

THE MERGER OF LAW AND MEDIATION: LESSONS FROM EQUITY JURISPRUDENCE AND ROSCOE POUND

*Jacqueline M. Nolan-Haley**

I. INTRODUCTION

Almost one hundred years ago, Roscoe Pound¹ warned about the decline of equity jurisprudence in the American legal system.² He called this phenomenon the “decadence of equity.”³ Though Pound offered several causes for this decline,⁴ what we know today as “institutionalization” in the court system was the primary suspect. “The very thing that made equity a system must, in the end, prove fatal to it. In the very act of becoming a system, it becomes legalized, and in becoming merely a competing system of law insures its ultimate downfall.”⁵ While Pound acknowledged that he saw some good from the “refinements” of equity, he rejected what he labeled the “perversions” that resulted from its being swallowed up by law.⁶

* Professor of Law, Fordham University School of Law; Director of the Fordham ADR & Conflict Resolution Program, and Graduate Studies Program. I would like to thank my friend and colleague, Catherine M. A. McCauliff, for sharing with me her immense knowledge of English Legal History, my research assistant, Elizabeth Frayer, for her excellent assistance and Fordham Law School for its financial support for this project.

¹ Roscoe Pound is considered one of the most significant leaders in American jurisprudence for his development of a progressive, sociological approach to law and judicial decision-making. His sociological approach is identified with the philosophy of Pragmatism. See generally, N.E.H. Hull, *Reconstructing the Origins of Realistic Jurisprudence: A Prequel to the Llewellyn-Pound Exchange over Legal Realism*, 1989 DUKE L. J. 1302 (1989).

² See Roscoe Pound, *The Decadence of Equity*, 5 COLUM. L. REV. 25 (1905).

³ Explaining this somewhat provocative description of equity, Pound wrote: “It may surprise at first thought in this era of liberal law, when the equity dockets of our courts are overloaded and some even think we are in danger of being governed by courts of equity, that any one should assert there is such a phenomenon as the decadence of equity. But we all see and know that the separate system of equity has been for a long time on the decline, and so much of the substance of law has always been wrapped up in procedure that we should be justified in anticipating grave effects. My purpose is to show that these effects have accrued and are accruing, and that the decadence of equity as a system is involving the decadence of a substantial element in our legal institutions.” *Id.* at 25.

⁴ *Id.*

⁵ *Id.* at 25. Pound was also concerned with the procedural effects of the blending of law and equity. *Id.* at 28.

⁶ See *id.* at 28.

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Pound is no stranger to the alternative dispute resolution (ADR) community. His influential address to the American Bar Association in 1906, *The Causes of Popular Dissatisfaction with the Administration of Justice*,⁷ challenged the bar to reform the existing legal regime.⁸ This speech was commemorated at the 1976 Pound Conference that launched the modern ADR movement.⁹ Perhaps less known, but equally significant today, are Pound's serious concerns about equity's loss of core values as they merged with common law into one court system. Pound cited as examples the facts that legal rules were superseding equitable rules in some cases, and that equitable rules were either disappearing, becoming rigid in their application, or being adopted in ways that confused rather than supplemented legal rules.¹⁰ Pound feared that the submergence of equity into one court system would result in a loss of the discretion and flexibility that characterized equitable jurisprudence and distinguished it from the common law's rigidity.¹¹ Almost one hundred years later, scholars echo the same sentiment.¹²

Pound's concerns about the state of equity jurisprudence resonate with modern ADR scholars, who worry about the effects of blending settlement with adjudication¹³ and mediation with the law.¹⁴ His observations are particularly instructive for those who work in court-connected mediation programs because of the historic parallels between equity and mediation. Both equity and mediation offer a form of "individualized justice" unavailable in the official legal system, and each allow room for mercy in an other-

⁷ Roscoe Pound, *The Causes of Popular Dissatisfaction with the Administration of Justice*, Address Before the American Bar Association Convention (Aug. 26, 1906), 35 F.R.D. 273 (1964).

⁸ Pound's sociological orientation argued for a more pragmatic view of law that would be responsive to social, economic and political currents. *Id.* at 273, 277-78. See also Hull, *supra* note 1, at 1308.

⁹ See The Pound Conference: Perspectives on Justice in the Future (A. Levine & R. Wheeler eds. (1979)) (proceedings of the *National Conference on the Causes of Popular Dissatisfaction with the Administration of Justice*).

¹⁰ See Pound, *supra* note 2, at 29.

¹¹ See Pound, *supra* note 2, at 24, 26.

¹² See *infra* text accompanying notes 50-55.

¹³ See Jonathan T. Molot, *An Old Judicial Role for a New Litigation Era*, 113 YALE L.J. 27 (2003).

¹⁴ See, e.g., Carrie Menkel-Meadow, *Pursuing Settlement in an Adversary Culture: A Tale of Innovation Co-Opted or "The Law of ADR,"* 19 FLA. ST. U. L. REV. 1, 3 (1991); Dr. Julie Macfarlane, *Culture Change? A Tale of Two Cities and Mandatory Court-Connected Mediation*, 2002 J. DISP. RESOL. 241, 244, 245-46 (2002).

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wise rigid, rule-bound justice system.¹⁵ Equity jurisprudence developed to remedy the harshness of common law rules, yet scholars today question whether equity is still equitable.¹⁶ Mediation was institutionalized in courts over the last twenty-five years, in part to provide access to justice that was otherwise unavailable in the civil justice system. Some scholars question whether this institutionalization offers anything that looks like justice.¹⁷

Pound's thoughts on the decline of equity prompt me to consider whether mediation, as practiced in the courts today, is headed in the same direction. I wonder whether one hundred years from now, a future generation of ADR scholars may gather to reflect on the disappearance of mediation under a unified regime of law and mediation. At present, my questions are grounded more pragmatically. Has court-connected mediation lost its way on the road to justice? Has mediation become so intertwined with litigation and adjudication as to be indistinguishable from judicial settlement processes or traditional bilateral negotiations?¹⁸ If so, what are the implications for achieving justice in mediation?

In looking for instructive lessons from the past, I am mindful of the inherent limitations of engaging in "history lite."¹⁹ There-

¹⁵ The difference between law and equity can be conceptualized as the difference between justice and mercy. See Martha C. Nussbaum, *Equity and Mercy*, 22 PHIL. & PUB. AFF. 83 (1993). Strict legal justice is available under the law and rules; mercy is available in the form of equitable relief.

¹⁶ See Stephen N. Subrin, THE EMPIRICAL CHALLENGE TO PROCEDURE BASED IN EQUITY: HOW CAN EQUITY PROCEDURE BE MADE MORE EQUITABLE? Equity and Contemporary Legal Developments, First International Conference on Equity 761 (Stephen Goldstein, ed., Hebrew University of Jerusalem, June 1990) [hereinafter Subrin, EMPIRICAL CHALLENGE].

¹⁷ See, e.g., Penelope E. Bryan, *Killing Us Softly: Divorce Mediation and the Politics of Power*, 40 BUFF. L. REV. 441 (1992); Richard Delgado et al., *Fairness and Formality: Minimizing the Risk of Prejudice in Alternative Dispute Resolution*, 1985 WIS. L. REV. 1359 (1985).

¹⁸ In connection with the blending of ADR with traditional processes such as adjudication, Professor Judith Resnick discusses a "third mode of civil processing . . . that melds aspects of privately-based dispute resolution with the public processes. . . . The legalization of private processes brings with it professional domination and greater complexity, making these processes mimic adjudication and collapse into it." Judith Resnick, *For Owen M. Fiss: Some Reflections on the Triumph and the Death of Adjudication*, 58 U. MIAMI L. REV. 173, 191 (2003).

¹⁹ My colleague, Martin Flaherty, describes "history lite" in the context of American constitutional history and critiques those for whom the use of history is dispositive in settling questions. Arguing that "constitutional discourse is replete with historical assertions that are at best deeply problematic and at worst, howlers," Flaherty calls for more rigorous research and the use of primary sources. See Martin S. Flaherty, *History Lite in Modern American Constitutionalism*, 95 COLUM. L. REV. 523, 525 (1995).

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fore, I offer these preliminary reflections in the nature of a cautionary tale by a critical, internal participant. The conflicting views of justice that are developing under the current regime of blended law and mediation suggest that more deliberation and caution is in order. Pound's observation of the state of justice in 1906 is equally relevant almost one hundred years later:

Justice, which is the end of law, is the ideal compromise between the activities of each and the activities of all in a crowded world. The law seeks to harmonize these activities and to adjust the relations of every man with his fellows so as to accord with the moral sense of the community. When the community is at one in its ideas of justice, this is possible. When the community is divided and diversified, and groups and classes and interests, understanding each other none too well, have conflicting ideas of justice, the task is extremely difficult.²⁰

II. EQUITY JURISPRUDENCE

A. Conceptual Understanding

Equity, like mediation, is a difficult concept to define with specificity. In its popular sense, equity is a notion of natural justice, or a determination of what is right and just between individuals.²¹ Aristotle regarded equity as a corrective to the general laws²² and a form of justice that was superior to and in tension with strict legal justice.²³ Equity is frequently associated with ideas of fairness, discretion, natural justice, and good conscience — concepts that scholars refer to as anti-legal elements.²⁴ Unsurprisingly, equity has been conceived of as justice without law.²⁵ Equity also

²⁰ Pound, *supra* note 7, at 276.

²¹ See WILLIAM Q. DEFUNIAK, *HANDBOOK OF MODERN EQUITY* 1-2 (5th ed. 1956).

²² See J. H. BAKER, *AN INTRODUCTION TO ENGLISH LEGAL HISTORY* 105 (4th ed. 2002).

²³ See Martha C. Nussbaum, *Equity and Mercy*, 22 *PHIL. & PUB. AFF.* 83, 96 (1993).

²⁴ See Thomas O. Main, *Traditional Equity and Contemporary Procedure*, 78 *WASH. L. REV.* 429, n.191 (2003).

²⁵ See Pound, *supra* note 2, at 24.

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offers “individualized” justice,²⁶ moderating the rigidity of law by integrating ideas of fairness and morality into the legal system.²⁷

B. Historical Background

The legal system of equity originated and developed outside the common law courts of England to provide relief that was unavailable in common law courts.²⁸ The origins of equity jurisprudence lie in the development of the Chancery Courts of England, where parties would seek relief from the Chancellor to prevent wrongs or injuries, or to specifically enforce rights. The Chancery was considered a court of conscience.²⁹ Unlike the common law courts’ practice of viewing law as a set of rules that could be objectively applied to specific facts, the Chancellor incorporated the roles of judge and jury.³⁰ By focusing on the specific circumstances of cases and following his conscience, the Chancellor exercised considerable discretion.³¹ The relief given strived for justice³² and was considered superior to the form of justice available in the common law courts.³³ Ultimately, this form of justice acquired the label “equity.”³⁴

By the middle of the 17th century, as Chancery courts began reporting cases on a regular basis, equity became expressed through a set of principles, and ultimately became a separate legal system.³⁵ Common law and equity procedures developed in England as complementary systems. Equity was invoked only when there was no adequate remedy at law and when a party would be

²⁶ See Main, *supra* note 24, at 476-77. Main explains this principle as “[r]eflected in the evolution of broad principles as opposed to narrow rules, broad grants of discretionary authority, variable standards of conduct, balancing tests, the (lee) ways of precedent, and the acceptance of legal fictions.” *Id.* at 476-477 (citations omitted).

²⁷ See Main, *supra* note 24, at 430.

²⁸ See DAN B. DOBBS, *DOBBS LAW OF REMEDIES, DAMAGES-EQUITY-RESTITUTION* 66-74 (1993). See also DEFUNIAK, *supra* note 21, at 1-5.

²⁹ Baker, *supra* note 22, at 106.

³⁰ *Id.*

³¹ *Id.* at 105-106.

³² There were moral overtones to equity jurisdiction, which was said to act upon an individual’s conscience requiring her to do her duty in specific situations. DEFUNIAK, *supra* note 21, at 11.

³³ See Baker, *supra* note 22, at 106.

³⁴ Equity, however, was not a novel concept. In addition to Aristotle, who wrote of it, medieval lawyers were familiar with equity. See Baker, *supra* note 22, at 106.

³⁵ See Baker, *supra* note 22, at 110.

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irreparably harmed without equitable intervention.³⁶ The themes of fair play and good conscience run through the development of equity and are reflected in many of the general equitable maxims: (1) Equity does not suffer a wrong to go without a remedy; (2) Equity regards substance rather than form; (3) Equity regards as done that which ought to be done; (4) Equality is equity;³⁷ (5) One who comes into equity must come with clean hands; (6) One who seeks equity must do equity.³⁸ While these maxims did not have the effect of law, they represented the ethical aspirations of equity courts.³⁹

The early settlers brought the English dual system of equity and law to the United States. In an effort to avoid the complicated aspects of a bifurcated system, several American states began to experiment by merging law and equity into one court and providing for only one form of action.⁴⁰ The most significant reform effort, developed in New York State, was the influential Field Code that simplified pleading and practice by abolishing the distinction between law and equity.⁴¹ In the United States, the merger of law and equity was accomplished in federal courts in 1938 with the Supreme Court's promulgation of the Federal Rules of Civil Procedure.⁴² The rigid pleading rules and technicalities that characterized the common law were replaced with more simplified procedures of equity. The civil litigation system was now theoretically balanced with the discretionary and flexible characteristics of equity and the certainty provided by common law rules.⁴³

³⁶ See Ellen E. Sward, *A History of the Civil Trial in the United States*, 51 *KAN. L. REV.* 347, 360 (2003).

³⁷ Professor Baker explains this principle: "The essence of equity as a corrective to the rigour of laws was that it should not be tied to rules. If, on the other hand, no consistent principles whatever were observed, parties in like cases would not be treated alike; and equality was a requisite of equity." Baker, *supra* note 22, at 109.

³⁸ See DOBBS, *supra* note 28, at 83 n.7 (quoting G. KEETON, *INTRODUCTION TO EQUITY* 87-117 (6th ed. 1965)).

³⁹ See DOBBS, *supra* note 28, at 83.

⁴⁰ See DeFuniak, *supra* note 21, at 6-7.

⁴¹ See Sward, *supra* note 36, at 382-83.

⁴² FED. R. CIV. P. 2, adopted pursuant to order of Supreme Court, Dec. 20, 1937. See FED. R. CIV. P. 2 Advisory Comm. Note.

⁴³ See Stephen N. Subrin, *A Traditionalist Looks at Mediation: It's Here to Stay and Much Better Than I Thought*, 3 *NEV.L. J.* 196, 197 (2002/2003).

C. Equity Today

Despite the merger of law and equity in most judicial systems, the distinction between legal and equitable remedies retains some significance. The common law still retains the constitutional right to a trial by jury guaranteed by the Seventh Amendment⁴⁴ when the remedy sought is purely legal.⁴⁵ Jury trial is not granted for equitable remedies.⁴⁶ The distinction between legal and equitable remedies may also have some significance in the traditional understanding that equitable relief is discretionary,⁴⁷ while legal remedies enforce rights.⁴⁸ Finally, as a general rule, unlike legal remedies, equitable remedies may be enforced by contempt.⁴⁹

Modern critiques of equity jurisprudence echo Pound's concerns about the extent to which equity has become subsumed by law with the resulting diminution of individualized justice.⁵⁰ Professor Stephen Subrin⁵¹ argues that neither the result-oriented goals of a good procedural system relating to efficiency, predictability, and the vindication of substantive rights, nor the process goals of dignity and respect are met in the unified system of law and equity.⁵² He calls for a return of equity to its former complementary role with litigation.⁵³ Other scholars, particularly in the context of mass tort litigation, have warned against the hardships and "mischief" that resulted from a unified system of law and equity, wherein the rigid application of rules deprives judges of sufficient discretion to do equity.⁵⁴ The demise of equity has been noted in England as well. In commenting on the current state of

⁴⁴ U.S. CONST. amend. VII.

⁴⁵ In *Tull v. United States*, 481 U.S. 412, 417-18 (1987), the Supreme Court offered a two-part test to determine whether parties have the right to a jury trial: a) comparison of the action to 18th century actions brought in the courts of England prior to the merger of the courts of law and equity; b) examination of the remedy sought and a determination of whether it is legal or equitable in nature.

⁴⁶ See DOBBS, *supra* note 28, at 11.

⁴⁷ It is well established that when a party seeks equitable relief, the courts have broad powers to deny relief completely, or to give partial or full relief. In exercising discretion, courts balance the needs of the public and those of third parties. See DOBBS, *supra* note 28, at 90-92.

⁴⁸ See *id.* at 12.

⁴⁹ See *id.* at 11.

⁵⁰ See Subrin, *Empirical Challenge*, *supra* note 16; Mains, *supra* note 24.

⁵¹ Civil Procedure scholar, Stephen N. Subrin, is a Professor of Law at Northeastern University.

⁵² See Subrin, *Empirical Challenge*, *supra* note 16.

⁵³ *Id.*

⁵⁴ Main, *supra* note 24, at 487-88.

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Chancery courts and equity, English legal historian Professor Baker has observed a paradoxical situation: “as the equity of the Chancery has hardened into law, so the law has been dissolving into something like abstract equity, with a consequent loss of clarity and certainty.”⁵⁵

III. MEDIATION, EQUITY, AND THE PROMISE OF INDIVIDUALIZED JUSTICE

The traditional understanding of mediation that focuses on its relational aspects is expressed in Professor Lon Fuller’s⁵⁶ description of mediation’s “capacity to reorient the parties towards each other, not by imposing rules on them, but 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.”⁵⁷ Since the publication of Fuller’s article over thirty-one years ago, the practice of mediation⁵⁸ has evolved to accommodate a diverse range of mediator and party expectations,⁵⁹ which are highly dependent on context.⁶⁰ Mediation discourse today focuses on many values, from empowerment to efficiency, while the relational story is less prominent.

There are historic parallels between mediation and equity that are relevant in shaping our present ideas about justice. Mediation, like equity, was conceived of as justice without law.⁶¹ Mediation

⁵⁵ Baker, *supra* note 22, at 115.

⁵⁶ Lon Fuller is one of the most influential American scholars in the fields of contracts, legal theory and legal philosophy. As a legal process theorist, Fuller crafted a unique jurisprudence of procedural natural law and is considered one of the most significant jurisprudential thinkers in the field of ADR. *See generally*, James Boyle, *Legal Realism and the Social Contract: Fuller’s Public Jurisprudence of Form, Private Jurisprudence of Substance*, 78 CORNELL L. REV. 371 (1993).

⁵⁷ Lon Fuller, *Mediation: Its Forms and Functions*, 44 S. CAL. L. REV. 305, 325 (1971).

⁵⁸ I refer here to North American-style mediation that is frequently perceived as rights-based and rule-bound. *See* John D. Feerick, *The Peace-Making Role of a Mediator*, 2003 OHIO ST. J. ON DISP. RES. 229 (2003) (discussing a conversation with a South African mediator about his perception of American-style mediation).

⁵⁹ I refer here to the enormous literature generated around Professor Leonard Riskin’s evaluative-facilitative grid, describing mediator behaviors that was first published in 1996 in the Harvard Negotiation Law Review, and most recently revisited and modified by Professor Riskin in *Decision Making in Mediation: The New Old Grid and the New Grid System*, 79 NOTRE DAME L. REV. 1 (2003).

⁶⁰ For example, whether disputes are legal or non-legal, and where mediation occurs in court or out of court.

⁶¹ *See* JEROLD S. AUERBACK, *JUSTICE WITHOUT LAW* 117-19 (1983).

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also offers the possibility of individualized justice, which may be in tension with strict legal justice.⁶² Just as equity moderated the rigidity of the common law by integrating fairness and moral values into the judicial process,⁶³ mediation offers fair alternatives to legal values and judicial decision-making.⁶⁴ Though scholars may disagree on the meaning of fairness in mediation,⁶⁵ substantive and procedural fairness remain its primary and enduring values.⁶⁶ Numerous professional codes require mediators to insure that agreements are fair according to prevailing social standards.⁶⁷ Scholars have suggested ways of promoting fairness in mediation,⁶⁸ and parties participating in mediation express satisfaction with such fairness in the process. Finally, just as equity offered relief from harsh pleading and procedural rules that operated to deny disputants justice in the common law courts, mediation offers relief from the rigidity of a rules-bound justice system. It provides opportunities for individualized justice through the exercise of party self-determination⁶⁹ and the expression of dignitary values.⁷⁰ While we may differ on the extent to which self-determination is over-valued and the extent to which procedural justice is undervalued in current versions of court mediation practice, these principles nonetheless support a framework for the realization of individualized justice in mediation.

⁶² See Jacqueline M. Nolan-Haley, *Court Mediation and the Search for Justice Through Law*, 74 WASH. U. L.Q. 47, 63 (1996) [hereinafter "*Court Mediation*"].

⁶³ See Main, *supra* note 24, at 430.

⁶⁴ In some cases, the possibility of seeking justice through mediation is a more attractive option than adjudication. See, e.g., Jonathan M. Hyman and Lela P. Love, *If Portia Were a Mediator: An Inquiry into Justice in Mediation*, 9 CLINICAL L. REV. 157, 177 (2002).

⁶⁵ Compare the views of Professor Frank Sander, Introduction, 13 OHIO ST. J. ON DISP. RESOL. 791, 792 (1998) with Professor Joseph B. Stulberg, *Fairness and Mediation*, 13 OHIO ST. J. ON DISP. RESOL. 909 (1998).

⁶⁶ See Stulberg, *supra* note 65.

⁶⁷ See Ellen A. Waldman, *Identifying the Role of Social Norms in Mediation: A Multiple Model Approach*, 48 HASTINGS L. J. 703, 764-67 (1997).

⁶⁸ See, e.g., Craig A. McEwen, Nancy H. Rodgers and Richard J. Maiman, *Bring in the Lawyers: Challenging the Dominant Approaches to Ensuring Fairness in Divorce Mediation*, 79 MINN. L. REV. 1317 (1995).

⁶⁹ In Fuller's view, mediation gave parties an opportunity to create their own norms, rather than follow existing ones. Boyle, *supra* note 56, at 308.

⁷⁰ See Nancy Welsh, *Disputants' Decision Control in Court-Connected Mediation: A Hollow Promise Without Procedural Justice* [hereinafter "*Disputants' Decision Control*"], 2002 J. DISP. RESOL. 179, 180 (discussing empirical research on procedural justice).

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A. De-Facto Merger of Law and Mediation

The institutionalization of mediation in courts⁷¹ and federal agencies⁷² is taken for granted today. The wholesale integration of mediation into our civil procedure points toward a de-facto merger of law and mediation. While less formal than the official merger of law and equity, it is nonetheless real. Perhaps more than any other ADR process, mediation has easily blended into the civil justice system and is greatly accepted. In a recent symposium, Professor Stephen Subrin acknowledged that mediation is “a major portion of the new era of civil procedure” and, as a former ADR skeptic, cautiously endorsed this development.⁷³

The de-facto merger of mediation and law has altered the way individualized justice is delivered and perceived. Professor John Lande⁷⁴ has appropriately described the contemporary legal landscape as a “liti-mediation” environment where it has become accepted practice that “mediation is the normal way to end litigation.”⁷⁵ Parties participate in court mediation programs with pre-mediation consultations, document and brief submissions,⁷⁶ and telephonic appearances.⁷⁷ The number of federal trials has been greatly reduced⁷⁸ and, at the same time, the role of judge as

⁷¹ See, e.g., The Alternative Dispute Resolution Act of 1998, 28 U.S.C. §§ 651-58, 652(a), requires federal district courts to provide litigants with access to at least one ADR process.

⁷² See Jeffrey M. Senger, *Turning the Ship of State*, 2000 J. DISP. RESOL. 79; Daniel Marcus & Jeffrey M. Senger, *ADR and the Federal Government: Not Such Strange Bedfellows After All*, 66 MO. L. REV. 709 (2001).

⁷³ Subrin, *supra* note 43, at 198.

⁷⁴ Professor John Lande, a dispute resolution scholar, teaches at the University of Missouri – Columbia, where he directs the LL.M. Program in Dispute Resolution.

⁷⁵ John Lande, *How Will Lawyering and Mediation Practices Transform Each Other?*, 24 FLA. ST. U. L. REV. 839, 841 (1997).

⁷⁶ Some judges request mediation “briefs” in which parties are requested to advance their major arguments. See Edward Brunet, *Judicial Mediation and Signaling*, 3 NEVADA L. J. 232, 235 (2002/2003).

⁷⁷ See Daniel Wise, *In Test, Lawyers May ‘Appear’ By Telephone*, NAT’L L. J., Feb. 2, 2004 at 17, col. 4 (reporting about a newly instituted practice in New York where judges and mediators allow attorneys to make certain types of court appearances by telephone). See also *Bay Area Luxury Homes/Stevick I, LLC v. Lee*, 2003 WL 22664648 (Cal. App., Nov., 2003) (holding telephonic appearance at pre-litigation mediation session permitted) (*discussed in* ABA DISP. RESOL. MAG., Winter 2004 at 29).

⁷⁸ See Marc Galanter, *The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Court*, American Bar Association (2003), available at <http://www.abanet.org/litigation/litnews/taskforce/cji/nosearch/galanter.zip> (last visited Mar. 22, 2004).

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mediator is growing.⁷⁹ Thus, the de-facto merger of law and mediation presents a paradoxical situation that is aptly described by Professor Subrin, who observed that “[a]t the same time that mediation begins to look more like adjudication in its attention to law application, judges, who eschew the actual trial of cases, have become more like mediators.”⁸⁰ While it is not clear that mediation is the reason for this shift in judicial gears, the omnipresence of mediation in court certainly has something to do with it.⁸¹

B. Is This the Decadence of Mediation?

The profile of mediation that emerges from what I have described as the de-facto merger of law and mediation in the formal legal system is a departure from the traditional understanding of mediation as a relational process.⁸² This departure diminishes the potential for achieving individualized justice in mediation and it prompts me to reformulate Pound’s provocative question about equity: Are we headed towards the decadence of mediation?

Mediation is both more public and more private than we have really acknowledged. Parties are theoretically empowered to fashion their own justice. Of course, such empowerment has always been the case with the traditional practice of pre-trial negotiation settlement efforts by attorneys, but the pre-trial settlement culture worked voluntarily. Large-scale mandated civil case mediation is a whole new ball game played in private, but on very public playing fields — the courts. In the words of one critic, it is a “new and largely unregulated industry that operates, by design, behind closed doors.”⁸³

Consider what is happening behind closed doors. Despite the prevalence of “good” mediation practice, there is considerable

⁷⁹ See Brunet, *supra* note 76. If Owen Fiss was right that “adjudication is the social process by which judges give meaning to our public values,” (see Owen M. Fiss, *The Supreme Court 1978 Term, Forward: The Forms of Justice*, 93 HARV. L. REV. 1, 2 (1979)), then under a de-facto merger of law and mediation, judicial mediation may well become the process by which judges also give meaning to private values. What does this do to the notion of individualized justice?

⁸⁰ Subrin, *supra* note 43, at 228.

⁸¹ See *id.* at 223. But see James E. McGuire and Frank E. A. Sander, *Some Questions About “The Vanishing Trial,”* ABA DISP. RESOL. MAG., Winter 2004, 17, 18. “ADR may deserve both credit and blame for this phenomenon.” *Id.* at 17.

⁸² See Fuller, *supra* note 56.

⁸³ Deborah R. Hensler, *Our Courts, Ourselves: How the Alternative Dispute Resolution Movement Is Re-Shaping Our Legal System*, 108 PENN ST. L. REV. 165, 187 (2003).

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room for improvement in programs where the pressures to settle in mediation are sufficiently strong that parties never get to the public forum of a courtroom,⁸⁴ especially in cases where the accountability of neutrals is questionable or where ethical conduct is suspect. Reports of coercion, threats, strong-arming, and other abusive behaviors by mediators and attorneys⁸⁵ suggest that the privacy of mediation has created space for behaviors that would hardly be tolerated in public courtrooms.⁸⁶

One response to these behaviors is legislation that requires parties and their attorneys to act in good faith in mediation.⁸⁷ Such legislative intervention into mediation practice has generated a deluge of bad faith litigation⁸⁸ to weed out the bad apples. This is a complicated project however, because of the strong, almost sacred, protection for mediation confidentiality.⁸⁹

How do we assess legislative efforts to make mediation fair? Pound would probably suggest that the very need to engage in such an assessment could be a sign of the decadence of mediation. In his equity essay, citing an example of the unconscionable beneficiaries who were allowed to use equitable principles to do injustice until the legislature intervened, Pound commented: "When a statute is necessary to make equity do equity and to prevent its doctrines from working wrong and oppression, we may well speak of decadence in this connection."⁹⁰ While we might not go so far as Pound, perhaps we could say with some assurance that when legis-

⁸⁴ This situation exists with programs that impose financial penalties if the trial outcome does not exceed the proposed mediation settlement by a certain amount. Craig A. McEwen and Laura Williams, *Legal Policy and Access to Justice Through Courts and Mediation*, 13 OHIO ST. J. ON DISP. RESOL. 865, 874 (1998) (discussing Michigan's mediation statutes).

⁸⁵ See James Alfini, *Trashing, Bashing, and Hashing It Out: Is This the End of "Good Mediation"?*, 19 FLA. ST. U. L. REV. 47 (1991).

⁸⁶ See, e.g., *Vitakis-Valchine v. Valchine*, 793 So.2d 1094 (2001); *Allen v. Leal*, 27 F. Supp.2d 945 (1998). See also cases discussed in Jacqueline Nolan-Haley, *Lawyers, Clients and Mediation*, 73 NOTRE DAME L. REV. 1369 (1998); Macfarlane, *supra* note 14, at 275 (discussing similar concerns in Canada).

⁸⁷ See John Lande, *Using Dispute System Design Methods to Promote Good-Faith Participation in Court-Connected Mediation Programs*, 50 UCLA L. REV. 69 (2002).

⁸⁸ See Roger L. Carter, *Oh, Ye of Little [Good] Faith*, 2002 J. DISP. RESOL. 367, 368 (summarizing good-faith literature into the pro-sanctions, anti-sanctions and moderates).

⁸⁹ See Maureen Weston, *Confidentiality's Constitutionality: The Incursion on Judicial Powers to Regulate Party Conduct in Court-Connected Mediation*, 8 HARV. NEGOT. L. REV. 29, 30-34. See also Peter Robinson, *Centuries of Contract Common Law Can't Be All Wrong: Why the UMA's Exception to Mediation Confidentiality in Enforcement Proceedings Should be Embraced and Broadened*, 2003 J. DISP. RESOL. 135, 162-63.

⁹⁰ Pound, *supra* note 2, at 27.

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latures are required to intervene for mediation to be fair, such intervention is a sign that some mediation practitioners have missed the point.⁹¹

A second aspect of mediation “decadence” relates to the uniqueness of mediation as a dispute resolution process. Mediation offers a distinctive conception of justice that is, like equity, the face of mercy.⁹² As a process, it has the capacity to acknowledge the emotional, psychological, and spiritual needs of parties, including the need to reconcile, to forgive, and to be forgiven. This aspect of individualized justice is in danger of being lost as mediation becomes a predominantly rule-bound process so blended in the legal system that its relational underpinnings evaporate.⁹³ With the demise of the relational emphasis in mediation, apology⁹⁴ and forgiveness become merely perfunctory actions. As scholars have argued in other settings, the possibility of apology and reconciliation are “cheap grace” without relational understandings.⁹⁵

My final “decadence” inquiry looks to the past. Historically, there have been costs associated with blending mercy and justice, not the least of which is that something tends to be lost in the process. In the case of equity, the fair and “equitable” became consumed by rules. In the case of mediation, the fair and relational are consumed by rules and by an instrumentalist conception that views mediation simply as an efficient tool in the administration of

⁹¹ See Lande, *supra* note 87.

⁹² See Nolan-Haley, *Court Mediation*, *supra* note 62, at 84-85 (discussing the equitable perspective in mediation).

⁹³ See Thomas O. Main, “An Overwhelming Question” *About Non-Formal Procedure*, 3 NEVADA LAW J. 388, 390 (Winter 2002/2003) (stating that “alternative methods have begun to ossify and formalize in a manner reminiscent of their traditional antecedents.”). *Id.*

⁹⁴ A developing literature explores the rich potential of the use of apology in mediation. See, e.g., Donna L. Pavlick, *Apology and Mediation: The Horse and Carriage of the Twenty-First Century*, 18 OHIO ST. J. ON DISP. RESOL. 829 (2003); Jonathan R. Cohen, *Legislating Apology: The Pros and Cons*, 70 U. CIN. L. REV. 819 (2002); Erin Ann O’Hara and Douglas Yarn, *On Apology and Consilience*, 77 WASH. L. REV. 1121 (2002); Deborah L. Levi, *The Role of Apology in Mediation*, 72 N.Y.U. L. REV. 1165 (1997); see also, Jennifer Gerarda Brown, *The Role of Apology in Negotiation*, 87 MARQ. L. REV. 665 (2004).

⁹⁵ See Nancy Berlinger, *Avoiding Cheap Grace: Medical Harm, Patient Safety, and the Culture(s) of Forgiveness*, 6 HASTINGS CENTER REP. 33, No. 6 (2003) 28, 29. Berlinger borrows the term “cheap grace” from Christian theologian Dietrich Bonhoeffer to construct a relational understanding of forgiveness in the medical context. She refers to the relational character of forgiveness as “the actions that various actors undertake in relation to one another so forgiveness can take place.” This stands in contrast to a “cheap grace,” non-relational approach “that in formulating forgiveness as automatic, either acknowledges no role for the injured person as agent of forgiveness, or assumes that this person should offer forgiveness in the absence of disclosure, apology, accountability, compensation, or other goods that we might place under the principles of justice.” *Id.* at 29.

justice, devoid of the intrinsic values that brought it to court in the first place.⁹⁶

IV. CONCLUSION

Lessons from equity's merger with law are out there for the taking. If court-connected mediation is to offer alternatives to traditional rule-bound justice, it must return to its complementary role to litigation and adjudication. This is easier said than done. Mediation is so deeply entangled in the justice system that it is difficult to categorize it as a distinct entity. But that is precisely what we need to do to recapture mediation's potential for individualized justice as a real alternative to rules-bound justice.

As a way to engage the rehabilitation process, I offer a few suggestions for which I make no claim to originality. First, we should be careful about labeling court-connected dispute resolution processes. When magistrates and judges conduct settlement conferences, and where heavy-handed evaluation takes place, we should hesitate before giving such processes the label "mediation." Second, the increasingly coercive nature of evaluative mediation needs to be monitored with efforts to develop safeguards for reducing and preventing it.⁹⁷ Finally, the dignity values associated with procedural justice should always be part of court-connected mediation.⁹⁸ In this regard, we need to pay more attention to how we train lawyers who represent parties in mediation, emphasizing the importance of honoring the principle of informed consent⁹⁹ and the legitimacy of client voice.¹⁰⁰ Returning mediation to its com-

⁹⁶ Recent discussions on the possibilities of restorative justice and healing through mediation are hopeful signs. See Symposium at Hamline Law School, *Intentional Conversations about Restorative Justice, Mediation on and the Practice of Law*, Nov. 1-2 (2003). Symposium bibliography available at http://www.hamline.edu/law/adr/symposium/2003_Symposium_BIBLIOGRAPHY.pdf (last visited Nov. 24, 2004).

⁹⁷ See Nolan-Haley, *Court Mediation*, *supra* note 62; Nancy Welsh, *The Thinning Version of Self-Determination in Court-Connected Mediation: The Inevitable Price of Institutionalization?*, 6 HARV. NEGOT. L. REV. 1, 788-92 (2000).

⁹⁸ See Welsh, *Disputants' Decision Control*, *supra* note 70, at 838-58 (listing suggestions for ways in which procedural justice values should be incorporated into court mediation).

⁹⁹ I have explored this issue more fully in an earlier article. See Jacqueline M. Nolan-Haley, *Informed Consent in Mediation: A Guiding Principle for Truly Educated Decision-making*, 74 NOTRE DAME L. REV. 775 (1999).

¹⁰⁰ See Nolan-Haley, *supra* note 86, at 1369. While recent scholarship demonstrates the value that lawyers can add to negotiation and mediation, e.g., Chris Guthrie, *Panacea or Pandora's Box?: The Costs of Options in Negotiation*, 88 IOWA L. REV. 601 (2003), Jean Sternlight, *Lawyers' Representation of Clients in Mediation: Using Economics and Psychol-*

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plementary role with litigation does not exclude it from an honorable place in the justice system. Rather, it encourages vigilance in keeping mediation's core values and relational character intact.¹⁰¹

Vigilance was the theme of Pound's final message with respect to the decline of equity, and it is surely a sensible approach for court mediation at this time.

Are we, then to condemn the reform which has given us one procedure instead of two, which allows litigants to adjust their disputes in one case instead of two. .? Surely not. . . The moral, I take it, is simply that we must be vigilant.¹⁰²

ogy to Structure Advocacy in a Nonadversarial Setting, 14 OHIO ST. J. DISP. RESOL. 269 (1999), lawyers can also impede the relational aspect of mediation. See "The Interface Between Negotiation Theory and Mediation Practice," at http://www.law.missouri.edu/aalsadr/Syllabi/Interface_Between_NegTheory_&_MedPractice.htm (last visited Nov. 24, 2004).

¹⁰¹ Here, I agree with Jean Sternlight and other scholars who have suggested that a broader conception of justice, including personal and emotional needs, should be part of our system of law. See Jean R. Sternlight, *ADR In A System of Justice*, 3 NEV. L. J. 289, 299 n.57 (2002/2003).

¹⁰² Pound, *supra* note 2, at 35.

