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Alternative Dispute Resolution

What is ADR?

- ADR refers broadly to alternatives to formal adjudication in the context of Courts or Quasi-Courts
- Alternative forms of adjudication
  - Arbitration
  - Alternatives to adjudication
    - Mediation

Alternatives to Judicial Adjudication

- Long history
  - Statutes of Edward III (1606) specified a form of what would be called commercial arbitration
  - Lex Mercatoria typically involved dispute resolution thru an arbitration process
- Colonial America
  - Society of Friends and arbitration
  - Pennsylvania more generally
  - Puritans in Massachusetts
20th Century Arbitration

- **Commercial arbitration**
  - Need for specialized dispute resolution within industries
  - Need for high volume dispute resolution in industries such as insurance
  - Concerns about lay juries deciding highly technical questions
  - Founding of American Arbitration Association in 1926

- **Labor arbitration**
  - Federal labor laws of 1930s institutionalized arbitration

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Early Alternative Movements within the Courts

- **Juvenile courts**
  - Helping children rather than punishing crime
  - *In re Gault* (1967)

- **Small claims courts**
  - Informal process where lawyers are not needed
  - Capture by business

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Modern ADR Movement

- 1976 “Pound Conference”
- Dissatisfactions with Justice (i.e., traditional court process):
  - Costs too much
  - Takes too long
  - Process is incomprehensible to the average person
- Seek alternatives to formal adjudication in court
Multi-Door Courthouse
- Frank Sanders at Pound Conference
- Alternatives in Court vs. Alternatives to Court
  - Court annexed arbitration
  - Court annexed mediation
- Increase judicial role in settlement
  - Mediation
  - Browbeating

Moving Justice Out of Court
- Privatize justice
  - Simplify procedure
  - Reduce costs
  - Speed process by avoiding queue for court action
  - Provide privacy
- Improve the quality of justice
  - Seeking win-win resolutions
- Bring justice closer to the average person through informality

Emulating Dispute Resolution in Other Cultures
- Legal Anthropology
- Kpelle Moot
  - James Gibbs, 1963 Article
  - Kpelle are a “tribe” in west Africa (Liberia and Guinea)
- Features of Kpelle Moot
  - Soon after dispute arises
  - Informal surroundings (a home)
  - Control by the parties rather than judge
  - Full airing of issues rather than strict evidentiary rules
Neighborhood Justice Center

- Import the model of the Kpelle moot
- "Popular" justice
- Focus on mediation
- Referral from court vs. voluntary use

Court-Annexed ADR

- Focus on supposedly simple cases
  - Dollar limits
- Mandatory vs. voluntary
- Mediation
  - Judicial
  - Other third parties
- Arbitration
  - Binding vs. advisory
- Hybrids of mediation and arbitration
  - Summary trials

Non-court ADR

- Private arbitration and mediation
  - American Arbitration Association
  - National Arbitration Forum
  - Many others, both profit and nonprofit
- Specialized procedures
  - Mini-trials
  - Rent-a-judge
Adjudicators as Mediators

- Labor arbitrators
- Judges as mediators
  - initiate settlement conferences
  - suggest settlement figures
  - do a damage analysis:
    - general damages
    - special damages
    - probabilities of outcomes
  - cite similar cases as examples

Advantages of ADR

- Privacy
- Faster, in theory
- Cheaper, in theory
- Can design your own procedure
- Can select an expert adjudicator or mediator

Critique of ADR

- Have to bear some extra costs
- Can cost more because settlement may be delayed
- Decisions may be reviewable
- May involve participation through coercion
  - Arbitration agreements as condition of employment
  - May be seen as second-class justice
  - Settlements may be seem coerced