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This symposium examines the relationship between collective bargaining, grievance arbitration, and individual employee rights in light of *14 Penn Plaza LLC v. Pyett*.[1] *Pyett* presents a substantial challenge to the partners in collective bargaining. Since *Steele v. Louisville & Nashville Railway*,[2] the Supreme Court has recognized the potential conflict between majority will in workplace democracy and vindication of individual employee rights. For over three decades, labor and management have bargained on the understanding, espoused by the Court in *Alexander v. Gardner-Denver Co.*,[3] that employees retain their power to pursue individual claims of discrimination (via Equal Employment Opportunity, or EEO, complaints). *Pyett* suggests that it may be possible for a union to waive individual employees' rights to pursue claims of age discrimination in a judicial forum if the waiver is sufficiently clear and unmistakable. The continued growth of statutory claims in grievance arbitration raises the prospect of further formalism, a phenomenon some have termed "creeping legalism."[4]

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1. 14 Penn Plaza LLC v. Pyett, 129 S. Ct. 1456, 1461 (2009) (holding that a provision in a collective-bargaining agreement that clearly and unmistakably requires union members to arbitrate claims arising under the Age Discrimination in Employment Act of 1967 (ADEA) is enforceable).

2. Steele v. Louisville & Nashville Ry. Co., 323 U.S. 192 (1944) (holding that a union may not discriminate on the basis of race in a collective bargaining agreement and recognizing an implied duty of fair representation).

3. Alexander v. Gardner-Denver Co., 415 U.S. 36, 59-60 (1974) (holding an employee has the statutory right to trial de novo under Title VII of the Civil Rights Act of 1964 after an arbitrator rejected his claim in grievance arbitration under the nondiscrimination clause of a collective bargaining agreement).

4. The phrase "creeping legalism" appears to originate with Lon Fuller. L. FULLER, *Two Principles of Human Association*, *in* THE PRINCIPLES OF SOCIAL ORDER 76-78 (K. Winston ed., 1981); *see also* Frank S. Alexander, *Beyond Positivism: A Theological Perspective*, 20 GA. L. REV. 1089, 1120 (1986) (describing Fuller's alternative to legal positivism and the progression of the development of law);

Labor and management have an opportunity to address this challenge in future collective bargaining as contracts expire. Some participants in the symposium have suggested one solution; simply carve these claims out of the contract entirely. There is another approach. While preserving an individual employee's rights to pursue these claims in the Equal Employment Opportunity Commission (EEOC) and courts, labor and management can provide an alternative: voluntary mediation. However, mediation itself presents issues of creeping legalism. Some models of mediation require that neutrals and parties have substantive employment law expertise; others are much less legalistic.

This article will explore the question of creeping legalism in mediation of statutory disputes arising out of employment. First, it will briefly review the issue of creeping legalism in arbitration. Second, it will introduce dispute systems design (DSD). Third, it will review the analogous debate on legalism in mediation in three design contexts: evaluative mediation of employment disputes in the court-connected setting, grievance mediation embedded in the collective bargaining agreement, and transformative mediation of employment disputes in the United States Postal Service's (USPS's) REDRESS program. Most employees do not face a choice among mediation models; instead, they choose among adjudicative processes or mediation. Thus, the article will conclude by reporting the results of an interview study comparing USPS employees' experiences in the EEO complaint process, grievance arbitration, and employment mediation. These results show that an individual employee complainant may benefit from a non-adversarial, non-legalistic, and voluntary mediation model that seeks to foster communication and mutual understanding.

## I. CREEPING LEGALISM IN ARBITRATION

Grievance arbitration in collective bargaining dates back to the 1930s,[5] but received a major impetus during the era of the War Labor Board.[6] Over the two decades following the end of the War Labor Board, labor arbitration evolved from a less formal to a much more formal or legalistic process, viewed more as a quasi-judicial forum than an extension of collective bargaining.[7] This evolution has engendered substantial debate in the labor relations community.[8]

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John M.A. DiPippa, *Lon Fuller, the Model Code, and the Model Rules*, 37 S. TEX. L. REV. 303, 318 (1996) (reporting that Fuller describes two kinds of voluntary associations, those organized by legal principles contrasted with common aims, although all associations have some element of both).

5. *See* Denis R. Nolan, Disputatio: *"Creeping Legalism" as a Declension Myth*, 2010 J. DISP. RESOL. 1.

6. *See generally*, Benjamin Aaron, *An Oral History of the National War Labor Board and Critical Issues in the Development of Modern Grievance Arbitration: Catalyst: The National War Labor Board of World War II*, 39 CASE W. RES. L. REV. 519 (1989).

7. Perry A. Zirkel & Andriy Krahmal, *Creeping Legalism in Labor Arbitration: Fact or Fiction?*, 16 OHIO ST. J. ON DISP. RESOL. 243 (2001) (reporting on an empirical analysis of features of legalism). After its impetus with the War Labor Board in the 1940s, grievance arbitration matured and became institutionalized by the 1960s along the lines of the model created by J. Noble Braden—a model based on Braden's view of arbitration as a quasi-judicial or private-judge mechanism—rather than the George Taylor model—a model based on the idea of arbitration as an extension of collective bargaining.

8. *See, e.g.*, Reginald Alleyne, *Delawyerizing Labor Arbitration*, 50 OHIO ST. L.J. 93 (1989) (proposing to solve the problem through "mutually adoptable rules for the governance of all but the most complex labor arbitration proceedings"); Alain Frécon, *Delaying Tactics in Arbitration*, 59 DISP.

Perry Zirkel and Andriy Krahmal characterize the features of a more formal or legalistic forum as a case taking longer to complete from filing to award, featuring higher arbitrator fees and expenses, professional advocates and lawyers, witnesses, transcripts of testimony, post-hearing briefs, and arbitrators citing legal authorities in labor arbitration awards.[9] In their empirical study, they find that over the period from 1970 to 1997, the average total elapsed time for a case increased from 245.6 to 311.8 days (an increase of 27%);[10] that from 1970 to 1998, the total number of days arbitrators charged in fees grew from 2.93 to 3.74 (an increase of 27.6%);[11] and that from 1974 to 1998, the percentage of cases with post-hearing briefs rose from 43.4% to 77%.[12]

*Pyett* raises concerns of "galloping legalism" if statutory claims arising out of employment end up in binding arbitration under a collectively bargained grievance procedure. The duty of fair representation alone will induce unions to mount more formal cases to protect themselves against liability.

## II. DISPUTE SYSTEMS DESIGN IN EMPLOYMENT

The question of legalism in arbitration or mediation is essentially one of dispute systems design.[13] Unions and management have designed the private justice system of grievance arbitration; they can change that design through collective bargaining. With unionism in decline, there are new experiments in employment conflict management.[14] Designs vary, depending on who has control over design

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RESOL. J. 40, 42 (2005) (arguing that delaying tactics include jurisdictional challenges, discovery-related motions, and other procedural, and hence legalistic, challenges).

9. Zirkel & Krahma, *supra* note 7, at 245-47.

10. *Id.* at 251, Table 1. This increase is associated with the prehearing, hearing, and award stages. However, it is only statistically significant for the pre-hearing phase. *Id.* at Table 4, 258.

11. *Id.* at 252, Table 2. Arbitrator study days (1.66 to 2.3, an increase of 38.5%) grew more than hearing days (.92 to 1.1, an increase of 19.5%). This increase is statistically significant for hearing, arbitrator study, and total charged days.

12. *Id.* at 254, Table 3. The percentage of cases with transcripts rose from 28.1% to 41.7%, but 1998 appears to be an outlier and the authors find no statistically significant increase over time in a multivariate regression analysis.

13. WILLIAM L. URY, JEANNE M. BRETT & STEPHEN B. GOLDBERG, GETTING DISPUTES RESOLVED: DESIGNING SYSTEMS TO CUT THE COST OF CONFLICT 41-64 (1988). Professors William Ury, Jeanne Brett, and Stephen Goldberg coined the phrase dispute system design (DSD) to describe the purposeful creation of a program to manage conflict. They argued that dispute resolution processes can focus on interests, rights, or power, but that these systems will function better for stakeholders if they focus primarily on their interests. Interest-based systems focus on the disputants' underlying needs (interests), such as those for security, economic well-being, belonging to a social group, recognition from others, and autonomy or control. Rights-based processes focus on legal entitlements under the language of a contract, statute, regulation, or court decision. Power-based systems are least effective as a basis for resolving conflict; workplace examples include strikes, lockouts, and corporate campaigns.

14. DAVID B. LIPSKY, RONALD L. SEEBER & RICHARD D. FINCHER, EMERGING SYSTEMS FOR MANAGING WORKPLACE CONFLICT: LESSONS FROM AMERICAN CORPORATIONS FOR MANGERS AND DISPUTE RESOLUTION PROFESSIONALS (2003). They report the results of their unique 1997 national survey on the Fortune 1000's use of various forms of alternative dispute resolution (mediation, ombudsperson, fact-finding, peer review, arbitration, mini-trials, mediation/arbitration, and in-house grievance procedures). Based on on-site interviews with a sample of the respondents, they develop a framework for analyzing organizational conflict management choices. *Id.*

choices.[15] Commentators have called for more systematic analysis[16] and evaluation[17] of dispute systems designs.[18] Stephanie Smith and Janet Martinez recently proposed a framework for analysis that examines goals, processes, structure, stakeholders, resources, success, and accountability.[19]

Goals include understanding what types of conflicts the system seeks to address. Employment disputes involve conflict arising out of a continuing or terminated employment relationship. Typical cases include: complaints of discrimination under state and federal EEO law, wrongful discharge under state law, whistleblower retaliation, workers' compensation, unemployment compensation, negligent supervision (employee violence at workplace), wage and hour violations, occupational safety disputes, breach of contract, alleged violations of administrative policies on performance evaluation, supervision, assignment of duties, communication problems in the chain of command, collective bargaining grievances, and unfair labor practice charges, among others.[20]

Designers' goals vary widely. David Lipsky, Ronald Seeber, and Richard Fincher developed a framework for analyzing organizational conflict management choices. They identified independent variables grouped into environmental factors and organizational motivations that together give rise to a conflict management strategy to contend, settle, or prevent workplace conflict.[21] The environmental factors include market competition, government regulation, litigation trends,

15. Lisa Blomgren Bingham, *Self-determination in Dispute System Design and Employment Arbitration*, 56 U. MIAMI L. REV. 873 (2002); Lisa Blomgren Bingham, *Why Suppose? Let's Find Out: A Public Policy Research Program on Dispute Resolution*, 2002 J. DISP. RESOL. 101-26.

16. Stephanie Smith & Janet Martinez, *An Analytic Framework for Dispute System Design*, 14 HARV. NEGOT. L. REV. 123 (2009).

17. Lisa Blomgren Bingham, *Designing Justice: Legal Institutions and Other Systems for Managing Conflict*, 24 OHIO STATE J. DISP. RESOL. 1 (2009).

18. Recent Nobel Laureate Elinor Ostrom has provided a framework for institutional analysis and design that examines participants, roles, outcomes, allowable actions, control over process and outcome, transparency, accountability, costs and benefits. ELINOR OSTROM, UNDERSTANDING INSTITUTIONAL DIVERSITY (2005). The study of institutional design is the subject of literature in political science, economics, sociology, public affairs, and policy analysis.

19. Smith & Martinez, *supra* note 16, at 133.

20. *See, e.g.*, CATHY A. COSTANTINO & CHRISTINA SICKLES MERCHANT, DESIGNING CONFLICT MANAGEMENT SYSTEMS: A GUIDE TO CREATING PRODUCTIVE AND HEALTHY ORGANIZATIONS 100 (1996) (listing disputes among employees and supervisors, grievances over work performance and evaluation, labor relations, and contracts); JOHN T. DUNLOP & ARNOLD M. ZACK, MEDIATION AND ARBITRATION OF EMPLOYMENT DISPUTES 81 (1997) (listing disputes covered by an arbitration clause as including claims for wages or other compensation, breach of contract or covenant, tort claims, discrimination claim based on race, color, sex, religion, national origin, disability, sexual orientation, marital status, or age, claims for denial of benefits, claims for violation of any federal, state, or other governmental law, statute, regulation, or ordinance, or claims under common law); James A. Gross, *Takin' It to the Man: Human Rights at the American Workplace*, *in* HUMAN RIGHTS IN LABOR AND EMPLOYMENT RELATIONS 13 (James A. Gross & Lance Compa eds., 2009) (listing nondiscrimination, freedom of association, collective bargaining, safety and health, wages, hours, and working conditions, migrant labor, forced labor, child labor, employment security, social security, and training and technology assistance); KARL A. SLAIKEU & RALPH H. HASSON, CONTROLLING THE COSTS OF CONFLICT: HOW TO DESIGN A SYSTEM FOR YOUR ORGANIZATION 68 (1998) (describing Shell's RESOLVE System for employment litigation and discrimination complaints). This catalogue and the discussion that follows applying the Smith & Martinez framework are drawn from a chapter on employment dispute systems in LISA BLOMGREN BINGHAM, JANET K. MARTINEZ & STEPHANIE SMITH, DISPUTE SYSTEMS DESIGN: PREVENTING, MANAGING, AND RESOLVING CONFLICT (working title for text scheduled to appear in 2011).

21. LIPSKY, ET AL., *supra* note 14, at 118.

legal and tort reform, statutory and court mandates, and unionization. The organizational motivations include organizational culture, management commitment, the champion's role, organization's exposure profile, and a precipitating event.[22]

Conflict management and prevention involves moving conflict management upstream, so that employees and supervisors address their differences before, rather than after, a complaint was filed. Goals for conflict management and prevention include improving morale, performance, employee citizenship behaviors, and image of the employer. These goals tend to be associated with human resources management. The settlement strategy involves downstream dispute resolution. The contend strategy may arise from risk avoidance and involves structuring processes to reduce the likelihood of financial liability in the event of litigation without regard to ongoing human resources management. Both of these latter two strategies are associated with law department programs. All three strategies have as goals reducing complaints, transaction costs, and litigation costs.

Processes and structure to prevent, manage, and resolve disputes vary with context. Programs may exist in a non-union workplace, or they may coexist with a union grievance procedure.[23] However, there are also programs offered by administrative agencies and courts for resolving employment disputes.[24] Whether employer-based or third party, programs may offer a variety of interventions, including an ombuds, early neutral assessment, fact-finding, peer panels, mediation, binding or advisory rights arbitration, binding or advisory interest arbitration, or some combination.[25] These different interventions may be integrated if there is an ombuds program[26] or integrated conflict management system,[27] or they may exist independently and in parallel with little or no coordination.

Examples of processes or structures include: grievance procedures in collective bargaining agreements; employee assistance plans (EAP); referrals to outside psychological counseling; workers compensation (internal human resources and state administrative agency); administrative grievance processes for nonunion employees; sexual harassment grievance procedures; internal EEO grievance procedures; employee evaluation and discipline; hotlines; confidential whistleblower procedures; unemployment compensation appeals to state agencies (may start with internal human resources handling and severance negotiation); civil service review boards and teacher tenure systems in the public sector; and unfair labor practice processes of the National Labor Relations Board, state boards of labor relations, or public employee relations boards for state and federal employees.[28]

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22. *Id.*

23. *See, e.g.*, the REDRESS program, *infra* Section III.D. The USPS is the largest unionized civilian employer in the United States. *See also* LIPSKY, ET AL., *supra* note 14, at 160-61 (discussing and critiquing the view that employment dispute systems cannot coexist with union grievance procedures).

24. *See, e.g.*, LIPSKY, ET AL., *supra* note 14, at 287-291 (discussion of the Massachusetts Commission Against Discrimination Alternative Dispute Resolution Program); *Id.* at 293-95 (discussion of the EEOC mediation program).

25. *See, e.g.*, COSTANTINO & MERCHANT, *supra* note 20, at 38 Figure 3.1.

26. *See generally*, CHARLES L. HOWARD, THE ORGANIZATIONAL OMBUDSMAN: ORIGINS, ROLES AND OPERATIONS-A LEGAL GUIDE (2010).

27. *See, e.g.*, LIPSKY, ET AL., *supra* note 14, at 13 (describing an integrated conflict management system as one that has the broadest possible scope, a culture that welcomes dissent and encourages resolution at the lowest level, has multiple access points, multiple options, and support structures.

28. This is simply a sketch of the landscape drawn from work in progress. BINGHAM, MARTINEZ & SMITH, *supra* note 20.

The incentives and disincentives for using the system vary with structure. Relevant structural features at the largest scale include: sector or setting; overall dispute system design, including level of self-determination and institutionalization; nature of intervention; due process protections; voluntariness; timing; and quality and characteristics of neutrals. These features can shift or impose costs on employees, or change the perceived likelihood of success in ways that encourage or discourage use. For example, the REDRESS program costs were borne entirely by the Postal Service, employees could bring any representative they chose, and it was voluntary for employees but mandatory for the respondent supervisor.[29] Moreover, employees could return to the traditional EEO process at any point. Thus, during the period discussed in this article, it was a no-lose process; seventy-five percent of employees generally chose to participate. In contrast, mandatory or adhesive employment arbitration may impose arbitrator fees on employees, and the limits on judicial review may deter employees from pursuing a claim.

The chosen system's interaction with the formal legal system also varies with structure. In voluntary programs entailing nonbinding processes, these are alternatives that do not supplant the formal legal system but merely supplement or precede it. In binding arbitration systems, programs may effectively preempt the formal legal system, eliminate access to both an administrative agency and a civil trial before a judge or jury on the evidence,[30] and dramatically reduce the scope of review in any judicial proceeding.[31]

There are many stakeholders in employment dispute systems. Within management, stakeholders include: the CEO, highest managers, law department and in house counsel, outside counsel, human resource management department, risk management offices, and, if separate, labor relations offices and offices or staff dedicated to processing various types of complaints. Apart from management, stakeholders include rank and file employees, employees inside and outside unions, middle managers, low-level supervisors, employee representatives (*i.e.*, unions and in house associations if nonunion), employee outside counsel on occasion, and professional or nonprofessional divisions. If public or nonprofit sector, stakeholders include elected representative governmental bodies, taxpayers, the public as consumers of public services, parents and students (regarding schools), and beneficiaries of services. If private or nonprofit, stakeholders include shareholders, the board of directors, and consumers of products or services. More distant stakeholders include industry associations, national manufacturing associations, and other similar entities or businesses who might look to practices as models; this is suggested by institutional and diffusion of innovation theory.

The parties' relative power will be reflected in control over DSD. This varies depending on whether the employer is a union or nonunion environment. In a union environment, power is shared. If nonunion, employers have most of the

29. For a comprehensive description and analysis of the REDRESS program, *see generally*, Lisa Blomgren Bingham, Cynthia J. Hallberlin, Denise A. Walker & Won Tae Chung, *Dispute System Design and Justice in Employment Dispute Resolution: Mediation at the Workplace*, 14 HARV. NEGOT. L. REV. 1 (2009).

30. *See, e.g.*, Preston v. Ferrer, 552 U.S. 346, 349-50 (2008) (holding that the Federal Arbitration Act preempted state law remedy before a state labor agency and compelled parties to arbitrate).

31. *See, e.g.*, Hall Street Assocs., L.L.C. v. Mattel, Inc., 552 U.S. 576, 578-579 (2008) (holding that the Federal Arbitration Act's standards for judicial review for outrageous arbitrator conduct were exclusive and preempted parties' agreement to expand judicial review to errors of law).

power. Employees have only market power, which varies with demand for their skills and employment rates. How stakeholder interests are represented also varies. In a nonunion environment, if an employer designs a system unilaterally for risk management, there is often little representation of employee interests. If the employer undertakes a design for conflict prevention and management, there may be representation through focus groups or committees, following organizational development best practices for designing a system.

The financial resources that support the system may make the difference between success and failure. Resources include the question of who pays for the system, the neutrals, the cost of representation, hearing space, whether there is training to use the system (for example, interest-based negotiation skills or active listening), or the use of cost-shifting (loser pays arbitrator, or other party's attorneys' fees) as a strategy for risk avoidance. Dedicated staff or human resources may also support the system. For example, an employer may adopt a full internal dispute resolution program such as an ombuds or inside peer mediation, in contrast with a program provided by external contract such as mandatory binding arbitration with the American Arbitration Association.

How to determine the success of a system and accountability to stakeholders are difficult issues. For example, this depends upon transparency. Generally, private sector systems are not at all transparent. Often, they are confidential by contract between the disputants and the neutral arbitrator or mediator. In many states, there is a privilege against disclosure of mediation communications. California has mandated disclosure of employment arbitration data to mixed success.[32] Public sector systems are governed by state and federal freedom of information acts and are much more transparent, but even here there are exceptions to disclosure for personnel files and similar files where disclosure would be an invasion of privacy. In the absence of comprehensive information, very few systems include evaluation components. Reviews of existing literature suggest that mediation systems can provide procedural justice and have positive organizational outcomes.[33]

## III. CREEPING LEGALISM IN MEDIATION

There is an ongoing dialogue regarding the definition and boundaries of various forms of mediation practice that corresponds roughly to the dialogue on creep-

32. Third party providers must disclose certain data pursuant to California law. *See* CAL. CIV. PRO. CODE § 1281.96 (West 2007). An unpublished paper presented at the American Bar Association Section of Dispute Resolution conference in 2005 examined arbitration disclosure statements reflecting a two-year caseload of over 4,000 arbitrations, analysis of a sample of which reflected that thirty-two percent or roughly 1280, were employment cases. Lisa Blomgren Bingham, Jean Sternlight, & John Healey, Arbitration Data Disclosure in California: What We Have and What We Need (2005) (unpublished paper) (on file with author). However, the disclosures were incomplete and ambiguous.

33. *See generally*, Lisa B. Bingham, *Employment Dispute Resolution: The Case for Mediation*, 22 CONFLICT RES. Q. 145 (2004) (concluding that DSDs using mediation has proven itself capable of producing positive organizational outcomes, while there is no evidence that nonunion employment arbitration has that impact); *see also* David B. Lipsky & Ariel C. Avgar, Commentary, *Research on Employment Dispute Resolution: Toward a New Paradigm*, 22 CONFLICT RESOL. Q. 175 (2004) (advocating multivariate models and more sophisticated statistical techniques to measure the impact of employment dispute resolution); LIPSKY, ET AL., *supra* note 14.

ing legalism in arbitration. This section will first briefly describe mediation models in terms of their formalism or legalism. Second, it will describe recent findings about three mediation settings: court-connected mediation, grievance mediation in collective bargaining, and transformative mediation for employment disputes in the REDRESS program. The data suggest that certain mediation behaviors in a given context do make a meaningful difference in a disputant's experience. As labor and management consider new collective agreements in the shadow of *Pyett*, they might consider alternative dispute systems designs.

### *A. Mediation Models*

Mediation models include evaluative, facilitative, or transformative, although there is some controversy associated with these labels.[34] In 1996, Leonard Riskin offered a grid of mediation styles called the Problem Definition Continuum that describes "what mediators do" in terms of either evaluation or facilitation along one axis, and "ways of defining the problem" as either broad or narrow along the other axis, ranging from litigation issues (narrow) to community interests (broad), to capture the goals of mediation.[35]

The evaluative mediator focuses on helping the parties understand the strengths and weaknesses of their case by providing assessment, prediction, and direction.[36] Evaluative mediators generally ask the parties to make formal opening statements presenting their case, and then conduct one or more caucuses in which they meet privately with disputants. The mediator focuses on collecting facts, identifying issues, and analyzing the parties' legal arguments to develop a sense of the case's economic value. In other words, the mediator evaluates who is likely to win and how much the winning party will probably recover. In order to press the parties to settle, the mediator will judiciously share this evaluation with each side at strategic moments. The mediator may propose a particular settlement. This model also tends to involve a more directive mediator, one who will not hesitate to "arm-twist" the parties to achieve settlement. Attorneys sometimes appreciate this approach because it helps them control unrealistic clients. However, parties often report reduced satisfaction with this form of mediation and mediator.[37]

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34. *See* Michael L. Moffitt, *Schmediation and the Dimensions of Definition*, 10 HARV. NEGOT. L. REV. 69, 93-102 (2005) (arguing that prescriptive acontextual definitions do not sufficiently advance our inquiry into how specific mediator practices function, and that there are five key questions we should consider about mediation: who is allowed to do it; who should get regulatory benefits; to whom should the market turn for services; what works; and what behavior is appropriate?); *see also*, Jonathan M. Hyman, *Swimming in the Deep End: Dealing with Justice in Mediation*, 6 CARDOZO J. CONFLICT RESOL. 19 (2004) (arguing for an approach to justice in mediation based on the detailed facts and context of each case).

35. Leonard L. Riskin, *Understanding Mediator's Orientations, Strategies, and Techniques: A Grid for the Perplexed*, 1 HARV. NEGOT. L. REV. 7, 17 (1996).

36. *Id.* at 44; *see also*, Dorothy Della Noce, *Evaluative Mediation: In Search of Practice Competencies*, 27 CONFLICT RESOL. Q. 193 (2009) (arguing there is demand for evaluative services and the need to come up with ways to evaluate "good" evaluative mediators since there are evaluation tools for transformative and facilitative mediation).

37. Susan S. Raines, Timothy K. Hedeen & Ansley B. Barton, *Best Practices for Mediation Training and Regulation: A Preliminary Review*, 48 FAMILY COURTS REV. (forthcoming 2010).

On the other end of the "what mediators do" axis, Riskin described the facilitative mediator, who focuses on clarifying and enhancing communication between the parties and helping them decide what to do.[38] The mediator generally will listen to opening statements and may conduct caucuses, but the focus of the process is not on the legal merits of the dispute, so much as on the parties' underlying needs and how those needs might be met in an interest-based settlement. The mediator generally will avoid evaluating the case, but may engage in "reality-testing" to help the parties achieve a more objective sense of their alternatives to a negotiated settlement. The mediator will help the parties engage in brainstorming to generate ideas for resolving the dispute, and will also suggest options to include in a settlement. However, one study has found that while mediators may call themselves "facilitative," their actual mediator behaviors often more closely resemble evaluative mediators.[39]

The primary goal of both facilitative and evaluative mediation is settlement, defined as reaching an agreement or solving a problem. In response to the criticism that the narrow-broad continuum does not capture all of the potential goals of mediation, Riskin revised the grid.[40] He substituted the word "directive" for evaluative and "elicitive" for facilitative, to better describe how to anchor the role of the mediator in the grid.[41] He then proposed a new grid "system" to capture the range of decisions in mediation and the extent to which participants can affect them, including matters of substantive compared to procedural decision-making.[42] In part, Riskin revised the grid to encompass new models of mediation, such as the transformative model.

In transformative mediation, the goal is framed as empowerment and recognition. Empowerment is movement away from weakness to strength, becoming clearer, more confident, articulate, and decisive.[43] Recognition is movement from self-absorption to responsiveness, becoming more attentive, open, trusting, and understanding of the other party.[44] Settlement is not a goal but rather sometimes an outcome that derives from empowerment and recognition. Transformative mediators do not unilaterally structure the process by setting ground rules, asking for opening statements, calling caucuses, brainstorming, and the like. Instead, the mediator will ask the participants how they would like to structure the process, and if necessary, will offer them a series of choices or examples. The transformative mediator does not evaluate or offer opinions on the merits of the dispute, does not pressure participants to settle, and does not recommend particular settlement terms or options. Instead, the mediator attempts to highlight moments in the discourse when one participant recognizes and acknowledges the perspective of the

38. *Id.* at 24.

39. Lorig Charkoudian et al., *Mediation by Any Other Name Would Smell as Sweet—or Would it? The Struggle to Define Mediation and its Various Approaches*, 26 CONFLICT RESOL. Q. 293 (2009). In this combination of studies, mediators first characterized their practice using open-ended questions. Next, researchers observed mediator practices. The study entailed a relatively large sample.

40. Leonard L. Riskin, *Decisionmaking in Mediation: The Old Grid and the New Grid System*, 79 NOTRE DAME L. REV. 1, 22-23 (2003).

41. *Id.* at 30.

42. *Id.*

43. *Id.* at 55.

44. *Id.* at 48.

other.[45] By putting control over the process in the hands of disputants, transformative mediation is consistent with self-determination theory in the workplace.[46]

Thus, the choice of mediation model in a DSD is important for participants' experiences. These varying models affect the nature of the interaction between disputants.

### *B. Court-connected Mediation*

Court-connected mediation has become all but universal.[47] Examples include mediation of federal appellate cases by court employees or private mediators from a roster.[48] Designs include face-to-face mediation, telephone mediation, or even mediation through text over the internet, or online dispute resolution.[49] There is a growing body of research on mediation in the courts.[50]

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45. For more detail on specific mediator behaviors in transformative practice, see Joseph P. Folger & Robert A. Bush, *Transformative Mediation and Third-Party Intervention: Ten Hallmarks of a Transformative Approach to Practice*, 13 MEDIATION Q. 263, 266-76 (1996).

46. *See, e.g.*, Marylène Gagné & Edward L. Deci, *Self-determination Theory and Work Motivation*, 26 J. ORG. BEHAV. 331 (2005) (describing self-determination theory as distinguishing between autonomous motivation and controlled motivation, and autonomy as acting with a sense of volition and the experience of choice).

47. For an excellent symposium on mediation in the courts that presages the discussion about legalism in mediation, see *Symposium*, 2002 J. DISP. RESOL. 1, which includes Deborah R. Hensler, *Suppose It's Not True: Challenging Mediation Ideology*, 2002 J. DISP. RESOL. 81 (arguing for dignified fact and law based dispute resolution processes and not transformative mediation in courts); Lisa B. Bingham, *Why Suppose? Let's Find Out: A Public Policy Research Program on Dispute Resolution*, 2002 J. DISP. RESOL. 101 (comparing research on disputant preferences and arguing that control over dispute system design and context matter); Chris Guthrie, *Procedural Justice Research and the Paucity of Trials*, 2002 J. DISP. RESOL. 127; Craig A. McEwen & Roselle L. Wissler, *Finding Out If It Is True: Comparing Mediation and Negotiation through Research*, 2002 J. DISP. RESOL. 131; John R. Phillips, *Mediation as One Step in Adversarial Litigation: One Country Lawyer's Experience*, 2002 J. DISP. RESOL. 143; Judith Resnick, *Mediating Preferences: Litigant Preferences for Process and Judicial Preferences for Settlement*, 2002 J. DISP. RESOL. 155; Susan S. Silbey, *The Emperor's New Clothes: Mediation Mythology and Markets*, 2002 J. DISP. RESOL. 171; Nancy A. Welsh, *Disputants' Decision Control in Court-Connected Mediation: A Hollow Promise Without Procedural Justice*, 2002 J. DISP. RESOL. 179.

48. *See* Shawn P. Davisson, *Privatization and Self-Determination in the Circuits: Utilizing the Private Sector Within the Evolving Framework of Federal Appellate Mediation*, 21 OHIO ST. J. ON DISP. RESOL. 953, 954 (2006) (discussing the prevalent DSD of mediation by court staff in the federal sector contrasted with the choice to hire a private sector mediator in state courts).

49. *See* David Allen Larson, *Technology Mediated Dispute Resolution (TMDR): A New Paradigm for ADR*, 21 OHIO ST. J. ON DISP. RESOL. 629 (2006) (describing the differences between online dispute resolution and face-to-face mediation).

50. A comprehensive review of that research is outside the scope of this article. *See, e.g.*, ELIZABETH PLAPINGER & DONNA STIENSTRA, ADR AND SETTLEMENT IN THE FEDERAL DISTRICT COURTS: A SOURCEBOOK FOR JUDGES & LAWYERS (1996) (describing the elements of court-connected DSDs in the U.S. federal district courts and reporting on the variation of designs); THE RESOLUTION SYSTEMS INSTITUTE, PROGRAM EVALUATIONS, http://aboutrsi.org/publications.php?sID=9 (last visited May 19, 2010) (an analysis of evaluations of state and federal court ADR programs with descriptions of their design); Thomas J. Stipanowich, *ADR and the "Vanishing Trial": The Growth and Impact of "Alternative Dispute Resolution"*, 1 J. EMPIRICAL LEGAL STUD. 843 (2004). For a review of court-connected ADR using DSD as its organizing frame, see Roselle L. Wissler, *The Effectiveness of Court-Connected Dispute Resolution in Civil Cases*, 22 CONFLICT RESOL. Q. 55 (2004); John Lande, Commentary, *Focusing on Program Design Issues in Future Research on Court-Connected Mediation*, 22 CONFLICT RESOL. Q. 89, 93-97 (2004) (arguing that researchers should examine outcomes including substantive justice, empowerment and recognition, and interest-based problem solving).

Not surprisingly, the dominant model of mediation in the courts appears to be evaluative or legalistic. In court-connected mediation programs in which disputants are often represented by counsel, lawyers often prefer mediators who can accurately evaluate the merits and value of the case, and who can help them control unreasonable clients.[51] Nancy Welsh has criticized mediator strong-arm tactics in court-connected evaluative mediation and suggested that courts give disputants a cooling off period within which to reject a tentative settlement.[52]

Recently, the American Bar Association Section of Dispute Resolution commissioned a Task Force on Mediation Quality. The Task Force conducted a number of focus groups in large cities around the country seeking to gather perspectives on mediator quality in large stakes civil litigation. Participants included corporate counsel, mostly lawyers and not their clients. John Lande served as reporter for the Task Force and provided a comprehensive analysis of the data. The Task Force found that lawyers in large stakes civil litigation want mediators with subject matter, meaning substantive legal, expertise.

The Task Force Findings suggest that lawyers prefer what amounts to legalism in court-connected mediation. Specifically, eighty percent believed analytical input appropriate. They described certain mediator skills as important, very important or essential. For example, ninety-five percent wanted the mediator to make suggestions and about seventy percent valued the mediator giving opinions. In about half or more of their cases, they reported that it was useful for the mediator to ask pointed questions that raise issues (ninety-five percent); to analyze strengths, weaknesses of case (ninety-five percent); to predict likely court results (sixty percent); to suggest ways to resolve issues (100 percent); to recommend a specific settlement (eighty-four percent); and to apply some pressure to accept solution (seventy-four percent). Most of these behaviors are more legalistic and associated with evaluative mediation.[53]

However, other studies show that the most common source of ethics complaints against court-connected mediators stem from overly strong evaluations or arm twisting.[54] Moreover, one study reveals diminishing marginal utility for evaluative tactics in high-end civil mediation; it shows that the more strong-arm the tactics become, the more negative the impact is on settlement rates.[55] Some states, such as Georgia, have explicitly rejected the evaluative model of mediation out of a belief that it is too similar to non-binding adjudication and therefore amounts to

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51. *See* Bobbi McAdoo & Art Hinshaw, *The Challenge of Institutionalizing Alternative Dispute Resolution: Attorney Perspectives on the Effect of Rule 17 on Civil Litigation in Missouri*, 67 MO. L. REV. 473, 475 (2002). *But see* Lela P. Love & John W. Cooley, *The Intersection of Evaluation by Mediators and Informed Consent: Warning the Unwary*, 21 OHIO ST. J. ON DISP. RESOL. 45, 70 (2005) (arguing for well-informed party consent before a mediator engages in evaluation of a case in order to maximize party self-determination).

52. *See* Nancy A. Welsh, *The Thinning Vision of Self-Determination in Court-Connected Mediation: The Inevitable Price of Institutionalization?*, 6 HARV. NEGOT. L. REV. 1, 6-7 (2001).

53. *See, e.g.*, Tina Nabatchi, Yuseok Moon, & Lisa Blomgren Bingham, *Evaluating Transformative Practice in the USPS REDRESS Program*, CONFLICT RESOL. Q. (forthcoming 2010) (describing results of a survey of a large sample of REDRESS mediators characterizing various mediator behaviors as more evaluative or more transformative).

54. Susan S. Raines, Timothy K. Hedeen & Ansley B. Barton, *Best Practices for Mediation Training and Regulation: A Preliminary Review*, 48 FAMILY COURTS REV. (forthcoming 2010).

55. James A. Wall, Jr. & Suzanne Chan-Serafin, *Processes in Civil Case Mediations*, 26 CONFLICT RESOL. Q. 261 (2009).

an inappropriate delegation of judicial authority.[56] This is of particular concern for pro se parties who may not be adequately familiar with the differences between mediation and adjudication and who may not understand their ability to completely reject proposals made by mediators.

There has been a tendency for courts to take a hands-off approach in many jurisdictions toward dispute systems design; after mandating mediation at a certain point in the litigation, courts generally leave the actual process up to private mediators either through disputant choice or via a roster.[57] Recently, there have been calls for courts to take a more active role in regulating the systems they have designed.[58] Donna Shestowsky has called for courts to consider disputants' preferences for different aspects of process when designing their programs.[59] The preferences of disputants and their lawyers may differ.

### C. Grievance Mediation

Collective bargaining presents a different context for mediation. Unlike court-connected cases, the great majority of collective bargaining cases involve disputants with a continuous relationship. There is a history of advocacy for grievance mediation as an alternative to arbitration in collective bargaining.[60] The literature suggests that grievance mediation is less legalistic than court-connected mediation. By its original design, grievance mediation involves interest-based negotiation skills and likely involves more facilitative and somewhat less legalistic mediation than courts. Mollie Bowers' study used empirical methods to examine the underuse of grievance mediation, summarized satisfaction and outcome data of from various grievance mediation programs, and argued that it is mostly

56. *See* Georgia Commission on Dispute Resolution - Welcome, http://www.godr.org (last visited May 19, 2010) (for the rules governing court-connected mediation in Georgia). In contrast, the state of Florida permits mediators in court-referred cases to give professional advice so long as it is based on a legitimate professional knowledge or certification (*i.e.*, a physician could comment on medical error issues or a tax account could give tax advice).

57. Courts will, however, address issues of mediator misconduct. *See* James R. Coben & Peter N. Thompson, *Disputing Irony: A Systematic Look at Litigation about Mediation*, 11 HARV. NEGOT. L. REV. 43, 95-98 (2006).

58. *See* Peter N. Thompson, *Enforcing Rights Generated In Court-Connected Mediation-Tension Between The Aspirations of a Private Facilitative Process and the Reality of Public Adversarial Justice*, 19 OHIO ST. J. ON DISP. RESOL. 509, 514-15 (2004); *see also* Nancy A. Welsh, *Making Deals in Court-Connected Mediation: What's Justice Got To Do With It?*, 79 WASH. U.L.Q. 787, 831-38 (2001) (calling for courts to deliver disputants an experience of procedural justice in court-connected mediation programs).

59. *See* Donna Shestowsky, *Disputants' Perceptions of Dispute Resolution Procedures: An Ex Ante and Ex Post Longitudinal Empirical Study*, 41 CONN. L. REV. 63 (2008). For excellent syntheses of the procedural justice literature as applied to court-connected dispute resolution, *see* Donna Shestowsky, *Disputants' Preferences for Court-Connected Dispute Resolution Procedures: Why We Should Care and Why We Know So Little*, 23 OHIO ST. J. ON DISP. RESOL. 549 (2008). *See also* Donna Shestowsky, *Misjudging: Implications for Dispute Resolution*, 7 NEV. L. REV. 487 (2007).

60. *See, e.g.*, Mollie H. Bowers, *Grievance Mediation: Another Route to Resolution*, 59 PERSONNEL J. 132 (1980) (reporting grievance mediation is not new as of 1980, but underutilized); Stephen B. Goldberg, *The Mediation of Grievances Under a Collective Bargaining Contract: An Alternative to Arbitration*, 77 NW. U. L. REV. 270 (1982) (advocating grievance mediation as an alternative to labor arbitration to avoid its slow, expensive, and formalistic downside).

path dependence that has led to an overuse of arbitration and an underuse of mediation in grievance issues.[61]

Analysis of longitudinal data consisting of participant surveys found that grievance mediation was interest-based, not rights-based.[62] During the period from 1980 to 2003, Stephen Goldberg reported the use of mediation in 3,387 grievances, eighty-six percent of which settled; of these settlements, half were compromises.[63] Grievance mediation took 43.5 days to complete, compared with 473 for arbitration.[64] Unions and management were highly satisfied with the process (sixty-eight percent and eighty-nine percent, respectively) without regard to outcome. The grievant was less so (forty-seven percent).

Goldberg also conducted an interview study. He obtained a seventy-eight percent response rate and a final sample of twenty-eight union representatives and twenty-three management representatives. Of the total sample, eighty-three percent said they were more able to resolve grievances.[65] They reported that a big asset was that mediation trained managers to look at all sides of an issue.[66] They also reported that parties learn communication skills and settled cases earlier in process.[67]

### *D. Transformative Mediation at the USPS*

The National REDRESS program adopted the transformative mediation model.[68] By design, transformative mediation is not legalistic. The program provides mediation for EEO disputes involving complaints of discrimination under Title VII of the Civil Rights Act of 1964,[69] the Age Discrimination in Employment Act of 1967,[70] and the Americans with Disabilities Act of 1990.[71] The key system design features that were part of the program during this study were that mediation was voluntary for the EEO complainant, but mandatory for the supervisor, since the supervisor represents the USPS as an organizational entity.

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61. Bowers, *supra* note 60.

62. Stephen B. Goldberg, *How Interest-based, Grievance Mediation Performs Over the Long Term*, 59 DISP. RESOL. J. 8 (2005).

63. *Id.* at 11.

64. *Id.*

65. *Id.* at 12.

66. *Id.* at 13.

67. *Id.*

68. For a detailed description of program design, implementation, and evaluation, *see* Bingham et al., *supra* note 29, at 1 (2009). The brief discussion that follows here is adapted from this more comprehensive report.

69. 42 U.S.C. § 2000 (2006). As early as 1992, there were concerns about the costs of the EEO Complaint and Counseling process in federal agencies, prompting a GAO study reporting that agencies described costs for disputants' time away from work, attorneys' fees, and payments in settlement agreements as significant in addition to their costs for staffing the function with employees and contractors. UNITED STATES GENERAL ACCOUNTING OFFICE, FEDERAL WORKFORCE: AGENCIES' ESTIMATED COSTS FOR COUNSELING AND PROCESSING DISCRIMINATION COMPLAINTS, GAO/GGD-92-64FS at 3 (1992). One might fairly characterize these as concerns with legalism in a supposedly informal administrative process.

70. 29 U.S.C. § 633 (2006).

71. 42 U.S.C. § 12112 (2006).

As required by EEOC regulations,[72] complainants were entitled to bring any representative that they chose to the table. These could include lawyers, union representatives, professional association representatives, family members, co-workers, or friends. The USPS, as a party, also designated a representative. The supervisor must have had settlement authority, or have been in immediate telephone contact during the process with someone else in the organization authorized to approve the settlement. Mediation occurred privately during work hours, and generally occurred within two to three weeks of a request.

In aggregate national exit surveys,[73] complainant and supervisor satisfaction with the process of mediation was high and comparable.[74] As to the mediation process, 91.2% of complainants and 91.6% of supervisors who participated in the program were somewhat satisfied or very satisfied. Both complainants (93.6%) and supervisors (93.2%) were particularly satisfied with the way in which mediation affords them an opportunity to present their views. Complainants (94.5%) and supervisors (93.8%) were also satisfied with the way the process permitted them to participate and the way they were treated in mediation (91.7% and 94.5%, respectively).

A second average addressed perceptions of the mediators. The great majority of complainants (total index average of 96.5%) and supervisors (total index average of 96.9%) reported satisfaction with the mediators who were assigned to their cases. The index included measures of respectfulness, impartiality, fairness, and performance. On each of these measures individually, between ninety-five percent and ninety-eight percent of all complainants and between ninety-six percent and ninety-eight percent of all supervisors were either somewhat satisfied or very satisfied with the mediators.

The substantial majority of employees and supervisors who participated in the program were satisfied or highly satisfied with the outcome of mediation (on average, 64.2% and 69.5% respectively based on the final national aggregate data). Complainants and supervisors most frequently reported satisfaction with the speed of the outcome (82.3% and 75.5% respectively) and their control over it (66.5% and 73.4% respectively).

The biggest gap between complainants and supervisors concerns the fairness of the outcome; 59.7% of complainants and 69.8% of supervisors reported satisfaction with outcome fairness. However, this difference is consistent with the great body of procedural justice research; moving parties expect more. Participant satisfaction with the mediation process and the mediators remained high even when the disputants do not fully resolve the dispute.

Exit surveys also provided data related indirectly to the nature of transformative mediation as more or less legalistic. Exit surveys asked whether participants

72. 29 C.F.R. § 1614.605 (2009).

73. *See* Bingham et al., *supra* note 29 (for the final comprehensive and longitudinal analysis of exit surveys from the national program from its inception in 1998 until 2006, when data collection terminated).

74. These results are consistent with early analyses of the pilot facilitative model. *See* Lisa B. Bingham, *Mediating Employment Disputes: Perceptions of REDRESS at the United States Postal Service*, 17 REV. OF PUB. PERSONNEL ADMIN. 20 (1997), and with a later analysis of interim data on the national transformative model; Yuseok Moon and Lisa B. Bingham, *Transformative Mediation at Work: Employee and Supervisor Perceptions on USPS REDRESS Program*, 11 INT'L. REV. PUB. ADMIN. 43 (2007).

agree that the mediator predicted who will win, evaluated the strengths and weaknesses of their case, or pressured them to accept a settlement. These are legalistic behaviors consistent with evaluative mediation but not transformative mediation. Complainants reported that mediators predicted who will win about 11.5% of the time, while all others reported this happens between 9.2% and 9.8% of the cases. Complainants reported that mediators evaluated strengths and weaknesses in about thirty-two percent of the cases, while all others, including complainants' representatives, reported this happened in 20.8% or less of the cases. Complainants reported that they felt pressured to accept a settlement in 15.2% of the cases, while their own representatives and others reported that this happened in 10.9% or fewer of the cases. Thus, in the great majority of REDRESS cases, mediators did not evaluate the substantive legal merits.

## IV. COMPARING TRANSFORMATIVE MEDIATION TO ADJUDICATIVE ALTERNATIVES

*Pyett* presents a challenge: how can unions and management address individual employee statutory rights within the organized workplace? This section will explore an alternative to creeping legalism: mediation of statutory disputes arising out of employment. It presents a qualitative empirical study of a voluntary non-legalistic alternative for complaints of discrimination, transformative mediation. Through in-person interviews, it examines perceptions of workplace conflict management processes at a large, unionized employer, the United States Postal Service (USPS). Specifically, it compares perceptions of the grievance procedure, EEO complaint process, and transformative mediation in the REDRESS program. In the Postal Service's REDRESS program, employees retained their right to resort to all three processes. Participation in one did not represent a waiver of the others.

First, this section will describe research methods. Second, it will present results of the interviews comparing these three alternatives. Third, it will examine the impact of implementing transformative mediation on perceptions of both the grievance procedure and EEO process. As a whole, the results suggest that implementing a non-legalistic mediation alternative may provide a choice that is effective for addressing some workplace conflict without undermining the union's role as elected representative. Instead, by modifying the DSD to provide a voluntary mediation alternative for appropriate complaints, it is possible to improve the function of the other processes.

### *A. Method*

The USPS implemented the REDRESS program nationally beginning in 1998. In order to gauge the impact of REDRESS on the USPS's workplace climate, researchers collected pre-REDRESS data in May and June 1998, and post-REDRESS data in April and May 2000. Data collection during both periods consisted of interviewers from the Indiana Conflict Resolution Institute (ICRI) traveling to three cities—Cleveland, New York, and San Francisco—and conducting interviews with USPS employees. These three cities represent separate geograph-

ic regions. While all three are in urban areas, interviewees included employees who generally work in the suburban and rural areas outside of these three cities.

For the pre-REDRESS study conducted in 1998, ICRI researchers randomly selected over 120 USPS employees from each of the three cities to request their participation in the interviews. Participants were chosen from all levels of the organization and represented the overall population of the USPS in each location. Researchers were able to obtain a response rate of forty percent or more in each of the three cities. A total of 214 employees and supervisors participated in the research: sixty-six in Cleveland, eighty-four in San Francisco, and sixty-four in New York.

For post-REDRESS data collection in 2000, the research team again randomly selected 120 employees from each of the three cities. San Francisco and Cleveland interviews were conducted with employees that proportionally represented the overall workforce, while New York interviews were again conducted with only production workers. In addition to the 120 employees randomly selected, researchers contacted the pre-REDRESS interviewees for a second, post-implementation interview. Researchers again obtained a response rate of at least forty percent.

The following two tables describe the entire sample.

**Table 1. Workplace-related Demographic Data on Study Participants (Before and After Implementation of REDRESS)**

| City | Production Employees | Customer Service Employees | Production Supervisors | Customer Service Supervisors | Managers | Others |
|---|---|---|---|---|---|---|
| Cleveland | *Before:* 10<br>*After:* 12 | *Before:* 33<br>*After:* 26 | *Before:* 4<br>*After:* 3 | *Before:* 4<br>*After:* 2 | *Before:* 6<br>*After:* 9 | *Before:* 9<br>*After:* 9 |
| New York | *Before:* 31<br>*After:* 40 | *Before:* 7<br>*After:* 7 | *Before:* 10<br>*After:* 7 | *Before:* 0<br>*After:* 5 | *Before:* 5<br>*After:* 9 | *Before:* 9<br>*After:* 9 |
| San Francisco | *Before:* 42<br>*After:* 38 | *Before:* 18<br>*After:* 12 | *Before:* 15<br>*After:* 5 | *Before:* 2<br>*After:* 5 | *Before:* 2<br>*After:* 6 | *Before:* 7<br>*After:* 10 |
| Totals | *Before:* 83<br>*After:* 90 | *Before:* 58<br>*After:* 45 | *Before:* 29<br>*After:* 15 | *Before:* 6<br>*After:* 12 | *Before:* 13<br>*After:* 24 | *Before:* 25<br>*After:* 28 |

**Table 2. Demographic Data on Study Participants (Combined Before and After Implementation of REDRESS)**

| City | Gender* (M, W) | Minority Percentage | Length of USPS Service | | | |
|---|---|---|---|---|---|---|
| | | | yrs < 10 | 10≤yrs<20 | 20≤yrs<30 | yrs ≥ 30 |
| Cleveland | *Before:* 40, 26<br>*After:* 30, 31 | *Before:* 44%<br>*After:* 57% | *Before:* 25<br>*After:* 15 | *Before:* 22<br>*After:* 18 | *Before:* 12<br>*After:* 17 | *Before:* 7<br>*After:* 11 |
| New York | *Before:* 47, 17<br>*After:* 44, 40 | *Before:* 72%<br>*After:* 75% | *Before:* 7<br>*After:* 6 | *Before:* 33<br>*After:* 34 | *Before:* 13<br>*After:* 17 | *Before:* 11<br>*After:* 20 |
| San Francisco | *Before:* 51, 33<br>*After:* 44, 32 | *Before:* 83%<br>*After:* 88% | *Before:* 14<br>*After:* 10 | *Before:* 43<br>*After:* 26 | *Before:* 14<br>*After:* 26 | *Before:* 13<br>*After:* 14 |
| Totals | *Before:* 138, 76<br>*After:* 118, 93 | *Before:* 68%<br>*After:* 75% | *Before:* 46<br>*After:* 31 | *Before:* 98<br>*After:* 78 | *Before:* 39<br>*After:* 60 | *Before:* 31<br>*After:* 45 |

* Gender data was missing for 3 interviewees.

During pre-REDRESS interviews ("before group"), employees were asked sixty-five questions in a forty-five minute to one hour period. Thirty-two of these

questions elicited yes/no or qualitative, open-ended responses. The remaining thirty-three questions required five-point Likert scale responses. The post-REDRESS interviews ("after group") conducted in 2000 consisted of seventy-seven questions—forty-eight yes/no or qualitative and twenty-nine five-point Likert scale questions. The research team designed both sets of interviews to collect information on workplace climate and communication. In addition, researchers asked interviewees about dispute resolution options and collected demographic data. Participants in the after group were also asked if any changes had occurred in the workplace climate over the previous year. All interviews were confidential, with no information traceable to a particular individual, and anonymity was guaranteed.

This discussion will focus primarily on results of interviews with non-supervisory employees after the USPS implemented the REDRESS program.

### *B. Grievance, EEO, and REDRESS Experiences*

Processes for resolving workplace conflict vary on a number of dimensions. How employees value these dimensions likely will affect their choice of process, if they have a choice. The goal of an effective DSD is to channel disputes to appropriate processes; in theory, this will improve satisfaction with all of the processes in the system.

The grievance, EEO, and REDRESS processes perform different functions within the USPS and are not usually substitutable. For instance, when contract issues are at stake and clarification or uniform enforcement of the contract is in question, then the grievance procedure is most likely appropriate; arbitrators can set necessary precedents. In cases of severe sexual harassment, it may be unwise to bring the parties together face-to-face in mediation, making the traditional EEO process most appropriate. REDRESS is appropriate for problems that arise out of interpersonal communication. Each process serves an important function.

The tables that follow reflect only (1) non-supervisory employees, (2) those with experience in a dispute process during the year immediately preceding interviews with researchers, and (3) interviews conducted after the Postal Service implemented REDRESS. Employees were asked whether they agreed or disagreed about certain characteristics of the process and how satisfied they were with various aspects of the process.

Table 3 represents a summary table regarding certain characteristics of employees' experience with grievances, the EEO process, and mediation.

**Table 3. Percent of Non-supervisory Employees Who Agreed with Process Characteristics**

| | Grievance | EEO | REDRESS |
|---|---|---|---|
| Did you have a chance to tell your side of the dispute to the other party? | 66% | 63% | 90% |
| Did the other party listen? | 41% | 44% | 81% |
| Did the other party apologize? | 11% | 11% | 33% |
| Did you apologize? | 7% | 17% | 15% |
| *N=* | *54-55* | *19-20* | *21* |

Table 3 shows that substantially more employees felt they had a chance to tell their side of the dispute to the other party in employment mediation than in the grievance or EEO procedures. Similarly, employees reported that the other party listened to them in mediation at twice the rate of the other two processes. An apology is not a goal of a legalistic procedure; in fact, advocates will advise against it as an admission against interest that may hurt a disputant's case. In contrast, an apology is evidence of empowerment and recognition of the other's perspective, both goals in the transformative mediation model. As Table 3 shows, it is relatively rare for the responding party to apologize in the grievance or EEO process (both eleven percent), but three times more employees report receiving apologies in employment mediation.[75]

To explore these characteristics in a little more detail, researchers asked interviewees to explain their experience. For the EEO and grievance processes, a number of interviewees noted that a third party had spoken for them. For the REDRESS process, about one-fifth of the disputants stated that they had told their side of the dispute and the other party responded, thereby indicating they had been heard. This response occurred less often with the grievance and EEO process users. In sum, users of the REDRESS mediation process were more likely to feel they had been listened to, that they had an opportunity to speak face-to-face with the other disputant(s), and that they did not have a third party speak for them.

This is an important indicator that the presence of a third-party mediator in the REDRESS process is not resulting in the parties' perception that the mediator is taking over or is in charge. An important idea in the transformative mediation model is that the parties should maintain control of the dispute resolution process and participate directly in dispute resolution, rather than indirectly through a third party. Through direct participation and maintaining control over the process, the parties are empowered.

Interview participants were asked to recall their most recent experience with a dispute resolution process and to rate their satisfaction with various aspects of the process.[76] Previously reported data about satisfaction with the REDRESS program is based upon exit surveys completed immediately at the conclusion of mediation. Employees interviewed reflected on experiences that had occurred as much as a year after the process. Survey research scholarship finds that satisfaction reports decline over time and are generally more favorable immediately after an experience.[77] Similarly, the results below for REDRESS are somewhat lower than previously reported exit survey data. Nevertheless, they reflect substantial rates of satisfaction with various aspects of the process. Non-legalistic mediation compares favorably with the grievance procedure and EEO process.

75. This result was durable and resilient during the longitudinal evaluation of the program. Bingham et al., *supra* note 29.

76. The ratings were on a five-point Likert scale from very satisfied to very dissatisfied. Not every interviewee answered each question, and therefore the N varies slightly.

77. ROYCE A. SINGLETON JR., BRUCE C. STRAITS, & M. M. STRAITS, APPROACHES TO SOCIAL RESEARCH 215 (2d Ed. 1993).

**Table 4. Percent of Non-supervisory Employees Who Were Satisfied or Very Satisfied with Various Aspects of the Process**

| | Grievance | EEO | REDRESS |
|---|---|---|---|
| With the process | 46% | 35% | 59% |
| With control over the process | 27% | 45% | 66%* |
| With participation in the process | 50% | 65% | 87%* |
| With the fairness of the process | 43% | 35% | 68%* |
| With the fairness of the outcome | 40% | 16% | 36% |
| With the degree to which the other party listened | 34% | 25% | 48%* |
| With the degrees to which the other party understood your concerns/issues | 35% | 20% | 43% |
| With the degree to which you understood the other party's concerns/issues | 45% | 53% | 71% |
| With the degree to which the other party recognized or was sympathetic to your concerns | 16% | 5% | 20% |
| *N=* | *54-55* | *19-20* | *21* |

*Sig. at .05 level[78]

Employees were more frequently satisfied or very satisfied with the mediation process overall (fifty-nine percent) than with the grievance or EEO processes (forty-six percent and thirty-five percent, respectively). In particular, they were satisfied with their control over mediation, their ability to participate in it, and the fairness of the mediation process. On these indicators, mediation outperformed the other more legalistic and adjudicatory processes. However, satisfaction with the fairness of the outcome was slightly higher for the grievance procedure (forty percent) than for mediation (thirty-six percent).

Researchers also asked about the impact that a process had on the relationships between employees and supervisors (Table 5). Overall, the mediation process was most likely to result in no change in the relationship or some improvement, rather than having a deleterious impact. No employees reported retaliation for participating in the process. In contrast, fewer employees reported improved communication and a small fraction reported retaliation for both the grievance procedure and EEO process. Employees in mediation were less likely to report an adverse impact on their relationship.

78. Asterisks indicate differences among categories are statistically significant at the .05 level using an analysis of variance on the mean responses to that question. A copy of the analysis is on file with the authors.

**Table 5. How Has the Process Affected Your Relationship With the Other Party?**

| | Grievance | EEO | REDRESS |
|---|---|---|---|
| No Effect | 51% | 35% | 41% |
| Relationship More Tense / Strained | 26% | 25% | 14% |
| Improved Communication | 9% | 5% | 27% |
| No Relationship Exists | 2% | 0% | 18% |
| No Longer Communicate With Each Other | 5% | 0% | 5% |
| Retaliation | 2% | 5% | 0% |
| *N=* | *57* | *20* | *22* |

Using a five-point Likert scale, researchers asked employees to rate their relationship with the other party to the dispute. Only five percent reported their relationship was better or much better after the EEO process and seventeen percent after the grievance procedure, but forty-one percent reported it was better after mediation.

**Table 6. After the Process, Was the Relationship with the Other Party . . . ?**

| | Grievance | EEO | REDRESS |
|---|---|---|---|
| Much Better | 4% | 0% | 5% |
| Better | 13% | 5% | 36% |
| Same | 57% | 65% | 45% |
| Worse | 17% | 20% | 9% |
| Much Worse | 9% | 10% | 5% |
| *N=* | *54* | *20* | *22* |

These findings suggest that a non-legalistic process can provide employees with an alternative to the traditional grievance procedure or EEO complaint process that they value and that serves an important function as part of a comprehensive conflict management system in the workplace.

### *C. Before and After Mediation: Evidence of a Positive Impact on Perceptions of Other Processes*

The preceding discussion may raise concerns about the impact of a potentially more popular and novel process on perceptions of the effectiveness of the grievance procedure. It raises the question: does this alternative undermine collective bargaining or the traditional EEO complaint process? To answer this question, researchers compared employee perceptions of the grievance procedure and traditional EEO processes before and after the USPS implemented REDRESS. While there is some variability in the data, in general, perceptions of the grievance procedure did not change and perceptions of the EEO complaint process improved after REDRESS. This is consistent with DSD theory. By addressing a body of conflict that stems primarily from interpersonal communication problems,

REDRESS provides a safety valve that permits the other processes to focus on more substantive, and more legalistic, cases.

Table 7 shows the percentage of non-supervisory employees who were very satisfied to satisfied or very dissatisfied to dissatisfied with the grievance procedures and traditional EEO processes before and after the USPS implemented the REDRESS program.

**Table 7. Non-Supervisory Employee Satisfaction/Dissatisfaction with Processes Before and After Implementation of the REDRESS Program**

| | Grievance | | EEO | |
|---|---|---|---|---|
| | Before | After | Before | After |
| | VS-S / VD-D | VS-S / VD-D | VS-S / VD-D | VS-S / VD-D |
| Process Overall | 53% / 38% | 46% / 49% | 25% / 65% | 35% / 50% |
| Control over Process | 41% / 44% | 27% / 51% | 20% / 70% | 45% / 35% |
| Participation in Process | 55% / 32% | 50% / 28% | 35% / 55% | 65% / 15% |
| Process Fairness | 47% / 38% | 43% / 33% | 20% / 60% | 44% / 50% |
| Outcome Fairness | 51% / 35% | 40% / 46% | 22% / 66% | 16% / 37% |
| Other Listened | 24% / 32% | 34% / 57% | 10% / 60% | 25% / 50% |
| Other Understood | 32% / 42% | 35% / 53% | 15% / 60% | 20% / 65% |
| Other Recognized | 29% / 54% | 16% / 63% | 11% / 66% | 5% / 75% |
| *N=* | *51* | *54* | *17* | *20* |

These findings are merely descriptive. It is notoriously difficult to conduct longitudinal research using qualitative interviews of this kind. In a perfect world, researchers would have followed trends in these indicators over more than two points in time and with significantly larger samples. However, the trend overall suggests that implementation of a voluntary mediation option does not damage perceptions of the union grievance procedure and substantially improves perceptions of the EEO complaint process.

There is some minor variation in both directions for the grievance procedure after REDRESS. There were slight improvements in satisfaction with the degree to which the other listened and understood and similar reductions in dissatisfaction with participation in the process and process fairness. There were negligible fluctuations in satisfaction with the fairness of the grievance process. Satisfaction with grievance outcome, while lower after REDRESS was implemented, was nevertheless higher than satisfaction with the outcome of either REDRESS or the EEO process. On those indicators where satisfaction declined markedly, such as satisfaction with control over the process or the degree to which the other recognized or was sympathetic to an employee's concerns, interviewees may have simply been recognizing the different features of the various processes. The union

is in control in the grievance procedure, not the individual grievant. Moreover, recognition of an employee's concerns is not a feature of the adversary process, which grievance arbitration more closely resembles. During implementation of REDRESS, employees had briefing sessions describing the process. Thus, they became more aware of the different process features.

More significant is the improved perception of the in-house EEO complaint process. This is the primary process for vindication of individual employee statutory rights in the federal sector. Satisfaction improved on every indicator except outcome fairness and degree to which the other recognized or was sympathetic with the claimant's concerns. Similarly, dissatisfaction declined on every indicator except satisfaction with the degree to which the other understood and the other recognized or was sympathetic to the claimant's concerns. Again, these two last indicators were explicit measures of success for the REDRESS mediation model, but not for a traditional adversarial EEO complaint process. Thus, they may reflect a contrast effect after employees became aware of REDRESS as an alternative process.

DSD theory suggests that fitting the forum to the fuss can improve conflict management overall. Providing alternatives that are not legalistic or adversarial may improve the function of the system and its parts. There are several key features of the REDRESS system that are important to these findings. First, mediation was voluntary for the employee complainant. Second, the employee complainant could bring any representative they chose, including their union representative. Third, employees did not have to make a choice among remedies; they could file a grievance and go to mediation through REDRESS on the same subject matter simultaneously. Moreover, they could go back to the traditional EEO process for an investigation and formal adjudicatory hearing if mediation failed. Given these features, the evidence suggests that employment mediation augments and does not undermine collective bargaining.

## V. CONCLUSION

Dispute resolution exists in the shadow of the civil justice system. There are a number of basic elements of dispute systems design in employment, including the nature of participants, intervention or outcome function, and de facto and de jure decision rules of the system. Design choices affect system performance and define the nature of justice a system delivers. The more similar alternative dispute resolution becomes to adjudication, the fewer its benefits. The more legalistic it becomes, the higher the costs, the greater the need for specialized legal representation, and the longer the conflict goes unresolved.

A system may offer participants choices among various processes. *Pyett* provides labor and management an opportunity to innovate. Rather than accelerating a trend toward legalism in labor arbitration, it may prompt labor and management to carve out a clearer alternative path for statutory claims arising out of employment, a path that includes mediation and preserves the right to resort to administrative agencies and court. This path has the potential to result in cost savings, higher participant satisfaction, and quicker resolutions for the majority of cases served.