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The Family, the Market, and ADR

Amy J. Cohen*

This Symposium poses a complex, recurring question: is alternative dispute resolution (ADR) in tension with the rule of law? Here is one quite common way to make sense of this question. ADR is private: its various institutions seek to evade public adjudication through informal, consensual, discretionary, and bottom-up techniques of social ordering. Rules of law (if they are to be part of the rule of law) are public: they “must emanate from the state, be explicit, be applied by independent and autonomous decisionmakers, and apply generally to all persons similarly situated.”¹ Thus in 1984, David Trubek provocatively remarked that ADR—with its situational and contextual techniques for resolving legal disputes—“seems to be the negation of the idea of the rule of law.”² In the years that followed, numerous critics indicted ADR for privatizing the functions of the public state and, as our Symposium topic reflects, ADR proponents, in turn, interpreted these criticisms as part of an overarching claim that ADR undermines the rule of law.³

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1. David M. Trubek, *Turning Away from Law?*, 82 MICH. L. REV. 824, 825 (1984) (describing Roberto Unger’s definition of a legal order according to the rule of law).

2. *Id.*

3. See, e.g., Jean R. Sternlight, *Is Alternative Dispute Resolution Consistent with the Rule of Law? Lessons from Abroad*, 56 DEPAUL L. REV. 569, 570-71 (2007). Sternlight reports that critics argue that the privatization of dispute resolution is problematic because the elaboration of law achieved in public trials and published decisions is necessary to protect and enhance individual rights. . . . [T]reating disputes as matters of individual, rather than public, concern eliminates important public accountability. . . . [D]ispute resolution fails to serve an important educational function when it is privatized. . . . [D]ispute resolution processes weaken[] the position of less powerful members of society. For example, when private companies use form contracts to require their customers or employees to resolve disputes outside the courtroom, companies have an incentive to skew the processes in their favor. . . . [And] women—traditionally less powerful members of society—may be worse off in mediation or other ADR processes than they are in litigation. . . . Together, these critiques can be seen as attacking alternative modes of dispute resolution for undermining the rule of law.

Id. at 571 (emphasis added). To understand Sternlight’s conclusion—and debates about ADR’s relation to the rule of law more broadly—it is important briefly to disentangle two arguments that are often conflated in ADR literature. The first argument is only that when judicial officers use state power to encourage disputants to reach an agreement according to any principle other than explicit, general legal rules, they undermine the rule of law. See, e.g., Trubek, *supra* note 1, at 825. This argument is, for example, what Lon Fuller appeared to have in mind when he suggested that “a certain incompatibility may be perceived between mediative procedures and ‘the rule of law.’” Lon L. Fuller, *Mediation—Its Forms and Functions*, 44 S. CAL. L. REV. 305, 328 (1970).

The second argument (reflected in Sternlight’s conclusion above) requires more of an interpretive leap—a leap that one could defend or attack depending on one’s definition of the rule of law. Here writers seemingly equate the rule of law with a particular vision of substantive justice or the social good: for example, remedying structural inequalities or pursuing the ends of a discrete social group. In this rendering, dispute processing institutions that facilitate private *contractual* rather than public coercive/authoritative dispute resolution threaten to erode the rule of law because (or so the

Central to the critique of ADR, therefore, is the claim that ADR represents a privatization of lawmaking and, more specifically, a shift from state to market forms of regulation and control.⁴ This Article complicates that claim. It does so not by contesting the general assertion that ADR represents a privatization of decisionmaking or dispute resolution, but rather by exploring how ADR proponents themselves understand the private sphere. In the 1970s and 1980s, some of the most important architects of ADR developed dispute processing theories and techniques through work that originated not in the private sphere of the market but in the *family*: think here of Frank Sander, Robert Mnookin, and Jay Folberg, among others.⁵ To be sure, these reformers encouraged the use of contract—the foundational tool of the market—to resolve a range of legal

argument goes) they are unlikely to lead to desirable substantive outcomes. Richard Reuben, for example, interprets Owen Fiss's criticisms of ADR in this way: "Owen Fiss expressed concerns in particular about power imbalances, authoritative consent, and the sometimes necessary continuing role of courts in the administration of law. *This Fissian view, at bottom, reflects traditional rule of law values.*" Richard C. Reuben, *ADR and the Rule of Law: Making the Connection*, 16 DISP. RESOL. MAG. 4, 5 (2010) (emphasis added). Reuben, in other words, reads Fiss as claiming that ADR undermines the rule of law.

For the sake of conceptual clarity, it is worth observing that in rejecting ADR, Fiss was also rejecting a classical definition of the rule of law in which legal rules serve primarily to expand the scope of freedom of contract and preserve individual consent—indeed, Fiss called for "the pervasive and almost continuous interventions of a state committed to improving the welfare of its citizenry." Owen M. Fiss, *The Social and Political Foundations of Adjudication*, 6 LAW & HUM. BEHAV. 121, 128 (1982). Classical and neoclassical legal theorists would surely find the Fissian critique of ADR an *affront* to the rule of law and, accordingly, find ADR—defined as consensual dispute settlement through private contract—entirely consistent with it. See, e.g., F.A. HAYEK, *THE ROAD TO SERFDOM: TEXT AND DOCUMENTS—THE DEFINITIVE EDITION* 112–23 (Bruce Caldwell ed., 2007) (1944) (chapter on planning and the rule of law). See also Amy J. Cohen, *Revisiting Against Settlement: Some Reflections on Dispute Resolution and Public Values*, 78 FORDHAM L. REV. 1143 (2009) (providing a detailed textual analysis of Fiss's criticisms of ADR).

4. Fiss developed this criticism in the most detail. See, e.g., Fiss, *supra* note 3, at 127 ("The resurgence of the dispute resolution model is not an isolated phenomenon, but occurs within a larger political context characterized by a renewed interest in market economics and theories of laissez-faire . . ."); Owen M. Fiss, *Out of Eden*, 94 YALE L.J. 1669, 1672 (1985) (describing ADR as an "assault upon the activist state" and part of "the deregulation movement, one that permits private actors with powerful economic interests to pursue self-interest free of community norms"); For more recent articulations, see OSCAR G. CHASE, *LAW, CULTURE, AND RITUAL: DISPUTING SYSTEMS IN CROSS-CULTURAL CONTEXT* 111–12 (2005) (describing ADR as, in part, a product of the trend toward privatization popularized by the economic policies of the Reagan era); Judith Resnik, *Courts: In and Out of Sight, Site, and Cite*, 53 VILL. L. REV. 771, 796 (2008) ("[The] worldwide movement toward ADR is propelled by political and social forces trumpeting deregulation and privatization and is staffed by lawyers and other professionals seeking and shaping new markets."); Peter L. Murray, *Privatization of Civil Justice*, 15 WILLAMETTE J. INT'L L. & DISP. RESOL. 133, 135 (2007) (arguing that the privatization of dispute resolution subjects disputes to "economic influences inconsistent with the standards of impartiality and independence associated with public justice and the rule of law").

5. Before he began his career in ADR, Frank Sander taught and wrote in the area of family law. See, e.g., CALEB FOOTE, ROBERT J. LEVY & FRANK E. A. SANDER, *CASES AND MATERIALS ON FAMILY LAW* (1966). Likewise, early in his career, Robert Mnookin wrote both on family law and family dispute resolution. See, e.g., ROBERT H. MNOOKIN, *CHILD, FAMILY AND STATE: PROBLEMS AND MATERIALS ON CHILDREN AND THE LAW* (1978). Jay Folberg, another important general theorist of negotiation and mediation, began his work in ADR with an intense focus on family disputes. See, e.g., JAY FOLBERG & ALISON TAYLOR, *MEDIATION: A COMPREHENSIVE GUIDE TO RESOLVING CONFLICTS WITHOUT LITIGATION*, at xii–xiii (1984) ("The mediation process can be applied to a variety of personal, social, and economic problems. . . . We have, however, chosen divorce and custody disputes for many of our examples in order to draw from our professional experience and because we anticipate the greatest immediate use of mediation in domestic conflicts.").

disputes. But they also proposed an understanding of contract that was family-driven as much as it was market-driven. That is, they envisioned the bargained-for-exchange of duties and obligations among parents, children, lovers, and friends, not simply among self-maximizing actors who stand at arm's length.

This Article thus suggests that the ways in which ADR blurs the family/market divide, not simply the public/private one, has had a profound, albeit unnoticed, organizing effect on the politics and promises of the field. In a wide range of institutions and contexts, ADR has successfully introduced the idea that people can and should manage conflict without the direct coercion of state law.⁶ ADR's success, I propose, reflects its embrace of two potentially paradoxical but increasingly mutually constitutive ideas. ADR, as many analysts observe, brings economic rationalities associated with the market to social domains—by, for example, applying ideas of Pareto efficient contractual exchange to a range of everyday (family, community, relational) disputes. But, as I describe here, ADR also brings social rationalities associated with the family to economic domains—by, for example, simultaneously describing nearly all contractual exchanges as produced through intensely social interactions driven by emotion, empathy, trust, solidarity, and shame. ADR, in other words, envisions communities of people who resolve conflict, correct criminal behavior, make deals, and manage organizations, because they are bound together—like the family—by affective, interpersonal, intimate, localized, and ethical relationships as much as by the mutual self-interest of the market or the collective political belonging of the nation-state. This vision, I suggest, presents an increasingly popular (yet normatively quite complex) construction of the kinds of societal self-regulation that are today deemed possible and desirable from within the “private sphere.”

This Article proceeds in three Parts. I begin by briefly summarizing what I will refer to as separate spheres ideology—the idea that our normative understandings of the family and the market are constructed in contradistinction to one another.⁷ I then show how this conceptual distinction between the family and the market shaped the development of alternative dispute processing during two periods of time. The first period, which I introduce to frame the second, examines how dispute processing reformers—beginning during the Progressive era and

6. For example, the U.S. Congress has directed every federal district court to establish an ADR program, see the Alternative Dispute Resolution Act of 1998, 28 U.S.C. § 651(b) (1998), and the European Union has issued a directive encouraging mediation for cross-border commercial disputes, Council Directive 08/52, art. 1, 2008 O.J. (L 136) 6 (EU). Moreover, as scholars have shown, judges themselves now often prefer voluntary dispute resolution processes based on contract and consensus. See, e.g., Judith Resnik, *For Owen M. Fiss: Some Reflections on the Triumph and the Death of Adjudication*, 58 U. MIAMI L. REV. 173, 188 (2003).

7. I borrow this description from Frances Olsen's foundational article, *The Family and the Market: A Study of Ideology and Legal Reform*, 96 HARV. L. REV. 1497, 1498 (1983), and from Janet Halley & Kerry Rittich, *Critical Directions in Comparative Family Law: Genealogies and Contemporary Studies of Family Law Exceptionalism*, 58 AM. J. COMP. L. 753, 756-57 (2010). These authors explore how dominant legal ideologies depend on the assumption that the market and the family comprise dichotomous spheres of social life. But I should add: my use of the separate spheres metaphor in this Article diverges somewhat from its canonical and explicitly gendered use. Many authors utilize the term to signify the ideological construction of a sphere of activity for women that is confined to the nurture and care of family members in the home, and which is distinct and separate from everything else, or rather from all the activity reserved for men. For a detailed historical excavation and critique of the term “separate spheres,” see Linda K. Kerber, *Separate Spheres, Female Worlds, Woman's Place: The Rhetoric of Women's History*, 75 J. AM. HIST. 9 (1988).

continuing to the 1930s—distinguished alternative forums for family disputes from alternative forums for commercial ones. In both family and market domains, reformers characterized their innovations as informal, antiadversarial, and extralegal. New family courts, however, were nonetheless understood as social and public; commercial arbitration and conciliation tribunals were understood as individual and private.

In Part II, I examine how ADR scholars and practitioners in the 1970s and 1980s promoted analogous ideologies and techniques for both family and market disputes, most commonly through the procedural techniques of mediation. Unlike Progressive era reformers, who distinguished between the problems of the family (described as public and social) and the problems of the market (described as private and individual), modern ADR proponents described problems in both domains as intensively interpersonal—and thus as both private *and* social, albeit social in a different way. Or to put this point differently, while for Progressive era reformers, “the social” was public and implicated a preexisting set of policy concerns that encompassed the family and demanded specific interventions from the state, for theorists of modern ADR, “the social” became private—a set of affective, mutual relationships that individuals can and should build themselves in the market, as much as in the home.

In this sense, I conclude, modern ADR coincides with the development of popular theories of societal self-regulation that weave together economic self-interest with more open-ended ideas of interdependence, affect, altruism, social capital, and trust. This Article thus aims to shift and broaden our debate: rather than continue to ask whether ADR undermines public governance (or the rule of law), this Article instead invites readers critically to consider the politics and potential distributional effects of contemporary private ordering regimes that aspire to integrate efficiency and relationality, individualism and altruism, economics and intimacy, the market and the family.

I. EARLY TWENTIETH-CENTURY DISPUTE PROCESSING REFORM: DISTINGUISHING THE FAMILY AND THE MARKET

A. Introduction

This Part frames the development of modern ADR by comparison to an earlier period of dispute processing reform. When ADR emerged as a recognizable field in the mid-1970s and early 1980s, ADR theorists regularly compared the resolution of family conflicts with the resolution of commercial conflicts (as well as with conflicts often considered more public in nature). Consider, to begin with a well-known text, the very first sentences of the first edition of *Getting to Yes*.

This book began as a question: What is the best way for people to deal with their differences? For example, what is the best advice one could give a husband and wife getting divorced who want to know how to reach a fair and mutually satisfactory agreement without ending up in a bitter fight? Perhaps more difficult, what advice would you give *one* of them who wanted to do the same thing? Every day families, neighbors,

couples, employees, bosses, businesses, consumers, salesmen, lawyers, and nations face this same dilemma of how to get to yes without going to war.⁸

The dispute settlement advice that Fisher and Ury proceed to offer encompasses families and couples as much as business, consumers, and salesmen—all of whom share interests in mutual collaboration. In fact, Fisher and Ury devote the final page of their famous book to the following caution: “to ask a negotiator, ‘Who’s winning?’ is as inappropriate as to ask who’s winning a marriage.”⁹ If you understand and treat your (other) negotiations fundamentally differently from how you understand and treat your marriage, they explain, then “you have already lost the more important negotiation—the one about what kind of game to play, about the way you deal with each other and your shared and differing interests.”¹⁰ For Fisher and Ury, the ethics and expectations that (they believe) people use to manage their marriages should inform negotiations in all other spheres of personal and professional life.

As we shall see, in ADR writing quite broadly, the family recurs as a model for thinking about other kinds of relationships, even in spheres that are commonly thought to be purely commercial or transactional in nature. Today, it is in fact entirely ordinary for ADR proponents to transfer dispute resolution models and techniques back and forth between family and market domains. But this conflation of paradigms is actually quite intriguing because, as Janet Halley has shown, beginning in the second half of the nineteenth century and persisting, in many ways, until today, American legal thought has virtually required a “division of intellectual labor” between the law of the family, on the one hand, and “the law of contract and, more broadly, the law of the market,” on the other hand.¹¹ This conflation of paradigms, in other words, is a novelty of modern ADR thinking. In order, then, to provide a point of comparison for contemporary ADR, this Part provides a brief overview of dispute processing reform during the first few decades of the twentieth century (a period that several scholars have described as a genealogical antecedent of modern ADR).¹²

To begin, in eighteenth and early nineteenth-century American law and legal thought, the market and the family were not especially distinctive legal institutions.¹³ The family, then considered a central economic unit of American

8. ROGER FISHER & WILLIAM URY, *GETTING TO YES: NEGOTIATING AGREEMENT WITHOUT GIVING IN*, at vi (Bruce Patton ed., 1981).

9. *Id.* at 154.

10. *Id.*

11. Janet Halley, *What is Family Law?: A Genealogy, Part I*, 23 *YALE J. L. & HUMAN.* 101, 101, 105 (forthcoming 2011).

12. See, e.g., JEROLD S. AUERBACH, *JUSTICE WITHOUT LAW?* 95-137 (1983); CHRISTINE B. HARRINGTON, *SHADOW JUSTICE: THE IDEOLOGY AND INSTITUTIONALIZATION OF ALTERNATIVES TO COURT* 43-101 (1985). Auerbach and Harrington present two of the most comprehensive and important historical works on dispute processing reform during this period.

13. Halley, *supra* note 11, at 102. Cf. MICHAEL GROSSBERG, *GOVERNING THE HEARTH: LAW AND THE FAMILY IN NINETEENTH-CENTURY AMERICA* 3 (1985). Grossberg explains that although by the turn of the twentieth century American family law had become a distinct and special field, previously “laws dealing with the family were strewn across the legal landscape, some to be found in diverse statutes, others in common-law decisions on matters ranging from contracts to torts, still others in various ecclesiastical rules.” *Id.*

life, included relations not only among husbands, wives, children (and other persons related by blood or marriage), but also between employers (i.e., husbands/fathers) and all the various laborers that contributed to the economic production of the household.¹⁴ Heads of households exercised similar authority over and owed similar obligations to laborers and kin.¹⁵ And jurists presupposed a legal framework in which the reciprocal rights and duties among legal persons encompassed domestic relationships as well as employment and commercial ones.¹⁶ Thus Halley explains that in Blackstone's *Commentaries*, "the reciprocal rights and duties of master and servant were equivalent to those of the husband and wife."¹⁷

By the 1870s, however, the laws governing the family had begun their drift apart from the laws governing wage labor and commercial relations.¹⁸ New industry, such as mills and factories, had removed significant forms of economic production, such as manufacturing, to a space outside the household.¹⁹ And over the second half of the nineteenth century, jurists formulated what legal historians today call classical legal thought—a system of legal reasoning marked by its emphasis on individual autonomy, will theory, formal deductive logic, and the politics of *laissez faire*.²⁰ Classical legal theorists understood the market and family to operate in quite different ways, and hence they established distinctive legal systems for the governance of each.²¹ In brief, the market was imagined as an institution organized around "individual will, private pleasures, selfish intentions, and hard bargains," whereas the family (husband, wife, and children) was imagined as an institution organized around "affective, sentimental, altruistic,

14. For example, Alan Dawley describes a typical eighteenth-century household in a rural New England community that manufactured shoes. "All of [the] elements in the production of shoes—masters, journeymen, [workshops], tools of the trade, real property—were fused together in the household. . . . To be the head of a household was to be an overseer of a small work team. . . ." ALAN DAWLEY, *CLASS AND COMMUNITY: THE INDUSTRIAL REVOLUTION* 17 (1976). See also ELIZABETH BLACKMAR, *MANHATTAN FOR RENT, 1785-1850*, at 57-60 (1989) and PAUL E. JOHNSON, *A SHOPKEEPER'S MILLENNIUM: SOCIETY AND REVIVALS IN ROCHESTER, NEW YORK, 1815-1837*, at 43-48 (1978) on the urban household, and MARY P. RYAN, *CRADLE OF THE MIDDLE CLASS: THE FAMILY IN ONEIDA COUNTY, NEW YORK, 1790-1865*, at 25-26 (1981) on the agrarian household.

15. DAWLEY, *supra* note 14, at 18-19; JOHNSON, *supra* note 14, at 44-45.

16. See generally Halley, *supra* note 11, at 102, 106-11.

17. *Id.* at 107 (describing 1 WILLIAM BLACKSTONE, *COMMENTARIES ON THE LAWS OF ENGLAND* (1765)).

18. See *id.* at 102-4.

19. See, e.g., JOHN FABIAN WITT, *THE ACCIDENTAL REPUBLIC: CRIPPLED WORKINGMEN, DESTITUTE WIDOWS, AND THE REMAKING OF AMERICAN LAW* 52-53 (2004); DAWLEY, *supra* note 14, at 77, 131, 224; RYAN, *supra* note 14, at 64-65. Of course, the gradual shift from household to market/wage labor is a complex, multi-factorial story. For one detailed historical account of this shift in Manhattan, see BLACKMAR, *supra* note 14, at 60-68.

20. For detailed historical descriptions, see Duncan Kennedy, *Three Globalizations of Law and Legal Thought: 1850-2000*, in *THE NEW LAW AND ECONOMIC DEVELOPMENT: A CRITICAL APPRAISAL* 19, 25-28 (David M. Trubck & Alvaro Santos eds., 2006); MORTON J. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW 1780-1860: THE CRISIS OF LEGAL ORTHODOXY* 9-31 (1992); Duncan Kennedy, *Toward an Historical Understanding of Legal Consciousness: The Case of Classical Legal Thought in America, 1850-1940*, 3 *RES. L. & SOC.* 3, 3-24 (1980).

21. See, e.g., Halley, *supra* note 11, at 103, 174-79 (reading James Schouler on domestic relations); see also DUNCAN KENNEDY, *THE RISE AND FALL OF CLASSICAL LEGAL THOUGHT* 157-241, 174-75 (2006) (chapter on the transformation of contract) (showing, for example, that as contract came to govern "essentially voluntary" obligations, obligations between parents and children and between husbands and wives became the distinct domain of quasi-contract).

ascriptive, and morally saturated” relationships.²² As such, the family could not be governed by the laws of contract that ordered the marketplace. Hence, Halley explains, the market became “the domain of ‘facilitation, self-determination, autonomy and formality,’” precisely because jurists separated out and preserved for the family legal rules “implicating ‘regulation, paternalism, community and informality.’”²³ Marriage became “status-not-contract” in legal ideology, defined through mandatory duties more than voluntary undertakings.²⁴ And contract became “a distinct legal topic . . . in part through the gradual exile of marriage from its domain.”²⁵ With this distinction, we also had the division of private law into two competing domains: the first “dedicated to the human need to find completion through the marital and parental/child relations,” and the second devoted “to humans as sole individuals free in the exercise of their wills.”²⁶

These two domains—the family and the market—became important early sites for experimental alternative dispute processing reform.

B. The Turn to “the Social” and Dispute Processing Reform²⁷

By the turn of twentieth century, American jurists and lawyers had begun to question nineteenth-century commitments to formal, adversarial adjudication following the conceptual innovations of, most prominently, Roscoe Pound.²⁸ Pound was writing against classical legal thought at a time when, as Frank Munger notes, “[n]ot only were the social problems of immigrant labor in the cities apparent, but also unregulated markets were damaging the organs of business themselves, destroying political credibility, and creating pressure for

22. Halley, *supra* note 11, at 125, 103.

23. *Id.* at 183 (quoting KENNEDY, *supra* note 21, at 185).

24. *Id.* at 118, 118-67; *cf.* GROSSBERG, *supra* note 13, at 21-24. Readers familiar with Henry Maine’s famous edict that “the movement of the progressive societies has hitherto been a movement from Status to Contract” may find this assertion surprising. HENRY SUMNER MAINE, *ANCIENT LAW: ITS CONNECTION WITH THE EARLY HISTORY OF SOCIETY AND ITS RELATION TO MODERN IDEAS* 174 (Frederick Pollock ed., London, John Murray 1906) (1861). Halley, however, illustrates that Maine himself in fact excluded marriage (“the portfolio of rules governing entry into, duties during, and exit from”) from the modern march to contract. Halley, *supra* note 11, at 167-70.

25. Halley, *supra* note 11, at 110. For example, Halley shows that as Joseph Story and Joel Prentiss Bishop formulated a status conception of marriage, they accordingly described contract as “defined entirely by the will of the parties, or their mere pleasure.” This understanding, she explains, “is the famous ‘will theory’ of contract . . . [that] would eventually morph into the ideas that contract is by definition free; that the role of the state in contract is to ‘let it be’—*laissez faire*; and that contract is the paradigm body of law for emerging modern capitalism and its market.” *Id.* at 140-41; *see also id.* at 185-88 (describing how Bishop and William A. Keener separated domestic relations from contract and will theory).

26. Halley, *supra* note 11, at 165.

27. For a detailed historical analysis of “the social” as a mode of legal thought, see Kennedy, *Three Globalizations of Law and Legal Thought*, *supra* note 20, at 37-56.

28. For a fascinating account of the nineteenth-century American decision to embrace formal adversarial process against conciliation courts, see Amalia D. Kessler, *Deciding Against Conciliation: The Nineteenth-Century Rejection of a European Transplant and the Rise of a Distinctively American Ideal of Adversarial Adjudication*, 10 *THEORETICAL INQUIRIES* L. 423 (2009). Kessler argues that the American jurists, lawyers, and politicians who made this choice were motivated by their belief that adversarial procedure would promote individualistic, egalitarian relations that, in turn, would foster a market-based society. *Id.* at 478-80.

increased intervention.”²⁹ For Pound, the free market individualism embedded in classical legal thought was inadequate to address the distinctively social problems of his day: classical jurists “thought of individuals and contracts rather than of groups and relations.”³⁰ Significantly, Pound linked the problems of individualism not only to substantive legal rules but also to adversarial legal forms—the “substance,” he explained, of procedural law.³¹ “The effect of our exaggerated contentions procedure,” he argued in 1906, is to elevate law’s forms above its social purposes and to encourage actors to use law in pursuit of individual self-interest rather than to yield to a social or public spirit.³² Formal procedures, he reasoned, reflect and reinforce increasingly outmoded cultural preferences against government intervention and in favor of individual initiative and control.³³ Thus, the model of “sociological jurisprudence” that Pound advanced included several elements of procedural reform: for example, he called for more flexible discretion in judging,³⁴ less expensive and strategic advocacy,³⁵ and an ethos of cooperation rather than self-assertion.³⁶

Pound’s idea—that through changing legal *procedure*, reformers could restructure their social, political, and economic norms and order—was quite radical for its time. Historian Amalia Kessler explains that it was only towards the end of the nineteenth century that American jurists began to conceptualize procedure as a distinct and powerful mechanism of social ordering apart from substantive law.³⁷ In the first decades of the twentieth century, reformers rapidly translated this new attention to procedure into a series of antiformal dispute processing reforms in both family and market domains.³⁸

Strikingly, Pound himself envisioned a legal regime that blurred conceptual distinctions between the market and the family just as it blurred the line between

29. Frank Munger, *Movements for Court Reform: A Preliminary Interpretation*, in THE POLITICS OF JUDICIAL REFORM 51, 55 (Philip L. Dubois ed., 1982) (citation omitted).

30. Roscoe Pound, *The End of Law as Developed in Juristic Thought II*, 30 HARV. L. REV. 201, 218 (1917).

31. Roscoe Pound, *Some Principles of Procedural Reform*, 4 ILL. L. REV. 388, 389 (1910).

32. Roscoe Pound, *The Causes of Popular Dissatisfaction with the Administration of Justice*, 29th Annual Meeting of the American Bar Association (Aug. 29, 1906), reprinted in 20 J. AM. JUDICATURE SOC’Y 178, 182 (1937).

33. See Paul R. Verkuil, *A Study of Informal Adjudication Procedures*, 43 U. CHI. L. REV. 739, 743 (1976) (describing Roscoe Pound, *The Administration of Justice in the Modern City*, 26 HARV. L. REV. 302, 306 (1913)).

34. See, e.g., Pound, *Some Principles of Procedural Reform*, *supra* note 31, at 397-99.

35. See, e.g., Pound, *The Administration of Justice in the Modern City*, *supra* note 33, at 315, 319 (“In petty causes there ought to be no expensive advocacy . . . [t]he alternative is a judge who represents both parties and the law, and a procedure which will permit him to do so effectively.”); Pound, *Some Principles of Procedural Reform*, *supra* note 31, at 399-401 (arguing against lawyers who use procedure as “a chief weapon of defense” rather than to advance the merits of a case).

36. See, e.g., Roscoe Pound, *A Comparison of Ideals of Law*, 47 HARV. L. REV. 1, 15 (1933) (“Where the last century hewed to an ideal of competitive self-assertion, the law of today is turning to an ideal of cooperation.”).

37. Kessler, *supra* note 28, at 480-82.

38. Cf. AUERBACH, *supra* note 12, at 95 (noting how in the aftermath of Pound’s outspoken criticisms of the American legal system, “there was a flurry of activity in legal circles to . . . devise new institutions, humane remedies, and flexible procedures that would make law and the administration of justice more responsive and efficient”); see also Munger, *supra* note 29, at 54 (“Addressing the problems articulated by Pound has become a routinized activity of bar committees, bar-sponsored institutes, and leaders of the legal profession.”).

individual and social interests. The “infusion of social ideas into the traditional element of our law,” he argued, cuts across all areas of human activity.³⁹ Social interests thus required limitations on a range of individual freedoms and entitlements granted to people both in their capacity as market participants and as members of families—such as the use and disposition of property, contractual freedoms, the rights of creditors, and parental rights vis-à-vis their children.⁴⁰ In both family and market contexts, “social interests,” Pound explained, “are now chiefly regarded.”⁴¹ Or, as Halley puts it, the “modernizing impulse that Pound brought to . . . domestic relations came with an intuition that it was no different from any other area of law: it was social, and so was the law of business.”⁴² Pound thus called for a welfarist regulatory regime empowered, for example, “to regulate housing, to enforce sanitation, to inspect the supply of milk, . . . to regulate conditions and hours of labor and provide a minimum wage,” and “to administer justice in relations of family life, where conditions of crowded urban life and economic pressure threaten the security of the social institutions of marriage and the family.”⁴³ Both the market and the family would become subject to progressive social reform. Or rather, both would become subject to government intervention that, guided by social scientific expertise, was designed to protect the weak from the strong.⁴⁴

But in the actual practice of judicial administration, two very different logics of procedural reform took hold. Pound’s push for “socialized law in socialized courts” rapidly transformed family courts.⁴⁵ One judge proudly proclaimed that family court procedure “initiated the movement to supersede the traditional individualistic point of view by a definite social policy.”⁴⁶ According to another judge, although the reform of legal procedure generally lagged behind the reform of substantive law in promoting “the welfare of people” over “the rights of private

39. Roscoe Pound, *Justice According to Law*, 14 COLUM. L. REV. 103, 119 (1914); Roscoe Pound, *Social Problems and the Courts*, 18 AM. J. SOC. 331, 336-38 (1912).

40. Pound, *Justice According to Law*, *supra* note 39, at 118.

41. Pound, *Social Problems and the Courts*, *supra* note 39, at 338.

42. Janet Halley, *What is Family Law?: A Genealogy, Part II*, YALE J.L. HUMAN. (forthcoming 2011).

43. Pound, *The Administration of Justice in the Modern City*, *supra* note 33, at 311.

44. I do not attempt to define progressivism in this Article beyond James Ely’s overarching observations of “a broad-based reform movement” whose principle concern “was to correct the imbalance of economic power associated with the new industrial order. . . . At the heart of the reform program lay the Progressive insistence on a more active role for both state and federal governments in regulating the economy and meeting social problems.” JAMES W. ELY, JR., *THE GUARDIAN OF EVERY OTHER RIGHT: A CONSTITUTIONAL HISTORY OF PROPERTY RIGHTS* 106-07 (3d ed. Oxford University Press 2008). For a synopsis of debates about the significant characteristics of the Progressive era, see David M. Kennedy, *Overview: The Progressive Era*, 37 THE HISTORIAN 453 (1975). Historians, moreover, deliberate about the proper periodization of the Progressive era, often beginning between the 1890s and 1900 and often ending between World War I and the Great Depression. See, e.g., Elisabeth Israels Perry, *The Changing Meanings of the Progressive Era*, 13 OAH MAG. HISTORY 3, 3 (1999); see also Steven J. Dincer, *Linking Politics and People: The Historiography of the Progressive Era*, 13 OAH MAG. HISTORY 5, 5 (1999).

45. HARRINGTON, *supra* note 12, at 68 (describing Progressive era court reform more broadly); see also Pound, *Social Problems and the Courts*, *supra* note 39, at 338-39; Pound, *Justice According to Law*, *supra* note 39, at 114-18.

46. Charles Zunsler, *The Domestic Relations Courts*, 124 ANNALS AM. ACAD. POL. & SOC. SCI. 114, 115 (1926) (quoting Walter H. Liebman, paper presented to the National Conference of Jewish Social Workers, Atlantic City, May 1919).

property,” in domestic relations courts “one can trace the process of socialization in the latter field [of procedure].”⁴⁷ By contrast, with the rise of progressive legislation that cut across numerous areas of private law, business interests promoted antiformal and antiadversarial procedures in order to evade, as one contemporary critic argued, the “socialized orderly process of the law” through the “*laissez-faire* individualism of lay arbitration.”⁴⁸ Or as historian Jerold Auerbach summarizes: “the growth of the regulatory state unsettled advocates of commercial autonomy, who turned to arbitration as a shield against government intrusion.”⁴⁹ Thus, as I describe in the sections that follow, in the early twentieth century, procedural dispute processing innovations in family and market contexts pursued quite different interests and ends.

C. Family Courts: 1910s-1930s

So how did early reformers envision new informal procedure as either social or individual, or as either public or private? Beginning in 1910, domestic relations courts cropped up throughout the country,⁵⁰ and were often renamed family courts as they consolidated jurisdiction over matters involving “the security of the home”:⁵¹ for example, nonsupport or abandonment of wives or children, paternity, divorce, child custody, adoption, guardianship, neglect and abuse of children, and matters formerly handled in juvenile court.⁵² The first properly named “family court” was established in Ohio in 1914,⁵³ and was defined by Judge Charles Hoffman as a court with exclusive jurisdiction over “all matters relating to the family . . . in which the same methods of procedure shall prevail as

47. Edward F. Waite, *Courts of Domestic Relations*, 5 MINN. L. REV. 161, 162–63 (1921). Judge Waite described domestic relations courts as a product of a larger wave of court reform that included juvenile courts, small claims courts, minimum wage commissions, and legal aid bureaus. *Id.* at 163.

48. Philip G. Phillips, *Rules of Law or Laissez-Faire in Commercial Arbitration*, 47 HARV. L. REV. 590, 617 (1934).

49. AUERBACH, *supra* note 12, at 101.

50. See, e.g., F. R. Aumann, *Domestic Relations Courts in Ohio*, 15 J. AM. JUDICATURE SOC’Y 89, 89 (1931).

51. REGINALD HEBER SMITH, *JUSTICE AND THE POOR: A STUDY OF THE PRESENT DENIAL OF JUSTICE TO THE POOR AND OF THE AGENCIES MAKING MORE EQUAL THEIR POSITION BEFORE THE LAW* 73 (1924).

52. Indeed, much early literature was devoted to analyzing the problems of fragmented jurisdiction and calling for consolidated “family courts.” See, e.g., Arthur J. Lacy, *What the Detroit Court of Domestic Relations Accomplished*, 25 AM. LEGAL NEWS 5, 13 (1914) (“[L]et me emphasize the tremendous advantages of a court with combined jurisdiction over all family cases The present system of non-support cases in one court, abandonment in another, divorces in a third and children in a fourth, tends to nullify the power of each court for good”); Aumann, *supra* note 50, at 89 (“For really effective results all cases involving family problems should be handled in one court.”); Herbert Harley, *Business Management for the Courts*, 5 VA. L. REV. 1, 11 (1917) (“The branch Court of Domestic Relations, though a tremendous success from the beginning, falls short of the ideal, for it has no divorce and no felony jurisdiction. What is essentially one controversy may still, in Chicago, be adjudicated piecemeal in the Municipal Court, the Probate Court, the Juvenile Court, the Criminal Court, and so forth.”); Pound, *The Administration of Justice in the Modern City*, *supra* note 33, at 313 (describing the “waste of judicial power” and expertise when “different phases of the same difficulties of the same family” must be heard by a number of different (juvenile, domestic relations, criminal, equity, and law) courts).

53. LYNNE CAROL HALEM, *DIVORCE REFORM: CHANGING LEGAL AND SOCIAL PERSPECTIVES* 117 (1980).

in the Juvenile Court and in which it will be possible to consider social evidence as distinguished from legal evidence."⁵⁴ Juvenile courts, inaugurated by progressives around the turn of the century, were similarly designed to provide "social justice" in contrast to "legal justice," especially for poor, working class, and immigrant families through processes of conflict prevention, treatment, and reform.⁵⁵

Modeled on juvenile courts, new family courts shared the following characteristics. First, they were emphatically antiformal. As political scientist F. R. Aumann declared, "[f]ormalities in bringing action, producing evidence and conducting proceedings are not present here."⁵⁶ Second, they promoted conciliation—a method of dispute processing in which court officials use their authority to promote settlement and agreement rather than litigate disputes.⁵⁷ Whereas adversarial litigation "embitter[s]" family members against one another, legal aid advocate Reginald Heber Smith argued, conciliation gives court staff the "chance to repair, reunite, and construct" without necessarily invoking formal law.⁵⁸

Third, these courts were explicitly extralegal—they combined informal and antiadversarial proceedings with social scientific expertise aimed at the resolution of conflicts that were frequently described as "social" rather than purely legal in character. In other words, not only were family conflicts negotiated with conciliatory techniques that did not track formal legal procedure, they were understood as ripe for scientific diagnosis and prescriptions aimed at treatment and reform. "Commentators who have had experience with the work of the 'domestic relations' or 'family court,'" Aumann explained, "believe that it should be looked upon as a *social agency* rather than as an agency to enforce criminal

54. Charles W. Hoffman, *Social Aspects of the Family Court*, 10 J. AM. INST. CRIM. L. & CRIMINOLOGY 409, 416 (1919). See also HALEM, *supra* note 53, at 117.

55. HARRINGTON, *supra* note 12, at 53-55 (describing the "treatment-oriented disposition" of juvenile courts in which "[t]he end sought [is] adjustment of a social difficulty rather than the punishment or penalization of the defendant") (citation omitted). For a detailed analysis of the creation of juvenile courts, see ROBERT M. MENNEL, *THORNS & THISTLES: JUVENILE DELINQUENTS IN THE UNITED STATES, 1825-1940*, at 124-57 (1973).

56. Aumann, *supra* note 50, at 91.

57. See, e.g., Lacy, *supra* note 52, at 5 ("The prime actuating motive [of the Detroit Court of Domestic Relations] was to restore families to normal conditions wherever possible, to stop family litigation rather than to encourage it, to save unnecessary arrests . . . [W]e aimed never to arrest even a guilty man until every conciliatory method utterly failed."); see also ZUNSER, *supra* note 46, at 117, 124 (suggesting that "'reconciliations' . . . are sometimes effected by the courts . . . before a case reaches the magistrate" and calling for further efforts to "perfect machinery for bringing about reconciliations or arrangements of separate support without recourse to the law itself").

58. SMITH, *supra* note 51, at 80-81. He observes further that

[a]s the domestic relations courts have applied themselves to the fast growing problem of desertion and non-support they have more and more employed the method of conciliation. The interest of the state in these cases is that homes should not be broken up except for grave causes and that families should be reunited whenever possible. A litigious proceeding is destructive, it is calculated to embitter the contestants, and after a trial in open court husband and wife feel a real grievance toward each other where before there may have been only a temporary discontent.

...

. . . . Conciliation is used very generally by the domestic relations courts as a sort of preliminary proceeding

Id.

law or decide technical controversies between litigants.”⁵⁹ According to another report,

[o]ne of the judges who sits in the Domestic Relations Court has said that if the letter of the law were followed, it would be a purely financial court. . . . Fortunately the judges do not hold too rigidly to the letter of the law and some very excellent social work is done in this court, and plans for the enlargement of its powers are already underway.⁶⁰

Judges thus freed themselves from the constraints of technical, formal laws (which enabled them to resolve only financial disputes) so that they could call upon social scientific expertise to reform families in conflict.⁶¹ Or as the director of one court’s “department of research and statistics” observed: “While the main issue arising in Courts of Domestic Relations is an economic one, the conditioning factors are physical, mental and social” and therefore “present a wide variation from the usual legal situations which courts are called upon to adjust.”⁶² “Domestic difficulties,” she added, are “social problems,” which require “the continuous application of the scientific principles developed in Medicine, Psychology and Sociology.”⁶³ Family conflict, in all these conceptions, is social and psychological and therefore quite different from usual legal/economic matters.

Progressive reformers and judges thus self-consciously understood family courts as agents of social reform, and not simply institutions to resolve legal disputes. Even more significantly, they also understood these courts—with their ad hoc, particularistic, and nonuniform techniques—as public rather than private. To supporters, family courts embodied the progressive and utterly public assumption of duties and obligations that were previously administered through the private family group. Through informal conciliatory procedures, the *state* could demand that the family behave in solidaristic, virtuous, and altruistic ways.⁶⁴ As one commentator noted, “family courts provide a striking illustration

59. Aumann, *supra* note 50, at 92 (emphasis added).

60. Mary E. Paddon, *The Inferior Criminal Courts of New York City*, 11 J. AM. INST. CRIM. L. & CRIMINOLOGY 8, 14 (1920).

61. For a historical analysis of how family conflict became the scientific subject of the new professional field of social work, see LINDA GORDON, *HEROES OF THEIR OWN LIVES: THE POLITICS AND HISTORY OF FAMILY VIOLENCE*, BOSTON 1880-1960, at 59-81 (1988).

62. Louise Stevens Bryant, *A Department of Diagnosis and Treatment for a Municipal Court*, 9 J. AM. INST. CRIM. L. & CRIMINOLOGY 198, 198 (1918).

63. *Id.*

64. For precisely this reason, later analysts would criticize family and juvenile courts as a crucible of social control—for example, as “tribunals for the poor, geared toward protecting lower class children from the baneful influences of their home and community and indoctrinating them in the values and standards of the middle class.” HALEM, *supra* note 53, at 118. For a classic class-based account of early juvenile courts as a tool to control the poor, see ANTHONY M. PLATT, *THE CHILD SAVERS: THE INVENTION OF DELINQUENCY* (1969); see also MARY E. ODEM, *DELINQUENT DAUGHTERS: PROTECTING AND POLICING ADOLESCENT FEMALE SEXUALITY IN THE UNITED STATES, 1885-1920*, at 111-21, 128-56 (1996) (showing how progressives used the juvenile justice system to supervise and reform working-class and poor teenage girls accused of “sex delinquency” or other moral offences, and to instruct their families as well). For a historical account of client agency within family and juvenile institutions, see Linda Gordon, *Family Violence, Feminism, and Social Control*, in *RETHINKING THE FAMILY: SOME FEMINIST QUESTIONS* 262 (Barrie Thorne with Marilyn Yalom eds., 1992). Cf. ODEM, *id.* at 160-84 (showing how immigrant and working-class parents attempted to use juvenile courts as a

of the performance by society of functions that of old fell to the council of the kin. . . . It compels deserters to support their families and sees to it that deserving and unfortunate women and children are placed under the protection that will help them toward self-maintenance.”⁶⁵ In other words, family court reformers used state power—in the form of conciliatory, therapeutic judicial interventions—to transform the problems of the weak (women, children) into matters of social concern. Or, as another writer argued, “The history of the growth and development of family courts represents the increasing consciousness of the community that these cases are a public responsibility. These cases present social problems that require adjustment, and their solution is a community responsibility.”⁶⁶ Resolving these cases are a public or communal duty, reformers explained, because the family, not the individual, is the primary unit through which society and the nation-state is reproduced.⁶⁷ “In affairs of such import [as wrongs in the home],” Smith proclaimed, “denial of justice transcends individual or personal injustice and, like a cancer, eats into the health and moral well-being of the body politic.”⁶⁸ Thus, in sum, in family domains, progressive reformers rejected formal adversarial adjudication, not to promote individual autonomy, let alone to “privatize” public conflict, but rather to promote social welfare, collective responsibility, and the national public good.

D. Commercial Arbitration: 1910s-1930s

During this same period that family courts spread throughout the United States, reformers also called for alternatives to litigation for a variety of other dispute types.⁶⁹ In the area of commercial litigation, the growth of alternatives

tool to discipline their daughters and enculturate them according to their own norms and moral standards). It is worth noting that during this period, courts generally upheld legislation creating juvenile courts against due process challenges. *See, e.g., Lindsay v. Lindsay*, 100 N.E. 892, 895-96 (Ill. 1913) (surveying the law in several states).

65. 3 ARTHUR CALHOUN, *A SOCIAL HISTORY OF THE AMERICAN FAMILY FROM COLONIAL TIMES TO THE PRESENT* 175 (1919).

66. L. B. Day, *The Development of the Family Court*, 136 ANNALS AM. ACAD. POL. & SOC. SCI. 105, 109 (1928); *see also Lacy, supra* note 52, at 10 (“The disintegration of a family is a matter of public concern.”).

67. *See, e.g., Charles W. Hoffman, Courts of Domestic Relations, Report of the Committee of the National Probation Association*, 8 J. AM. INST. CRIM. L. & CRIMINOLOGY 745, 745 (1918) (“It is conceded by the judges, by probation officers, and by social welfare workers . . . that ‘the unit of society is not the individual, but the family, and whatever tends to undermine the family . . . will crumble and destroy the foundations of society and the state.’”); *id.* (“[T]he family is the mechanism which delivers over to the nation the raw material, or the partially improved material, out of which the nation must be composed.”) (Albion Small’s remarks); Zunsch, *supra* note 46, at 114 (“The family is the basis of social life, upon its integrity and stability rests, in the last analysis, the whole fabric of society. . . .”). For a historical analysis of how this idea—that the family provides the raw material to construct the nation-state—became a necessary construct for modern state-family dynamics, see JACQUES DONZELOT, *THE POLICING OF FAMILIES* 227-33 (Robert Hurley trans., 1979).

68. SMITH, *supra* note 51, at 73.

69. Beyond the family, they recommended conciliation to resolve a range of minor civil and criminal disputes, most often within legal institutions designed to serve the urban and immigrant poor. On the spread of conciliation to small claims and municipal courts, *see, e.g., id.* at 60-67. In these more marginalized arenas, as Auerbach explains, dispute processing reforms “limped along” developing slowly at “the periphery of a legalistic culture.” AUERBACH, *supra* note 12, at 97, 101.

rivalled procedural transformations in the area of family law.⁷⁰ In 1914, the New York State Bar Association created the Committee on the Prevention of Unnecessary Litigation (soon renamed the Committee on Arbitration).⁷¹ Over the course of the 1920s, several states enacted statutes making agreements to arbitrate valid, enforceable, and irrevocable,⁷² and in 1925, Congress did the same.⁷³ In 1926, the American Arbitration Association was founded,⁷⁴ and in 1927, then Secretary of Commerce, Herbert Hoover, called commercial litigation “the largest single item of preventable waste in civilization” next to war.⁷⁵

Like their family court counterparts, reformers in the arena of trade and commerce argued for new informal procedures that could bring a range of social experience and social expertise to bear on legal disputes. As Duncan Kennedy has shown, this idea of “the social” as a mode of legal thought cut across a spectrum of left/right ideologies and arguments.⁷⁶ Illustrating Kennedy’s point, writings on commercial arbitration regularly included the observation that traders and merchants had created norms and practices better suited to their own social needs and conditions than formal courts. For example, in 1917, William Ransom, former Justice of the City Court of New York, argued that “business men eschew litigation” because of a gap between court procedure and the substance of their conflicts.⁷⁷ “[S]omehow,” he wrote, “the organization, procedure and administrative routine of [the] court hark back to an era which the business community outside has necessarily superseded, in order to hold its own in the commercial competition of today.”⁷⁸ Courts had become insufficiently responsive to the needs of their users, Ransom explained, because they were governed by cumbersome, technical, and inefficient evidentiary and procedural rules rather than “present-day business methods for ascertaining facts and determining controversies.”⁷⁹

70. See, e.g., IAN R. MACNEIL, *AMERICAN ARBITRATION LAW: REFORMATION, NATIONALIZATION, INTERNATIONALIZATION* 25 (1992). Macneil suggests that what he calls arbitration “evangelism” began in 1911. Of course, arbitration has a much longer history in the United States. For an overview of arbitration stretching back to the seventeenth century, see AUERBACH, *supra* note 12, at 19-68. See also Bruce H. Mann, *The Formalization of Informal Law: Arbitration Before the American Revolution*, 59 N.Y.U. L. Rev. 443 (1984).

71. Julius Henry Cohen, *The Law of Commercial Arbitration and the New York Statute*, 31 YALE L.J. 147, 147-48 (1921).

72. For a detailed analysis, see MACNEIL, *supra* note 70, at 34-47. At common law, agreements to arbitrate were revocable. See, e.g., WESLEY A. STURGES, *A TREATISE ON COMMERCIAL ARBITRATIONS AND AWARDS* 45-46 (1930) (defining and explaining revocability).

73. The Federal Arbitration Act made arbitration agreements in maritime and commercial transactions “valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.” See Federal Arbitration Act of 1925 § 2, Pub. L. No. 68-401, 43 Stat. 883 (1925) (codified at 9 U.S.C. § 2 (2006)).

74. For descriptions, see ROBERT COULSON, *VOLUNTARY ARBITRATION IN ACTION: THE STORY OF THE AMERICAN ARBITRATION ASSOCIATION* 7 (1976) and MACNEIL, *supra* note 70, at 40-41.

75. Edgar J. Lauer, *Conciliation: A Cure for Congested Court Calendars*, 27 LEGAL AID REV. 1, 1 (1929).

76. Kennedy, *Three Globalizations*, *supra* note 20, at 39.

77. William L. Ransom, *The Layman’s Demand for Improved Judicial Machinery*, 73 ANNALS AM. ACAD. POL. & SOC. SCI. 132, 151 (1917); see also William L. Ransom, *The Organization of the Courts for the Better Administration of Justice*, 2 CORNELL L.Q. 261, 266-67 (1917).

78. Ransom, *The Layman’s Demand for Improved Judicial Machinery*, *supra* note 77, at 147.

79. *Id.* at 145, 147-48. Ransom inveighed the legal community to take seriously such criticisms of judicial procedure that emanated from “conservative and constructive” quarters—criticisms, he

For proponents of commercial arbitration and conciliation, this gap between legal procedures and social conditions animated particular kinds of procedural reforms, such as decisionmaking that incorporated extralegal expertise like “knowledge of trade conditions and customs.”⁸⁰ The Chamber of Commerce of the State of New York, for example, instructed arbitrators that when a commercial dispute involves “law points” they should “disregard pure technicalities and go to the merits. If they believe that the legal proposition is based upon sound sense and the experience of mankind generally, they should follow it.”⁸¹ It urged arbitrators, in other words, to make decisions based on their experiences and perceptions, rather than technical or formal legal logic. Thus, in commercial arbitration, as in family courts, studied expert discretion would trump formal legal rules. And like their family court counterparts, commercial reformers spoke of interdependence and reconciliation. They proposed that conciliatory procedures could promote “good will and friendliness” rather than “hostility and enmity.”⁸² “[A] discharged employee may be re-employed,” another New York judge reasoned, “or an interrupted business relationship may be resumed where a dispute is adjusted without the bitterness left by a fight in court.”⁸³

Despite these commonalities, however, commercial and family dispute processing reform followed different courses. If the conciliatory procedures administered in family courts were understood to be both public and social—adjusting mandatory familial relationships of duty and dependence on behalf of a national social good—commercial conciliation and arbitration were understood to be individual and private—carving out a private space in which contracting equals could adjust their own economic relations in the marketplace.⁸⁴ Indeed, the push to arbitration reflected the antipathy that many businessmen expressed towards

explained, that were entirely different from the humanitarian’s concerns that judicial decisions thwart “their projects of human betterment.” *Id.* at 140.

80. SMITH, *supra* note 51, at 69.

81. *Id.*; see also JULIUS HENRY COHEN, COMMERCIAL ARBITRATION AND THE LAW 3 (1918) (“[Merchants seek arbitration because] [t]hey are trying to get their questions settled in accordance with their instincts and habits of thought.”).

82. Edgar J. Lauer, *Conciliation and Arbitration in the Municipal Court of the City of New York*, 1 J. AM. JUDICATURE SOC’Y 153, 155 (1918).

83. *Id.*

84. The little writing I can discover on the application of arbitration to family disputes during this period is consistent with my description of distinct and separate logics for dispute processing reform in family and market domains. In his 1000-plus page treatise on arbitration, Wesley Sturges reported that few cases consider whether the “disputes of husband and wife [are] of such a special character that they cannot be determined by under a submission to arbitration.” STURGES, *supra* note 72, at 212. Given the “special” nature of domestic relations, Sturges himself proposed that only domestic disputes that “are of sufficient pecuniary and nondomestic character” appear proper for arbitration. *Id.* at 212-13. “[I]t seems doubtful,” he ventured, that

the courts will recognize an [arbitration] award which determines the existence or nonexistence of a cause for separation, divorce, or alimony. Much less, it seems, would the courts recognize an award which purported to grant any such readjustment of the marital relationship, or which disposed of the rights or duties of the parties with respect to children.

Id. at 213. Similarly, Sturges reported that it was unclear if parties could arbitrate “disputes involving the validity of a will, as measured by the rules of law concerning the capacity of the testator or testatrix, or concerning the execution of the document, or concerning the legality of the devises, bequests and legacies therein provided”—that is, Sturges doubted that arbitration, rather than probate court, could decide questions of capacity, dependency, and family status (all matters that were presumably considered noneconomic). *Id.* at 212.

courts. For example, one lawyer, William Potter, lamented that courts are “avoided by everyone who has his own business interests at heart.”⁸⁵ “The delays in the administration of justice and the manner in which the *rights of liberty and property* are bandied about,” he explained,

has led intelligent and progressive men in practically every trade and department of commerce to organize tribunals for the administration of justice. . . . [L]umber dealers, hay dealers, grain dealers, fruit shippers, potato shippers, coal dealers, furniture dealers, and many other branches of commercial enterprise . . . resort to their own tribunals to settle dispute from *choice*.⁸⁶

During a time when, as historians have widely observed, judicial attitudes towards social welfare legislation were “anything but uniform or monolithic,”⁸⁷ the business community called for private process and private law that they could make through their own contracts (and presumably in the substantive directions they desired).⁸⁸

85. William W. Potter, *Give Judiciary Greater Power: Efficiency Organization for Courts Points Way out of Dilemma—Curtailment of Judicial Power a False Solution*, 6 J. AM. JUDICATURE SOC’Y 164, 165 (1923); see also Percy Werner, *Voluntary Tribunals: A Democratic Ideal for the Adjudication of Private Differences Which Give Rise to Civil Actions*, 3 J. AM. JUDICATURE SOC’Y 101, 101 (1919) (describing a “growing distrust of our courts”).

86. Potter, *supra* note 85, at 165 (emphasis added). As the title of his article suggests, Potter wanted to rehabilitate the reputation of judicial institutions.

87. WILLIAM G. ROSS, *A MUTED FURY: POPULISTS, PROGRESSIVES, AND LABOR UNIONS CONFRONT THE COURTS, 1890-1937*, at 16 (1994). Ross explains that

[t]he traditional view . . . that the courts of the progressive era were recalcitrant defenders of a rigid doctrine of laissez-faire, has given way to an increasing recognition that the courts were remarkably amenable to progressive reforms. In addition to making many modifications to common law that had the effect of subordinating property rights and liberty of contract to broader communal rights, the courts upheld far more progressive measures than they struck down.

Id. at 16-17. Legal scholars have similarly challenged “the traditional Lochner story that the period from 1900 to 1920 was an era in which courts regularly thwarted all regulation.” Victoria Nourse, *A Tale of Two Lochners: The Untold History of Substantive Due Process and the Idea of Fundamental Rights*, 97 CAL. L. REV. 751, 754 (2009). As Victoria Nourse explains,

The Progressive Era . . . was full of reform and regulation, from trust-busting to railroad regulation to labor injunctions; from consumer protection and the federal reserve to worker’s compensation; from regulations of drink, lotteries, fight films, and stolen cars to seditious speech to birth control—and the Court’s case law did little to squelch any of these regulatory impulses, for good or ill.

Id.; cf. David E. Bernstein, *Lochner’s Legacy’s Legacy*, 82 Tex. L. Rev. 1, 33-34 (2003) (cataloguing instances of “redistributive regulatory legislation” upheld during the Lochner era); Michael J. Phillips, *The Progressiveness of the Lochner Court*, 75 DENV. U. L. REV. 453, 479-83 (1998) (cataloguing instances of legislation regulating trade and business upheld during the Lochner era).

88. Or at least this was clearly among the reasons that both contemporary commentators and modern historians have identified as motivating the business community’s push for arbitration. For example, in their comment on the Federal Arbitration Act, Julius Henry Cohen and Kenneth Dayton argued that enforceable agreements to arbitrate correct three problems faced by the business community in courts: (1) delay, (2) expense, and (3) “the failure, through litigation, to reach a decision regarded as just when measured by the standards of the business world” (due, they explained, to the application of general rules and lay juries without sufficient understanding of commercial disputes). Julius Henry Cohen & Kenneth Dayton, *The New Federal Arbitration Law*, 12 VA. L. REV. 265, 269 (1926). *But see* Ransom, *The Layman’s Demand*, *supra* note 77, at 148 (arguing that it was inefficient, uneconomical,

Consider, for example, how Percy Werner crafted his proposal for commercial arbitration (which caught the attention of the New York Chamber of Commerce in 1914 and was later passed as a resolution adopted by the Bar Association of the State of Missouri).⁸⁹ Werner explained that in the United States, a new social jurisprudence was emerging that emphasized social or community rights not only individual ones.⁹⁰ “But self-respecting individuals,” he continued,

having an honest difference between them . . . who desire nothing further than a speedy settlement in strict accordance to the law . . . will search in vain for a reason why this may not be had . . . by creating a voluntary tribunal The time of our state courts will be given to the adjudication of cases involving community rights, in the decision of which all citizens are interested.⁹¹

By proposing that public courts devote their time to matters of communal or social concerns, Werner did not challenge what he described as “the wise administration of that vast and steady stream of social legislation that is so characteristic of our young and growing republic.”⁹² To the contrary, he distinguished public disputes from private ones. “[T]o be publicly haled into court to settle a mere private dispute,” he argued, “unless all other methods failed, might rather be regarded as an invasion of the sacred right of privacy.”⁹³ Courts, he argued, “are instruments by which the organized community exercises its supremacy over the individual.”⁹⁴ This supremacy is appropriate, he stipulated, in cases involving public or community rights.⁹⁵ By contrast, for “private differences between individuals,” Werner called for “a democratic procedure” that was voluntary and conciliatory.⁹⁶ For Werner, arbitration resuscitated the ideals of voluntary consent, freedom of contract, and individual privacy inoculated from government control.

Thus, in distinction to their domestic relations counterparts, advocates of procedural reform in commercial contexts promoted extralegal process, cooperation, and compromise to facilitate private autonomy, not the public or social good. At the same time, however, they did not attack the “wise

nonuniform, and time-consuming procedures, not “a desire to avoid the application of rules of law which [drove] business men out of the courts”).

89. Percy Werner, *Voluntary Tribunals: A Democratic Ideal for the Adjudication of Private Differences*, *supra* note 85, at 102, 109-10; see also Percy Werner, *Voluntary Tribunals: A Democratic Ideal*, 2 VA. L. REV. 276 (1914).

90. Werner, *Voluntary Tribunals: A Democratic Ideal for the Adjudication of Private Differences*, *supra* note 85, at 102.

91. *Id.* at 103.

92. *Id.* at 104.

93. *Id.* (emphasis added).

94. Werner, *Voluntary Tribunals: A Democratic Ideal*, *supra* note 89, at 276.

95. *Id.* at 276-77.

96. Werner, *Voluntary Tribunals: A Democratic Ideal for the Adjudication of Private Differences*, *supra* note 85, at 103. See also Percy Werner, *Voluntary Tribunals Functionally Considered*, 7 VA. L. REV. 110, 114 (1920) (“Is it speaking too broadly to say: Public courts for public issues, private courts for private issues . . . ?”).

administration of . . . social legislation” that was proliferating all around them.⁹⁷ To the contrary, they sought to carve out spaces for the resolution of “private disputes” in which the public interest could not intervene.⁹⁸ Or as Auerbach concludes, “the stronger the regulatory state, the stronger the desire for spheres of voluntary activity beyond its control.”⁹⁹ Proponents of commercial autonomy used arbitration “to insulate private rule-making from government control and to remove business disputes from the courts.”¹⁰⁰

By the 1930s, New Dealers explicitly attacked commercial arbitration as an assault on the regulatory state.¹⁰¹ In 1934, for example, Philip Phillips offered a “deep social objection” to the mandatory enforcement of arbitration agreements: “that the government, through its courts, would be entirely deprived of control over business disputes, unable to lay down social policy, unable to insure standardization through properly worked out rules of law, unable perhaps even to reach in upon disputes involving constitutional questions.”¹⁰² A decade later, Heinrich Kronstein assailed the development of business arbitration as private governance “divorced from an ideal of social justice” that should alarm anyone “who would place public interest before private gain.”¹⁰³

These criticisms notwithstanding, commercial arbitration continued to gain popularity over the following decades within the legal and business communities because it mediated larger shifts from individualistic theories of law to social

97. *Id.* at 104. In fact, some proponents of commercial arbitration argued that it was precisely because of the benefits of new social regulation that contracts to arbitrate commercial disputes should be enforceable by courts. In his testimony before Congress on the federal arbitration bill, Julius Cohen explained that previously courts were unwilling to enforce arbitration contracts via specific performance because of bargaining inequalities between the parties. “[T]he real fundamental cause” of nonenforcement Cohen asserted, “was that at the time this rule was made people were not able to take care of themselves in making contracts, and the stronger men would take advantage of the weaker, and the courts had to come in and protect them.” *Arbitration of Interstate Commercial Disputes: Joint Hearings on S. 1005 and H.R. 646 Before the Subcommittees of the Committees on the Judiciary*, 68th Cong. 15 (1924) (statement of Mr. Julius Henry Cohen). Social conditions are different now, Cohen declared in 1924: “we have the regulation of the Federal Government, through its regularly constituted bodies, and they protect everybody. Railroad contracts and express contracts and insurance contracts are provided for. You can not get a provision into an insurance contract to-day unless it is approved by the insurance department. In other words, people are protected to-day as never before.” *Id.* Cohen thus argued that new background regulatory rules made it both acceptable and desirable for Congress to permit traders and businessmen to contract as equals to opt out of court supervision and to hold them to the terms of their agreement.

98. Here is how Charles Bernheimer, Chairman of the Committee on Commercial Arbitration of the NY Chamber of Commerce, expressed this ideal:

Whatever course [the parties see] fit to adopt [is] no matter of public concern, and affects no question of public policy, and if they [see] fit to make an agreement, otherwise valid, that they would forbear to pursue their remedy by action in the courts of this state, there is no public policy which renders that agreement invalid.

Charles L. Bernheimer, *Introduction to J. COHEN, supra* note 81, at x-xi (1918) (quoting a New York State Supreme Court case upholding a contract in which a plaintiff agreed not to enforce a judgment in New York).

99. AUERBACH, *supra* note 12, at 101.

100. *Id.* at 105.

101. *Id.* at 112.

102. Philip G. Phillips, *Commercial Arbitration Under the N.R.A.*, 1 U. CHI. L. REV. 424, 433 (1934).

103. Heinrich Kronstein, *Business Arbitration—Instrument of Private Government*, 54 YALE L.J. 36, 36, 67 (1944).

ones.¹⁰⁴ It did so not by directly attacking the infusion of social concerns into American law, but rather, far more modestly, by suggesting, as Lon Fuller argued in 1941, that there is a “proper sphere” for “the rule of private autonomy.”¹⁰⁵ Fuller supposed that “the most familiar field of regulation by private autonomy” (or what he called “law-making by individuals”) is “that having to do with the exchange of goods and services.”¹⁰⁶ And, as Duncan Kennedy observes, Fuller’s sphere of private governance “extends beyond to partnerships and collective bargaining agreements.”¹⁰⁷ But make no mistake: “[t]he family was implicitly but firmly excluded.”¹⁰⁸

In sum, during the first few decades of the twentieth century, progressives used the tools of procedural informality and extralegal expertise to advance public/social ends in family disputes, whereas advocates of commercial autonomy used a similar set of tools to enable individual actors to advance private ends in market ones. Consistent with separate spheres ideology, dispute processing reformers understood family conflict as the proper concern of society and the nation-state, and preserved private individual rule-making for matters such as commerce and trade. In the Part that follows, I turn from early twentieth-century reforms to the modern ADR movement. As we shall see, rather than theorize the family as social and public, and the market as individual and private, modern ADR reformers describe the challenge of managing interpersonal relationships across the family/market divide. As the president of the American Arbitration Association, Robert Coulson, put it in 1983: “All disputes, at bottom, are interpersonal[, f]rom the most intimate family disagreements to complicated reallocation of resources”¹⁰⁹

II. THE BEGINNINGS OF MODERN ADR: MAKING THE FAMILY LIKE THE MARKET

A. Introduction

In the 1970s, elite judges, lawyers, and law professors were again gripped by the idea of procedural reform. Several analysts have therefore noted broad commonalities between the innovations of the modern ADR movement and early twentieth-century dispute processing reforms.¹¹⁰ But although ADR proponents themselves regularly invoked the legacy of Pound (even naming their foundational

104. For example, Auerbach reports that “by the 1950s, according to one estimate, nearly three quarters of all commercial litigation was being diverted from courts to arbitrators.” AUERBACH, *supra* note 12, at 113-14.

105. Lon L. Fuller, *Consideration and Form*, 41 COLUM. L. REV. 799, 809 (1941).

106. *Id.*

107. Duncan Kennedy, *From the Will Theory to the Principle of Private Autonomy: Lon Fuller’s “Consideration and Form,”* 100 COLUM. L. REV. 94, 125 (2000).

108. *Id.*

109. *Problem Solving Through Mediation: Conference Proceedings* (December 1-2, 1983), in DISPUTE RESOLUTION PAPER SERIES NO. 3, at 10 (Maria R. Volpe and Thomas F. Christian eds., 1984) (Coulson’s remarks).

110. See, e.g., Jessica Pearson, *An Evaluation of Alternatives to Court Adjudication*, 7 JUST. SYS. J. 420, 420 (1982) (suggesting that 1970s architects of ADR echoed “the litany of criticism directed at courts by Roscoe Pound and other Progressive era reformers”).

conference after his 1906 essay, *The Causes of Popular Dissatisfaction with the Administration of Justice*¹¹¹), the movement they inspired had little in common with Pound's early ambitions to achieve the "socialization of the law."¹¹² To the contrary, modern ADR proponents resoundingly criticized a description of law as a tool to advance social ends. In law review articles and conferences, they discussed the intrinsic difficulties in reaching consensus about what social ends, in fact, are: they emphasized the challenges of making reliable predictions about human desires and behavior, of understanding the "real" interests of individuals and groups, and of formulating rational decisions under conditions of uncertainty and imperfect knowledge.¹¹³ One commentator even described the anguish of family court staff forced "to agonize over other peoples' life decisions."¹¹⁴ ADR proponents thus promoted procedural informality for reasons of private autonomy and individual self-determination in family contexts, not simply in market ones.¹¹⁵

Of course, by the time ADR emerged in the mid-1970s, background understandings of the family had shifted significantly. It became entirely plausible (in fact necessary) to understand the family not as a social formation but as a compilation of individuals with constitutional rights,¹¹⁶ and as people who, as equal rights-bearing individuals, can and should contract with each other.¹¹⁷ A dispute processing innovation of the 1950s signifies a mid-point towards this transition. In 1958, Judge Louis Burke published a book describing his role in the Los Angeles County Conciliation Court. He began by recounting how it was precisely when he realized that marriage is emphatically a contract, that he also understood how judges could assume radically different procedural roles.¹¹⁸ "[I]f a court can enforce contracts of all types," he reasoned, "then surely a court may enforce a contract whereby the parties agree to live together in marriage and behave toward each other in certain specific ways."¹¹⁹ Burke and his team thus drafted contracts (in mindboggling detail) to delineate responsibilities and

111. See *Addresses Delivered at the National Conference on the Causes of Popular Dissatisfaction with the Administration of Justice*, 70 F.R.D. 79 (1976).

112. Pound, *Social Problems and the Courts*, *supra* note 39, at 341.

113. See generally Robert H. Mnookin, *Child-Custody Adjudication: Judicial Functions in the Face of Indeterminacy*, 39 LAW & CONTEMP. PROBS. 226 (1975) (describing the indeterminacy of the best interest standard, the lack of social consensus about proper child-rearing norms, and the impossibility of predicting the effects of various custody regimes); Anne E. Meroney, *Mediation and Arbitration of Separation and Divorce Agreements*, 15 WAKE FOREST L. REV. 467, 469 (1979) ("[P]arties fear the power of a judge . . . to decide the course of their lives based on a few minutes' contact and subjective observation."); Meyer Elkin, *Divorce Mediation: An Alternative Process for Helping Families to Close the Book Gently*, 20 CONCILIATION CTS. REV. iii, at v (1982) ("[J]udges and attorneys . . . are set up by society as 'experts' but in reality know very little about the family involved and what is best for it.")

114. Ann Milnc, *Custody of Children in a Divorce Process: A Family Self-Determination Model*, 16 CONCILIATION CTS. REV. 1, 1 (1978).

115. See, e.g., Janet Malcolm Spencer & Joseph P. Zammit, *Mediation-Arbitration: A Proposal for Private Resolution of Disputes between Divorced or Separated Parents*, 1976 DUKE L.J. 911, 912-13 (advocating for divorce and custody mediation/arbitration with minimal state involvement in order to enhance parents' freedom of choice).

116. In the 1960s, for example, children's rights advocates launched an assault on the antiadversarial, informal, and "socialized" procedures of the juvenile courts, winning significant due process protections in the Supreme Court decision, *In re Gault*, 387 U.S. 1 (1967).

117. See Frances Olsen, *The Politics of Family Law*, 2 LAW & INEQ. 1, 11 (1984).

118. LOUIS H. BURKE, *WITH THIS RING* 23 (1958).

119. *Id.* at 30.

obligations for, among other things, household labor, finances, leisure, privacy, and sex.¹²⁰

On the one hand, Judge Burke anticipated a new model: he conceived of spouses as contracting units, and he used highly individualistic and liberal language to describe and enforce their contracts. For example, he instructed parties to return to court to request a hearing if they felt they could not abide by the terms of the agreement, and for those who breached he stood ready to (and sometimes did) issue orders of contempt.¹²¹ On the other hand, Burke's work was reminiscent of older social therapeutic interventions in family disputes—his conciliation contracts expressed a deep therapeutic consciousness and an explicitly normative judicial agenda to properly socialize the family. Even more, these contracts were drafted in mandatory counseling sessions compelled by the court. Hence Caleb Foote, Robert Levy, and Frank Sander's 1966 family law casebook invited students to question the legitimacy of these intrusions into family life. In a fictional debate, one commentator proclaimed:

Damn it, marriage is a private affair. When I think of the Judge's court issuing orders telling people not to speak harshly to one another or how often to go to bed together or what technique to use in making love—well, it sickens me. It must be unconstitutional. Isn't there some amendment that prohibits that sort of prying into the intimacy of one's private life?¹²²

The operative theme captured in this quotation (followed by a reference to the newly promulgated *Griswold v. Connecticut*¹²³) is the constitutionalization of the right to family privacy *against* social control. But rather than divide family members into adversarial, rights-bearing units consigned to fight out their disputes in court, the newly emergent ADR movement had a different, indeed transgressive, solution in mind.

B. The Market Model of Family Mediation

In the 1970s, ADR scholars and practitioners proposed borrowing ideas about dispute processing from the market—typically from business and labor relations—to restructure a range of domestic disputes (for example, divorce, custody, premarital negotiations, domestic violence, child welfare, youth offenders, inheritance and the division of estates). O.J. Coogler, who founded the Family Mediation Association in 1975, began his pioneering book by analogizing the problems of the separating family to those of “a partnership of any kind.”¹²⁴ Through mediation, he explained, parties could contract to divide their property

120. *See id.* at 270-80.

121. *See id.* at 31-32, 77-85; *see also* ROGER ALTON PFAFF, *THE CONCILIATION COURT OF LOS ANGELES COUNTY* 8 (1963).

122. FOOTE, LEVY & SANDER, *supra* note 5, at 792.

123. 381 U.S. 479 (1965).

124. O.J. COOGLER, *STRUCTURED MEDIATION IN DIVORCE SETTLEMENT: A HANDBOOK FOR MARITAL MEDIATORS*, at xv & 1 (1978).

yet maintain “the ongoing business initiated by the partnership.”¹²⁵ Numerous other writers compared family conflict to labor-management conflict and hence subject to similar contractual techniques for resolution.¹²⁶ For example, in 1969, Coulson published an article encouraging family dispute resolution practitioners to employ dispute settlement techniques already widely used and accepted in commercial and labor contexts.¹²⁷

Most of these theorists proposed mediation—that is, contractual negotiations facilitated by a third party—as an optimal strategy for resolving family disputes and for opting out of court adjudication. Advocates of what I thus call the “market model of family mediation” made clear that they rejected the social-therapeutic conciliatory interventions of early twentieth-century family courts to remedy the relations of the home. Eager to inoculate themselves from the specter of social control that haunted Progressive era reforms, they instead described volitional forms of private ordering.¹²⁸ Robert Mnookin, for example, proposed that family mediators could facilitate “parental resolution of the custody dispute, rather than the broader tasks of ‘curing’ or ‘treating’ the parents.”¹²⁹ Jay Folberg, then president of the Association of Family and Conciliation Courts, was more emphatic: mediation, he insisted, is not a therapeutic but rather “task-directed and goal-oriented” process that utilizes contract to resolve conflict among people in a variety of (domestic, social, business, labor) relations.¹³⁰ Coulson proposed enabling “parties to design their own settlement machinery,” rather than subject

125. *Id.* at 1; see also Ann L. Milne, *Divorce Mediation—An Idea whose Time has Come?*, WIS. J. FAM. L. 3, 5 (1982) (“The family’s similarity to a corporate entity cannot go unnoticed. . . . As with the termination of a corporation and perhaps its reorganization into a new legal entity, we find a parallel with that of the divorcing family.”).

126. JOHN M. HAYNES, *DIVORCE MEDIATION: A PRACTICAL GUIDE FOR THERAPISTS AND COUNSELORS* 7 (1981) (“The concept of a divorce mediator advanced in this book is modeled on that of a labor mediator.”); Kenneth Kressel et al., *Mediated Negotiations in Divorce and Labor Disputes: A Comparison*, 15 CONCILIATION CTS. REV. 9 (1977); James R. Markowitz & Pamela S. Engram, *Mediation in Labor Disputes and Divorces: A Comparative Analysis*, 2 MEDIATION Q. 67 (1983); Joel M. Douglas & Lynn J. Maier, *Bringing the Parties APART: Divorce Mediation’s Debt to Labor Mediation*, 49 DISP. RESOL. J. 29 (1994). Labor-management conflict, of course, has its own rich and distinctive history in the United States that I do not describe here. However, it is worth noting that in the 1970s, labor scholars were far from sanguine about efforts to extend labor arbitration and mediation to disputes that were not organized around collective bargaining. See Julius G. Getmant, *Labor Arbitration and Dispute Resolution*, 88 YALE L.J. 916, 933-34 (1979) (“When labor arbitration has been successful, it is because collective bargaining has established a rough equality and mutual respect between the parties . . . not [because of] the establishment of a particular system of dispute resolution. . . . The intimate relationship between labor arbitration and collective bargaining makes its value as a precedent for dispute resolution in other contexts doubtful.”).

127. Robert Coulson, *Family Arbitration—An Exercise in Sensitivity*, 3 FAM. L.Q. 22 (1969).

128. Critics of family ADR would eventually level precisely this attack. Robert Levy, for example, described new nonadversarial techniques of family dispute resolution as deeply interventionist and reminiscent of juvenile courts, which he noted were once “a prominent and admired progressive ideal.” Robert J. Levy, *Custody Investigation in Divorce Cases: The New York Law Revision Commission Proposal in Perspective*, 19 COLUM. J.L. & SOC. PROBS. 485, 487, 490 (1985). Cf. Martha Fineman, *Dominant Discourse, Professional Language, and Legal Change in Child Custody Decisionmaking*, 101 HARV. L. REV. 727, 731-34, 760-68 (1988) (describing child custody mediation as the embodiment of therapeutic ideas that delegatize and depoliticize custody battles to the detriment of mothers).

129. Mnookin, *Child-Custody Adjudication*, *supra* note 113, at 289.

130. Jay Folberg, *A Mediation Overview: History and Dimensions of Practice*, 1 MEDIATION Q. 3, 8 (1983).

them to the conciliatory interventions of “well-meaning social workers, court aids and other appointees.”¹³¹ Patricia Vroom, Diane Fasset, and Rowan Wakefield made clear that family mediation envisions responsible individuals capable of making their own choices and decisions: “Mediation is attractive because it is not saddled with the negative connotations of weakness or sickness often associated with therapy. Mediation clearly assigns responsibility to the disputants for working through their own conflicts.”¹³²

Many other proponents described family mediation as a process through which individual family members could engage in predictable, reciprocal exchange by learning to make their own interests and obligations explicit and concrete through contracts that specify, for example, “who? is to do what? for whom? under what circumstances?”¹³³ Each mediation principle, another family mediation theorist explained, is a “contractual norm, a commonly understood and agreed upon prescription for acceptable behavior, which . . . specifies the rules to be observed as well as the sanctions that may be applied for their violation.”¹³⁴ In 1981, John Haynes devoted a portion of his book on family mediation to teaching family members “how to trade.”¹³⁵ The problem, he explained, is that people within families are often uncomfortable and inexperienced in using exchange-based norms to govern the distribution of resources and entitlements. Rather than behave like market actors, family members either understand themselves as altruists and thus they refuse (on moral or emotional grounds) to take (“Oh, I can’t do that; it’s not right”).¹³⁶ Or they understand themselves as individual rights-holders with legal entitlements and refuse to give (“Why should I give *a*? I am entitled to *b* and should get it anyway”).¹³⁷ Thus, Haynes reasoned, “begins the process of explaining the legitimacy of offering concessions in return for other concessions.”¹³⁸ Building on these ideas, in 1982 Charles Bethel and Linda Singer proposed to use mediated contracts to remedy cases of low-level

131. Coulson, *Family Arbitration*, *supra* note 127, at 23. Although Coulson would later become an important proponent of family mediation, in this 1969 article he is arguing for the application of arbitration to family disputes.

132. Patricia Vroom et al., *Winning Through Mediation: Divorce Without Losers*, in ALTERNATIVE MEANS OF FAMILY DISPUTE RESOLUTION 3, 4 (Am. Bar Ass’n eds., 1982); *see also* JOHN M. HAYNES & GRETCHEN L. HAYNES, *MEDIATING DIVORCE: CASEBOOK OF STRATEGIES FOR SUCCESSFUL FAMILY NEGOTIATIONS* 5-9, 9 (1989) (distinguishing mediation from therapy: “reorganizing interpersonal dynamics is the work of a therapist, and negotiating agreement over issues is the work of a mediator”); Joan B. Kelly, *Mediation and Psychotherapy: Distinguishing the Differences*, 1 *MEDIATION Q.* 33 (1983).

133. Richard B. Stuart et al., *An Experiment in Social Engineering in Serving the Families of Predelinquents*, 4 *J. ABNORMAL CHILD PSYCHOL.* 243, 245 (1976); *see also* HARRINGTON, *supra* note 12, at 127-29 (describing Stuart et al. and explaining that local mediation centers used analogous techniques to develop “a contractual agreement regarding future behavior”).

134. Sarah Childs Grebe, *Structured Mediation and its Variants: What Makes it Unique*, in *DIVORCE MEDIATION: THEORY AND PRACTICE* 225, 229-30 (Jay Folberg & Ann Milne eds., 1988) (quoting JEFFREY Z. RUBIN & BERT R. BROWN, *THE SOCIAL PSYCHOLOGY OF BARGAINING AND NEGOTIATION* 13 (1975)).

135. HAYNES, *supra* note 126, at 74-76.

136. *Id.* at 74.

137. *Id.*

138. *Id.*

domestic violence (especially when victims—for reasons of either financial support or love—wished to evade the coercive apparatus of criminal law).¹³⁹

Thus, in the 1970s and early 1980s, family ADR advocates reconceived the family as a site of contractual relationships in terms that reflected a renewed commitment to the privacy and autonomy of the individual as well as to a decreased role for the state in family (as well as market) affairs. While their predecessors explicitly conceptualized the family as public and social, and thus as a receptacle for specific normative interventions worked out through conciliatory procedures directed by the state, modern reformers constructed the family as private—a space where individuals could use contract to arrange their own norms and obligations. Coulson, for example, described the devolution of control over dispute resolution (for a range of conflicts) as “the essence of personal freedom.”¹⁴⁰ To that end, he and several other ADR proponents emphasized the similarities, rather than dissimilarities, between the resolution of family and commercial disputes—particularly with respect to the role the state should play in each.¹⁴¹ “The state,” Folberg proclaimed, “should use its increasingly precious resources to intervene in economic relationships between adults only when all efforts for private ordering or settlement fail.”¹⁴² “Divorcing parties,” he added, “should be free to contract between themselves, and they should be encouraged to do so.”¹⁴³ Or as Ann Milne, Chairperson of the Association of Family and Conciliation Courts, argued: divorcing parties “ought to be free to contract between themselves regarding the financial, estate planning and parenting details of their marriage and divorce. Resultant agreements may be enforceable as with any other contract and subject to challenge by one of the participants on the

139. Charles A. Bethel & Linda R. Singer, *Mediation: A New Remedy for Cases of Domestic Violence*, 7 VT. L. REV. 15 (1982). The authors offer several examples of the kinds of contracts they draft; for example:

I, Spencer W., agree to return all record albums and one tape of Aretha Franklin, Amazing Grace. I also agree not to hit or choke Ms. M. anymore. While under the doctor's care whatever hospitalization does not cover, Mr. W. will pay for. This includes doctor visits and prescriptions.

Id. at 22 n.13. Or:

I, Barbara M., and I, Darnez S., hereby agree to end the relationship that has existed between us. I, Barbara M., will continue to live at my mother's house and I, Darnez S., will continue to live at my mother's house.

Id. at 23 n.14. Or:

I, William S., agree that I will not physically harm in any way my wife, Rita S., or my three children, Daryl, Roger, and James.

I, Rita S., agree that I will talk and communicate with Mr. S. on any subject provided Mr. S has not been drinking when he approaches me.

Id. at 23 n.15.

140. *Problem Solving Through Mediation*, *supra* note 109, at 10 (Coulson's remarks).

141. *Cf.* Olsen, *The Family and the Market*, *supra* note 7, at 1517 (describing the historical liberalization of the family and arguing that the family is presently assuming “more of the characteristics associated with the free market”). Olsen herself extended the legal realist critique of the free market to family relations. Just as legal realists endeavored to render incoherent the idea of state nonintervention in the free market, she argued that the idea of the “private family” masks innumerable policy choices supported and enforced by the state. Frances E. Olsen, *The Myth of State Intervention in the Family*, 18 U. MICH. J.L. REFORM 835, 835-37 (1985).

142. Folberg, *A Mediation Overview*, *supra* note 130, at 11.

143. *Id.*; see also Jay Folberg, *Mediation of Child Custody Disputes*, 19 COLUM. J.L. & SOC. PROBS. 413, 419 (1985) (“Family mediation furthers the policy of minimal state intervention . . .”).

grounds of fraud.”¹⁴⁴ From this perspective, families constitute private economic relations; even upon their dissolution, families, like market actors, should be encouraged to govern themselves through contract rather than become subject to the intervention of the state. And because family members are analogous to market actors, their contracts are analogous to market contracts: courts, ADR proponents therefore advised, should refuse to enforce mediated contracts only if they find “fraud or overreaching” among adults or “neglect and abuse” when children are involved.¹⁴⁵

Early ADR proponents thus self-consciously described family ADR as a form of “private ordering” that, in Mnookin’s words, is “premised on the notion that . . . bargaining involves rational, self-interested individuals.”¹⁴⁶ “Family fights are susceptible to rational bargaining,” Coulson similarly inveighed.¹⁴⁷ Carl Dibble, a family mediator, summarized these ideas as follows: “[B]argainers may legitimately prefer their own or the common interest. . . . Labor is expected to prefer labor’s interest, and management, management’s.”¹⁴⁸ Why, Dibble asked, should family mediation be subject to different standards?¹⁴⁹

Yet the development of family ADR was analytically complex. Market model theorists clearly brought to the family free market ideas of private contract and individual self-interest. But they did not necessarily refuse, as either a conceptual or political matter, traditional distinctions between the market and the family. For some, these distinctions crept in gradually. For example, Coulson recounts:

At first I saw the role of the [family] mediator as limited to helping parties bargain, much as union and management do in labor relations, but I gradually realized that the function was more complex, involving collaboration, enhanced communications, behavioral modification, and family therapy, in addition to traditional negotiating skills.¹⁵⁰

Others always, if also sparingly, described the family and the market as distinctive entities even as they blurred the differences between them. Mnookin, for example, reminded his readers that the family is a space of affection and mutual

144. Milne, *Divorce Mediation*, *supra* note 125, at 5.

145. Robert H. Mnookin & Lewis Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 YALE L.J. 950, 957 (1979).

146. Robert H. Mnookin, *Divorce Bargaining: The Limits on Private Ordering*, 18 U. MICH. J.L. REFORM 1015, 1019 (1985).

147. ROBERT COULSON, HOW TO STAY OUT OF COURT 90 (1984). He advised separating spouses, whenever possible, to “[f]ollow the basic principles of contract negotiation. Think about what your opponent wants. What concessions are you willing to make? How can you get the best possible agreement for the future?” *Id.* at 92. Cf. ROBERT COULSON, FAMILY MEDIATION: MANAGING CONFLICT, RESOLVING DISPUTES 94-95 (2d ed. 1996) (“A spouse is not a customer, so arms-length bargaining may not be appropriate between them. . . . Still, parties should not lower their expectations to encourage collaboration. Some concessions may eventually be necessary to reach agreement, but caving in up front is not one of them.”).

148. Carl M. Dibble, *Bargaining in Family Mediation: Ethical Considerations*, MEDIATION Q. 75, 83 (1984) (cataloguing debates within the field of family mediation for and against bargaining, and offering his own qualified defense of bargaining).

149. *Id.* at 75.

150. COULSON, FAMILY MEDIATION, *supra* note 147, at xi.

self-interest.¹⁵¹ Folberg observed “the strong emotional forces” in families “require measures more delicately wrought than those that can be provided in a court-imposed solution.”¹⁵² “The legal system,” he maintained, “is not able to supervise or enforce the fragile and complex interpersonal relationships between parents and children”¹⁵³ Thus, even at moments of family dysfunction and breakdown, these market model theorists did not revert to a purely transactional (self-interested/rational) paradigm to negotiate family conflict. Rather they promoted a different—and more idealized paradigm—one characterized by ongoing relationships and complex emotional ties.

To be sure, some important early advocates of family ADR never embraced the market model. Their writings are *full* of appreciation for the specificity of the family as a site of conflict. Consider Frank Sander’s lengthy observations in 1983:

I believe that family disputes have particular promise for the alternative movement. . . . A number of points strike me as special about family disputes. First, they often involve parties who are not fully competent, such as children and the mentally disabled. Obviously, these individuals require special procedures and protections. . . .

. . . . Feelings are often so intense that we may justifiably question whether the normal legal processes will be effective. . . . [W]e often must deal with individuals who have serious personality pathologies. . . .

Still another important characteristic of family disputes is that the very nature of family relations means that we often are dealing with continuing relationships.¹⁵⁴

Sander repeatedly invoked the family’s special characteristics—intensely emotional relationships, inequality, irrationality, interdependence—as a justification to remove family disputes from adversarial adjudication.¹⁵⁵ For example, he described the famous case of *McGuire v. McGuire*¹⁵⁶—in which a wife asked a court to order her miserly husband to transfer financial resources to

151. Mnookin, *Child-Custody Adjudication*, *supra* note 113, at 266.

152. Folberg, *A Mediation Overview*, *supra* note 130, at 9.

153. Folberg, *Mediation of Child Custody Disputes*, *supra* note 143, at 420.

154. Frank E. A. Sander, *Family Mediation: Problems and Prospects*, 2 *MEDIATION Q.* 3, 5-6 (1983).

155. See also, Frank E. A. Sander, *Towards a Functional Analysis of Family Process*, in *THE RESOLUTION OF FAMILY CONFLICT: COMPARATIVE LEGAL PERSPECTIVES* xi, at xii (John M. Eckelaar & Sanford N. Katz eds., 1984); see also Daniel G. Brown, *Divorce and Family Mediation: History, Review, Future Directions*, 20 *CONCILIATIONS CTS. REV.* 1, 5-8 (1982) (summarizing arguments that suggest that adjudication is too “coldhearted” for family disputes); HOWARD H. IRVING, *DIVORCE MEDIATION: A RATIONAL ALTERNATIVE TO THE ADVERSARY SYSTEM* 14-16 (1980) (describing divorce as “unique among legal actions because it is invariably accompanied by intense and intimate emotions” and thus as better suited for voluntary settlement than can operate on emotional as well as intellectual levels).

156. 59 N.W.2d 336 (1953).

her—not as an economic but as “fundamentally a *relational* dispute” that called for a meditative process including conciliation, therapy, or counseling.¹⁵⁷

Many other family mediators did not reject the market model per se but rather redescribed the distinctiveness of the family as a source of ethical dilemmas *within* the model. For example, in 1982, Crouch invited his readers to consider the problem of “too-aggressive bargaining” in family mediation that could facilitate the “exploitation of the weaker by the dominant party.”¹⁵⁸ In 1984, Sydney Bernard, Joseph Folger, Helen Weingarten, and Zena Zumata debated whether the family mediator, *unlike the labor mediator*, should try to minimize acquisitive or risk-taking behavior or discourage the commodification of party preferences (e.g. trading money for kids).¹⁵⁹ That same year, Dibble described what he saw as a normative divide in the field. Should family mediators, he summarized, “choose to tolerate and encourage impersonal, acquisitive, manipulative, instrumentally rational values” of the marketplace, or rather should they “defend those distinctive values of the family (and intimate relationships) such as personal regard, respect for autonomy, sharing, and appreciating intrinsic goods.”¹⁶⁰ Thus as soon as the family was assimilated into a voluntary, contractual model for dispute resolution (contiguous with the model widely used for business and labor disputes), its distinctiveness reemerged in the form of questions about ethics, responsibility, and fairness.

In sum, family ADR, as it developed over the course of the 1970s and 1980s, reflected an uneasy mix of two modes of human interactions that were kept largely distinct by early twentieth-century dispute processing reformers. On the one hand, market model advocates borrowed the assumption from theorists of market-based exchange that individuals involved in family disputes are private, individual, and self-interested actors. On the other hand, virtually all proponents of family ADR emphasized the importance that emotions and notions of altruism and duty play in family disputes and their resolution. Family ADR never

157. Sander, *Towards a Functional Analysis of Family Process*, *supra* note 155, at xv (emphasis added). We can trace Sander’s understanding of mediation most readily to Lon Fuller who, in 1970, defined mediation (unlike contract) as a process that “reorient[s] the parties toward each other . . . by helping them to achieve a new and shared perception of their relationship, a perception that will redirect their attitudes and dispositions toward one another.” Fuller, *supra* note 3, at 325. Fuller argued that mediation is therefore best suited to non-market relationships. “It is fairly obvious,” he asserted,

that mediation has scarcely any role to play in human relationships fluidly organized on what may be broadly described as the market principle. If X finds A, B and C all competing to supply his needs through rival contractual arrangements, he may need the services of an expert adviser, but he will scarcely have occasion to call on those of a mediator. Likewise, in a society where transient and freely terminable sexual alliances took the place of marriage it is hardly likely that there would develop any institutional practice comparable to “marriage therapy.” Mediation by its very nature presupposes relationships normally affected by some strong internal pull toward cohesion.

Id. at 314. For Fuller, this “person-oriented” quality of mediation most paradigmatically encompasses relations between spouses, but also encompasses, for example, relations between labor unions and employers—relationships that he, in turn, distinguished from business deals marked only by the performance of reciprocal obligations governed by “act-orientated” contractual rules. *Id.* at 326-34.

158. Richard E. Crouch, *Divorce Mediation and Legal Ethics*, 16 *FAM. L.Q.* 219, 240-41 (1982).

159. Sydney E. Bernard et al., *The Neutral Mediator: Value Dilemmas in Divorce Mediation*, 4 *MEDIATION Q.* 61, 63-65, 70 (1984).

160. Dibble, *supra* note 148, at 78 (describing the reasoning of those who argue against bargaining in family mediation).

produced any uniform resolutions to its dual impressions of the family as a collection of self-interested individuals who possess values that they can commodify and exchange *and* as a collection of people bound together by ethical, affective, and solidaristic commitments. In 1987, Howard Irving and Michael Benjamin thus simply observed that “there remains no consensus concerning the status of self-interest bargaining in [family] mediation. Some are in favor, others against.”¹⁶¹ But by 1987, I would argue that something far more conceptually powerful than a split in the field over bargaining had taken place.

C. Political Critiques, Depoliticized Mediations

First, by the mid-1980s, concerns about the special characteristics of the family developed into a full-blown feminist assault—one, I would speculate, that Sander saw coming. “[W]e in the family law field,” he cautioned in 1983, “have so far escaped the sharpest criticism [of ADR], but I have no doubt that we, too, will get our share.”¹⁶² Immediately after he published these words, feminists assailed the dangers posed to women and children by the expansion of market logics into family domains. They proposed to limit ADR to *nonfamily* disputes and interactions. For example, in 1984, the National Center on Women and Family Law (a legal services organization focused on domestic issues) published an article explaining that “‘alternate dispute resolution’ lends itself more appropriately to arm’s length disputants possessed of equal bargaining and financial power and information, not to ‘unequal’ matrimonial partners.”¹⁶³ The following year, Laurie Woods, director of the Center, described mediation as an effort to reprivatize family conflict that (like the market) levels class-based inequalities.¹⁶⁴ Family disputes, she argued, do not represent “intra-class controversies . . . amenable to mediation,” but rather embody conflicting social and economic interests linked to the poverty of women.¹⁶⁵ The Battered Women’s Advocates Caucus passed a resolution in 1983 declaring mediation “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.”¹⁶⁶

Nor were these critics reassured by family ADR’s valorization of affect, interdependence, and intimacy, not simply rationality and self-interest. For them, the family was better described as a space of deeply gendered and unequal power relations. Men reproduced social and economic inequalities through the family—this problem was structural and political and therefore not amenable to correction through a proposal to distribute resources and entitlements via the tools of the market (bargaining and contract) even if these tools could be modified to

161. See, e.g., HOWARD H. IRVING & MICHAEL BENJAMIN, *FAMILY MEDIATION: THEORY & PRACTICE OF DISPUTE RESOLUTION* 55 (1987) (internal citations omitted).

162. Sander, *Family Mediation*, *supra* note 154, at 5.

163. Harriet N. Cohen, *Mediation in Divorce: Boon or Bane?*, WOMEN’S ADVOC. (Nat’l Ctr. on Women & Family Law, New York, N.Y.), March 1984, at 1.

164. Laurie Woods, *Mediation: A Backlash to Women’s Progress on Family Law Issues*, 19 CLEARINGHOUSE REV. 431 (1985).

165. *Id.* at 435.

166. *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 & Family Law, New York, N.Y.), July 1983, at 3.

anticipate intensely emotional and/or altruistic behavior. If anything, feminists predicted that under structural conditions of “private” inequality, women, overly endowed with relational and affective traits, would be even further exploited by a regime of voluntary negotiated exchange.¹⁶⁷

These feminist critics thus labored to preserve a distinction between the kinds of dispute resolution processes appropriate for the market versus those appropriate for the home on explicitly normative and political grounds. At the same time, however, market model theorists, and most especially Robert Mnookin, aimed to use ADR’s double understanding of the family—one that sought to mute the apparent contradictions of individualism and altruism, rationality and affect, economics and intimacy—to build more general and ambitious theories of dispute resolution. Mnookin offered a model of ADR in which conflicting needs and desires—indeed conflicting experiences of one’s self as market actor and family member—could be balanced and managed. For him, this model stood apart from right/left ideology and male/female structural inequality.¹⁶⁸ Mnookin, we shall see, proposed a grand-scale and depoliticized mediation.

In 1979, he and Lewis Kornhauser recommended the reform of legal procedures governing divorce and custody disputes in their famous *Bargaining in the Shadow of the Law*.¹⁶⁹ Their key innovation was purposefully to blur the boundaries between the public and private, law and norms, and self-interest and concern for others. To that end, they borrowed Lon Fuller’s idea of “‘law’ that parties bring into existence by agreement,”¹⁷⁰ as well as Melvin Eisenberg’s idea of negotiation as not simply an exercise in bargaining power and horse trading, but rather as also “a norm-bound” process involving principle, rule, and precedent that “determine . . . outcomes, even when they conflict with self-interest.”¹⁷¹ (Eisenberg, in turn, derived his understanding of negotiation in part from observations of preindustrial family dispute resolution.¹⁷²)

Mnookin and Kornhauser therefore envisioned a theory (and practice) of private lawmaking and dispute settlement that combined contractual exchange with normative negotiation and that could accordingly integrate the dual model of the family imagined in ADR. This theory, they insisted, could encompass the complex interaction between parties’ preferences (rational self-interest but also altruism and spite) and norms (seemingly, rules and principles parties articulate

167. Cf. H. Cohen, *supra* note 163, at 1 (arguing against mediation’s “exaltation of the ‘emotional’ aspects of the divorce”). By the mid-1980s and early 1990s, family mediation had generated a sizable feminist critique. Important contributions include Lisa G. Lerman, *Mediation of Wife Abuse Cases: The Adverse Impact of Informal Dispute Resolution on Women*, 7 HARV. WOMEN’S L.J. 57 (1984); Martha Shaffer, *Divorce Mediation: A Feminist Perspective*, 46 U. TORONTO FAC. L. REV. 162 (1988); Fineman, *supra* note 128; Trina Grillo, *The Mediation Alternative: Process Dangers for Women*, 100 YALE L.J. 1545 (1991); Penelope E. Bryan, *Killing Us Softly: Divorce Mediation and the Politics of Power*, 40 BUFF. L. REV. 441 (1992).

168. See, e.g., *infra* note 176.

169. Mnookin & Kornhauser, *supra* note 145.

170. *Id.* at 950, n.1.

171. *Id.* (citing Eisenberg); Melvin Aron Eisenberg, *Private Ordering Through Negotiation: Dispute-Settlement and Rulemaking*, 89 HARV. L. REV. 637, 638, 650 (1976).

172. Eisenberg, *supra* note 171, at 640-43 (quoting at length from P. H. GULLIVER, *SOCIAL CONTROL IN AN AFRICAN SOCIETY: A STUDY OF THE ARUSHA: AGRICULTURAL MASAI OF NORTHERN TANGANYIKA* (1963)).

through reasoned elaboration).¹⁷³ It could also encompass parties' appetite for risk and strategic behavior—in part because analysts would understand *all* these interactions as shaped and regulated by background rules of state law.¹⁷⁴ In a 1985 article, Mnookin clarified that “[s]ome might think that the stresses and emotional turmoil of separation and divorce undermine the essential premise of private ordering—individuals’ capacity to make deliberate judgments. I disagree.”¹⁷⁵ Nor was he indifferent, in general terms, to feminist concerns about bargaining inequalities.¹⁷⁶ To the contrary, Mnookin envisioned a negotiated contractual regime that could absorb, diffuse, and address these critiques. Emotional relationships, as well as power imbalances and externalities, he argued, can and should be managed within the institution of private ordering—at times by disputants themselves (or their advocates) and at times by the state, which retains the power to alter baseline bargaining endowments, add procedural protections, or intervene in “unusually one-sided bargain[s].”¹⁷⁷ Mnookin thus derived a model of private ordering—based on, he argued, the twin ideals of individual liberty and efficient exchange—by theorizing the affective, unequal, and duty-bound relations of the family *not* simply the arms-length, rational bargaining of the marketplace.¹⁷⁸ He and Kornhauser concluded their seminal piece with a prescient claim: “certainly,” this vision of dispute settlement “has implications far broader than family law.”¹⁷⁹

D. Dispute Processing Across the Family/Market Divide

By the 1990s, as ADR advanced and progressed, general theorists of ADR began to see the features that once appeared particularly salient in family contexts as emblematic of *all* bargaining situations.¹⁸⁰ For many, if not most, ADR proponents, the sort of affective, interdependent relationships that long defined family disputes in fact defined disputes in a wide array of (nonfamily/market) contexts. In other words, the combinations of relational norms and economic

173. Mnookin & Kornhauser, *supra* note 145, at 968, 973.

174. *Id.* at 966-74.

175. Mnookin, *Divorce Bargaining*, *supra* note 146, at 1021.

176. *Id.* at 1024-31 (generally discussing relative bargaining power). Feminists, however, observed that Mnookin’s discussion of bargaining power evaded structural and political questions of male/female inequality. Martha Shaffer, for example, argued: “Throughout his discussion of bargaining inequality, Mnookin uses nonsexist language, implying that either husband or wife may have the upper hand on any one of these dimensions. While this is certainly true of individual relationships, it ignores the forces of gender hierarchy operating on a societal level.” Shaffer, *supra* note 167, at 179.

177. *Id.* at 1023.

178. *Id.* at 1017-19.

179. Mnookin & Kornhauser, *supra* note 145, at 997.

180. Family mediation “experienced its most dramatic growth” between 1980 and 1989. GEORGE PETER STONE, FAMILY AND INTERPERSONAL MEDIATION: A BIBLIOGRAPHY OF THE PERIODICAL LITERATURE 1980-1989, at 7 (1991). In fact, by the 1990s, family mediation had switched from a later-comer, following (in the 1970s) on the heels of labor and commercial arbitration and conciliation (and thus as a recipient of techniques honed in those more sophisticated market contexts), to one of ADR’s most entrenched, foundational, and fertile areas of practice. By 1996, for example, Coulson could write that “[m]ediation is *not only* being used for family disputes but in employment, insurance, and general business to help disputants avoid court.” COULSON, FAMILY MEDIATION, *supra* note 147, at 33 (emphasis added).

efficiency that Mnookin and others were working out in the 1970s and 1980s became, by the 1990s and 2000s, the dominant discourse of the field.¹⁸¹ In 2000, for example, Mnookin and his coauthors published a book that combined lessons in efficiency maximization with social-psychological proposals to manage “the tension between empathy and assertiveness” that is present, they argued, in nearly all negotiations.¹⁸² In 2006, Folberg, in his book with Dwight Golann on negotiation, combined lessons in hard bargaining with lessons on managing emotional and interpersonal relationships.¹⁸³ Around the same time, Leonard Riskin (another important early proponent of family mediation) began to pioneer dispute resolution writings on “mindfulness.”¹⁸⁴ He proposed that individuals can improve all of their personal and professional negotiations if they learn to self-regulate their “impulses, fears, passions, thoughts, and habitual assumptions and behaviors.”¹⁸⁵ In 2005, Roger Fisher published, with Daniel Shapiro, a book devoted to the following overarching claim: in “virtually every negotiation” nearly everyone desires “appreciation, affiliation, and autonomy” and, moreover, nearly everyone is concerned with perceptions of their “status and role.”¹⁸⁶ To illustrate these arguments, moreover, these authors moved seamlessly between examples of disputes in family and market domains.¹⁸⁷

Unlike their early twentieth-century predecessors, these modern ADR writers clearly do not commend the use of conciliatory, informal, and antiadversarial procedures by public institutions in order to advance a preexisting national or

181. See, e.g., Robert J. Condlin, “*Every Day and in Every Way, We are All Becoming Meta and Meta*” or *How Communitarian Bargaining Theory Conquered the World (of Bargaining Theory)*, 23 OHIO ST. J. DISP. RESOL. 231, 238-45 (2008) (describing the dominance of communitarian and relational ideals in negotiation and ADR theory). I should add: I do not mean to suggest that family dispute resolution, while significant, was the only model that ADR theorists drew upon to import a discourse of affect, community, and social cohesion into market domains. Important social-psychological theories of dispute resolution were also developed in labor and organizational contexts. For important early examples, see RICHARD E. WALTON, *INTERPERSONAL PEACEMAKING: CONFRONTATIONS AND THIRD-PARTY CONSULTATION 2* (1969) (emphasizing the role of emotional and interdependent relations in complex organizational conflict) and RICHARD E. WALTON & ROBERT B. MCKERSIE, *A BEHAVIORAL THEORY OF LABOR NEGOTIATIONS: AN ANALYSIS OF A SOCIAL INTERACTION SYSTEM 184* (1965) (criticizing bargaining theorists for “not pay[ing] attention to the attitudinal dimensions of negotiations” and proposing a “social-psychological” analysis of labor negotiation to correct this gap).

182. ROBERT H. MNOOKIN, SCOTT R. PEPPE & ANDREW S. TULUMELLO, *BEYOND WINNING: NEGOTIATING TO CREATE VALUE IN DEALS AND DISPUTES 44-68* (2000).

183. JAY FOLBERG & DWIGHT GOLANN, *LAWYER NEGOTIATION: THEORY, PRACTICE, AND LAW 36-44, 49-58* (2006).

184. See, e.g., Leonard L. Riskin, *The Contemplative Lawyer: On the Potential Contributions of Mindfulness Meditation to Law Students, Lawyers, and Their Clients*, 7 HARV. NEGOT. L. REV. 1 (2002). Like Mnookin, Sander, and Folberg, Riskin taught family law early in his career and in 1982 “devoted three weeks of his Family Law course to divorce mediation.” AM. BAR ASS’N, *LAW SCHOOL DIRECTORY OF DISPUTE RESOLUTION PROGRAMS 21* (Kevi Brannelly et al. eds., 1983). In his widely cited 1982 article, *Mediation and Lawyers*, he devoted (in his words) “substantial attention” to family mediation. Leonard L. Riskin, *Mediation and Lawyers*, 43 OHIO ST. L.J. 29, 32 (1982).

185. Leonard L. Riskin, *Knowing Yourself: Mindfulness*, in *THE NEGOTIATOR’S FIELDBOOK: THE DESK REFERENCE FOR THE EXPERIENCED NEGOTIATOR 239, 239* (Andrea Kupfer Schneider & Christopher Honeyman eds., 2006).

186. ROGER FISHER & DANIEL SHAPIRO, *BEYOND REASON: USING EMOTIONS AS YOU NEGOTIATE 15* (2005).

187. See, e.g., *id.* at 3; MNOOKIN, PEPPE & TULUMELLO, *supra* note 182, at 1-2, 173-74; FOLBERG & GOLANN, *supra* note 183, at 2-3.

communal social good. But neither do they necessarily commend procedural informality to evade a “steady stream” of social welfare legislation.¹⁸⁸ They have divorced their ambitions from such explicitly political ends: they aim instead to enable individual disputants to manage the emotional, altruistic, and simultaneously self-interested relationships that cut across all the spheres of their existence. How should we evaluate these contributions?

On the one hand, if, as Clare Huntington recently argued, “[t]he curative to the separate spheres ideology . . . is to see both family *and* market as affective sites,”¹⁸⁹ then these architects of modern ADR have accomplished an important analytical feat: they have produced a range of dispute processing techniques for resolving (commercial, relational) disputes that do not presuppose a sharp divide between the market and the family. It is worth emphasizing this point. Over the past two decades, numerous scholars have productively complicated distinctions between the family and the market. But most have investigated how economics, care, and intimacy overlap in family domains.¹⁹⁰ ADR is significant, I am arguing, because it imports these imbricated understandings of the family to reshape how we understand conflict in market domains.

On the other hand, however, and as I suggest in the concluding Part that follows, it is precisely ADR’s apolitical mediations of economic and social logics that make it compatible with neoliberal projects.¹⁹¹

III. CONCLUSION: MAKING THE MARKET LIKE THE FAMILY

At the same time that ADR proponents were settling how they would combine social and economic logics into a theory of private dispute resolution, a similar shift was happening in theoretical writing on the market writ large. Indeed, in the last two decades, we have witnessed an explosion of efforts that, like ADR, have introduced new discourses of the social into market-based exchange—for example, terms like social capital, social networks, and social trust. Here “the social” is, as neoliberal economic philosopher Friedrich Hayek would have it, illustrative of interactive and localized human processes.¹⁹² It is not a

188. Werner, *Voluntary Tribunals: A Democratic Ideal for the Adjudication of Private Differences Which Give Rise to Civil Actions*, *supra* note 85, at 104.

189. Clare Huntington, *Embracing the Affective Family*, 33 HARV. J.L. & GENDER 321, 325 (2010) (emphasis added).

190. For example, Viviana Zelizer’s recent work examines “the processes by which people negotiate coherent connections between intimacy and economic activity” most “notably in the realms of coupling, caring relations, and household life.” VIVIANA A. ZELIZER, *THE PURCHASE OF INTIMACY* 2-4 (2005). In another recent book, Margaret Brinig examined the benefits and drawbacks of applying “the idea of the market, with its legal analogy of contract,” to different kinds and stages of family relations. MARGARET F. BRINIG, *FROM CONTRACT TO COVENANT: BEYOND THE LAW AND ECONOMICS OF THE FAMILY* 3 (2000). For both helpful overviews and contributions to this complex literature, see, e.g., Martha M. Ertman, *For Both Love and Money: Viviana Zelizer’s The Purchase of Intimacy*, 34 LAW & SOC. INQUIRY 1017 (2009) (review essay) and Philomila Tsoukala, *Gary Becker, Legal Feminism, and the Costs of Moralizing Care*, 16 COLUM. J. GENDER & L. 357 (2007) (analyzing how feminists have adopted, limited, and/or rejected economic theories of the family and household labor).

191. Other scholars have observed the recent uptake of ADR in neoliberal discourse. See, e.g., UGO MATTEI & LAURA NADER, *PLUNDER: WHEN THE RULE OF LAW IS ILLEGAL* 79 (2008).

192. 2 FRIEDRICH A. HAYEK, *LAW, LEGISLATION AND LIBERTY: THE MIRAGE OF SOCIAL JUSTICE* 78 (1976).

normative/redistributivist idea that signifies “that ‘society’ ought to hold itself responsible for the particular material position of all its members” (which we saw at work in the ideology of progressive family court reform).¹⁹³ Nor is it a normative/functional idea that dictates “that the processes of society should be deliberately directed to particular results”¹⁹⁴ (made famous in American law by Roscoe Pound).¹⁹⁵ Rather, in contemporary neoliberal discourse, “the social” is a descriptive idea used to commend the processes among people who collaborate successfully to produce both relationships and things.

Strikingly, several writers who understand the market as social in this way also theorize the family as an important, even paradigmatic, social form. Consider the following two brief examples. In 1988, James Coleman published an article widely credited for coining the term social capital.¹⁹⁶ In that article, he described how intra-family (and community) relations—in distinction to material resources like money or human resources like education—influence children’s performance in schools.¹⁹⁷ Coleman, in turn, used this example of the family to describe what he famously called capital that is produced through “*relations* among persons,” and to challenge dominant depictions of market exchange grounded solely in principles of utility maximization.¹⁹⁸ “[N]orms, interpersonal trust, social networks, and social organization,” he argued, “are important in the functioning not only of the society but also of the economy.”¹⁹⁹

Building on Coleman’s ideas, in 1995, Francis Fukuyama argued for the creation of “a high degree of trust between individuals who [are] not related to one another, and hence a solid basis for social capital.”²⁰⁰ He explored how families produce various forms of sociability by cultivating shared ethical values as well as how “strong private economic institutions that go beyond the family” (such as business organizations) can foster similar forms.²⁰¹ Like ADR proponents, he argued against the organization of society based primarily on litigation, lawyering, and policing rather than active human collaboration—the more trust in a society, the less it requires an “intrusive, rule-making government to regulate social relations.”²⁰² And like Coleman, he challenged descriptions of economic behavior based exclusively on theories of rational choice and utility maximization. “[T]here is a mistaken tendency,” he claimed, “encouraged by contemporary economic discourse, to regard the economy as . . . a realm in which individuals come together only to satisfy their selfish needs and desires But in any modern society, the economy constitutes one of the most fundamental and

193. *Id.* at 79.

194. *Id.*

195. See, e.g., Roscoe Pound, *The Scope and Purpose of Sociological Jurisprudence*, 25 HARV. L. REV. 140, 140-47 (1911).

196. James S. Coleman, *Social Capital in the Creation of Human Capital*, 94 AM. J. SOC. S95 (1988). For an extensive and enlightening genealogy of the social capital concept, see BEN FINE, *SOCIAL CAPITAL VERSUS SOCIAL THEORY: POLITICAL ECONOMY AND SOCIAL SCIENCE AT THE TURN OF THE MILLENNIUM* (2001).

197. Coleman, *supra* note 196, at S109-S113.

198. *Id.* at S95-S98, S100-S101.

199. *Id.* at S96.

200. FRANCIS FUKUYAMA, *TRUST: THE SOCIAL VIRTUES AND THE CREATION OF PROSPERITY* 57 (1995).

201. *Id.* at 49.

202. *Id.* at 11, 51, 361.

dynamic arenas of human sociability.”²⁰³ Market exchanges, he argued, are not simply an instrument, “a means to the end of earning a paycheck but an important end of human life itself.”²⁰⁴ People engage in economic activity “for the sake of recognition rather than merely as a means of satisfying natural material needs. . . . Work and money are much more important as sources of identity, status, and dignity.”²⁰⁵ Thus Fukuyama—famous for his claim that liberal capitalism is “the end of history”²⁰⁶—envisioned a market economy comprised not of atomistic, narrowly self-interested individuals but rather of explicitly *social* forms of organization. These forms are like the (idealized, well-functioning) family but “allow unrelated people to collaborate,”²⁰⁷ because they foster “social ties and moral obligation[s]”²⁰⁸ and even “social solidarity” that are not limited to the family but extend within and across associational, professional, not-for-profit and for-profit corporate groups.²⁰⁹

We can read Fukuyama as providing a large-scale articulation of ADR.²¹⁰ At the level of the individual dispute, ADR combines the self-interest of the market with the kind of voluntary human regard for others that Fisher and Ury (quite charitably) presume is emblematic of marriage.²¹¹ It promises new ideologies of interpersonal collaboration that are powerful precisely because they disrespect prior oppositions between self-interest and altruism, rationality and affect, the market and the family. On a broader conceptual level, ADR deploys (historically and ideologically) particular understandings of the family as a means of redescribing the market—that is, as a place of community, social network, and identity, not simply alienation, selfishness, and greed. Like Fukuyama, ADR strives to make compatible oppositional logics such as efficiency and social connection: economic goods are redistributed as relationships, and relationships are put to the service of economic goods.

In our present political moment of late neoliberalism, these are seductive harmonizing visions.²¹² Today, the social dimensions of our collective life have continued to emerge transformed from state-enforced entitlements, mandatory obligations, rights and insurance schemes *not* (or not only) into rational/economic cost-benefit calculations, but into requirements to cultivate responsible *social*

203. *Id.* at 6.

204. *Id.*

205. *Id.* at 7.

206. See FRANCIS FUKUYAMA, *THE END OF HISTORY AND THE LAST MAN* (1992).

207. FUKUYAMA, *TRUST*, *supra* note 200, at 150.

208. *Id.* at 56.

209. *Id.* at 156 (explaining how the social solidarity fostered in families mitigates free riding: “family members usually contribute to the success of a family enterprise more energetically than if they were collaborating with strangers and do not worry nearly so much about questions of relative contributions and benefits”).

210. In fact, today, ADR theorists quite explicitly argue that the production of social capital is both a means and ends of effective dispute system design. See, e.g., NANCY H. ROGERS, ROBERT C. BORDONE, FRANK E.A. SANDER, & CRAIG A. MCEWEN, *DESIGNING SYSTEMS AND CREATING PROCESSES FOR THE EFFECTIVE MANAGEMENT OF CONFLICT* (see chapter 8, “Enhancing Trust among People”) (forthcoming approximately 2011, Aspen) (manuscript on file with author).

211. Fisher & Ury, *supra* note 8, at 154.

212. As Ronen Shamir has persuasively argued, “the neo-liberal imagination . . . collapses the epistemological distinction between economy and society”—each transforms the other. Ronen Shamir, *The Age of Responsibilization: On Market-Embedded Morality*, 37 *ECONOMY & SOCIETY* 1, 6 (2008).

relations by market actors themselves: businesses, employers, laborers, producers, and consumers.²¹³ Yet, as several scholars have observed, the distributional effects of these new social configurations are at best unclear.²¹⁴

To return to the topic of this Symposium, the scholarly discourse on ADR has pursued a long-enduring debate about the “rule of law” and ADR—defined as an opposition between the public and the private, law and interests, and, by extension, the state and the market. As I have analyzed elsewhere, in the late 1970s and 1980s, critics mounted a “public/social” attack on ADR.²¹⁵ For example, famous legal figures such as Owen Fiss sought to defend the social values embodied by the public state against what he saw as ADR’s relentless drive towards individual utility and efficient exchange embodied by the private market.²¹⁶ In these criticisms, adjudication was described as a public and social process.²¹⁷ ADR, by contrast, was equated with unadulterated discourses of individualization, interest maximization, and private capital accumulation.²¹⁸

This Article suspended the public/private distinction in order to consider the family/market one and to discover what ADR proponents themselves envision when they conceptualize the private sphere. In so doing, it proposes to shift the terms of the debate. For early architects of ADR, private dispute resolution *extended* the social and relational norms of the family into commercial domains. To be sure, pioneers such as Mnookin, Folberg, or Fisher never made the blurring of the family/market divide an explicit theme in their work. But, as I have argued

213. See, e.g., Andrea Karin Muchlebach, *The Moral Neoliberal: Welfare State and Ethical Citizenship in Contemporary Italy*, at xvii-xix (June 2007) (unpublished Ph.D. dissertation, University of Chicago) (arguing that the Italian welfare state “is shifting away from a public, state-mediated moral order” where citizens are bound through rights and political ties to a “privatized, diffuse moral order” where citizens are bound through affective relations of care and duty); Nikolas Rose, *Community, Citizenship, and the Third Way*, 43 AM. BEHAVIORAL SCIENTIST 1395, 1395 (2000) (describing “the emergence of a new politics of conduct that seeks to reconstruct citizens as moral subjects of responsible communities”).

214. See, e.g., Lisa T. Alexander, *Stakeholder Participation in New Governance: Lessons From Chicago’s Public Housing Reform Experiment*, 16 GEO. J. ON POVERTY L. & POL’Y 117, 174-75 (2009) (illustrating the “limits of stakeholder collaboration” in public housing reform to advance the interests of marginalized groups); César A. Rodríguez-Garavito, *Global Governance and Labor Rights: Codes of Conduct and Anti-Sweatshop Struggles in Global Apparel Factories in Mexico and Guatemala*, 33 POL. & SOC’Y 203, 204-06 (2005) (critically analyzing the conditions under which codes of conduct can in fact protect the interests of labor versus those of management); Paul M. Secunda, *The Perils of Procedurally Regulating Self-Regulation*, 64 INDUS. & LAB. REL. REV. 203, 204 (2010) (book review) (arguing against any form collaborative workplace self-regulation without union representation); David A. Super, *Laboratories of Destitution: Democratic Experimentalism and the Failure of Antipoverty Law*, 157 U. PA. L. REV. 541, 546-48 (2009) (arguing that decentralized, collaborative, participatory forms of anti-poverty policymaking have harmed the interests of low-income people).

215. See Cohen, *supra* note 3.

216. See, e.g., Fiss, *supra* note 3, at 128 (“Today we feel increasing doubts about the existence of public values . . . and the dispute resolution model of adjudication, like the night-watchman state, accommodates those doubts. Both afford an easy haven for all those who would deny or minimize the role of public values in our social life and the need for governmental power to realize those values.”).

217. Owen M. Fiss, *Forward: The Forms of Justice*, 93 HARV. L. REV. 1, 2 (1979); Harry T. Edwards, *Alternative Dispute Resolution: Panacea or Anathema?*, 99 HARV. L. REV. 668, 676-78 (1986).

218. See, e.g., Fiss, *supra* note 3, at 122-23, 127-28 (describing the “dispute resolution model of adjudication”); Owen M. Fiss, *Against Settlement*, 93 YALE L.J. 1073, 1085 (1984); see also Cohen, *supra* note 3, at 1148-57.

here, it had a significant organizing effect on how they created the field. Today, defenders of ADR disrespect the public/private divide in precisely the same way their predecessors disrespected the family/market one. ADR, they argue against their critics, can generate the forms of human connection and social relationships that undergird and justify the functions of the public state. As our Symposium convener Richard Reuben recently put it, ADR can promote “the constructive *social capital* that is necessary to support the rule of law” and “effective democratic rule.”²¹⁹

Reuben’s argument does not answer public/social criticisms of ADR—rather, it illustrates the complex analytical work that the idea of “the social” today performs. To recap: critics, such as Fiss, have described ADR as private and therefore individuating and market-based. Proponents, such as Reuben, have answered that ADR is in fact (like the family) social and relational. But what neither side appears to address is that the market is now regularly described as social, affective, and relational too. Or to put this point another way, from a perspective concerned with distributive justice, the problem is not that ADR is privatizing and therefore individualizing and de-socializing. This Article has argued that as a technique of private ordering, modern ADR was never about individual efficiency dislocated from relational concerns. The potential problem instead is that ADR is depoliticizing. ADR’s greatest value is also its greatest danger: it relentlessly collapses binaries—public/private, social/economic, family/market—in order to integrate positions where some would want law and others direct action to fight out interests that in the real world are often stubbornly, even violently, opposed. The challenge for contemporary ADR critics and proponents, then, is as it always was: attention to distribution and power. It appears that today, however, we must analyze the distributional effects of private ordering regimes that, like ADR (or like contemporary theories of the market), are potentially hegemonic—they have already absorbed the oppositional social logics that once served as a source of market critique.

219. Richard C. Reuben, *How ADR Can Foster the Rule of Law: Beyond the Fundamental Tension*, October 15, 2010, <http://law.missouri.edu/csdr/symposium/rol/docs/RichardReuben.pdf> (last visited March 15, 2011) (emphasis added); Reuben, *supra* note 3, at 5; cf. Robert A. Baruch Bush, *Mediation and Adjudication, Dispute Resolution and Ideology: An Imaginary Conversation*, 3 J. CONTEMP. LEGAL ISSUES 1, 6, 15 (1989) (arguing that critics miss “the public-value argument for mediation” grounded in relationality and concern for others).