrie Menkel-Meadow observed, that the "periphery" was becoming the "core."[68] The casebook prompted two critical reviews by sociolegal scholars—Austin Sarat in the *Law & Society Review*[69] and Sally Engle Merry in the *Harvard Law Review*.[70] Both agreed the casebook marked an important shift: the legal academy was finally taking the study of nonjudicial dispute processing seriously. But the casebook did so in ways that revealed a chasm between sociolegal scholars and law professors.[71]

Sarat submitted that the book's "neglect [of] some of the most important . . . insights of the sociological study of disputing" was baked into its structure—it presents dispute processes as sets of abstract, essential attributes à la Lon Fuller.[72] For example, law students learn that "the mediator, in contrast with the arbitrator, has no power to impose an outcome on disputing parties."[73] What students do not learn, however, is that mediators exercise power and coercion in diverse ways in different contexts.[74] The student also learns that mediation is future-oriented, relational, flexible, and participatory. "In this description," Sarat quipped, "the advertised advantages of mediation are taken as its essential attributes. Failure to display these attributes means that a disputing process cannot claim to be mediation; it must be something else."[75] Lest readers suspect that Sarat was exaggerating, recall

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[67] STEPHEN B. GOLDBERG, ERIC D. GREEN & FRANK E. A. SANDER, DISPUTE RESOLUTION (1985).

[68] Carrie Menkel-Meadow, *Dispute Resolution: The Periphery Becomes the Core*, 69 JUDICATURE 300, 300 (1986) [hereinafter Menkel-Meadow, *Periphery*].

[69] Austin Sarat, *The "New Formalism" in Disputing and Dispute Processing*, 21 LAW & SOC'Y REV. 695 (1988).

[70] Sally Engle Merry, *Disputing Without Culture*, 100 HARV. L. REV. 2057 (1987) [hereinafter Merry, *Culture*].

[71] Sarat, *supra* note 69, at 696.

[72] *Id.* at 696–97. Fuller famously proposed to define the key attributes of different dispute processes. *See, e.g.*, Lon L. Fuller, *Mediation—Its Forms and Functions,* 44 S. CAL. L. REV. 305, 312 (1971); Lon L. Fuller, *The Forms and Limits of Adjudication*, 92 HARV. L. REV. 353, 354 (1978).

[73] Sarat, *supra* note 69, at 697.

[74] *Id.* For examples, see generally Merry, *Social Organization*, *supra* note 42; Susan S. Silbey & Sally E. Merry, *Mediator Settlement Strategies*, 8 LAW & POL'Y 7 (1986).

[75] Sarat, *supra* note 68, at 698. He elaborated further:

> [T]he contexts and practices of mediation are given less attention than is the effort to achieve a kind of definitional purity. . . . For contemporary formalists the mediator who exercises power or advances a zero-sum solution is not doing mediation.

my introductory observation that ADR audiences doubted that CVICT dispute processing could properly be characterized *as mediation*. The casebook also presented disputes as sufficiently stable so they could be matched to appropriate processes. But sociolegal scholarship, Merry objected, has already shown how disputes are cultural events that emerge and are used in social relationships in open-ended ways.[76] Disputes may shift and transform with a "chameleonlike quality" depending on participants and audiences—and frequently without any sort of final resolution.[77]

To be sure, these sociological insights do not prevent ADR practitioners from deciding to characterize a dispute to "fit[] the forum to the fuss"[78] potentially to the benefit of some people in conflict.[79] But sociolegal scholars suspected the casebook's apolitical framing: *Who* would fit what fusses to what forums and with what justificatory basis? The fitter would need a theory about "how to define the problems, what kinds of coercive force to impose on parties, and what value society should place on problems of each type," Merry argued.[80] Maureen Cain and Kalman Kulcsar had likewise previously submitted that "the question 'how can we help people/society eliminate disputes?'" is atheoretical[81]—that is, it lacks systematic reflection on its motivating assumptions and hence can unfold without making explicit its biases and political functions.

Finally, both Merry and Sarat rejected *Dispute Resolution*'s call for empirical research. The casebook concludes, Merry bristled, with a plea for research to narrow the gap between design and implementation, "suggesting that the problem is one of expertise, not politics."[82] Sarat likewise argued that the book's empirical questions assign the social scientist the labor of correcting mistakes, educating and influencing policymakers, and facilitating

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> Formalism thus presents a nonfalsifiable portrait of dispute processing techniques in which all that sociologists can do is to evaluate practices in light of ideal types.

Id. at 698, 710.

[76] Merry, *Culture*, *supra* note 70, at 2065.

[77] *Id.* For examples, see Sally Engle Merry, *Going to Court: Strategies of Dispute Management in an American Urban Neighborhood*, 13 LAW & SOC'Y REV. 891 (1979); Lynn Mather & Barbara Yngvesson, *Language, Audience, and the Transformation of Disputes*, 15 LAW & SOC'Y REV. 775 (1981); Sally Engle Merry & Susan Silbey, *What Do Plaintiffs Want? Reexamining the Concept of Dispute*, 9 JUST. SYS. J. 151 (1984); Marilyn Strathern, *Discovering 'Social Control'*, 12 J.L. & SOC'Y 111 (1985).

[78] Frank E.A. Sander & Stephen B. Goldberg, *Fitting the Forum to the Fuss: A User-Friendly Guide to Selecting an ADR Procedure*, 10 NEGOT. J. 49, 66 (1994).

[79] *See* Marshall, *supra* note 19, at 39.

[80] Merry, *Culture*, *supra* note 70, at 2067. She concluded that "[t]he book ignores the social, cultural, and political dimensions of ADR, but this neglect accurately represents the unreflective nature of the ADR movement as a whole." *Id.* at 2060.

[81] Cain & Kulcsar, *supra* note 6, at 388.

[82] Merry, *Culture*, *supra* note 70, at 2067.

best practices by evaluating institutions against ideal types.[83] Hence, even if ADR could facilitate a dialogue "between the sociology of law and the legal academy," Sarat warned that sociolegal scholars would pay a high price to enter the conversation.[84]

ADR proponents and sociolegal scholars never came to speak the other's language.[85] For their part, sociolegal scholars soon turned to the study of other kinds of informalisms—for example, the vernacularization of human rights; the rise of extralegal governance technologies such as standards, indicators, risk assessments; and the growth of collaborative managerial practices in state and private institutions.[86] Some pursued the study of social ordering in "nondispute situations," contributing to work that Merry called new legal pluralism because it examines how multiple legal systems coexist in nearly all societies.[87] ADR proponents meanwhile consolidated their own field, proliferating classes and casebooks.

In 1993, William Twining took stock of what was then a burgeoning American ADR literature. He simplified it thus: there is literature on institutional design that asks about "the appropriateness of different methods of dispute resolution to various types of 'dispute.'"[88] There is literature that offers "essentially political debates about the desirability and necessity of encouraging and developing ADR on a large scale."[89] And there is literature devoted to teaching ADR practice skills to law students and lawyers. "The vast bulk of these three bodies of literature," he concluded, "is atheoretical."[90]

Early sociolegal scholars had used theory as a tool to grapple with a contradiction. They criticized formal law *and* they also criticized the turn to informal justice, which they interpreted as, among other things, elite backlash to the rights revolution. Yet they hardly depicted formal legality as a tool of

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[83] Sarat, *supra* note 69, at 706–07.

[84] *Id.* at 712.

[85] For a significant exception, see Menkel-Meadow, *Periphery*, *supra* note 68, at 302–03 ("My concern here is that [Goldberg, Green, and Sander's] book has something of an advocate's tone . . . . Where, one might ask, are excerpts of such trenchant criticisms of informal justice as [those written by sociolegal scholars]?"). For an early interdisciplinary reader on mediation, see CARRIE MENKEL-MEADOW, MEDIATION: THEORY, POLICY AND PRACTICE xiii (2001).

[86] *See, e.g.*, SALLY ENGLE MERRY, HUMAN RIGHTS AND GENDER VIOLENCE: TRANSLATING INTERNATIONAL LAW INTO LOCAL JUSTICE (2006); THE QUIET POWER OF INDICATORS: MEASURING GOVERNANCE, CORRUPTION, AND RULE OF LAW (Sally Engle Merry, Kenneth Davis, and Benedict Kingsbury eds., 2015); Susan Silbey, Ruthanne Huising & Salo Vinocur Coslovsky, *The "Sociological Citizen" Relational Interdependence in Law and Organizations*, 59 L'ANNÉE SOCIOLOGIQUE 201 (2009).

[87] Sally Engle Merry, *Legal Pluralism*, 22 LAW & SOC'Y REV. 869, 873, 890 (1988).

[88] William Twining, *Alternative to What? Theories of Litigation, Procedure and Dispute Settlement in Anglo-American Jurisprudence: Some Neglected Classics*, 56 MOD. L. REV. 380, 380 (1993).

[89] *Id.*

[90] *Id.* at 381.

genuine social and economic emancipation.[91] Hence even as they criticized informalism, some early sociolegal scholars continued to analyze its potential to produce a "'genuinely' human and popular form of justice."[92] In other words, these scholars used theory as Ethan Miller defines it: as a "tool for challenging fixed modes of thought, opening up new possibilities, and enabling transformative action in the world."[93] Many ADR proponents simply had a different normative and practical orientation: they wanted to work with the world as it is—not to unravel and reimagine its basic organizing categories but rather incrementally to improve existing institutions.[94]

For example, and as Twining observed, ADR scholars produced a literature engaged in political debates about the benefits and dangers of entrenching ADR at a national scale. But this literature had a specific target. In the 1980s, law professors, such as Owen Fiss and Richard Delgado, published important articles that censured ADR and defended formal legality (largely without also criticizing it) as a shield against inequality.[95] ADR proponents mostly entered this second conversation. In response to arguments that mediation favors the strong over the weak, they asked the following kinds of policy-oriented questions: How should they limit their field of cases? How

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[91] For a review of these arguments, see, for example, David M. Trubek, *Turning Away from Law?*, 82 MICH. L. REV. 824 (1984). Trubek concludes: "The high priests celebrate an informalism they don't believe in, while the critics reluctantly champion a formalism they distrust." *Id.* at 835.

[92] Cain, *supra* note 55, at 335 ("Academic criticism and negative evaluation have created . . . a feeling that the devil of formal justice whom we know may, after all, be better than hisdangerously unfamiliar informal brother. This chorus is occasionally punctuated by an attenuated left wing squeak of hope that by some dialectical feat a 'genuinely' human and popular form of justice may emerge in spite of all from this newly identified diabolical situation . . . . This article is an attempt to make that squeak a little stronger.") *See also* Abel, *supra* note 43, at 12 ("[T]he moral ambiguity of informalism must mean that it can liberate as well as oppress"); Santos, *supra* note 7, at 265 ("Community justice cannot be ideological without at some time being implicitly utopian. It cannot manipulate unless it offers some 'genuine shred of content as a fantasy bribe to the community members about to be manipulated' . . . . Resistance against manipulation must start from that genuine shred of content.") (citation omitted); Fitzpatrick, *Informalism, supra* note 52, at 195 (theorizing how understanding informalism "as an effect of relations of power" could "lead to the identification of counter-powers otherwise denied or obscured in the domain of the informal" and made visible in alterative, non-state legal systems); Steven Spitzer, *The Dialectics of Formal and Informal Control*, 1 THE POLITICS OF INFORMAL JUSTICE: THE AMERICAN EXPERIENCE*, supra* note 7, at 167, 169 ("[E]ven if 'the politics of informal justice' is no more than an ideological arena in which larger social struggles are being fought, the very visibility and ubiquity of these politics make them an important subject for investigation.").

[93] ETHAN MILLER, REIMAGINING LIVELIHOODS: LIFE BEYOND ECONOMY, SOCIETY, AND ENVIRONMENT xvii (2019).

[94] Robert Mnookin aptly summarizes this orientation: "Proponents of ADR regularly argue that arbitration and mediation—the two primary ADR processes—reduce the transaction cost of resolution and otherwise lead to better outcomes. In assessing the benefits and costs of these procedures it is, of course, necessary to ask: Compared to what?" Robert Mnookin, *Alternative Dispute Resolution* (Harv. L. Sch., John M. Olin Ctr. for L., Econ. & Bus. Discussion Paper Series No. 232, 1998).

[95] Owen M. Fiss, *Against Settlement*, 93 YALE L.J. 1073 (1984); Richard Delgado, Chris Dunn, Pamela Brown, Helena Lee & David Hubbert, *Fairness and Formality: Minimizing the Risk of Prejudice in Alternative Dispute Resolution*, 1985 WIS. L. REV. 1359 (1985).

should they marshal what kinds of empirical evidence? How should they design specific kinds of legal regulations and procedural safeguards?[96]

The feminist legal movement hastened ADR proponents' mobilization of formal legality. In the 1970s, as Danzig was calling for community intervenors to replace the police, other reformers were arguing to informalize the police by teaching them mediation.[97] Feminists successfully organized against informal police interventions in cases of domestic violence.[98] But, having won the battle for mandatory arrests, they confronted judges, prosecutors, and court administrators diverting arrested men into mediation.[99]

Community mediators defended their decision to mediate cases of domestic violence—at least for a while. In 1978, Anna Laszlo and then-Assistant District Attorney Thomas McKean described their community mediation center's work before Congress: "[W]e saw everything from threats to assault with a dangerous weapon to attempted homicide."[100] For such cases, they used community mediators, without lawyers present, on the assumption that they would "get closer to the problems involved and would also get the community involved in the whole problem of wife beating."[101] In 1982, mediators Linda Singer and Charles Bethel likewise explained their judgement that mediating some domestic violence cases could produce safety, separation, and behavioral change via contract.[102] They described mediation as voluntary only insofar as individuals make choices within a context of "coercive external pressures."[103] Offenders face criminal charges and victims face their own constraints: they "may be uninterested in prosecution not only out of fear, but also out of love, or economic concerns, or consideration for children."[104] And they reasoned that the coercions produced through mediation could better serve the interests of

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[96] *See, e.g.*, GOLDBERG, GREEN & SANDER, *supra* note 67. For a review of some of these arguments, see generally Amy J. Cohen, *Revisiting* Against Settlement*: Some Reflections on Dispute Resolution and Public Values*, 78 FORDHAM L. REV. 1143 (2009).

[97] *See, e.g.*, U.S. COMM'N ON C.R., UNDER THE RULE OF THUMB: BATTERED WOMEN AND THE ADMINISTRATION OF JUSTICE 18–19 (1982) (describing police training techniques that "call for the responding officer to calm the dispute, listen carefully to both parties without showing favoritism or fixing blame, and to suggest ways to resolve the problem without involvement of the criminal justice system" and arguing that these practices of mediation are misapplied to domestic violence cases).

[98] *See, e.g.,* Laurie Woods, *Mediation: A Backlash to Women's Progress on Family Law Issues*, 19 CLEARINGHOUSE REV. 431, 432 (1985).

[99] *Id.* at 432–33.

[100] Anna T. Laszlo, Court Diversion: An Alternative to Spousal Abuse Cases, Presentation at a Consultation Sponsored by the United States Commission on Civil Rights, *in* BATTERED WOMEN: ISSUES OF PUBLIC POLICY 65 (Jan. 30–31, 1978).

[101] *Id.* at 87–88 (comment by Thomas McKean during discussion).

[102] Charles A. Bethel & Linda R. Singer, *Mediation: A New Remedy for Cases of Domestic Violence*, 7 VT. L. REV. 15, 21–25 (1982).

[103] *Id.* at 19.

[104] *Id.* at 30.

some victims than the coercions of the formal penal system.[105] In 1984, Dianna Stallone described centers where mediators added a political justification to this practice: namely, "keep[ing] men of color out of the criminal system."[106] "Protecting the interests of men of color is a somewhat unknown although expressed function of mediation," she conceded (she, however, was not persuaded).[107]

By the mid-1980s, feminist domestic violence advocates had effectively won this fight. They described mediation as a "voluntary, noncoercive process" when what was needed were rules that emanate from the state applied consistently by decisionmakers.[108] There was only a defense of state power in this anti-violence, anti-mediation writing. For their part, ADR proponents conceded the feminist's rule of law hierarchy. Most agreed that cases involving any sort of (non-trivial) crime, let alone domestic violence, should not be mediated.[109] For the conflicts that ADR proponents retained for mediation, such as divorce and child custody, they proposed formal legality to manage private inequalities. For example, Craig McEwen, Nancy Rogers, and Richard Maiman described an unfortunate perception that "one must choose between a 'lawyered' process ending in the courtroom, and an informal, problem-solving process."[110] They wanted the state to mandate divorcing spouses into mediation. But they also wanted "attorneys [to] participate regularly and vigorously."[111] Their research suggested that lawyer participation in mediated processes could protect women's interests.

By 1995—the time McEwen, Rogers, and Maiman wrote their widely cited article "Bring in the Lawyers"—American ADR retained few traces of the anti-legalist, anti-capitalist radicalism that once inspired left interest in informal justice.[112] ADR proponents began to discuss appropriate rather than

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[105] *Id.* at 30–31.

[106] Dianna R. Stallone, *Decriminalization of Violence in the Home: Mediation in Wife Battering Cases*, 2 LAW & INEQ. 493, 515 (1984).

[107] *Id.*

[108] Woods, *supra* note 98, at 435; *see also* Carol Lefcourt, *Women, Mediation and Family Law*, 18 CLEARINGHOUSE REV. 266, 267–68 (1984); *Resolution on Mediation Passed by the Battered Women's Advocates Caucus of the 14th National Conference on Women and the Law, Washington, D.C., April 10, 1983*, WOMEN'S ADVOC. (Nat'l Ctr. on Women & Fam. L., New York, N.Y.), July 1983, at 3 (stating that mediation "is always inappropriate with respect to any issue (be it related to violence or not) where there has been any act or threat of violence against a woman or child").

[109] *See, e.g.*, Jennifer Gerarda Brown, *The Use of Mediation to Resolve Criminal Cases: A Procedural Critique*, 43 EMORY L.J. 1247 (1994); *see also* Carrie Menkel-Meadow, *When Dispute Resolution Begets Disputes of Its Own: Conflicts Among Dispute Professionals*, 44 UCLA L. REV. 1871, 1907 (1997) (characterizing the mediation of criminal cases as intensely controversial).

[110] Craig A. McEwen, Nancy H. Rogers & Richard J. Maiman, *Bring in the Lawyers: Challenging the Dominant Approaches to Ensuring Fairness in Divorce Mediation*, 79 MINN. L. REV. 1317, 1322 (1995).

[111] *Id.*

[112] *Cf.* Carrie Menkel-Meadow, *Pursuing Settlement in an Adversary Culture: A Tale of Innovation Co-Opted or "The Law of ADR"*, 19 FLA. ST. U. L. REV. 1, 1, 3 (1991). In 1991, Menkel-Meadow traced how "[a] field that was developed, in part, to release us from some—if not all—of the limitations and

alternative dispute resolution and some argued that ADR could advance rule of law values—an argument roughly analogous to the idea that a well-functioning legal system needs a mix of clear rules and equitable standards.[113] Carrie Menkel-Meadow encouraged scholars to think less about formalism versus informalism than about how to evaluate hybrid institutions in a dispute resolution landscape increasingly characterized by process pluralism.[114] To be sure, the field developed its own criticisms. ADR proponents, prominently Jean Sternlight, traced how mandatory arbitration (and the legal architecture supporting it) served corporate more than consumer interests.[115] Other ADR scholars argued to preserve liberal values such as individual consent, party self-determination, and procedural justice in court-annexed mediation.[116]

D. *Crisis in the Center*

ADR scholars have not given up on theory and politics. But all too often the contemporary field does not engage in world-making questions about the kinds of people and social orders they hoped that ADR techniques and values would nurture and advance.[117] To recall Twining's 1993 trilogy: we continue to have institutional design literature indebted to legal process theory but now this literature often includes efforts to address larger social conflicts beyond the multidoor courthouse.[118] We also continue to have

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rigidities of law and formal legal institutions has now developed a law of its own." *Id.* at 1. She continued: "[A] critical challenge to the status quo has been blunted, indeed co-opted, by the very forces I had hoped would be changed by some ADR forms and practices." *Id.* at 3.

[113] *See, e.g.*, Sternlight, *supra* note 4, at 569–72; Richard C. Reuben, *ADR and the Rule of Law: Making the Connection*, DISP. RESOL. MAG., Summer 2010, at 4, 5.

[114] Carrie Menkel-Meadow, *Regulation of Dispute Resolution in the United States of America: From the Formal to the Informal to the 'Semi-Formal'*, *in* REGULATING DISPUTE RESOLUTION: ADR AND ACCESS TO JUSTICE AT THE CROSSROADS 419, 428 (Felix Steffek, Hannes Unberath, Hazel Genn, Reinhard Greger & Carrie Menkel-Meadow eds., 2013).

[115] Jean R. Sternlight, *Panacea or Corporate Tool?: Debunking the Supreme Court's Preference for Binding Arbitration*, 74 WASH. U. L.Q. 637, 638–39 (1996). Hiro Aragaki proposes that Sternlight's argument implicitly expresses a critical legal sensibility because it describes how an extrajudicial process (arbitration) works together with judicial and statutory authority against the interests of weaker parties. *See* Hiro N. Aragaki, *The Critical Theory Legacy of Jean Sternlight's* Panacea or Corporate Tool?, *in* DISCUSSIONS IN DISPUTE RESOLUTION: THE FOUNDATIONAL ARTICLES 260 (Art Hinshaw, Andrea Kupfer Schneider & Sarah Rudolph Cole eds., 2021).

[116] *See, e.g.*, Nancy A. Welsh, *Disputants' Decision Control in Court-Connected Mediation: A Hollow Promise Without Procedural Justice*, 2002 J. DISP. RESOL. 179, 184–87; Bobbi McAdoo & Nancy A. Welsh, *Look Before You Leap and Keep on Looking: Lessons from the Institutionalization of Court-Connected Mediation*, 5 NEV. L.J. 399, 404 (2005).

[117] *See* MILLER, *supra* note 93, at 187.

[118] For example, Stephen B. Goldberg, Nancy H. Rogers and Sarah Rudolph Cole explain that they conclude the 2020 version of Goldberg, Green, and Sander's casebook (now Goldberg, Sander, Rogers, and Cole) with the following questions: "What adaptations of dispute resolution practices might give society tools to tackle such current challenges as community division, conflicts over delivery of services for opioid addicts, and climate change?" Stephen B. Goldberg, Nancy H. Rogers & Sarah Rudolph Cole,

political debates in which ADR scholars mobilize the benefits of formal legality to speak fairness to power[119] and mobilize empirical evidence for policy-oriented aims, such as to improve the quality of an ADR process.[120] And, as Twining observed, we have literature grounded in skills training.[121]

Briefly described, this third strand of writing teaches people how to negotiate across a range of economic, social, and political relations. It translates basic neoclassical economic concepts into popular principles so that people can practice Pareto optimality and transaction cost minimization in their workplaces and families.[122] Some scholars have also infused these practices with relational feminist sensibilities[123] and psychological writing on self-reflexivity and interpersonal connection.[124] But, read as a whole, this relational literature developed apart from any broader structural vision that would place political or ethical limits on how these skills could travel without friction. As ADR created its own market for professional expertise and industry best practices, scholars established consultancy firms and businesses, some remaining within (but with many prominent writers opting out of) full-time law teaching. And they translated knowledge about interpersonal practice into something that could be sold and bought across any kind of public, family, workplace, market, or corporate context.[125]

Questions for the Future of the Dispute Resolution Field, *in* THEORIES OF CHANGE, *supra* note 9, at 82, 82; *see also* Deborah Thompson Eisenberg, *Beyond Settlement: Reconceptualizing ADR as "Conflict Process Strategy"*, 35 OHIO ST. J. ON DISP. RESOL. 705, 735 (2020) [hereinafter Eisenberg, *Conflict Process Strategy*].

[119] "[A]rbitration's enhanced formalism suggests significant promise for reformers who seek to improve minorities' fair and effective representation in dispute resolution," Cole argues. Sarah Rudolph Cole, *The Lost Promise of Arbitration*, 70 SMU L. REV. 849, 849 (2018).

[120] As Nancy Welsh reflects, "My goal for our field is . . . that we actually are helping to improve people's ability to solve problems and resolve disputes in a way that they find to be sufficiently fair." To that end, she calls for research: "We need more researchers (both quantitative and qualitative, both inside and outside law schools) to take on our field as their life's work." Nancy A. Welsh, *We Need Good Data to Know Whether What We Are Doing—and Espousing—Is Good*, *in* THEORIES OF CHANGE, *supra* note 9, at 258, 258, 260.

[121] Twining, *supra* note 88, at 381.

[122] *See generally* DAVID A. LAX & JAMES K. SEBENIUS, THE MANAGER AS NEGOTIATOR: BARGAINING FOR COOPERATION AND COMPETITIVE GAIN (1986); ROBERT H. MNOOKIN, SCOTT R. PEPPET & ANDREW S. TULUMELLO, BEYOND WINNING: NEGOTIATING TO CREATE VALUE IN DEALS AND DISPUTES (2000); RUSSELL KOROBKIN, NEGOTIATION THEORY AND STRATEGY (2002); ROGER FISHER & WILLIAM URY, GETTING TO YES: NEGOTIATING AGREEMENT WITHOUT GIVING IN (Bruce Patton ed., 1981). For a genealogy of the turn to neoclassical ideas in negotiation, see Cohen, *Labor Theory*, *supra* note 13, at 150–52.

[123] *See* Carrie Menkel-Meadow, *Toward Another View of Legal Negotiation: The Structure of Problem Solving*, 31 UCLA L. REV. 754, 803 (1984) [hereinafter Menkel-Meadow, *Problem-Solving*]; Deborah M. Kolb, *The Love for Three Oranges Or: What Did We Miss About Ms. Follett in the Library?*, 11 NEGOT. J. 339, 344 (1995).

[124] *See, e.g.*, DOUGLAS STONE, BRUCE PATTON & SHEILA HEEN, DIFFICULT CONVERSATIONS: HOW TO DISCUSS WHAT MATTERS MOST (1999); ROGER FISHER & DANIEL SHAPIRO, BEYOND REASON: USING EMOTIONS AS YOU NEGOTIATE (2005).

[125] *See* Cohen, *Labor Theory*, *supra* note 13, at 168–70.

Commodification has taken a significant toll on the field. For example, in a recent volume that asked contributors to limn a vision for the future, John Lande lamented that "[t]he dispute resolution field in American legal education is facing a slow-moving demographic disaster," describing how law schools now view ADR as "'merely practice courses'" and hence are replacing retiring tenured faculty with adjuncts.[126] Or as Douglass Yarn recently reported: "My dean polled deans on the AALS dean listserv about whether ADR (just as an example of a people skills delivery mechanism) attracts students. . . . [S]he got a resounding 'no' . . . . This partially informed her decision to spend resources elsewhere."[127]

Several contributors to this volume therefore argued that ADR must stand apart from industry best practices. "Would we remain excited about the field," Lela Love asked, if we taught the model of commercial mediation actually practiced (in which mediators often help parties evaluate the legal merits of a case so they can reach a cost-effective settlement)?[128] Or Nancy Welsh: could mediation serve as "midwife[e]" to "more humanistic successor processes and practices," such as the ethical practices advanced by collaborative law (an anti-adversarial approach to lawyering in divorce negotiations)?[129] Or Eisenberg: being a "*how*-focused field . . . . is not sufficient" (by which she means a field focused on apolitical skills training).[130] Or as Lande summarized the prevailing sentiment: "most of us are deeply concerned about promoting substantive justice in human interactions, not only procedural justice or efficiency," and "many of us want to help promote just outcomes in individual cases and in dealing with major social problems."[131]

There is urgency, even a sense of alienation, in this summary. For decades, progressive ADR scholars have witnessed the growth of consumer and workplace arbitration and efficiency-oriented court annexed mediation, never having wanted the field to become so tethered to privatization through the market and freedom-of-contract ideology. ADR scholars, in other words, are today struggling to reclaim the field as a site for meaning-making as well as a set of tools that professionals have on offer (many of which have been put to political and economic ends that they themselves did not desire).

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[126] John Lande, *The Dispute Resolution Movement Needs Good Theories of Change*, *in* THEORIES OF CHANGE, *supra* note 9, at 14, 24.

[127] Doug Yarn, Jean Sternlight & John Lande, *What Will Be the Future of ADR in US Legal Education?*, *in* THEORIES OF CHANGE, *supra* note 9, at 145, 148.

[128] Michael Z. Green, Lela P. Love, Nancy A. Welsh, Chris Guthrie, Ava J. Abramowitz & Noam Ebner, *New Horizons for the ADR Field: Where Are We Headed and Where Can We Go?*, *in* THEORIES OF CHANGE, *supra* note 9, at 47, 49.

[129] *Id.* at 50.

[130] Eisenberg, *Process Strategy*, *supra* note 9, at 53; *see also* Eisenberg, *Conflict Process Strategy*, *supra* note 118, at 727.

[131] John Lande, *Introduction*, *in* THEORIES OF CHANGE, *supra* note 9, at 1, 11.

But with what theories of the individual, community, and the state—and with what theories of property, democracy, and violence—could the field organize a humanistic project? With what analytical and methodological commitments could it organize a research program devoted to substantive justice? In 1982, Cain and Kulcsar criticized dispute theorists for failing to construct a theory of the social order that dispute resolution practices are meant to function within. That is, they criticized dispute theorists for asking "the reformist question of 'how can order be created'" rather than the sociological question of "how is order possible."[132] One consequence, Cain and Kulcsar argued, of this reformist orientation is that dispute theorists may become vulnerable to the view "that moments of disorder must be stopped," without articulating a political account of why this should be so, available for scholarly criticism and debate.[133] A second consequence of this reformist orientation, I would add, is that it may constrain ADR proponents from seeing that what might look like disorder—or at least what might look like divisive and confrontational politics—may have embedded within it extensive attention to how to build and proliferate skills in *mediation*.

Allow me to explain. As I pivot to the second Part of this Article, consider recent comments by Heidi Burgess and Guy Burgess, scholar-practitioners devoted to handling intractable conflict. They explain why they believe "[d]efund the police" is a regrettable slogan: it attacks the police and "does not at all acknowledge the role that citizens themselves play in making communities unsafe."[134] A conflict intervenor would do well, Burgess and Burgess suggest, to propose "a more constructive choice of words to encourage people to think about conflict in more constructive ways."[135] And yet, in suggesting common frames to translate confrontational politics into productive and proleptic action, Burgess and Burgess misdescribe reality on the ground. Movement organizers seeking to defund the police think endlessly about how citizens make communities unsafe *and* also potentially safe. That is why they are intensely interested in mediation. But their version of community mediation diverges sharply from how most legal scholars understand contemporary ADR.

As the following Part describes, transformative justice (TJ) is a contemporary effort to take back control over conflict, including harm,

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[132] Cain & Kulcsar, *supra* note 6, at 388.

[133] *Id.* For scholarship examining how divergent assumptions about what constitute a just social order shape divergent understandings of conflict, violence, disorder and policing, see ALEX S. VITALE, THE END OF POLICING (2017); Monica C. Bell, *Police Reform and the Dismantling of Legal Estrangement*, 126 YALE L.J. 2054 (2017); Amna A. Akbar, *An Abolitionist Horizon for (Police) Reform*, 108 CALIF. L. REV. 1781 (2020); Jocelyn Simonson, *Police Reform Through a Power Lens*, 130 YALE L.J. 778 (2021).

[134] Heidi Burgess & Guy Burgess, *Framing the Events of Spring and Summer 2020*, BEYOND INTRACTABILITY (July 14, 2020), http://beyondintractability.org/cci-mbi-cv19-blog1/burgess-framing-summer2020.

[135] *Id.*

violence, and abuse—that aims neither to reinforce existing inequalities nor to give away power to an external decisionmaker. To advance this ever elusive ambition, TJ grounds itself broadly in the following commitments: it seeks transformations of self-understandings, interpersonal relations, and political and economic systems simultaneously; it resists professionalization (i.e., in TJ processes, facilitators are already people in relation); it resists commodification (i.e., facilitation is not a service offered for hire); it does not seek to constrain harmers who refuse to participate, even as facilitators aim to create conditions that will motivate harmers to see participation as in their interest; it invites communities, identified through explicit conversations, to influence processes; and it is ambivalent about whether or how these processes should scale.

In the following Part II.A, I simply elaborate TJ on its own terms, using writings and presentations prepared by TJ practitioners because I wish to offer readers a textured sense of its processes and commitments—even as I should stress that TJ is an emergent, grassroots practice intended to accommodate diversity and experimentation. In Part II.B, I suggest that TJ is a contemporary version of the kinds of practices that once inspired critical sociolegal inquiry in mediation. I ask readers to think of TJ as a kind of mediation, and, in so doing, I suggest that the contemporary field need not be thought of as a politics-free, neutral collection of techniques for resolving interpersonal or commercial disputes. The fact that movements for penal abolition are turning to ADR-like tools and practices suggests that ADR could be thought of as a field with an important set of critical, albeit also irresolvable, questions linked to macro political, economic, and social change.

II. THE RISE OF TRANSFORMATIVE JUSTICE

A. *To Build an Alternative World, You Begin by Learning How to Apologize*

In 2002, I was studying community mediation in Nepal in a moment when the country was in political crisis. That year, first the Prime Minister and then the King dissolved democratically elected government bodies as Maoist insurgents waged an armed rebellion against the reigning constitutional monarchy.[136] A mediator began his village training "by lighting three candles: the first dedicated to the 'martyrs of democracy,' the second to 'fighters for human rights,' and the third to 'victims of [police] torture.'"[137] He continued his lament: "When will this end? We don't know. Even the government does not obey the Constitution. We must protect the human rights guaranteed in our Constitution, especially women's rights. We

[136] John Norris, *How Not to Wage a Counter-Insurgency: Nepal, the Maoists and Human Rights*, 11 HUM. RTS. BRIEF, no. 2, 2004, at 13–14.

[137] Cohen, *Globalization*, *supra* note 1, at 297.

must not suppress women's rights in the mediation process. *This* is what this training is for."[138] With this frame, villagers were taught to embrace political commitments—e.g., to gender and caste equality—to address conflict and harm without state assistance and according to higher-order cosmopolitan values that meant caring for disputants with the least access to formal or informal power.

Here is how a transformative justice training[139] began in 2020—now the political crisis is that of the United States: "I want to reground . . . always in our commitment to liberation for Black lives, liberation for trans and queer lives, and liberation from cages and policing, liberation for all . . . ."[140] The trainer paused solemnly: "I would like to also take a moment to honor the memory of Breonna Taylor, Nina Pop, Tony McDade, Ahmaud Arbery, George Floyd, Cornelius Fredericks, and the countless lives that we've lost to the agents of white supremacy and anti-Blackness."[141] This, then, is a basic distinction: like my trainings in far-eastern Nepal, and unlike nearly all forms of contemporary ADR, this webinar linked informal justice to political liberation.

This is liberation not from a repressive monarchy but rather from the American prison industrial complex (PIC). That is, from surveillance, policing, and imprisonment and from all the ways in which these practices reflect and reproduce white supremacy, racial capitalism, and gendered violence. Mariame Kaba makes this point foundational and plain. "You cannot understand transformative justice if you don't understand PIC abolition," she explains.[142] "Everybody who believes in transformative justice . . . has to believe in PIC abolition."[143]

This was not always so explicitly the case. In North America in the 1990s, Ruth Morris first popularized the term transformative justice. Morris, herself a prison abolitionist, was then attempting to consolidate a political criticism of restorative justice.[144] Restorative justice is a mediative process where offenders and victims (potentially alongside their families and

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[138] *Id.*

[139] STEPS TO END PRISONS AND POLICING: A MIXTAPE ON TRANSFORMATIVE JUSTICE (Just Practice Collaborative comp., 2020) [hereinafter MIXTAPE], https://learninglab.freedomlifted.com/courses/just-practice-mixtape. Just Practice Collaborative provides resources, training, and mentoring for people engaged in addressing "violence without reliance on criminal legal and traditional social services." *See* just-practice.org. It created the Mixtape as a training resource.

[140] Elliott Fukui, *Mad World: Psychiatry, Abolition, and New Horizons*, *in* MIXTAPE, *supra* note 139, at 05:26.

[141] *Id.* at 05:43.

[142] Mariame Kaba, *Prison Industrial Complex (PIC) Abolition 101: A Vision to End Prisons, Policing & Surveillance*, *in* MIXTAPE, *supra* note 139, at 1:44:23.

[143] *Id.* at 1:44:38.

[144] RUTH MORRIS, STORIES OF TRANSFORMATIVE JUSTICE (2000) [hereinafter MORRIS, STORIES]; RUTH MORRIS, A PRACTICAL PATH TO TRANSFORMATIVE JUSTICE (1994).

communities) deliberate about how to remedy instances of harm and violence.[145] Morris reasoned that restorative justice is incommensurably better than retribution administered by the state. But she also argued that restorative justice all too often omits "the social causes of all events" and fails to confront "distributive injustice."[146] Many restorativists agreed. In 1990, for example, Howard Zehr clarified that "restorative justice must often be transformative justice. To make things right, it may be necessary not merely to return to situations and people to their original condition, but to go beyond."[147]

Transformative justice thus once signaled a general commitment among restorative justice scholars to theorizing interpersonal restoration and social transformation in one breath. Today, anti-violence PIC-abolitionist feminists continue to articulate this commitment and to draw on restorative principles and practices.[148] But they also build on practices that originated not with restorative justice scholars as much as "from BIPOC communities, from sex workers, from trans people, or people who were street-based"—people who could not access state law enforcement to respond to harm.[149] And they have identified a range of strategies to prevent, interrupt, and transform harm, including through facilitating processes. What are often called *community accountability processes* typically involve small groups, including people present to support harmers and survivors, that are organized around concrete goals. Facilitators convene deliberative interventions that work towards ways that people who cause harm, for example, can meet the concrete needs that survivors articulate, including for recognition that a harm took place.[150] All of these strategies are understood as part of achieving transformative justice defined as part of mass grassroots political organizing to abolish the penal and capitalist state.

Rearticulated as a social movement praxis, TJ cultivates a focus on life in its entirety, and especially on one's intimate relationships. Indeed, at the same

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[145] *See generally* Howard Zehr, *Retributive Justice, Restorative Justice*, *in* NEW PERSPECTIVES ON CRIME AND JUSTICE: OCCASIONAL PAPERS OF THE MCC CANADA VICTIM OFFENDER MINISTRIES PROGRAM AND THE MCC U.S. OFFICE OF CRIMINAL JUSTICE (1985).

[146] MORRIS, STORIES, *supra* note 144, at 4–5.

[147] HOWARD ZEHR, CHANGING LENSES: A NEW FOCUS FOR CRIME AND JUSTICE 190 (1990) (footnotes omitted). For a review of American restorativists who embraced—and others who explicitly rejected—this social-structural argument, see Cohen, *Moral Restorative Justice*, *supra* note 38, at 891–95.

[148] *See, e.g.*, MARIAME KABA, WE DO THIS 'TIL WE FREE US: ABOLITIONIST ORGANIZING AND TRANSFORMING JUSTICE 171–72 (2021) [hereinafter KABA, 'TIL WE FREE US].

[149] Ejeris Dixon, Leah Lakshmi Piepzna-Samarasinha, Mimi Kim & Shira Hassan, *Sexual Violence and Transformative Justice in Abolitionist Times*, NAT'L SEXUAL ASSAULT CONF., http://www.nationalsexualassaultconference.org/2020/07/25/sexual-violence-and-transformative-justice-in-abolitionist-times/ (last visited Oct. 25, 2021) (comment by Hassan) (choose the second video embedded on the page; then drag the toggle to 09:14). Hassan's presentation was part of a Conference Panel at the 2020 National Sexual Assault Conference, held on September 3, 2020.

[150] For detailed examples, see CREATIVE INTERVENTIONS, CREATIVE INTERVENTIONS TOOLKIT: A PRACTICAL GUIDE TO STOP INTERPERSONAL VIOLENCE § 3.1 (2018), https://www.creative-interventions.org/toolkit/ [https://perma.cc/SG9X-GVPA].

time as ADR proponents and other reformers were certifying gendered violence as suitable only for the state,[151] early TJ organizers were forging their practice by doing just the opposite. "We've so long understood in our bones," recalls Mimi Kim, "that there was something wrong with relying on the police state to protect us from gender-based violence."[152] The basic idea is that the state—through law enforcement, social services, and contracting these functions through the market—has failed to institutionalize the relationships necessary to advance accountability, healing, and safety. To the contrary, organizers argue, the state reproduces the kind of coercive power and control that defines sexual violence and, all too often, it reproduces sexual violence in policing, prison, wars, the military, and at borders.[153]

To respond to harm outside of state systems, relationship building is the bedrock principle: "we have to actually transform our relationships to each other enough so that we can see that we can keep each other safe," Kaba inspires.[154] Relationship building is also therefore understood as a shield against state power: without it, Mia Mingus elaborates, "our movements . . . [are] more vulnerable to the state . . . to come in and divide and conquer us, to separate us, to exploit us."[155] Or as adrienne maree brown puts it: "our movements are in danger because we don't know how to handle conflict or how to move towards accountability in satisfying and collective ways."[156]

TJ thus enacts a sharp distinction between state and popular power and, in so doing, cultivates an ethics of conflict intervention that diverges sharply from professional models common today in modern Euro-American states. In TJ, there is no service for a professional to provide—either through a labor-market or through philanthropic volunteerism. TJ facilitators convene processes only within their own communities. "We are not talking about being missionaries and going into somebody else's community . . . . we are talking about people who already have relationship with each other," Mingus explains.[157] Likewise Kaba makes clear: "I never seek out any processes.

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[151] *See, e.g.*, Sarah Curtis-Fawley & Kathleen Daly, *Gendered Violence and Restorative Justice: The Views of Victim Advocates*, 11 VIOLENCE AGAINST WOMEN 603, 609 (2005) (arguing that feminist critics blocked restorative justice "for cases of gendered violence in most world jurisdictions").

[152] Dixon, Piepzna-Samarasinha, Kim & Hassan, *supra* note 149 (comment by Kim) (choose the first video embedded on the page; then drag the toggle to 02:25).

[153] *Id.*

[154] KABA, 'TIL WE FREE US, *supra* note 148, at 191; *see also* Ejeris Dixon & Leah Piepzna-Samarasinha, *Be Humble: An Interview with Mariame Kaba*, *in* BEYOND SURVIVAL: STRATEGIES AND STORIES FROM THE TRANSFORMATIVE JUSTICE MOVEMENT (Ejeris Dixon & Leah Lakshmi Piepzna-Samarasinha eds., 2020).

[155] Cat Brooks, Mimi Kim & Mia Mingus, *#WeTakeCareOfUs Webinar #7: Transformative Justice*, JUST. TEAMS NETWORK, at 59:23 (July 24, 2020), https://justiceteams.org/wetakecareofus-webinar-series (comment by Mingus).

[156] ADRIENNE MAREE BROWN, WE WILL NOT CANCEL US AND OTHER DREAMS OF TRANSFORMATIVE JUSTICE 22 (2021).

[157] Mia Mingus, *Transformative Justice Intro*, *in* MIXTAPE, *supra* note 139, at 03:28.

Ever."[158] She facilitates only when she is already "in community with people who aren't going to avail themselves of the systems that currently exist for multiple reasons."[159]

By insisting on already existing relationships as a precondition for facilitation, TJ organizers also aim to decommodify the skills and labor of conflict intervention. TJ practitioners do not facilitate for hire, even as they do think about how to make their work and livelihoods sustainable (for example, several trainings I attended charged a small fee). Facilitation, however, is presented as political work and, perhaps more precisely, part of a social commons. Hence, Kaba: "It's work that belongs to everyone,"[160] or Hassan: "There is no such thing as an expert" in TJ, just people with more or less practice.[161] The work is solidaristic and sacrificial. As Ejeris Dixon recalls: "There was a five-year point in my life where my cell phone number was also a hotline . . . . And I did it gladly and I'm happy I did, but it's a particular way to organize, [and] it's also a really challenging way to live."[162] It is through such gifts of time, patience, and emotional labor—indeed, it is through what Roberto Unger calls love defined as a "gift of self"[163]—that facilitators express the movement's dual commitment: on the one hand, to the reality that oppression shapes harmful acts, and, on the other hand, to the belief that harmers can take responsibility and choose to do otherwise. As Kim reflects, recognizing "root causes" means convening a process where "we have *time* for [the person who causes harm] to get to" the truth of what happened (which in practice may mean several months to a few years).[164]

Given the time and labor-intensive nature of a TJ intervention, it follows that the mass proliferation of relational skills and capacities is crucial to the movement. "We have to do work to say: How are we going to build the kinds of skillsets and capacities within our intimate networks so that we can respond well when somebody comes forward about violence or harm or abuse that they've experienced?" Mingus teaches.[165] Because "we can talk about mass incarceration forever; we can talk about colonization . . . racism

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[158] KABA, 'TIL WE FREE US, *supra* note 148, at 154.

[159] *Id.* at 143; Mariame Kaba and Shira Hassan, Zoom Training Facilitated by Project Nia and the NYC TJ Hub: Fumbling Towards Repair Practice Session (Oct. 10, 2020).

[160] Mariame Kaba, Shira Hassan, Deana Lewis & Rachel Caidor, *Introduction Bonus Track*, *in* MIXTAPE, *supra* note 139, at 07:00 (comment by Kaba).

[161] Shira Hassan, *No Transformative Justice without Harm Reduction*, *in* MIXTAPE, *supra* note 139, at 1:21:50.

[162] Ejeris Dixon & Piper Anderson, *Supporting Black-Led Community Safety and Abolition for NYC*, FACEBOOK, at 41:00 (Aug. 10, 2020), https://www.facebook.com/watch/live/?v=3632305546689 60&ref=watch_permalink (webinar facilitated by North Star Fund) (comment by Dixon).

[163] ROBERTO MANGABEIRA UNGER, LAW IN MODERN SOCIETY: TOWARD A CRITICISM OF SOCIAL THEORY 207 (1976).

[164] Brooks, Kim & Mingus, *supra* note 155, at 54:45 (comment by Kim).

[165] Mingus, *supra* note 157, at 20:26.

and white supremacy [and] . . . patriarchy . . . [but] when actual violence happens a lot of us don't know what the hell to do."[166]

From this perspective, the challenge is not simply that people don't know how to respond to violence or mediate conflict. The challenge is that structures of domination are constantly experienced and performed through self and social interactions. "White supremacy, ableism, classism, homophobia, trans phobia exist everywhere, even in radical spaces," Kaba reminds listeners in collaborative trainings.[167] Capitalism, for example, means that we have all internalized competition and fear rather than mutual aid and interdependence. Criminalization and punishment mean we all have "cops in our heads and hearts."[168] Indeed, it means that "most of us are in an abusive relationship with ourselves . . . let alone other people."[169]

The basic insight here is anarchist: that there is a mutually constitutive relationship between political organization and self-transformation. The state, as Gustav Landauer taught, "is not something that can be destroyed by a revolution, but is a condition, a certain relationship between human beings, a mode of human behavior; we destroy it by contracting other relationships, by behaving differently."[170] Hence, relationship building is prefigurative—or perhaps more accurately, it is a way of insisting that transformative justice already exists. One recognizes in the relationships they already have the kinds of reciprocal, solidaristic, nonstatist networks they wish to create at a larger scale. And, in so doing, one aims to build mass grassroots political power.

In trainings, facilitators may therefore suggest that people don't rush to grapple with the hardest cases—should one have a TJ process with a killer cop or a "Voldemort batterer"?[171] Instead, people are encouraged to think about the everyday conflicts and low-level harms in the relationships they already have and wish to continue. One learns, for example, to become clear about one's moral values and hence to recognize when they have transgressed them. One also learns that self-accountability—restoring a right

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[166] *Id.* at 39:39.

[167] *See, e.g.*, NYC TJ Hub, *Self-Accountability & Movement Building with Shannon Perez-Darby*, YOUTUBE, at 09:37 (Sept. 18, 2020) [hereinafter Perez-Darby], https://www.youtube.com/watch?v=3eUoi23fgEs (introductory remarks by Kaba). Kaba explains she adapts these words from the radical education movement, Free Minds, Free People. *Community of Care Statement*, FREE MINDS, FREE PEOPLE, http://fmfp.org/community-of-care-statement (last visited Oct. 25, 2021).

[168] Paula X. Rojas, *Are the Cops in Our Heads and Hearts?*, *in* THE REVOLUTION WILL NOT BE FUNDED: BEYOND THE NON-PROFIT INDUSTRIAL COMPLEX 197 (Incite! ed., 2017).

[169] Brooks, Kim & Mingus, *supra* note 155, at 49:45 (comment by Mingus).

[170] Richard J.F. Day, *Gramsci is Dead: Anarchist Currents in the Newest Social Movements* 126 (2005) (quoting and summarizing GUSTAV LANDAUER, REVOLUTION AND OTHER WRITINGS: A POLITICAL READER 214 (Gabriel Kuhn ed. & trans., 2010)).

[171] Perez-Darby, *supra* note 167, at 1:17:20. For a hopeful discussion of hard cases, see Black Lives Matter – Los Angeles, *This Is Not a Drill: What Is Transformative Justice?*, FACEBOOK, at 34:20 (Aug. 6, 2020), https://www.facebook.com/watch/live/?v=237830976914314 5&ref=watch_permalink (comments by Prentis Hemphill).

relationship with one's own values—is necessary to nurture accountability in relationships with others.

And perhaps most significantly, one learns to think about accountability as a set of micro-skills that one can constantly practice in everyday relationships. For example, I took a three-hour packed-to-capacity training led by abolitionist educator Mia Mingus on how to give a genuine apology.[172] We practiced self-reflection and interpersonal understanding as preconditions for behavior change and making reparations, and we were encouraged to grow these skills by applying them to small conflicts.[173] And one learns that all of this is sacred work: it is the process of becoming someone who can participate in breaking generational cycles of violence and therefore someone who can participate in their own liberation: "Even if your apology is about something small, understand that it is connected to a broader collective cultural shift we are trying to create."[174]

To be sure—and precisely because self-transformation is understood as necessary to achieve broader social and cultural shifts—TJ practitioners must negotiate tensions between their commitments to supporting voluntary, autonomous action and their commitments to creating solidaristic social relations. As I mentioned above, early facilitators evolved their practice from grassroots responses to help survivors of gendered violence and trauma. In that spirit, many design survivor-oriented processes that aim to cultivate choice, agency, and self-determination with and for survivors because these are precisely the experiences of the self that trauma denies. At the same time, facilitators will not use processes to advance punishment understood as the intentional infliction of suffering.[175] They will therefore attempt to work with survivors to articulate goals for a process that are consonant with TJ's social and political values[176]—recognizing, however, that sometimes honoring survivor desires (for revenge, for example) may mean jettisoning a process.[177]

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[172] Mia Mingus, Zoom Training: How to Give a Genuine Apology (Oct. 24, 2020).

[173] For detail, see Mia Mingus, *The Four Parts of Accountability: How to Give a Genuine Apology Part 2: The Apology—The What and the How*, LEAVING EVIDENCE (Dec. 18, 2019, 7:48 AM), https://leavingevidence.wordpress.com/tag/accountability ("Practice with small apologies and practice the many mini skill sets needed . . . .").

[174] *Id.* ("Apologizing is part of accountability and accountability is a sacred practice of love. If you've hurt someone you care about, it is sacred work to tend to that hurt. You are caring for this person, the relationship you share, as well as your self. You are engaging in the sacred work of accountability, healing, and being in right relationship. This work is part of the broader legacy of transformative justice, love, and interdependence. Do not take it lightly and give it the respect it deserves.").

[175] *See, e.g.*, KABA, 'TIL WE FREE US, *supra* note 148, at 241–50; KABA & HASSAN, WORKBOOK, *supra* note 11, at 86; CREATIVE INTERVENTIONS, *supra* note 150. *See also* Zehr, *supra* note 145, at 3, 13.

[176] *See, e.g.*, CREATIVE INTERVENTIONS, *supra* note 150 (especially Section 4.D on setting goals and Section 4.E on supporting survivors or victims).

[177] Kaba, for example, explains that a desire for punishment or vengeance, however normal or healthy, "is not going to get addressed in an accountability process. If you are the one who is rushing after that and that's really what you're seeking, an accountability process really would not help. You're

Likewise, facilitators grapple with how to right-size reparations: "if you are working hard to be accountable, and then you get kicked out of your home, your community, you don't have your basic needs met, those are pretty hard conditions under which to lean in and do the work of accountability." Participants must therefore deliberate about the kinds of consequences that can actually facilitate steps towards transformation: "We are under practiced at this. And we are under skilled at this."[178]

Perhaps an even more vexing challenge, in nearly every training I attended, participants grapple with how to address recalcitrant aggressors. "This is one of the biggest questions that we get in the work," Hassan reflects, "how do we hold someone accountable who's not admitting that they've done harm?"[179] Facilitators are encouraged to anticipate "resistance to accountability" at the outset of a process.[180] Strategies to engage resistance include using existing relationships and networks of connection, care, and leverage to influence people who cause harm, and even using pressure or force if needed to prevent further violence.[181] But, as community accountability processes move toward self-reflection, responsibility, and acts of repair, they do so, if at all, through voluntary cooperation.[182]

This insistence upon voluntarism is as pragmatic as it is normative. Self-fashioning, by its nature, rarely happens via mandate. But as a world making project, TJ also aims to reduce hierarchy and coercion in social relations. "[W]e're not actually the state," Hassan stresses.[183] Nor will TJ practitioners mimic its forms and functions: "we're not going to be monitoring people and following people around."[184] Indeed, facilitators explain that ideally they do not want to hold people accountable at all ("that's our state").[185] The utopic vision instead is supporting people so they can "proactively take accountability for themselves."[186]

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always going to be feeling as though it's 'not working' because it's not doing the thing that you really would like." KABA, 'TIL WE FREE US, *supra* note 148, at 251.

[178] Perez-Darby, *supra* note 167, at 1:25:14. There are, of course, many similar debates among restorativists. *See, e.g.*, John Braithwaite, *In Search of Restorative Jurisprudence*, *in* RESTORATIVE JUSTICE AND THE LAW 150 (Lode Walgrave ed., 2002) (discussing proportionality).

[179] Shira Hassan & Ejeris Dixon, *How to Support Survivors Who Seek to Hold Harm-Doers Accountable Without Engaging the Police or the State*, *in* MIXTAPE, *supra* note 139, at 1:05:02 (comment by Hassan).

[180] CREATIVE INTERVENTIONS, *supra* note 150, at § 4.F.

[181] *Id.* Creative Interventions elaborates, "we do not mean the use of physical violence, but acts such as asking someone to stay away or leave, letting someone know that there will be consequences if violence continues, or physically restraining someone from acting out violently at that moment." *Id.*

[182] *See generally id.* (especially § 4.F on taking accountability). *See also* KABA & HASSAN, WORKBOOK, *supra* note 11, at 98.

[183] Hassan & Dixon, *supra* note 179, at 37:16 (comment by Hassan).

[184] *Id.*

[185] *Id.* at 1:05:24.

[186] Mingus, *supra* note 157, at 59:17.

But, as readers may have already anticipated, some TJ tools and concepts—responsibility, agency—resonate deeply with liberalism, indeed, even with American ideals of bootstrapping individualism. Believing that "one's only going to take accountability . . . [that] it's up to them" can sound "individualistic," Kim acknowledges.[187] The challenge for TJ facilitators is therefore to help people desire their own transformation by making accountability something that happens within communities—that is, through the process of encountering the kinds of social relations, interdependences, and support systems that would enable harmers to *want* to ask: what do others need from me?[188]

This question, in turn, requires facilitators to define "community" with a great deal of specificity—and neither as a locality nor as an abstract group of people presumed to share values. Organizers know well that through informal social relationships, people can reproduce all the pathologies and inequalities that they see as endemic in state institutions ("just because you didn't call the cops doesn't mean [what you did is] revolutionary").[189] TJ organizers therefore rely on "community" defined as a *process*, colloquially called podmapping. People are encouraged to identify who they would turn to if they enact or experience violence, harm, or abuse and need advice, help, resources, or support. And then to ask these people if they would agree to join together into a "pod"—for example, an accountability pod or a support pod. These pods may engage in skill-sharing and attend trainings, participate

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[187] Mimi Kim, *From Rapid Response to Transformative Justice Processes: Some Basics You Should Know*, *in* MIXTAPE, *supra* note 139, at 1:26:12.

[188] Kim explains that facilitators may tell people, "You do not have to say you are responsible to be part of this" but then "quickly try to create those conditions so somebody would think it was in their benefit to actually reflect and move towards change." *Id.* at 1:26:56. *See also* CREATIVE INTERVENTIONS, *supra* note 150, at § 4.F2 ("What we mean by benefit is that [the person doing harm] can have better and more meaningful relationships, they can live better lives, they can create respect and healthiness rather than abuse and harm."). I should add: practitioners, of course, do not believe that everyone is ready for voluntary processes. As Jerry Tello reflects:

> I've had men that are so wounded that I've had to take them out of the home because it wasn't safe for them to go back there. . . . [B]ecause of their addiction, because of their woundedness . . . I could feel that spirit. . . . So there are ways of doing this, we have to have spaces that are not based on incarceration . . . but also make sure [of the] safety [of] the community.

Cat Brooks, Jerry Tello, Reina Sandoval-Beverly & Lisa Osborne, *#WeTakeCareOfUs Webinar #8: Working with People Who Have Caused Harm*, JUST. TEAMS NETWORK, at 31;08 (Aug. 7, 2020), https://justiceteams.org/wetakecareofus-webinar-series.

[189] Mingus, *supra* note 157, at 21:21. *See also* Andrea Smith, *Preface* to THE REVOLUTION STARTS AT HOME: CONFRONTING INTIMATE VIOLENCE WITHIN ACTIVIST COMMUNITIES xvi (Ching-In Chen, Jai Dulani, Leah Lakshmi Piepzna-Samarasinha eds., 2011) ("[D]eveloping community-based responses to violence cannot rely on a romanticized notion of 'community' that is not sexist, homophobic, or otherwise problematic. We cannot assume that there is even an intact community to begin with. Our political task then becomes to create communities of accountability.").

in accountability processes, and perhaps convene a few times a year to recommit or break up with this endeavor.[190]

Podmapping makes transformative justice both ongoing and workmanlike: "Gone were the fantasies of a giant, magical 'community response.'"[191] It turns out, Mingus reflects, "[b]uilding [political] analysis was much easier than building the relationship and trust required for one's pod."[192] Hence podmapping also helps to broaden TJ from a process intelligible within social movements to one practiced concretely within families and neighborhoods. TJ practitioners ask people who they would turn to if violence happened, and then build analysis and practice "where there is already authentic relationships and trust."[193]

Building a movement through one's families and networks is one way that TJ practitioners envision they could produce scale through repetition ("if everybody has, let's say, two to six people in their pod, and then all those people have two to six people in their pod . . . that, to me, is a concrete way of how community gets built").[194] But organizers also express ambivalence about how far TJ can or should travel, even if it has broad-based support and ample resources. As Mingus stresses, organizers crafted tools and models "in the fires of our intimate networks of our communities"—not tools designed to respond to state and institutional violence.[195] Some organizers therefore offer restorative justice as a bridge to engage state institutions.[196] Some suggest that one could build restorative, non-punitive processes in schools, courts, or workplaces—provided these processes bring existing systems closer to abolitionist ideals by producing less policing and incarceration and not policing and incarceration in gentler, more legitimating forms.[197] Transformative justice, however, is a prefigurative practice that organizers argue must be kept "away from the state."[198] Through sharing skills and gifting facilitation—and through meeting the immediate needs of survivors and people who cause harm—participants in

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[190] Mia Mingus, *Pods and Pod Mapping Worksheet*, BAY AREA TRANSFORMATIVE JUST. COLLECTIVE (June 2016) [hereinafter Mingus, *Worksheet*], https://batjc.wordpress.com/resources/pods-and-pod-mapping-worksheet. *See also* Mia Mingus, Zoom Training Sponsored by Learning TJ: Pods and Podmapping (Sept. 26, 2020).

[191] Mingus, *Worksheet*, *supra* note 190.

[192] *Id.*

[193] *Id.*

[194] Connie Wun & Mia Mingus, *Community Response to COVID-19: Ep. 2 – Mia Mingus*, AAPI WOMEN LEAD, at 23:40, https://www.imreadymovement.org/post/community-response-to-covid-19-ep-2-mia-mingus (Mar. 18, 2020) (comment by Mingus).

[195] Brooks, Kim & Mingus, *supra* note 155, at 16:08.

[196] *See* Leah Lakshmi Piepzna-Samarasinha, *Every Mistake I've Ever Made: An Interview with Shira Hassan*, *in* BEYOND SURVIVAL, *supra* note 154.

[197] *See, e.g.*, Amna A. Akbar, *Demands for a Democratic Political Economy*, 134 HARV. L. REV. F. 90, 97–106 (2020) (elaborating on the idea of non-reformist reforms).

[198] Hassan & Dixon, *supra* note 179, at 57:55 (comment by Hassan).

TJ live in the present the world they wish to build, even as it is not yet possible to know what that this world will look like apart from conscious, collective, and often hyper-local practices.

B. *A Rebirth for ADR?*

Transformative justice recalls the radical left turn to informal justice in the 1970s and 1980s.[199] As we have seen, in the 1980s and 1990s, left sociolegal scholars responded to utopian projects for informal justice by asking this overarching question: "what capacity does popular justice have to promote the forms of social transformation and the reallocations of power which it envisions?"[200] As we have also seen, the sociolegal literature established that there are no acontextual or general answers. There is nothing intrinsic to teaching anti-state dispute practices that will ensure left, progressive politics. As TJ organizers themselves know well, anti-state dispute practices are always vulnerable to reconfigurations when they encounter state law and ordering;[201] to complex translations across a political spectrum; to fading away.

I have previously traced how a version of restorative justice—one meant to temper, not to replace, the existing carceral system—now enjoys growing support among Republican policymakers, evangelical conservative Christians, and libertarian think tanks and organizations funded by the Charles Koch Foundation. Like TJ organizers, these reformers aim to cultivate within Americans particular moral beliefs such as self-accountability, forgiveness, and mutual aid. Through teaching people to develop relational capacities, the idea (quite explicitly) is to generate forms of social cohesion and care needed to shrink both the penal *and* the social state.[202] Or to put this another way, today, it is not simply ADR proponents, but people understood by some ADR proponents as engaged in undesirable ("defund") left-wing, confrontational, anti-capitalist politics *and* people engaged in right-wing politics for radical forms of "market freedom" who are now *all* practicing

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[199] Even as TJ also reflects today's new social movement ethos steeped in processual and horizontal organizing. *See, e.g.*, DAY, *supra* note 170, at 91–126.

[200] Sally Engle Merry, *Popular Justice and the Ideology of Social Transformation*, 1 SOC. & LEGAL STUD. 161, 162 (1992).

[201] This is how some TJ organizers understand the fate of early radical impulses in the restorative justice movement when, in the 1990s and 2000s, restorative justice programs operated in some criminal courts and yet hardly influenced the proliferation of mass incarceration. As one TJ group reflected: "While [restorative justice] offered us a valuable starting point, we quickly rejected Restorative Justice models because of their co-optation by the State." GENERATION FIVE, TOWARD TRANSFORMATIVE JUSTICE: A LIBERATORY APPROACH TO CHILD SEXUAL ABUSE AND OTHER FORMS OF INTIMATE AND COMMUNITY VIOLENCE: A CALL TO ACTION FOR THE LEFT AND THE SEXUAL AND DOMESTIC VIOLENCE SECTORS 4 (2007), http://relationshipanarchy.com/wp-content/uploads/2016/07/Toward-Transformative-Justice-06-2007.pdf.

[202] Cohen, *Moral Restorative Justice*, *supra* note 38, at 894.

and teaching conflict transformation, accountability, and apology from deeply opposing normative positions.[203]

This left-right convergence reveals the contingent nature of ADR techniques and values—indeed, it pushes ADR scholars, from the bottom up, to reflect upon the politics of the discipline in a moment when we are called to account for the future of the field. But I also think today's resurgence of anti-state dispute practices presents an opportunity for the field to reengage a set of critical, historical, and empirical questions about how alternative imaginaries are produced within and against law and capitalism—questions that evaporated during ADR's centrist decades of institutionalization.

In the 1980s, when sociolegal scholars converged on studying informal dispute processing, they were building a critical empirical methodology that aimed "to invert what is central so that the marginal, invisible, or unheard becomes a voice and a focus."[204] As a field in American legal education, this was ADR's path not taken. As a field devoted to informal and alternative dispute resolution, its guiding inquiry could have been about how to stand aside from studying and trying to change the center directly. That is, about how to stand aside from studying state legal institutions and the relentless gap between design and implementation to focus instead on how people, lacking access to the state and capital, "come to terms with and often resist the penetration of official legal norms as they construct their own local universe of legal values and behavior."[205] Efforts, Silbey and Sarat argued, that will produce "instances that both confirm and contradict the dominant discourse" and crucially "that will require us to reimagine the discourse in a different way."[206]

In the spirit of reviving this sociolegal perspective, let me suggest that *mediation* is an especially useful concept to see what people do when they wish to supplement cracks in the system. This is because mediation, as Carol Greenhouse argues, "represents something of a residual category," one that analysts sometime define against formal adjudication and other times against violent self-help.[207] The usefulness of the category, she therefore ventures, is that it enables analysts to study multiple social orders simultaneously.[208]

Allow me to elaborate. Rather than describe mediation as a process internal to a group, Greenhouse suggests that mediation "by its very nature draws our attention not only to intra-group relations, but also to intergroup

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[203] *Id.* at 935–46.

[204] Susan S. Silbey & Austin Sarat, *Critical Traditions in Law and Society Research*, 21 LAW & SOC'Y REV. 165, 172 (1987).

[205] *Id.* at 173.

[206] *Id.*

[207] Greenhouse, *supra* note 12, at 91, 98.

[208] *Id. See also* Ilana Gershon, *Porous Social Orders*, 46 AM. ETHNOLOGIST 404 (2019).

relations."[209] She borrows Sally Falk Moore's concept of a semi-autonomous social field, which is a community defined "by a processual characteristic, the fact that it can generate rules and coerce or induce compliance," but whose rules and norms almost always also interact with the rules and norms of a dominant and typically state-based system.[210] And Greenhouse argues that to study mediation, especially when it is understood as a response to the problem of maintaining social order, "[t]he nature of the links between one semi-autonomous social field and another is of the utmost importance."[211]

Analysts can pay attention to links—that is, to how mediators and participants construct connections and boundaries between social fields and between intra-group and intergroup relations—by asking the following kinds of questions: Where does a mediator's source of authority come from and how does she garner influence or coercive power? Does the mediator use *explicit norms* that invoke abstract rules that everyone recognizes as authoritative and that therefore relate a conflict to "a social order beyond and above (and including) the participants"?[212] Or does she use *implicit norms*, that is, norms expressed as personal statements where "the relevant social field is the relationships in terms of which they are expressed"?[213] And how does the mediator derive her legitimacy? Is it derived from her relationships with parties—hence *inclusive mediation*? Or, instead, is there "an institutionalised system of statuses" that authorizes her participation—i.e., *exclusive mediation*?[214]

From this perspective, mediation is not necessarily an alternative to the state, although it can be. But, crucially, mediation is always a vector, pointing to and co-constitutive with the social order beyond it. In other words, it is a category that is emergent from the social order and that simultaneously insists that this order needs to be played with, inverted, invoked, evaded, transgressed, changed, perhaps abolished. Indeed, I think the key insight to take from Greenhouse is that mediation is analytically richest when it is understood as a practice where people on the ground point to gaps—to how the dominant social order is failing to provide the forms of justice, safety, relationality, and security they are seeking.[215] And mediation is likewise

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[209] Greenhouse, *supra* note 12, at 98.

[210] *Id.* at 92 (citing Sally Falk Moore, *Law and Social Change: The Semi-Autonomous Social Field as an Appropriate Subject of Study*, 7 LAW & SOC'Y REV. 719, 722 (1973)).

[211] *Id.* at 98.

[212] *Id.* at 101.

[213] *Id.*

[214] *Id.* at 102.

[215] *See also* Carrie Menkel-Meadow, *The Many Ways of Mediation: The Transformation of Traditions, Ideologies, Paradigms, and Practices*, 11 NEGOT. J. 217, 241 (1995) (describing mediation as "an 'intermediate' process operating at the boundaries of other more formal or personal systems" that can illuminate for analysts "new kinds of communication, human interaction and problem solving that may challenge, transform, and supplement—as well as supplant—older ways of conflict resolution and political change").

analytically most anemic when it is defined as a formulaic, institutionalized practice that takes place primarily in the shadow of state legality.

Readers can thus see why I have argued that transformative justice, like the dispute resolution practices CVICT introduced into Nepali villages, is an especially robust example of mediation. Let me briefly redescribe TJ using Greenhouse's categories. TJ organizers aim to establish as much autonomy and as few linkages to the dominant social order as possible. They offer practices of conflict intervention that aim purposefully to orient people away from a vertical system topped by police and prosecutors and instead towards horizontal interpersonal relations. As such, a facilitator's source of legitimacy must be relational, and her knowledge must be local. To be sure, TJ facilitators draw on explicit, as well as implicit, norms. But here explicit norms reflect a consensus within a social movement—for example, shared understandings of affirmative consent and sexual harm that are often far broader than those encoded in official law.[216] These explicit norms orient participants to authoritative political understandings that transcend and also challenge, rather than legitimate, state-centered law. TJ facilitators will not, moreover, draw on formalized institutional hierarchies for legitimacy. Nor will they draw on any resources from these hierarchies—or at least not as a strategy deployed to influence a voluntary process.[217] TJ, as far as possible, is inclusive mediation.

The specific ways in which TJ practitioners labor to create autonomy and minimize linkages between social fields, in turn, limit how they can conceive of a scale-making project. As we have seen, TJ practitioners do not want to create an overarching system of conflict management for the nation to practice as a whole. Features such as deprofessionalization, decommodification, local knowledge, podmapping, and voluntarism all represent efforts by TJ organizers to keep their social fields distinct. These delineations (which for some readers, I recognize, will render the practice marginal) are understood precisely as a means of building social movement power. The point of enacting conceptual (and material) separation after all is to help oppressed communities resist the dominant social order being imposed upon them.

Many questions follow: Will TJ be able to provide a sustainable alternative to state criminal law, notwithstanding (or because of) its refusal

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[216] *See, e.g.*, The Chrysalis Collective, *Beautiful, Difficult, Powerful: Ending Sexual Assault through Transformative Justice*, *in* THE REVOLUTION STARTS AT HOME: CONFRONTING INTIMATE VIOLENCE WITHIN ACTIVIST COMMUNITIES, *supra* note 189, at 189, 204 (defining rape as "[n]onconsensual sex through physical force, manipulation, stress, or fear; the experience of sex as the unwanted physical, emotional, mental, or spiritual violation of sexual boundaries; not an act of caring, love, or pleasure; sexual violation of trust").

[217] *Cf.* Robert H. Mnookin & Louis Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 YALE L.J. 950 (1979) for a classic statement of how consensual disputing processes are shaped by state law.

of institutionalization and its rejection of elite and expert rule? And could the movement produce different forms of social change by helping to spur the creation of more relational and restorative state,[218] where state power is used to build an economy based on cooperation?[219] Or might TJ processes become entangled in internal conflicts and hierarchies when norms about what counts as sexual (and other forms of) harm are not shared?[220] My point here is simply that these are the kinds of analytical and empirical questions about power and social transformation that the field of ADR could claim by understanding transformative justice—and, for that matter, a range of relational conflict processes outside of state adjudication—as mediation.

Or to put this argument another way: this Article is an effort to recover mediation less as an institution or set of procedures than as a way of *framing a research question*.[221] By rejecting the idea that mediation is no more and no less than a set of formal procedural practices and the skills that broadly support these practices—and by recognizing mediation's analytical, political, and individual value to stem from how facilitators and participants traverse and delineate social orders—ADR scholars have a particular vantage point to reveal what people in conflict do when the dominant order fails them and hence also to think about the transformative potential of new practices of dispute resolution.

Inversely, as reformers and scholars offer theories and proposals for egalitarian structural change, ADR scholars have a particular, if still underdeveloped and underutilized, perspective to link macro and micro levels of analysis—namely, by asking about the ordinary and yet difficult practices of negotiation, relationship-building, and dispute resolution that invariably enable (and constrain) such proposals. Indeed, a virtue of thinking with mediation is that it allows ADR scholars to build "weak theory"—that is, "theory that 'refuses to know too much' about what is or isn't possible" because it constantly draws attention to "the hard, messy and humble work of building transformative relationships, organizations, and movements" on the ground.[222]

This research perspective may, in turn, have some broader implications for ADR practice and teaching. I will offer three provisional suggestions.

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[218] *See, e.g.*, RESTORATIVE AND RESPONSIVE HUMAN SERVICES (Gale Buford, John Braithwaite and Valerie Braithwaite eds., 2019); MARTHA MINOW, WHEN SHOULD LAW FORGIVE? (2019).

[219] *See, e.g.*, Bernard E. Harcourt, *For Coöperation and the Abolition of Capital, Or, How to Get Beyond Our Extractive Punitive Society and Achieve a Just Society* (Columbia L. Sch. Pub. L. Working Paper, Paper No. 14-672, 2020), https://scholarship.law.columbia.edu/faculty_scholarship/2708.

[220] *See, e.g.*, Cohen, *Globalization*, *supra* note 1, at 337–51, for examples of how CVICT mediation provided Nepali villagers with methods to use against the social and political hierarchies that oppress them *and* to reconfigure local relationships and prioritize rights and values in the service of ends that were not always predictable nor always progressive.

[221] Moore, *supra* note 210, at 742.

[222] Ethan Miller, *Community Economy: Ontology, Ethics, and Politics for Radically Democratic Economic Organizing*, 25 RETHINKING MARXISM 518, 526 (2013) (reading J.K. Gibson-Graham).

First, thinking of transformative justice as a kind of mediation—as a kind of ADR—suggests that ADR practice may be of use in a wider array of institutional and political settings than it has been applied so far. It also suggests that the public-private distinction that ADR scholars once relied upon may no longer hold as a guide to what kinds of cases belong in informal forums. In the 1980s, ADR proponents produced a consensus in response to their Fissian critics: "When an authoritative ruling is necessary, . . . the courts must adjudicate and provide clear guidance for all: Racial discrimination is wrong; oppressive prison conditions are intolerable in a decently humane society."[223] Or William Ury, Jeanne Brett, and Stephen Goldberg: "Although reconciling interests is generally less costly than determining rights, only adjudication can authoritatively resolve questions of public importance."[224] As I suggested above, many early ADR proponents never relinquished their faith in formal legality to regulate and redress social wrongs and inequalities.

Today, however, TJ organizers are mobilizing from a very different premise (and political and social context): to fight racial discrimination and oppressive prison conditions, they argue that people should reclaim control over the resolution of questions of public importance, even those that involve interpersonal and sexual violence. And although TJ organizers do not themselves wish to design large-scale popular dispute resolution institutions, their bold embrace of difficult cases invites ADR scholars to think more critically about the scope and limits of informal justice—to think again about how to balance the individual protections offered by formal legality against the opportunities for civic and political engagement offered through popular participation. Indeed, it suggests that ADR scholars and practitioners could rethink when and how what John Braithwaite calls the "justice of the law" should be infused and constrained by the "justice of the people"[225] (a question elaborated in the civil context in literature on democratic experimentalism).[226]

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[223] Carrie Menkel-Meadow, *For and Against Settlement: Uses and Abuses of the Mandatory Settlement Conference*, 33 UCLA L. REV. 485, 500 (1985).

[224] WILLIAM L. URY, JEANNE M. BRETT & STEPHEN B. GOLDBERG, GETTING DISPUTES RESOLVED: DESIGNING SYSTEMS TO CUT THE COSTS OF CONFLICT 17 (1988). *See also* Jethro K. Lieberman & James F. Henry, *Lessons from the Alternative Dispute Resolution Movement*, 53 U. CHI. L. REV. 424, 433 (1986) ("One short answer to Fiss is that most ADR proponents make no claim for shunting all, or even most, litigation into alternative forums.").

[225] John Braithwaite, *Restorative Justice and De-Professionalization*, 13 GOOD SOC'Y 28, 30–31 (2004) [hereinafter Braithwaite, *De-Professionalization*].

[226] *See, e.g.*, Charles F. Sabel & William H. Simon, *Epilogue: Accountability Without Sovereignty*, *in* LAW AND NEW GOVERNANCE IN THE EU AND THE US 395, 395 (Gráinne de Búrca & Joanne Scott eds., 2006); Joanne Scott & Susan P. Sturm, *Courts as Catalysts: Rethinking the Judicial Role in New Governance*, 13 COLUM. J. EUROPEAN L. 565, 565 (2007); *see also* Carrie Menkel-Meadow, *The Lawyer's Role(s) in Deliberative Democracy*, 5 NEV. L.J. 347, 347 (2005).

Second, paying attention to how social movements are creating their own relational forms of negotiation and dispute processing presents an opportunity for ADR scholars and practitioners to revitalize their work in this normative tradition. Today, ADR interventions typically assist disputants to bargain in the shadow of the law and to discover opportunities for efficiency maximization. And yet key ADR texts have also aimed to foster a different paradigm: that is, a deep "alternative to detachment, separation, adversarial modes of relating."[227] But, as I suggested above, ADR's relational skills and practices are themselves politically indeterminate. Perhaps today's resurgence of interest in nonstate dispute resolution on both the political left and right will spur a new generation of ADR scholars to build relational skills and capacities alongside building experimental organizing visions of the political, economic, and social order that they intend these skills to disrupt or sustain.[228] One of the field's early twentieth century founders, Mary Parker Follett, advanced precisely this ambition. She originated the field-defining concept of integration—but through a body of political writings that made clear that she did not think there could be integrative negotiations in a workplace where labor and capital did not come meaningfully to share power.[229]

And finally: could re-envisioning what mediation "is" reshape some ADR teaching? I would not suggest that ADR teachers take TJ—designed as a counter-hegemonic practice of deprofessionalization and decommodification—and attempt to translate it into its own course in legal education. But, in a moment when scholars and advocates are arguing that "[w]e can use the power of communities and government to make our cities safer without relying on police, courts, and prisons,"[230] I would suggest that ADR courses should explicate for students how different practices of conflict and conflict intervention presuppose very different relationships to the state and capitalism. And I would likewise suggest that ADR courses could therefore teach relational skills and capacities that are explicitly connected to the diverse normative political theories that shape them. From this perspective, one potential aim of ADR could be to help students develop relational skills as part of broader deliberations about how and why to use these skills to

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[227] Gary Friedman & Peter Gabel, *When Law Is the Elephant in the Room*, 18 TIKKUN 40, 41 (2003). *See, e.g.*, Menkel-Meadow, *Problem Solving*, *supra* note 123; FISHER & SHAPIRO, *supra* note 124; STONE, PATTON & HEEN, *supra* note 124; ROBERT A. BARUCH BUSH & JOSEPH P. FOLGER, THE PROMISE OF MEDIATION: RESPONDING TO CONFLICT THROUGH EMPOWERMENT AND RECOGNITION (1994); JOHN WINSLADE & GERALD MONK, NARRATIVE MEDIATION: A NEW APPROACH TO CONFLICT RESOLUTION (2000).

[228] For recent examples, see Andrew B. Mamo, *Three Ways of Looking at Dispute Resolution*, 54 WAKE FOREST L. REV. 1399 (2019); Daniel Del Gobbo, *Feminism in Conversation: Campus Sexual Violence and the Negotiation from Within*, 53 UBC L. REV. 591 (2021).

[229] Cohen, *Labor Theory*, *supra* note 13.

[230] VITALE, *supra* note 133, at 22; TONY PLATT, BEYOND THESE WALLS: RETHINKING CRIME AND PUNISHMENT IN THE UNITED STATES 253 (2018).

resist—or attempt to change and transform—externally imposed state power in their own relationships and communities.[231]

CONCLUSION

In 1977, Norwegian criminologist Nils Christie published an essay that elaborated the basic values and aspirations that would coalesce first as restorative and then transformative justice. Christie argued that advanced industrialized states deprive citizens of a critical resource—conflicts—which citizens rightfully "own" and should be entitled to use to elaborate their own norms and social relationships.[232] He extensively criticized professional, statist forms of expertise and called instead for lay-oriented community moots that would stage intensely personalized and dialogic encounters between victims and offenders.[233]

Christie's essay remains famous to this day. Less remembered, however, is how he ended it. Christie linked his plea for the mass democratization of crime control systems to radically democratic theories of education (e.g., Freire, *Pedagogy of the Oppressed* (1970)) and of the economy (e.g., Schumacher, *Small is Beautiful* (1973)) and criticism of the concept Gross National Product. And then he turned to the role of universities. "More schools for more lawyers, social workers, sociologists, criminologists," he lamented.[234] "While I am *talking* deprofessionalisation, we are increasing the capacity to be able to fill up the whole world with them."[235] Hence, he asked: "what about the universities in this picture?"[236] "The answer," he surmised:

> [H]as probably to be the old one: universities have to re-emphasise the old tasks of understanding and of criticising. But the task of training professionals ought to be looked into with renewed scepticism. Let us re-establish the credibility of encounters between critical human beings: low-paid, highly regarded, but with no extra power—outside the weight of their good ideas. That is as it ought to be.[237]

In 1977, when Christie offered this humble vision he did not then need to confront a very different attack on scientific expertise and professional social planning alongside an attack on state-sponsored education and intellectualism—attacks introduced and entrenched in American popular

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[231] *Cf.* Jennifer W. Reynolds, *The Activist Plus: Dispute Systems Design and Social Activism*, 13 U. ST. THOMAS L.J. 334, 352–53 (2017).

[232] Nils Christie, *Conflicts as Property*, 17 BRIT. J. CRIMINOLOGY 1, 1 (1977).

[233] *Id.* at 11–12.

[234] *Id.* at 13.

[235] *Id.*

[236] *Id.* at 14.

[237] *Id.*

consciousness by prominent neoliberal thinkers (think: Frederick Hayek, James Buchanan, Milton Friedman).[238] Today, in part for this reason, I do not think it is desirable, let alone plausible, to call for deprofessionalization in legal education.

This Article has, however, suggested that ADR is today increasingly understood as a field devoted to professional skills and industry best practices apart from "the old tasks of understanding and of criticising"—a programmatic orientation that no longer appears to suffice to sustain ADR as a necessary and vibrant scholarly field in legal education.[239] And yet this Article has also ventured that the demands of the political present suggest that, perhaps more than ever, law students interested in dispute practices need critical encounters with professionalisms that are oriented around theories of nondomination, direct democracy, and political-economic change.[240] And that ADR can therefore be a foundational and critical steppingstone for radical thinking.

[238] *See generally* Philip Mirowski, *Hell Is Truth Seen Too Late*, 46 BOUNDARY 1 (2019).
[239] Christie, *supra* note 232, at 14.
[240] *See* Braithwaite, *De-Professionalization*, *supra* note 225, at 31.