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A Theory of Access to Justice

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A THEORY OF ACCESS TO JUSTICE

Robert Rubinson*

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Throughout the twentieth century, as judges and lawyers have monotonously conceded, legal institutions have defaulted on their obligation to provide justice to all. This is surely because the ideal of equal justice is incompatible with the social realities of unequal wealth, power, and opportunity, which no amount of legal formalism can disguise. In an unequal society, the Haves usually are better served by legal formalism than the Have-Nots, a disparity that creates a persistent legitimacy crisis.¹

I. INTRODUCTION

There are three conclusions that any observer of dispute resolution in this country must draw.

First, the vast, vast majority of dispute resolution involves low-income disputants.² By "dispute resolution" I mean not only adjudication, but also the massive number of administrative proceedings and the increasing use of alternative dispute resolution, especially mediation.

Second, the vast, vast majority of the public and private resources of dispute resolution are allocated to disputes involving wealthy individuals and organizations.³ By "resources of dispute resolution," I mean the resources of legal representation (including lawyers and the apparatus of lawyering, such as administrative assistants, experts, and paralegals) and the resources of third parties who aid in dispute resolution (judges, arbitrators,

². See infra text accompanying notes 16-26.
³. See infra text accompanying notes 11-14, 26-40.
mediators, and the apparatus of the offices of such actors, such as adminis-
trative assistants, clerks, bailiffs, and the like).

Third, any principled moral or ethical analysis demonstrates that the
stakes are much higher in disputes involving low-income disputants than in
disputes involving affluent individuals or organizations. Eviction, losing
minimal subsistence benefits, the welfare of children, and the risk of starva-
tion are matters of consequence. Low-income disputants do not have the
luxury of pursuing claims driven by principle or ego, or to accumulate fur-
ther wealth, or to pursue greater profitability. In lives where the basics of
life are at risk, disputes virtually always involve food and shelter, life and
death.

One final conclusion is thus inescapable: The matters that attract a
minute percentage of dispute resolution resources are the matters that im-
plicate issues of food and shelter, life and death.

Although the phrase "resources of dispute resolution" is novel, the
situation described has long been recognized as an appalling state of affairs,
albeit one whose outrageousness is almost matched by its imperviousness to
reform. There has always been—and remains—far more in the way of
empty platitudes and even emptier gestures toward reform than any mean-
ingful change in how things are done. And as even a cursory glimpse at the
current dispute resolution scene reveals, the situation continues to worsen
each year. As a result, real people are suffering.

I take on the grim realities presented here without the usual common-
places of optimism for a better future or of a vision of exciting vistas of
problems solved if only an author's proposals for reform became a reality.
The problems are too persistent and structural, the stakes too high, for such
indulgences. But it is precisely because the problems are so persistent and
structural, and because the stakes are so high, that to refrain from doing or
saying anything borders on complicity with the perversions of justice that
are occurring on a massive scale.

I begin with a bit of autobiography. I began my legal career as a litiga-
tion associate at a large firm and later became a staff attorney at a neigh-
borhood civil legal aid office. I describe these vastly different experiences.
I then pick apart the phenomenon of unequal justice with a new unit of analy-
sis: resources of dispute resolution (RDR). Three straightforward principles
comprise "RDR theory." The operation of these principles generates iron-
clad hierarchies in terms of the quality of dispute resolution.

With these ideas as a basis, I then examine the real-life consequences of
RDR theory. This takes the form of a kind of cook's tour of the dispute
resolution universe at the beginning of the twenty-first century. This tour
necessarily focuses on the less popular destinations, or at least less popular
with those who do not have to go there—the shadowy places in courts, ad-
ministrative agencies, and mediations where the overwhelming bulk of dis-

pute resolution occurs in places utterly unlike TV courts or the relatively well-heeled corridors of the federal practice of elite law firms.

I conclude with two proposals, each of which, if properly funded and pursued (a big and potentially insurmountable if), can break the stranglehold of forces that have caused the powerless to be persistently and tragically shortchanged in dispute resolution.

II. A PERSONAL HISTORY

Before entering academia, I was a litigation associate at a law firm and then a staff attorney at a Legal Aid Society Office where I represented the indigent elderly. What follows is an account of my experiences in those law offices.5

A brief note about these recollections: I make no claim that my descriptions are representative of anything other than my own experiences. Indeed, my perspective is necessarily my own, which is that of a lawyer doing certain kinds of work, not of a client, and it is the experience of clients that is ultimately what matters most in the issues I address. Moreover, while this account suggests some (but by no means all) of the themes I develop in my succeeding analysis, I have not structured it with this in mind.

Nevertheless, this description does disclose the impact which my experience has had on my view of these issues.6 Even considering its limitations, it acts as something of an introduction to what follows—a comparison of actual professional experiences which startled me, causing me to consider issues of access to justice in a more systematic fashion.

A. At the Firm

One group of shareholders wanted to do one thing, another group wanted to do another thing. The first group filed a lawsuit in federal district court hoping to enjoin the pending transaction.

I was in my office Friday at 5:00 p.m. A partner called. New case. Much work. Much work turned out to be two weeks of (at least) fifteen-hour days. But the point was not that I had to work for fifteen-hour days; the point was that there were fifteen-hour days for, by my rough estimate, at least eleven other attorneys plus an array of others charged with logistical

5. A note about what follows: These recollections are a composite of how I personally experienced two profoundly different practice contexts. They are not a literal retelling of specific cases. Moreover, I have omitted all identifying information and altered and combined facts in order to preserve client confidentiality. Finally, these descriptions arose from my experiences at particular times and at particular places. While the balance of the Article will draw larger conclusions that, I believe, resonate with what I experienced, I make no assertion that these experiences reflect the "truth" or current realities of the specific practices I describe.

6. Such disclosures have become increasingly common in many forms of social science research. MARGOT ELY ET AL., ON WRITING QUALITATIVE RESEARCH: LIVING BY WORDS 32–52 (1997).
support for the troops, including, but not limited to, feeding, answering phones, typing, proofreading, arranging trips, driving, and flying.

The essence of the game was the preliminary injunction stage. If we succeeded there, we would, for all practical purposes, win.

I was assigned research—one limited, relatively elementary point on preliminary injunctions. The issue was standard stuff—the sort of thing that lawyers scavenge from other briefs and stick in an early paragraph, secure in their knowledge that the judge will ignore it. I researched for days, spending hours in front of my computer terminal, reading through hundreds of unpublished cases in search of that case that really was directly on point. I wrote up a couple of paragraphs, handed it in, and it made its way up the hierarchy and, as far as I was concerned, out of my consciousness and into oblivion.

As I researched, other tasks were parceled out in neat, bite-sized chunks. Limited, relatively elementary points for research were assigned, one, more or less, per young, able-bodied associate. Multiple affidavits needed to be drafted, one affidavit per lawyer. Discovery needed to be conducted in a far-off state. A group of three traveled a thousand miles to review reams of documents in a warehouse—a largely empty exercise, as revealed by partners' impatient looks when the leader of the document-examining team offered telephonic status reports.

The moment drew nearer when the brief would be due. One lawyer was saddled with the task of taking bits and pieces of research and turning it into a workable draft of our opposition brief. The draft then circulated to those in the team who mattered (mattering determined exclusively by dint of seniority). The changes continued, draft succeeding draft, as the rough-hewn draft was successively sanded down and polished. Then, one day, the senior partner decided the draft was not good enough and smashed it to bits, after which it was rearranged, circulated to those in the team who mattered, and the process repeated; and repeated; and repeated.

During this time, I happened to go into the computer room one day and came upon a new member of the team, an associate junior to me. I asked her what she was researching. She looked at me sheepishly; a partner had given her my own little preliminary injunction point to look into again. "[He] just told me to spend a couple of hours on it to see if I could turn up any other cases," she said.

It was her second day on the project.

The activity reached a crescendo as the Monday approached when we would have to submit our brief. I worked all day Saturday. We were told Sunday night would be late; therefore, there was no need to arrive too early on Sunday. Ten a.m. was fine.

Sunday morning arrived. A large conference room had been set aside, with tables full of people. Lawyers were lawyering, paralegals were paralegaling, word processors were word processing, proofreaders were proofreading, delis were delivering. My role was as a sort of a utility infielder,
ready at a moment’s notice to do whatever was needed. So I did a little bit of this and a little bit of that.

We stayed all night. The brief needed to be out the door by about 4:30 p.m. on Monday, leaving a paralegal thirty minutes to leap into a waiting limousine, go the few blocks to the courthouse, and file the brief before the clerk’s office closed. As Monday wore on—no one had slept since Sunday—it became clear that there really was not much for me to do anymore. I was told to stick around anyway. Monday afternoon came. To my horror, someone had managed to finagle an extension of a few hours from the clerk’s office. Two p.m. came. Three p.m. came. Four p.m. came.

Having decided that this situation had, at long last, reached a point beyond the absurd, I decided to go up, find the partner, confirm that my services were no longer needed and, assuming that they were not, go out into the hall, enter the elevator, and leave. I climbed the stairs to the office and walked in. There were about six people in the office. The partner had a draft of the brief in his hands. He was reading carefully, making changes here and there, the junior partner by his side ready to rush off so the corrections could be entered. Everyone else was either standing or sitting, doing absolutely nothing. I got the sense that no one dared leave until the brief was out. There could still be that final affidavit that needed to be drafted or that final line of research that needed to be pursued.

The senior partner asked someone about a point of grammar. There was a response.

I asked a senior associate if I could leave. He shrugged his shoulders, his eyes on the ground. I left.

* * *

One day, I received a call from a partner.

“How would you like to go out West tomorrow morning?”

“Sure,” hesitating just a moment as I pondered when last I did my wash.

My secretary tried to make reservations for me at a hotel. The only available hotel she could find cost $325 a night. Checking with colleagues, the consensus was, well, you have to sleep somewhere (of course, no one considered that that somewhere could include a Holiday Inn).

The following afternoon, I found my way to the airport in a limousine, met three other associates, and flew first class. We arrived very late. We would meet early the following morning and finally learn what it was that we would be doing.

I was shown to my room, or, rather, rooms. There was a wet bar, a sunken living room, kitchen, a huge bathroom larger than my bedroom at home complete with telephone and television, hangers that could be removed (top hook and all), and a king-sized bed.

As I began to unwind, I was startled to hear a knock at the door. It was room service.

“A complimentary bottle of wine to welcome you, sir.”
"Ah yes, of course. Thank you."
I didn’t open it. After all, this was work.
As it turned out, prodigious consumption of hard alcohol would not have affected my performance. Upon arrival at our client’s office, we were met by three more attorneys from another firm representing the client. The actual task at hand was a mind-numbing exercise in adding lists of numbers for reasons that were obscure to me and, I suspect, to everyone else there as well, with the possible exception of the person who dreamed up the exercise. I was completely at a loss to understand what special expertise I had to perform what was, in effect, elementary school arithmetic. In fact, I was awful at it, having gone to law school precisely to avoid this sort of thing.

Of course, in order to engage our interest during breaks, we ate at excellent restaurants, at one point ordering champagne at the insistence of a senior member of our dinner party.

The trip lasted two days. After the project was deemed finished (by fiat of the senior lawyer there, given that he was the only one who ostensibly knew why or what we were doing to begin with and, thus, the only one capable of offering an opinion as to completion), the question arose about what we should do about the results. The decision: Keep a set of our papers in one associate’s office for future reference in the event our conclusions (whatever they were) should become significant.

Some years later, I checked to find out what happened to our project. It had generated no interest. As far as I know, no one ever looked at it again.

B. Segue

A turning point in my legal career came when I was asked to research issues relating to “right to counsel” on behalf of a corporate client that was the subject of a criminal investigation. One of the cases I came across was Powell v. Alabama7—the “Scottsboro Boys” case. I began reading it as I always read a case on my job—scrutinizing it for facts and principles applicable to the client’s case. And then an excruciating disconnect, a kind of intellectual and emotional vertigo, began to take hold. I got some cover letters together and sent them out to places that seemed to work in the interest of worthy causes.

I interviewed with The Legal Aid Society. On the day of the interview, I had just received a complaint on an insurance matter that I needed to review. The Legal Aid office was covered with graffiti. The reception room had chairs of the plastic molded variety. I felt their rough texture before I sat, somewhat gingerly, and began, incongruously, to review the complaint.

I was interviewed. I was hired. I was later told that I was the only applicant for the position from private practice who had not been fired by his firm.

7. 287 U.S. 45 (1932).
Upon my announcement of my departure at the firm, one partner cautioned that I was about to leap from a professional precipice. Some were indifferent. Some were wistful about a path they wish they had taken (in the abstract, of course). Another questioned why I would give up "cutting-edge legal work" to "stop little old ladies from getting evicted." I chuckled with one partner about how clients could now suddenly obtain my services for $170 an hour less than they had been previously paying.

C. At the Legal Aid Office

Housing Court in Brooklyn is nothing like a court. On the outside, it does not say "Court." It has the look of hundreds of nondescript office buildings that clutter blocks of the city. Inside, the nerve center is the fifth floor, a long, narrow, L-shaped corridor lined with six courtrooms. The courtrooms range in size, from modest to tiny. At calendar calls, there are never remotely enough chairs for litigants. People line up in the aisles, some with children, some with canes or walkers, all with varying degrees of hopelessness. Air conditioning is nonexistent. On summer mornings, as things pick up by around 10:00 a.m., the corridor seethes with desperation.

The air is heavy, the noise deafening. Shouting matches are common, fainting spells regular. So what happens? Landlords haul urban sufferers one-by-one out of obscurity and into the glare of the legal system, or rather, a legal system, because a definite article implies a uniform system, and the legal system is nothing if not utterly lacking in uniformity.

In terms of its procedures as well, Housing Court is nothing like a court, at least as a court is understood in popular culture. The vast majority of landlords have lawyers. The vast majority of tenants do not. Even the semblance of an individualized adjudication of rights and duties is a sham. Poor people, many of whom know little or nothing of legal arcana and are justly terrified of losing their homes, typically waive all rights and agree to pay large sums of money without legal counsel. The agreements to pay money are usually based on the chance—dubious at best—that City welfare agencies will pay the agreed amount of arrears. Such failure-to-pay cases produce the bitter irony of a heretofore indifferent government suddenly spurred to action, the action being forcible eviction and the result being homelessness.

People do not pay rent for a vast number of reasons: senility, drug addiction, physical impairments, elder abuse, low-wage jobs, and countless other reasons. Landlords notice that rent is not being paid and commence a legal proceeding. Housing Court then becomes a kind of furnace where seething social crises and human suffering are melted down and metamorphosed into a tidy sum of money owed by one party to another. Rarely does the process resolve anything; if money is paid, the underlying problems usually remain and sooner or later the process repeats itself. If the money is not paid, the tenant is evicted and rendered either permanently homeless or thereafter bounces from shelter to shelter.
Here is a relatively typical case. It is not especially sympathetic—just typical. There was a client, extremely elderly and suffering from mental impairments, who lived with one of her two daughters. The daughter, it seemed, failed to contribute rent because of a drug habit. The landlord filed eviction papers, which the daughter seemed to have answered from time-to-time, signing, during one of those times, a "Stipulation" which waived all the rights of the elderly woman. The woman was brought in by her granddaughter.

Apparently, the woman received Social Security benefits which, while meager, were just enough to cover her rent and, in combination with food stamps, her food expenses. In other words, the usual bare bones subsistence benefit. She gave the benefits directly to her daughter. It turned out that, upon examining her records, her rent was too high, the eviction papers defective, and the amount agreed to by her daughter fictitious, among many other issues. The woman was utterly confused, had no idea what her rent was, what season it was, or where she was. She received a 72-hour notice, which means that she could be evicted at any time three days after service of the notice. The date of the notice was one week prior to her visit with me. She might have been getting evicted as she sat in my office.

I called up the City Marshal, whose secretary told me there was no eviction scheduled for that day or the next (these offices will not tell you any more in advance than that; it keeps you guessing). I quickly filed papers the next day to stay the eviction.

When the case came up to be heard, I met with my adversary. I gave him a brief description of my client, an elderly, impaired woman who had enough money to pay her rent but who was confused and just needed a little help. We needed a little time to help her to her feet.

His response: "I want my money!"

I told him there might be some money due, and we could probably get it from the City; we just needed to sit down. "Give us a couple of weeks, and we can work it out."

His response: "I want my money!"

I got angry, and, for once, I decided to engage in a more global discussion of the process, with this case just being an example. I told him not everything is money. Sometimes people get old, get confused, things happen, and you need a little patience. The system stinks, it doesn't work, I know it's not necessarily his fault, but it takes time to work these things out.

His response (a little louder than before): "Give me my money!"

I got before the judge, told him the situation, got a little time, and, I'm sure much to my adversary's satisfaction, I got him the money.

The moral of the story: If my client's granddaughter had not brought her into my office and my office had not agreed to represent her, which happens all too often, she would be on the street.
I had submitted a set of motion papers on behalf of an elderly woman threatened with eviction. For Housing Court, my papers were a monstrosity, containing a ten-page brief with ten exhibits attached. Of course, by standards of my former law firm, I probably would have been fired for conveying in ten pages what could have been communicated in forty.

The motion was set to be heard in Part 18, a huge room on the first floor complete with wooden benches, microphones, and hundreds of unrepresented tenants who have no idea what is going on. The clerk called my client’s case. I went to the bench, and there the judge sat, impassive, a kind of Buddha in robes. Most of her desk, it seemed, was taken up with my motion papers.

She glanced at the pile of papers, and a look of disgust slowly crossed her face.

She said, “I’m not reading this pile of shit.”

Turning to the clerk, she asked who was sitting in Part 18 the following week.

“Judge Roe? Good. Case adjourned for one week. Next?”

My client remained at risk of eviction for that much longer.

Compared to my maximum firm workload of six active cases at a time, my typical workload at Legal Aid was at least 40 active cases, and many more than that were potentially active. It was not unusual for me to handle multiple cases in Housing Court. My personal record was six. Even though much of the activity occurs on the fifth floor, there are also courtrooms on the first, second, and sixth floors, not to mention other Civil Court courtrooms on many other floors. The bulk of my court days thus entailed running up and down stairs (the elevators were way too crowded), collaring adversaries in stairwells and hallways, and drafting and signing settlement agreements in the frenzy of the scene.

The physical toll was extraordinary, and, as physical tolls tend to do, it affected my mental functioning. But shed no tears for me; imagine what happened to my clients. On several occasions, I was so happy to be through with my day in court that I forgot to tell my client what happened on her case. This happened once to a client with a prosthetic leg; I only realized that I had left him in the courtroom just when I got to my subway on DeKalb Avenue. I would get messages from clients whom I knew were my clients but about whose cases I could recall nothing. Whereas my law firm had a “Managing Attorney’s Office” in charge of getting forms, filing papers, and doing so many of the other clerical things that law practice requires, I was, more often than not, my own one-man Managing Attorney’s Office.
There were none of the many other luxuries of Wall Street. No word processing departments, proofreaders, after-hours receptionists, or after-hours secretaries. No paralegals to assist you in cases. No cars to clients, messenger deliveries, secretaries, Xerox departments, mailrooms, minimally-stocked law libraries, or on-line legal research tools. All of this hampered my ability to effectively represent such a huge number of clients.

All of this said, my life as a legal aid lawyer was nothing compared to what my clients experienced. My clients were also a tiny minority of the masses whose cases were processed through Housing Court and, as a result, were flatly unrepresentative: After all, my clients, unlike most litigants, were represented.

A recurring thought—at the law firm, I almost never met clients. All cases were about money. At Legal Aid, I always met my clients—my many hundreds. And while cases, at a certain level, were about money, they were really about scraping together enough money to subsist with a modicum of comfort and dignity.

III. DISPUTE RESOLUTION RESOURCES AND THE MARKET FOR LEGAL SERVICES

My brief description of life in two law offices demonstrates how disputes attract different levels of the resources of dispute resolution, or RDR, the resources from whatever source that are directed towards resolution of a particular dispute. This section introduces concepts and mechanisms that lay the foundation for understanding the distribution of RDR. Building upon this material, the next section identifies principles that determine how different disputes attract different quantities of RDR.

A. The Components of RDR

RDR is comprised of two components. First, in a system characterized by "disputing through agents," a major component of RDR is the time, compensation, and expenditures generated by the provision of legal services. The most obvious element of this component is lawyers, but lawyers represent only a fraction of the total here. Other sources include the expenses of law offices, paralegals, administrative assistants, filing clerks, process servers, mailrooms, word processors, consultants, experts, and so forth. Given that what lawyers do and the resources they control are largely driven by economics, the market for legal services shapes, in fundamental ways, which clients are represented and how cases are resolved.

The second component involves time and compensation for third-party actors who have a role to play in resolving disputes but are not part of an

8. This phrase was coined by Ronald J. Gilson & Robert H. Mnookin, Disputing Through Agents: Cooperation and Conflict Between Lawyers in Litigation, 94 COLUM. L. REV. 509 (1994).
advocacy team for one side or another. These actors include judges, juries, arbitrators, mediators, as well as those who facilitate the work of these actors (clerks, bailiffs, administrative assistants). Such actors—judges and the cost of judicial facilities and assistants—have traditionally been supplied by the State through general funds. In recent years, third-party actors—namely arbitrators and mediators—have been able to be retained and paid directly by parties. I will return to this distinction at a later point in this Article, but for purposes of the macro view of RDR that I am now sketching, the distinction is not significant.

As I will describe shortly, the quantity of the first component of RDR—legal services—largely controls the quantity of the second component—the cost of third-party actors. Examining the market for legal services thus constitutes the first step in exploring this territory.

B. The Market for Legal Services

Unlike criminal cases, there is no constitutional right to representation in most civil cases—a fact of which almost eighty percent of the population is unaware. Given that there is no state mandate to provide representation, the market controls the distribution, availability, and quality of legal services. Given the nature of market dynamics, lawyers are attracted to areas of practice where there is substantial money to be made. There is substantial money to be made from clients who have enough resources to direct

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9. See infra text accompanying notes 94–103.
10. Lawsuits that sought judicial recognition of a “Civil Gideon” right to counsel in civil cases were largely abandoned in state and federal courts in the last ten to twenty years, although there has recently been a revival of attempts in Maryland and Washington. Richard Zorza, Some Reflections on Long-Term Lessons and Implications of the Access to Justice Technology Bill of Rights Process, 79 WASH. L. REV. 389, 398–99 (2004); Frase v. Bamhart, 840 A.2d 114 (Md. 2003) (a four-to-three decision, declining to reach issue of “Civil Gideon” rights). See also Simran Bindra & Pedram Ben-Cohen, Public Civil Defenders: A Right To Counsel for Indigent Civil Defendants, 10 GEO. J. ON POVERTY L. & POL’Y 1 (2003). In any event, it is rather startling and disturbing to learn that such a right is recognized as a matter of constitutional or statutory law in most industrialized nations. See James Earl Johnson, Jr., Equal Access To Justice: Comparing Access to Justice in the United States and Other Industrialized Democracies, 24 FORDHAM INT’L L.J 583 (2000); Robert J. Rhudy, Comparing Legal Services to the Poor in the United States with Other Western Countries: Some Preliminary Lessons, 5 MD. J. CONTEMP. LEGAL ISSUES 223 (1994). This is particularly ironic in light of how the United States has three times as many lawyers per capita than other industrialized nations. Richard H. Sander & E. Douglass Williams, Why Are There So Many Lawyers? Perspectives on a Turbulent Market, 14 LAW & SOC. INQUIRY 431, 432 (1989).

Even the achievement of a “Civil Gideon” is not necessarily an answer. One need look no further than to how we administer the criminal justice system, in which criminal defendants do have Gideon rights and which display shocking inequities. See, e.g., Deborah Rhode, Access to Justice, 69 FORDHAM L. REV. 1785, 1788–89 (2001); Bruce A. Green, Criminal Neglect: Indigent Defense from a Legal Ethics Perspective, 52 EMORY L.J. 1169 (2003).

Given this footnote contains the first citation to Deborah Rhode, I should note that Professor Rhode, who has done crucial work on access to justice, published a book as this Article was going to press that summarizes and elaborates on her ideas. DEBORAH L. RHODE, ACCESS TO JUSTICE (2004).

11. Rhode, supra note 10, at 1792. Even more shocking in my experience, this percentage might only be modestly less even among law students.
to the provision of legal services. There are three classes of clients who fit this description.

By far the most important and the most numerous are commercial organizations. Not all such organizations, of course, have significant resources to divert to legal services or, for that matter, to anything else; many organizations are small, struggling, or just starting up. That said, successful organizations tend to have far more resources at their command than individuals because they represent, by definition, an *aggregation* of resources. As a result, "[c]ommercial clients command a huge fraction of legal effort, effectively squeezing the interests of individuals . . . to the margins." Lawyers from elite law schools aggregate in elite large firms in order to provide legal services to these clients for handsome compensation. Law schools offer classes in areas of importance to large commercial clients because future lawyers demand to be trained in them because there is money to be made in working for them directly or through law firms. Legal publishers provide vast numbers of treatises, specialized reporters, and other research support in these areas. A corps of experts grows to provide consultations and testimony on commercial matters.

Another class of clients that can afford substantial allocation of resources to legal services is affluent individuals. Given the cost of legal services, these individuals must be spectacularly affluent indeed; being merely "well-heeled" likely will not suffice in today's market.

A final class of clients is somewhat different in character from commercial interests and affluent individuals. These are clients who are engaged in "values conflicts." These tend to be individuals who seek to promote a distinct value, whether it be moral, political, or religious. Such clients can command substantial resources for legal services not because they them-

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12. Gillian Hadfield makes this point as follows:

The fees lawyers charge are high . . . because the market is fundamentally characterized by a bidding competition between commercial actors and individuals for access to scarce legal resources. This is a competition commercial actors . . . overwhelmingly win because of the great disparity in resources between commercial/organizational entities and individuals. Legal fees are high precisely because legal resources are, as a result of free market forces, pulled disproportionately into the commercial sphere, and individuals are largely priced out of the market.

Gillian Hadfield, *The Price of Law: How the Market for Lawyers Distorts the Justice System*, 98 MICH. L. REV. 953, 956 (2000). An additional factor that further enhances the resources available to organizations is that "[c]orporate legal fees are tax-deductible," while fees paid by individuals are not. *Id.* at 998.

13. *Id.* at 961. Evidence suggests that the disparity in resources devoted to commercial disputes continues to increase over time. *Id.* at 962. Marc Galanter, "Old and in the Way": The Coming Demographic Transformation of the Legal Profession and Its Implications for the Provision of Legal Services, 1999 WISC. L. REV. 1081, 1088 ("An ever increasing share of the ever-growing legal services 'pie' is purchased by businesses and government rather than individuals."); Sander & Williams, supra note 10, at 470-71 ("[T]he fastest growing demand for legal services has come from the business sector.").

14. There is no question that the vast majority of clients of large firms are business organizations. *See, e.g.*, Sander & Williams, supra note 10, at 440-41.

15. In terms of theories about the nature of conflict, such "values conflicts" are also distinct from other types of conflicts. For an influential model of conflicts that includes such "values conflicts," see CHRISTOPHER W. MOORE, THE MEDIATION PROCESS: PRACTICAL STRATEGIES FOR RESOLVING CONFLICT 60 (1996), setting forth the "Circle of Conflict" which includes value conflicts.
selves have substantial resources, but because organizations that initiate and litigate these cases themselves represent aggregations of resources from like-minded constituencies. Moreover, this is one area where substantial numbers of attorneys are willing to participate at reduced or no fees both because such cases represent values they share and because these cases attract significant public and professional attention. In a sense, values conflicts are the sole instance of cases in which legal service providers inject a substantial amount of legal services resources at their own expense.

Once litigation involving large business interests, affluent individuals, and "values clients" are accounted for, what's left? With only modest exceptions, a massive number of cases involve low-income disputants who do not have money to pay for a lawyer. Any public interest lawyer knows that the categories into which these cases primarily fall—family law, public benefits, and housing (which is mostly, but not exclusively, landlord-tenant cases)—account for almost three-quarters of requests for subsidized legal assistance. Of course, even this is misleading, because such data can only track requests for legal assistance; in many instances, indigent litigants assume they owe money, particularly in consumer debt collection cases, and thus do not see the need to request representation. This assumption is emphatically not the case, as even a passing familiarity with the law of consumer protection—a richly patterned and complex set of federal and state statutes and common-law causes of action—and the scourge of predatory lending, payday loans, and other unfair and deceptive lending practices demonstrate.

To the extent there is money to be made by lawyers in these and other cases involving low- or even moderately resourced clients, profitability demands an enormous volume of cases to generate adequate income. This is the case, for example, in most immigration, government benefits (particularly Social Security Disability cases, which can be handled on a contingency basis that can generate meaningful attorney's fees when retroactive benefits are at stake), workers' compensation, and, especially, bankruptcy and uncontested divorce practices. Such volume practices are profitable only insofar as cases are simple and uniform; any matter out of the ordinary either does not get handled or is handled as simplicity and uniformity demand, that is, by stripping away complexity and nuance.

17. See infra text accompanying note 116.
19. 42 U.S.C. § 406(b)(1)(A) (2000) (attorneys may be awarded "a reasonable fee ... not in excess of 25 percent of the ... past-due benefits" awarded to a claimant).
20. Id.
Apart from such practices, the balance of legal services to indigents is provided by a corps of poorly compensated public interest attorneys struggling under massive caseloads.\textsuperscript{21} To add insult to injury, most of these lawyers must also labor under federally imposed restrictions on the nature of their practice if their offices are funded even partially by the Legal Services Corporation.\textsuperscript{22} The compensation differential between lawyers at elite firms engaging in primarily business litigation and all other lawyers is only getting more pronounced over time.\textsuperscript{23}

And what is left once the market works its magic? Different measures reflect grim realities. Roughly eighty percent of the legal needs of the poor remain unmet.\textsuperscript{24} Of the total expenditures on lawyers, the amount of this total spent for the representation of the "official" poor is less than one percent.\textsuperscript{25} Vast numbers of low-income and even moderate-income disputants cannot afford lawyers and must proceed \textit{pro se}.\textsuperscript{26} Even when a low-income disputant is lucky enough to have a lawyer, such lawyers command minuscule dispute resolution resources and, as a result, can only allocate a tiny percentage of even these minimal resources to each client because of massive caseloads. Moreover, such law practices—marginalized as unworthy, low-status, or "easy"\textsuperscript{27} among the larger legal community—do not demand much judicial time; as I will detail shortly, since a lawyer has little time for individual attention to each case, little time can be demanded of third-party actors. Of course, the impetus for allocation of judicial resources when a litigant is unrepresented is even less. The end result is increasingly smaller RDR per case. Another term for it is mass justice.

Given the low-status nature of this work and the relatively few lawyers who engage in it at all, law schools offer virtually no courses on issues of

\textsuperscript{21} See, e.g., Peter Margulies, \textit{Representing Domestic Violence Survivors as a New Paradigm for Poverty Law: In Search of Access, Connection, and Voice}, 63 GEO. WASH. L. REV. 1071, 1087–88 (1995) (describing overwhelming caseloads weighing down poverty lawyers). Given the intensity of this practice, another unfortunate consequence for indigent disputants is that the minimal compensation and crushing workloads leads to "burnout." As a result, as advocates gain experience, they often lose the energy to continue the grueling pace and minimal financial compensation generated by this work.


\textsuperscript{23} Hadfield, \textit{supra} note 12, at 984; Sander & Williams, \textit{supra} note 10, at 449–51. \textit{See also infra} text accompanying note 243.

\textsuperscript{24} Deborah Rhode, \textit{supra} note 10, at 1785.

\textsuperscript{25} \textit{Id.} at 1788.

\textsuperscript{26} See, e.g., Russell Engler, \textit{And Justice for All—including the Unrepresented Poor: Revisiting the Roles of Judges, Mediators, and Clerks}, 67 FORDHAM L. REV. 1987 (1999). For an interesting empirical study which includes interviews with unrepresented disputants, see, e.g., Young, \textit{supra} note 16.

\textsuperscript{27} For a critique of these characterizations, see \textit{infra} the text accompanying notes 108–120.
particular interest to the poor.\textsuperscript{28} Apart from clinics, many of which repre-
sent low-income individuals and, increasingly, community organizations,\textsuperscript{29} the best most law schools can do in terms of traditional doctrinal courses is
catch-all courses on “Poverty Law.” While well-intentioned, such courses
could never expose students to the bewildering array of poverty law issues
in any detail. To illustrate this point, consider a course on business law that
includes antitrust, secured transactions, taxation, business organizations, and
securities regulation all packed into a single three-credit course. Such
courses do not exist. Poverty law courses do. The market drives law school
curricula as surely as it drives the provision of legal services.

IV. THE DISTRIBUTION OF RESOURCES OF DISPUTE RESOLUTION

Everyone—lawyers, judges, academics, the public—knows that the
“rich” get more justice than everyone else. Lawyers who practice in spe-
cific areas—be it commercial litigation, landlord-tenant, bankruptcy, family
law, or any other defined area of practice—know that there are disparate
levels of process accorded to parties depending on whether the parties have
significant resources or not. In my view, however, there is much more to be
said on this topic. In fact, identifiable mechanisms operate which divert
RDR to different categories of disputes. Such mechanisms are not immuta-
ble laws of the universe; rather, they are immutable laws given the norms
and realities of a dispute resolution system that is, like ours, characterized
by “disputing through agents,” that distributes legal services through market
dynamics, and that involves significant differentials of wealth among dispu-
tants who can, as a result, command different quantities and qualities of
representation.

A. The Three Principles of RDR

Once the market works its influences on the legal profession, three prin-
ciples allocate RDR to different sorts of disputes. While there are necessar-
ily outlying instances that are anomalous, these principles determine RDR
allocations for the vast majority of disputes and describe with precision the
macro allocations for different categories of disputes.

The First Principle of RDR: Disputants purchase, to the extent possi-
ble, adequate legal representation to insure a fair chance of success in re-
solving a dispute. Given the centrality of disputing through agents, con-
sumers of legal services necessarily want a “good lawyer” (or, in some in-
stances, good lawyers) to pursue or defend claims. Disputants, however,
will not at least knowingly overdo it if they do not have to; in other words,

\textsuperscript{28} Rhode, supra note 10, at 1786 (“Access to justice . . . is not a core concern in . . . law school
curricula.”).

\textsuperscript{29} I discuss the significance of such “community lawyering,” infra, in the text accompanying notes
231–254.
if, from the perspective of a disputant, an individual matter is not "high-stakes," the First Principle of RDR only holds that the disputant, to the extent possible, will purchase "adequate" legal services.

The Second Principle of RDR: Only disputants commanding significant resources have meaningful choices about the quantity of legal services described in the First Principle of RDR. Given that the market has generated high prices for individualized representation, the caveat to the extent possible in the First Principle of RDR swallows that principle for the vast majority of litigants. Most disputants either cannot afford a lawyer at all, in which case their only "choice" is to try (often unsuccessfully) to obtain subsidized legal assistance if they meet income guidelines, or they can purchase the services of an affordable lawyer, which, in most instances, means buying the services of a lawyer engaged in a volume practice. In either case, such disputants must take what they can get: Their limited or nonexistent resources do not permit meaningful choices about the quantity of legal services they can purchase.

As I have already described,30 there are three categories of disputants for whom the extent possible is not a limitation and, as a result, the First Principle of RDR truly determines choices about how much to spend on legal services in a given dispute. These disputants are (1) commercial entities, (2) affluent individuals, and (3) values disputants.

The Third Principle of RDR: The greater the magnitude of the legal services component of RDR, the greater the magnitude of the third-party actor component of RDR. This is an ironclad relationship. Courts in the American system are "reactive institutions,"31 with judges acting "as umpire, while the development of the case, collection of evidence and presentation of proof are left to the initiative and resources of the parties."32 As a result, the more lawyers demand of third-party actors, the more such actors must react by providing services in return. The more lawyers there are and the fewer numbers of cases that they have (a situation characteristic of larger firms), the more intensive the disputing and the more resources such a lawyer or lawyers can demand of third-party actors.

While these three principles focus on individual cases, taken together they have profound systemic implications. The First and Second Principles award control of total RDR to high-resource disputants. The Third Principle ensures that when high-resource disputants deem it appropriate to inject significant legal services into a dispute (and this is, as I will show, almost always when facing a high-resourced opponent),33 third-party actors accommodate by allocating more of their own resources. This, in turn, further magnifies the need to allot ever greater amounts of legal services which, in turn, magnifies the third-party allocation even further. The magnitude of

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30. See supra text accompanying notes 12–15.
32. Galanter, supra note 18, at 120.
33. See infra text accompanying notes 37–93.
RDR allocation for such disputes increases explosively, with each component of RDR intensifying the other. Disputes outside of this whirlpool—that is, virtually all disputes—are left with a shrinking pie of both legal services and the services of third-party actors. The justice system copes with these disparities largely through rules of jurisdiction—a process I will address shortly.  

B. Examples

The best way to illustrate how these principles operate in the real world is to examine how they play out in different categories of disputes. The following is necessarily brief and by no means exhaustive, but it does offer some flavor of a good portion of adjudication as it is now practiced.

I will, for now, defer consideration of collections cases to a subsequent discussion of how subject matter jurisdiction affects the allocation of RDR as well as consideration of the increasingly important issue of alternative dispute resolution and especially mediation—a process that cuts across most of the categories of cases I discuss.

1. Commercial Disputes

Commercial disputes come in many shapes and sizes. Small and medium-size companies often resort to adjudication to resolve contract or business tort disputes that arise in the normal course of business. In such instances, the parties have adequate resources so that the Second Principle brings the First Principle into play, and meaningful amounts of legal services are usually brought to bear in the hopes of obtaining a successful result. These disputants will still usually have substantial constraints for expenditures on legal services. Thus, under the Third Principle, the third-party actor component generates substantial, but not lavish, amounts of third-party actor RDR. Indeed, the typical operation of jurisdictional limits in many jurisdictions insures that even relatively modest business disputes are adjudicated in relatively high-resource courts of general jurisdiction, while most individual claims, deemed smaller by dint of the amount in controversy, are adjudicated in lower-resource civil or small claims courts of limited jurisdiction.

In any event, the very model of lavish RDR allocations are in the relatively few cases that involve large business organizations as disputants and
that involve prodigious amounts of money; these are the takeover battles, business insurance disputes, contract litigation, and business torts which occupy the litigation departments of large firms. In such circumstances, the adequate legal representation to insure a fair chance of success mandated by the First Principle is spectacular indeed; it is spectacular because adequacy means that each side must take into account the legal army being assembled by the other. The resulting legal teams involve numerous lawyers, multiple firms, and the full panoply of support personnel that characterize legal services at its most profligate and excessive.\textsuperscript{38}

This legal arms race has an impact not only on the amount of legal services RDR allocated to such disputes; under the Third Principle, the greater the magnitude of legal services RDR, the greater the magnitude of third-party actor RDR. It should thus come as no surprise that the courts with the greatest resources at their disposal and with the highest status—the federal courts—have increasingly transformed themselves into specialized fora adjudicating “high-stakes, ‘bet-the-company’ business cases.”\textsuperscript{39} These cases demand a disproportionate amount of judicial time, even within the federal system, in comparison with most other types of cases—by one estimate, they “consumed more than twice the judge time of prisoner cases and social security cases combined.”\textsuperscript{40} Put simply, these cases demand far more third-party RDR on a national scale than other types of cases do because, under the Third Principle, the glut of legal resources devoted to them so demands it.

\textsuperscript{38} Another factor that generates such an “arms race” arises from imprecision in determining when legal work is finished. After all, at the big corporate firms . . . [r]esearching a complex legal issue or writing a brief is much like writing a novel: The results are never perfect . . . . In this sense, a greater supply of lawyers will tend to create more legal work, simply because more work will be done more thoroughly. (And who is to say it is done \textit{too} thoroughly?) Sander & Williams, supra note 10, at 471.

\textsuperscript{39} Bryant G. Garthy, Tilting the Justice System from ADR as Idealistic Movement to a Segmented Market in Dispute Resolution, 18 GA. ST. U. L. REV. 927, 941 (2002). Interestingly and unsurprisingly, two classes of mass justice cases that do make it to federal courts are Social Security Disability and prisoner pro se actions, both of which are subjected to various procedural mechanisms through which they receive less attention than the sorts of commercial disputes that are the bread and butter of the federal judiciary. \textit{See infra} text accompanying notes 140–146.

\textsuperscript{40} Marc Galanter, The Life and Times of the Big Six: \textit{Or, the Federal Courts Since the Good Old Days}, 1988 WIS. L. REV. 921, 944. Interestingly, despite all the political and popular exorcism of “trial lawyers” and the “litigation explosion,” available evidence suggests that the largest increase in civil filings in the federal courts have been in commercial litigation. \textit{Id.} at 945. In contrast to the many calls for “tort reform,” an empirically verifiable “explosion” in commercial litigation is never cited as warranting legislative reform. \textit{See infra} text accompanying notes 72–73.

Another massive component of the elite bar that often passes underneath the radar screen are the “transactional” lawyers—the large numbers of lawyers who advise commercial organizations on business transactions of various sorts. While these lawyers are not litigators, their expertise is almost exclusively for high-resource entities—a point to which I will return later. \textit{See infra} text accompanying notes 249–52.
2. Landlord-Tenant

In urban jurisdictions with substantial low-income populations who are renters, landlord-tenant matters generate a massive volume of cases. The quality of adjudication in such places depends, of course, on individual jurisdictions, but the overall picture is grim. A particularly appalling example is Baltimore’s aptly-named “Rent Court,” which functions in many ways as a “collection agency that operates for the convenience of landlords.”\(^1\) In so doing, landlords’ rights are vindicated “with smooth and speedy dispatch,” while tenants’ rights are not because tenants have no idea what their rights are and there are no lawyers available to educate them.\(^2\) An equally infamous example is New York City’s “Housing Court,” which, finally, after many years of deplorable conditions and hundreds of thousands cases settled in minutes in hallways with landlords’ lawyers negotiating with pro se tenants,\(^3\) has been the subject of some reform, the results of which remain in question.\(^4\)

Places like these—and there are, of course, many others\(^5\)—are virtually invisible to the legal community or the general public, except to those unfortunate enough to have to go there. These places are, however, exemplars of how RDR theory works. In virtually all instances, only one party—the landlord—has adequate resources to retain an attorney. While there are, of course, many landlords who own one or two small buildings, the bulk of the cases are brought by larger players—substantial property owners who own numerous properties and make money renting to many low-income tenants. These property owners can afford individualized legal representation if they so desire and may make such a selection if they are involved in a divorce or a dispute with a commercial entity. But the First Principle of RDR does not say that relatively high-resource disputants must pay lots for legal services; it says only that they will pay for adequate representation to insure a fair chance of success in resolving a dispute. Given that they are virtually always facing pro se disputants who cannot afford any representation at all,

\(^{1}\) A System in Collapse, ABELL REP., Mar. 2003, at 1, 5.


\(^{3}\) See, e.g., Mark H. Lazerson, In the Hall of Justice, the Only Justice Is in the Halls, in THE POLITICS OF INFORMAL JUSTICE 119 (Richard Abel ed., 1981). The obvious abuses inherent when represented parties “negotiate” with non-represented parties are explored in Russell Engler, Out of Sight and Out of Line: The Need for Regulation of Lawyer’s Negotiations with Unrepresented Poor Persons, 85 CAL. L. REV. 79 (1997). Engler concludes that in such situations, lawyers often mislead and misrepresent the law or facts to pro se litigants. Id. at 130–57.

\(^{4}\) See Engler, supra note 26, at 2063–69. Such impulses towards reform, while generated by the best of intentions, often “become a symbolic substitute for redistribution of advantages.” Galanter, supra note 18, at 149.

\(^{5}\) See, e.g., Engler, supra note 26, at 2057–63 (describing Boston’s “Housing Court”); Trina Drake Zimmerman, Representation in ADR and Access to Justice for Legal Services Clients, 10 GEO. J. ON POVERTY L. & POL’Y 181, 195 (2003) (on a typical day at Boston’s Housing Court, 141 of 208 cases on the docket were set for trial, and in these trials, “landlords were represented in 111 cases, tenants were represented in 13 cases”); Cook County courts handle about 40,000 eviction cases in a year, in which only about 10% of tenants are represented).
landlords only need minimal legal services to meet the requirements of the First Principle, and that is what they purchase. Attorneys who represent landlords in such courts typically have numerous cases through a volume practice, accord minimal if any attention to individual cases, and occupy low status within the profession. Even still, they usually win because only a little representation goes a long way in these fora.

Given that there is no incentive to expend substantial resources on legal services, Principle Three keeps the total RDR very low. These courts adjudicate staggering numbers of cases. Baltimore’s Rent Court, for example, has only one judge assigned to it per day, and yet that judge often has a docket of 1,050 cases in a single day. As a result, “the average case receives less than 30 seconds of judicial review.” In such an environment, even the most well-intentioned judges cannot help but be benumbed by overwhelming dockets and constrained by a system that could only function by according virtually no process to individual cases. They can only hope for and encourage maximum numbers of settlements and default judgments, and the system accommodates them.

An irony is that in the rare instance that a tenant can obtain a legal services attorney, the tenant will likely be successful. While no doubt frustrating to landlords and their attorneys in these individual cases, such instances do not trigger any change in RDR allocations because it is the aggregate that matters. Landlords, in the end, remain confident that their minimal investment in legal services will succeed most of the time. There is no incentive to spend more on legal services; thus, there is no trigger to increase the third-party actor component of RDR; thus, you have Rent Court and Housing Court.

It is here, as always, important to keep in mind what is being adjudicated. In these cases it is shelter. State-sponsored forcible eviction, at best, generates extreme hardship on individuals and families (including, often, children) and, at worst, generates homelessness or, sometimes, even death.

3. Government Benefits

A massive adjudicatory system for low-income claimants operates in the shadowy realms of administrative agencies. These are even less understood and observed by those who do not participate in them than landlord-

46. A System in Collapse, supra note 41, at 2 (emphasis added). Even more remarkably, this 1,050 total is an administratively imposed limit. Id.
47. Id. For a rare judicial recognition of these realities, see 144 Woodruff Corp. v. Lacrete, 585 N.Y.S.2d 956, 960 (1992), wherein the opinion notes that cases in New York City’s Housing court are “disposed of at an average rate of five to fourteen minutes per case, with many settlements in the range of five minutes or less.”
48. Bezdek, supra note 42, at 578–82 (describing the sources and mechanisms for the large numbers of default judgments in Baltimore’s Rent Court).
49. For example, one study found that represented tenants were successful 90% of the time. SEPTEMBER JARETT & MICHAEL MCKEE, HOUSING COURT, EVICTIONS, AND HOMELESSNESS: THE COSTS AND BENEFITS OF ESTABLISHING A RIGHT TO COUNSEL 8 (1993).
tenant cases. These cases, taking place primarily in the Social Security Administration and before a patchwork of state departments of social services, typically address the availability, amount, or termination of benefits such as food stamps, Medicaid, social security, and Supplemental Security Income, and the variety of state programs funded through the federal block grant program known as "Temporary Assistance for Needy Families" (TANF). While these cases on occasion percolate through the judicial system and generate appellate decisions, such instances are exceedingly rare.

Despite the opacity of these proceedings to the public and to most practitioners, they unsurprisingly manifest qualities reminiscent of the courts of mass justice, albeit with variations generated by the specific nature of these proceedings. There are large caseloads for administrative law judges, limited or nonexistent legal representation for claimants, and simplified procedures that operate to the detriment of claimants. Evidence suggests an alarming lack of uniformity in decision-making in these fora, with administrative law judges' political or personal proclivities, largely unchecked by procedure or external review, counting for even more than in judicial proceedings. Such tendencies are only becoming more pronounced as the

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50. The lack of attention paid to these procedures by the public and the profession are the result of the unfortunate conjunction of two characteristics. First, they involve indigents, and the experience of how mass justice courts operate "publicly" with virtually no public scrutiny means that such administrative proceedings are hardly candidates for much attention. Second, they are administrative in nature and thus neither present the spectacle of jury trials so beloved in popular culture nor generate the appellate decisions so beloved of academics. All of this, of course, is utterly beside the point to the claimant who desperately needs government benefits to achieve minimal levels of subsistence.

51. 42 U.S.C. §§ 601–03 (2000). This Program replaced the prior "Aid To Families with Dependent Children" ("AFDC").

52. In terms of workload, however, administrative law judges (A.L.J.) are luckier than their judicial counterparts. Cases typically do not even come before an A.L.J. until, first, a claimant applies for benefits, and, second, appeals a denial, change, or termination of benefit levels. See, e.g., 20 C.F.R. § 416.1430 (2004) (listing predicates required prior to a hearing before an A.L.J. in Supplemental Security Income cases). Some claimants, of course, do receive appropriate benefits. Thus, A.L.J.s, in effect, act as appellate fora. This status screens out numerous cases that need not be appealed or that a claimant does not know should be appealed because there are no lawyers to so advise.

53. "[P]ublic and private legal agencies and advocates for the poor describe representation for public benefit issues as a priority and a major unmet need." Young, supra note 16, at 570.

54. The process first identified as due in Goldberg v. Kelly, 397 U.S. 254 (1970), and at least purportedly defined by Mathews v. Eldridge, 424 U.S. 319 (1976), has been largely abrogated in practice. See infra text accompanying notes 152–58.

55. JERRY L. MASHAW ET AL, SOCIAL SECURITY HEARINGS AND APPEALS 21 (1978). This is not necessarily surprising, given that A.L.J.s, unlike other judges, have a "basic obligation to develop a full and fair record" which "rises to a special duty when an unrepresented claimant unfamiliar with hearing procedures appears before him." Lashley v. Sec'y of Health and Human Servs., 708 P.2d 1048, 1051 (6th Cir. 1983); Clark v. Schweiker, 652 F.2d 399, 404 (5th Cir. 1981). This peculiarity of judge acting as both lawyer and decision-maker no doubt further exacerabtes the consequences of political biases against or in favor of claimants.
stripping away of benefits as entitlements\(^\text{56}\) intensifies the ad hoc nature of decision-making in this area.\(^\text{57}\)

In terms of RDR analysis, some twists distinguish administrative adjudication from judicial adjudication. Like most tenants, only a tiny percentage of claimants for government benefits can obtain legal assistance.\(^\text{58}\) Principle Two thus disables Principle One. The third-party actor component—controlled through Principle Three—is, however, even paltrier than in mass justice cases in courts for three reasons. First, a private attorney rarely represents an opposing interest. Thus, no external spur generates even a modest allocation of third-party RDR under the Third Principle. Second, given that administrative agencies often act as both adjudicator and opposing party, and given that they have sole control over the third-party actor allocation in most instances, they have a significant disincentive to allocate any more third-party actor resources than absolutely necessary. This is especially true for social welfare agencies that, as a rule, are primary targets for budget cuts. Finally, even mass judicial adjudication is public and thus must make at least some attempt, however hollow, at being an impartial and meaningful forum for the resolution of disputes. Administrative adjudication, largely private and utterly invisible, has no such incentive.

One telling variation on the recurring theme that the interests of indigent disputants always lose involves the speed of adjudication in mass justice administrative fora. Mass justice courts are models of efficiency; given that such courts invariably adjudicate claims against indigents, they display an extraordinary ability to issue judgments in record time with minimal process.\(^\text{59}\) In contrast, mass justice administrative fora almost invariably involve claims by indigent disputants for benefits. As a result, the wheels of adjudication or even of processing initial applications for assistance often grind at an agonizingly slow pace.\(^\text{60}\) Given that claims for government benefits are made by the most impoverished among us, such inefficiency intensifies the desperation of the already desperate.

Interestingly, although also little-noted and little-studied, high-resource disputants often participate in administrative fora as well. These are not, of course, social welfare agencies. Rather, they include agencies such as the Securities and Exchange Commission, the Federal Trade Commission, the

\(^{56}\) The Personal Responsibility and Work Opportunity Reconciliation Act (PRA) is quite explicit in stating that the law "shall not be interpreted to entitle any individual or family to assistance under any State program funded under [the Act]." Pub. L. No. 104-193, § 401, 110 Stat. 2105, 2113 (1996).

\(^{57}\) See Houseman, supra note 22, at 386-87 ("[W]e are moving from a system of advocacy based on applying federal law and rules to state agency practices to a system that is fact-based and relies on effective and persuasive presentation of facts and options to agency decisionmakers.").

\(^{58}\) See, e.g., Young, supra note 16, at 570.

\(^{59}\) See supra text accompanying notes 41-49.

\(^{60}\) In a representative example of the appalling delays that afflict cases subject to administrative adjudication, one federal magistrate observed that "it has taken six years for this relatively simple claim to work its way through the system, approximately two years of that time having been expended by the Appeals Council in deciding that it would not review the claim." Jacobs v. Barnhart, Civil Action No. S-01-2788, slip op. 1 n.1 (D. Md. Oct. 7, 2002).
Federal Communication Commission, the Environmental Protection Agency, the Food and Drug Administration, and so forth. As RDR theory would predict, these agencies, faced with substantial allocation of legal services, magnify the third-party component with much lower volume, more process, and more time and energy expended on each case on the part of the decision-makers. 61

Putting such agencies aside, what are the stakes in proceedings within agencies that adjudicate government benefits claims? Anyone applying for such benefits is, by definition, grindingly impoverished. The amounts at issue, when viewed from the perspective of the larger culture, are pitifully small 62 yet critical when no other resources are available. Indeed, delay or failure to award such subsistence benefits—as well as improper termination of them—lead to other cases that comprise poverty law—evictions, collections cases, and increased domestic violence. 63

4. Personal Injury

Personal injury cases are something of an oddity because they are a very rare example of matters where disputants of modest means can command significant resources of legal representation. 64 The reason is that contingent fee arrangements operate to make commercial interests fund the costs of legal representation in successful cases. As a result, the typical defendant in personal injury cases—resource-rich commercial organizations or insurers or both—are the source of substantial attorney's fees, thus providing an incentive for attorneys to represent such clients. 65 Put in RDR terms, personal injury plaintiffs meet the requirements of the Second Principle vicariously by gaining access to the resources of the party they are suing.

Given this anomalous state of affairs, RDR allocations can be considerable in these cases. The substantial amount of legal services resource at

61. Indeed, as is often noted, such agencies are ‘captured’ by the entities they are designed to regulate—a circumstance somehow unlikely to happen in social service agencies.


64. The only other examples that come to mind—consumer class actions or variations on the class action theme such as shareholder derivative suits—similarly have elements of contingent fees in that courts award attorneys’ fees in successful (which virtually always means settled) cases, and, thus, the large resource commercial entity pays the costs of legal representation for its adversary. Such cases, apart from being much less common than their occasional notoriety might suggest, have also been subjected to intense criticism because it is not unusual for attorneys to receive far more than the modest amounts awarded to individual members of the plaintiff class. As with other instances of small resource plaintiff against large resource defendant, stories of abuses on the part of plaintiffs are greatly exaggerated. See generally Charles Silver, We’re Scared To Death: Class Certification and Blackmail, 78 N.Y.U. L. REV. 1357 (2003).

65. Hadfield, supra note 12, at 956.
play means that, under the Third Principle, third-party actors must respond with RDR allocations of their own. Indeed, most of these cases are litigated in the same courts as are business disputes and even, on occasion, make it to federal court. These cases are also notable in that while, like most cases, the vast majority settle, a non-trivial number do go to trial, and jury trials at that—the ultimate in third-party actor resource allocations.

That said, the oddity of this circumstance—low-resource disputants taking on commercial organizations in something approaching parity—generates consequences that strikingly illustrate how outside the norm these cases are. First, personal injury lawyers experience the lowest public estimation of a profession already held in low regard; stereotypes about "ambulance chasers" and "shysters" cling to personal injury lawyers, not to Wall Street lawyers. Non-personal injury attorneys often join in this tarring and consider themselves as far away from such low-prestige work as being members of a theoretically unified profession will allow. Such waves of contempt appear to arise, at least partially, from how such work involves the representation of low-resource disputants against commercial interests.

Second, a personal injury practice, for all of its potential windfalls and its rhetoric of fighting for the little guy, still has much in common with the non-contingent fee volume practices that I have already described. It is no secret that in order to be profitable, personal injury lawyers must take on a portfolio of numerous cases, out of which a lawyer hopes that some will generate significant returns to offset the many that do not. This often leads to simplifying cases, dropping cases that turn out not to be lucrative, quick settlements, and other practices that diminish the individualized attention that is the hallmark of the hourly billing practice of elite firms representing commercial interests. In other words, the quality of representation is, to say the least, not always up to the gripping portrayals in the popular media.

Third, and perhaps most telling of all, the relative parity of the playing field in personal injury cases has generated a ferocious attack by the defendants' bar. Indeed, out of all of the appalling inequities in the justice system, so-called "tort reform" is the one issue relating to the administration of

66. For a discussion of the influence that jurisdiction has on RDR allocations, see infra the text accompanying notes 135–51.
67. The distinctiveness of personal injury cases in this regard has long been recognized. Galanter, supra note 18, at 110 (noting how personal injury cases "are distinctive in that free entry to the arena is provided by the contingent fee").
68. It is interesting that these attacks use the code word "trial lawyers"—a subtle way to marginalize one component of the profession from the rest that does not sully itself with such activities.
69. See supra text accompanying notes 18–20.
71. A recent famous account of a personal injury action also made into a popular film is Jonathan Harr, A Civil Action (1995). While the intensity of the litigation in that book is hardly typical of personal injury practice, in a sense, the book at least demonstrated the financial advantages of defendants as the plaintiffs' lawyers struggled to maintain the litigation prior to receiving compensation through a contingent fee.
justice that is on the national political radar screen. This is ironic not only because the number of tort filings is actually falling, but also because the usual rhetoric of such attacks—that personal injury awards increase prices to the consumer—is, if anything, more true of hugely expensive commercial litigation undertaken by elite law firms; yet redressing such excesses is never mentioned in political discourse, let alone the subject of serious proposals for reform.

There is, nevertheless, more than enough self-serving rhetoric to go around in this debate. While professed concerns for consumer pricing and out-of-control litigiousness mask economic self-interest on the part of the defendants’ bar, the professed concern for the rights of “ordinary Americans” on the part of the plaintiffs’ bar is similarly disingenuous; after all, there are plenty of rights at stake in family law matters, consumer cases, and landlord-tenant disputes, but contingent fee arrangements in these cases either do not or cannot generate substantial attorneys’ fees. As with so much else in this arena, the level of compensation drives what principles the profession decides are worth fighting for.

In the end, debates about tort reform divert attention from issues of far greater import. As a function of sheer numbers, “[t]orts are only a small fraction of lawsuits,” while “business litigation is growing faster.” More importantly, while victims of negligence deserve redress and legal assistance, many more who are lucky enough to escape such misfortune remain in desperate need of legal assistance to put food on their tables and roofs over their heads.

5. Family Law

Family law disputes are critical to any consideration of access to justice. Such cases account for about one third of requests for legal assistance in the

72. See EXAMINING THE WORK OF STATE COURTS, supra note 37, at 24–25 (noting that tort filings decreased in 30 states surveyed, representing 73% of the United States population).

73. Another interesting aspect of this is that all of the public ridicule of frivolous personal injury lawsuits involving spilled coffee vastly distorts the field. In fact, “[t]he truth, established by every reputable study, is gross underclaiming and gross undercompensation of the largest claims.” Richard Abel, Big Lies and Small Steps: A Critique of Deborah Rhode’s Too Much Law, Too Little Justice: Too Much Rhetoric, Too Little Reform, 11 Geo. J. LEGAL ETHICS 1019, 1023 (1998). As to the presumed litigiousness of average Americans, virtually every study that has examined the issue has found restraint, not excess. See, e.g., SALLY ENGLE MERRY, GETTING JUSTICE AND GETTING EVEN: LEGAL CONSCIOUSNESS AMONG WORKING-CLASS AMERICANS 17 (1990); Young, supra note 16, at 571.

74. In the case of family law cases, the Rules of Professional Conduct prohibit contingent fees. MODEL RULES OF PROF’L CONDUCT R. 1.5(d)(1) (2003). In the case of consumer and landlord-tenant disputes, there is typically no money from the debtor/tenant side from which to collect a fee. In one of innumerable iterations of RDR theory, it is ironic that, at least in consumer cases, collections attorneys can and do establish contingent fee arrangements which provide that their fee will be a percentage of damages they recover. However, debtors, by definition, typically have no damages from which to collect fees and, thus, virtually no ability to obtain counsel.

75. Abel, supra note 73, at 1023.
United States—the highest total for any category of cases. Apart from the sheer volume of family law cases, such cases are distinctive for a number of other reasons: (1) The nature of family law excludes commercial litigants as parties—an extraordinarily unusual, and perhaps unique, characteristic; (2) family law is the only significant category of cases that presents substantial numbers of disputes where all parties have few resources; (3) family law is the only significant category of cases where low-resource disputants and high-resource disputants are both frequent players, albeit with low-resource disputants appearing in much greater numbers; and (4) family law cases often directly or indirectly have an impact on vulnerable non-parties who are of extraordinary importance, namely children.

Even with all of these distinctive characteristics, the Principles of RDR grind away as they do with everything else, with typical consequences. The vast majority of family law disputants have few resources and, thus, few can afford lawyers. As a result, the first two Principles of RDR do not apply, but the Third Principle does. Given the negligible amount of legal services resources expended on both sides of the "v." in such cases, the Third Principle diverts minimal third-party actor resources. What is left are mass justice courts adjudicating family law matters.

A tragic and wrenching consequence of the operation of these Principles in this area is that what is at stake in many family law cases—the well-being of children—is extraordinarily high, while, at the same time, the RDR allocated to disputes involving low-resource disputants is astonishingly low. Another tragedy is that even though "[w]omen in low-income households experience violence at significantly higher rates than women with higher annual incomes," their economic status plummets further post-separation, and the numbers of battered women far outstrip the numbers of lawyers available to represent them. In such circumstances, victims of domestic violence who are unrepresented—an increasingly common phenomenon—

77. See Nancy Ver Steegh, Yes, No, and Maybe: Informed Decision Making About Divorce Mediation in the Presence of Domestic Violence, 9 WM. & MARY J. WOMEN & L. 145, 155-66 (2003) (gathering data that "[t]he number of pro se litigants in family cases has increased dramatically in recent years" and "that divorce proceedings where both sides are represented by counsel are no longer the norm; rather, they are surprisingly rare"); Jane C. Murphy, Engaging with the State: The Growing Reliance on Lawyers and Judges to Protect Battered Women, 11 AM. U. J. GENDER SOC. POL'Y & L. 499, 511 (2003) (describing an empirical study which found that only 25% of women had a lawyer for civil protection hearings). In terms of gender breakdowns, "[w]omen, including battered women, are less likely to be represented than men." Ver Steegh, supra, at 166.
78. Ver Steegh, supra note 77, at 167; Rhode, supra note 10, at 1793.
operate under more than a mere "disadvantage;" their lack of representation constitutes a danger to the victim and to the victim's children. 80

In the relatively few family law matters where significant resources are at stake, that is, in cases involving affluent disputants, all of the principles of RDR come into play, with the end result being that parties divert significant resources into legal services in order to reach a fair chance of success, and, as a result, the Third Principle allocates a substantial quantity of third-party actor resources to such disputes. Ironically, given that it is not unusual for both sides to have access to resources in cases involving affluent parties in family law, the quality of dispute resolution may be more intensified, but the relatively even playing field insures that neither side has a particular advantage. As with commercial disputes, the Principles generate a kind of stalemate.

In any event, these represent a tiny percentage of cases. The real bottom line? As one commentator has compellingly put it, "civil courts take weeks to try a commercial dispute between wealthy businesses but give less than five minutes to decide the future of an abused or neglected child." 81

6. School Desegregation Cases

I will conclude this survey with a brief discussion of a series of cases that, on their face, differ substantially from what I have discussed previously. While how they ended up should not be surprising, 82 tracing this line points to a heretofore unaddressed aspect of the RDR model: the power of the Third Principle to draw resources away from disputes when the third-party actor allocation becomes intolerably high.

The most famous Supreme Court case of all, Brown v. Board of Education, 83 articulated grand principles of the Equal Protection Clause, yet it postponed consideration of the knotty question of "appropriate relief," that is, how actual human beings could secure the benefits of those grand principles. Brown II, 84 decided the following year, sought to answer this question by, in its famous words, holding that courts should "retain jurisdiction" and conduct proceedings that were "necessary and proper to admit

80. Ver Steegh, supra note 77, at 167. As with landlord-tenant cases, see supra text accompanying note 49, the presence of an attorney vastly increases the chances that such clients will be successful. See, e.g., Murphy, supra note 77, at 511 (empirical study demonstrated "that having an attorney substantially increased the rate of success in obtaining a protection order"). This last study also notes the troubling truth that often the quality of lawyers who were affordable to battered women were not only abysmal, but, in some instances, such lawyers would "push women into inappropriate arrangements with their batterers or even . . . pressure women into giving up." Cauthert et al., supra note 79, at 69.


82. For a fascinating treatment of what follows, albeit from a somewhat different perspective, see ANTHONY G. AMSTERDAM & JEROME BRUNER, MINDING THE LAW 55-77 (2000).


84. Brown, 347 U.S. at 495.

[students] to public schools on a racially nondiscriminatory basis with all deliberate speed."\(^{86}\)

In order to place the *Brown* line in an RDR context—something that might be a bit of a challenge in light of the sheer familiarity of these cases and the way they are usually analyzed—the plaintiffs in *Brown* and *Brown II* were not low-resource; rather, they were what I have called "values disputants."\(^{87}\) While, of course, individuals affected by these decisions (and the named plaintiffs themselves) were mostly low-income, the aggregation of such claims into "test cases" and the involvement of higher resource groups and individuals who shared the values at stake generated sufficient legal services muscle to warrant the third-party actor treatment these cases received. In other words, plaintiffs in these cases had substantial enough resources that, under the Second Principle, they could purchase enough legal services under the First Principle to have a meaningful chance of success.

That said, *Brown II* did usher in an extraordinary allocation of third-party actor RDR that would seem to have begun to stretch the legal services/third-party actor nexus of the Third Principle. The federal courts, for the most part, did their best to achieve desegregation with frustrating results. The post-*Brown II* period was punctuated with opinions from an increasingly restive Supreme Court because actual results continued to evade the courts.\(^{88}\) This line culminated in 1971 with *Swann v. Charlotte-Mecklenburg Board of Education*,\(^{89}\) which detailed devices courts could employ to achieve the remedies the Court had sought to achieve some seventeen years earlier.\(^{90}\) At the risk of some simplification, *Swann* represented the high-water mark of total RDR allocation in desegregation cases.

While the details of the doctrinal modifications after *Swann* are not necessary to an RDR analysis, a summary of the Supreme Court's shift is relevant: In the end, "[n]o longer impatient about how long it was taking state authorities to comply with judicial desegregation orders, the Court now began to express impatience with the duration of the desegregation orders themselves."\(^{91}\) In other words, in RDR terms, the third-party allocation began to grow too large; courts were expending too much time and money regardless of whether the principles underlying *Brown* and *Brown II* were being vindicated. This led the Supreme Court in *Freeman v. Pitts*\(^{92}\) and *Missouri v. Jenkins*\(^{93}\) to an utter retreat, whereby, for all practical purposes,

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86. *Brown*, 349 U.S. at 301.
87. See supra text accompanying note 15.
88. For a summary of these decisions, see AMSTERDAM & BRUNER, supra note 82, at 55–56.
89. 402 U.S. 1 (1971).
90. These devices included busing and "a frank—and sometimes drastic—gerrymandering of school districts and attendance zones." *Swann*, 402 U.S. at 27.
91. AMSTERDAM & BRUNER, supra note 82, at 58 (emphasis added).
continuing federal jurisdiction in desegregation cases ended, and ended is where it remains today.

There are, of course, many explanations of why Brown became close to a dead letter, from the jurisprudential, to the sociological, to the political. All of these are critical to understanding these shifts. From an RDR perspective, the magnitude of third-actor allocation became too great to justify continuing federal involvement even when a relatively high-resource set of value disputants was pursuing these cases. Or, to put it somewhat differently, it did not matter that local authorities refused to adhere to core principles of the Fourteenth Amendment: It simply cost too much in terms of judicial resources to care.

C. Alternative Dispute Resolution for the Masses: Hierarchies Emergent

The emergence of ADR and especially mediation, while full of promise of empowerment for disputants, has, by all accounts, largely replicated the hierarchies that exist for traditional adjudication.

There has emerged an elite and relatively closed group of lawyers, mediators, courts, and disputants who together attract prodigious amounts of RDR. In this world, the promise of ADR rings true; it furnishes a true alternative to litigation, albeit to the elite forms of litigation traditionally practiced in the federal courts. And for the rest? The mass justice of low-income courts and "a parallel (and rather sloppy) justice system dominated by a potluck of court-appointed neutrals." Indeed in some instances, this parallel is striking; one day in Boston's Housing Court's mediation program, an observer saw seventy people waiting to be ushered into five mediation rooms—evidently, a fairly typical number. One Boston attorney characterized this mediation program as "a fast way for landlords to get their tenants evicted."

Interestingly, there has not emerged something akin to what has happened in education: an elite private school world for the affluent (analogous to mediation), and an underfunded, under-resourced public education world

94. See Garthy, supra note 39, at 931–33. An advertisement from the American Arbitration Association offers some flavor of the elite, necessarily commercial segment of the ADR market. A man in a business suit and office setting has the following quote printed above his picture: “I want a neutral who knows both my industry and the rules—inside and out.” The copy is as follows:

There’s ADR. And then there’s AAA. At the American Arbitration Association, we recognize outstanding neutrals are essential to successful dispute resolution. AAA neutrals are not only distinguished by their industry-specific expertise, they’re also the only ones in their profession who have received mandatory training on our rules and their proper use and enforcement. When combined with AAA case managers who have been trained to keep things moving, parties benefit from a faster, more predictable process. To find out more about working with the ADR provider who sets the standards others follow contact us at .... Am. Arbitration Ass'n, 90 A.B.A. J., Apr. 2004, at 5, 5.

95. Garthy, supra note 39, at 932.

96. Zimmerman, supra note 45, at 196. Whether such a scene could be legitimately characterized as mediation is highly questionable.

97. Id. at 197.
for everyone else (analogous to adjudication in the courts). Rather, there are two worlds, each of which, in turn, has two sub-worlds within it. High-resource disputants have access to both elite courts and elite mediators and the ability to choose between them. Low-resource disputants are forced into overburdened and underfunded courts or overburdened and underfunded mediation programs and, often, have not even the ability to choose between whatever appears to be the lesser of two evils. This is because so-called mandatory mediation—an increasingly common phenomenon—is virtually always limited to matters involving low-income disputants. 98

To pause briefly on the mandatory mediation issue, there is no public policy reason why mandatory mediation should be limited to low-income litigants. Indeed, it would make all the sense in the world to send large organizations and their legal teams to mediation to clear dockets of the explosions of motions and discovery disputes such cases generate. This would make room for the really important matters—cases involving the welfare of individuals. From a moral or public policy point of view, this would make eminent sense. But when public policy and morality face RDR theory, there is no contest; it is invariably a rout, and RDR theory always wins in this as in all matters relating to dispute resolution.

In sum, just as there are forms of the practice of law that are of a lower status within the legal profession—the sorts of volume practice alluded to earlier 99 being a prime example—there is evidence to suggest that there is now "a place for relatively marginal members of the legal profession to be deputized as mediators" in the sorts of cases judges do not want to handle, which tend to be, unsurprisingly, cases formerly subjected to mass justice. 100 Moreover, in similar fashion to the emergence of elite law firms, there are now elite ADR firms 101 who associate with highly trained neutrals yet, in an utterly unsurprising yet dispiriting trend, do not handle mass justice cases because it is not in their economic interest to do so. 102 In the absence of substantial legal services RDR, there is no incentive to allocate

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98. Most of these mandatory mediation programs are for family law cases in which the vast majority of disputants are low-income, although, of course, mandatory mediation does sometimes apply to affluent spouses who are getting divorced. See Zimmerman, supra note 45, at 182. Mandatory mediation is something of a misnomer in that it means parties must mediate before seeking judicial redress; it would be unconstitutional if judicial redress was completely precluded. Nevertheless, the effect of such programs—particularly for low-income disputants—is constructively the same, because there is usually intense pressure to resolve matters in mediation. Jacqueline M. Nolan-Haley, Court Mediation and the Search for Justice Through Law, 74 WASH. U. L.Q. 47, 60–62 (1996); Andrea G. Gagnon, Ending Mandatory Divorce Mediation for Battered Women, 16 HARV. WOMEN'S L.J. 272, 281 (1991) (noting that mediators are pressured by judges to settle cases and that mediators believe that their job performance is evaluated based on their percentage of cases settled).


100. Garthy, supra note 39, at 938, 949. Some have argued that judges affirmatively want to handle business disputes involving large sums of money because this will allow for employment after leaving the bench in the highly lucrative ADR market for individuals to mediate and arbitrate such disputes. Id. at 941–43.

101. These include JAMS and the CPR Institute for Dispute Resolution.

102. Zimmerman, supra note 45, at 193 ("Because there is little to no money in mediating landlord/tenant disputes, few mediators do this type of work."); Garthy, supra note 39, at 938.
substantial third-party actor RDR. Thus, the market siphons off many of the best mediators, leaving those desperately in need with little or nothing.  

D. A Graphic Summary

Table 1 displays the Principles of RDR in tabular form by setting forth how different categories of cases generate different “RDR Profiles.”

<table>
<thead>
<tr>
<th>Disputes Among High-Resource Parties</th>
</tr>
</thead>
<tbody>
<tr>
<td>Resource Level of Parties: High</td>
</tr>
<tr>
<td>RDR Allocated to Legal Representation: High</td>
</tr>
<tr>
<td>RDR Allocated to Third-Party Actors: High</td>
</tr>
<tr>
<td>Examples: Commercial disputes among business organizations; civil matters involving affluent parties; administrative proceedings involving high-resource commercial entities.</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Disputes Between High-Resource Parties and Low-Resource Parties</th>
</tr>
</thead>
<tbody>
<tr>
<td>Resource Levels of Parties: High against low</td>
</tr>
<tr>
<td>RDR Allocated to Legal Representation: Low (or non-existent for pro se litigants)</td>
</tr>
<tr>
<td>RDR Allocated to Third-Party Actors: Low</td>
</tr>
<tr>
<td>Examples: Landlord-tenant disputes; debt collections cases; bankruptcy.</td>
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</tbody>
</table>

<table>
<thead>
<tr>
<th>Disputes Between Government and Low-Resource Parties</th>
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</thead>
<tbody>
<tr>
<td>Resource Level of Parties: Low</td>
</tr>
<tr>
<td>RDR Allocated to Legal Representation: Low (or non-existent for pro se litigants)</td>
</tr>
<tr>
<td>RDR Allocated to Third-Party Actors: Low</td>
</tr>
<tr>
<td>Examples: Administrative and judicial hearings involving government benefits; immigration cases.</td>
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<table>
<thead>
<tr>
<th>Disputes Among Low-Resource Parties</th>
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<tbody>
<tr>
<td>Resource Level of Parties: Low</td>
</tr>
<tr>
<td>RDR Allocated to Legal Representation: Low (or non-existent for pro se litigants)</td>
</tr>
<tr>
<td>RDR Allocated to Third-Party Actors: Low</td>
</tr>
<tr>
<td>Examples: Family law cases involving low-income couples and children.</td>
</tr>
</tbody>
</table>

103. In a sure sign that the world of mediators is beginning to mirror the world of adjudication, the ABA has begun to call for successful ADR practitioners to engage in pro bono mediation on behalf of underserved populations. Zimmerman, supra note 45, at 187. The results will likely be as unsuccessful as pro bono initiatives among the private bar. See infra text accompanying notes 177–81.
How do we know the accuracy of these profiles? Taking solely the legal representation component of the resources of dispute resolution, about one percent of lawyers are working as legal aid lawyers or public defenders, and revenues of such organizations are less than one percent of the total revenues of legal services nationwide. As a result, when the interests of a high-resource disputant are at risk, such as in commercial disputes or when an organization or individual has a dispute with a governmental agency, the system allocates prodigious amounts of dispute resolution resources. There are multiple lawyers, logistical support for the lawyers, the expenditure of decision-maker time and attention for these types of cases. In contrast, when the interests of low-resource disputants are at stake, there almost certainly will be no lawyer or, at best, an overwhelmingly overworked, albeit dedicated, public interest lawyer, and only a minimal expenditure of judicial time and resources. Moreover, the additional resources required to prosecute appeals render them virtually the exclusive domain of resourced litigants.

The end result: Low-resource disputants grievously suffer. First, such disputants are left with less access to legal services: As more and more legal services are focused on commercial disputes which are, by definition, the virtually exclusive domain of high-resource commercial interests, most disputants are priced out of obtaining the services of this corps of lawyers or, in many instances, of any legal services at all. The balance of the profession must make a living through a volume practice, with the end result being that the quality of legal services in these other cases—if obtainable at all—suffers accordingly. Second, given that there is usually a fixed amount of resources available to third-party actors, the increasing demands placed on decision-makers in a small subset of cases limits the amount of time and effort such decision-makers can spend on everything else. This generates the ever-increasing zeal for judicial economy with such zeal directed almost exclusively at the “everything else” cases. This also generates mechanisms that divert cases involving low-income disputants away from fora where cases involving higher-resourced disputants are resolved. This end result is the creation and administration of mass justice courts and agencies.

V. RATIONALIZATIONS AND ENABLERS

The discourse of law and lawyers contributes to inequities in RDR allocations by enabling them and rationalizing them through misleadingly neu-
tral and truthful assumptions and mechanisms that are, in fact, neither neutral nor truthful.

A. Rationalizations

1. Complexity

The extraordinary inequalities and hierarchies that stratify the profession and, as a result, the legal representation component of RDR are so obvious that common sense (and self-justification for the higher end elements of the profession) demand some sort of explanation. That explanation is remarkably pervasive and rarely questioned, even among critics of the current system. The explanation is that business litigation demands more intelligence and resources because it is more complex. The unspoken (and sometimes spoken) corollary is that in a free market, it is justifiable that business lawyers, particularly at large firms, command high fees, because the challenges of their work demand it. This assumption is false.

More lawyers learn about the complexities of the Uniform Commercial Code, the Tax Code, securities regulation, and business organizations because that is what the market demands; clients who have resources require expertise in these areas. Faced with heavily litigated matters that are peppered with lavish motion and discovery practices propounded by large legal teams retained by high-resource commercial entities, judges respond with numerous decisions which make their way into legal reporters to be, in turn, researched and cited by future legal teams retained by high-resource commercial entities for similar cases. Legal publishers oblige with treatises and practice guides designed to make sense of this increasingly intricate array of authorities and precedent. The succeeding vortex not only generates intensifying and self-fulfilling complexity, but it also acts to further justify the need for the best legal talent and the bulk of dispute resolution resources to focus on commercial matters.

In contrast, while clients without resources must grapple with a range of intensely complex legal problems, law schools tend not to focus on these issues because practicing lawyers tend not to focus on them; there is no money to be made in doing so. The marketplace, unsurprisingly, influences law school curricula as much as the specialties of the practicing bar.108

While these processes and consequences generate assumptions about what is or is not legally complex, the unacknowledged leap that almost invariably takes place is that legal issues facing low-income disputants—if

108. Interestingly, a narrow exception to this picture involves high-profile constitutional litigation, such as cases involving the First Amendment, the Equal Protection Clause, or the Due Process Clause. Given the attention paid to these areas by high-profile academics and, of course, the United States Supreme Court, elite firms often consider such matters worthy of their expertise and participation. Nevertheless, many of these issues, while, of course, of great significance, are not high on the list of issues for those in poverty; free speech matters little in the face of inadequate health care, childcare, education, or shelter.
they are acknowledged as worthy of attention at all—are simple, straightforward, and, in a word that is particularly offensive in this context, routine. 109 There is, conversely, a universal truth that commercial transactions and disputes surrounding them are necessarily and inherently more complex and challenging than other types of practice, including, of course, poverty law. 110

This assumption is verifiably false for three reasons. First, poverty law currently embodies an enormously complex and intricate web of laws and regulations. To take one of many examples, any aspiring or practicing poverty lawyer well knows that the web of public benefit programs presents an overwhelming tangle of decisional, statutory, and regulatory provisions that easily rival in complexity the most mind-numbing of commercial law issues. 111 Moreover, these public benefits issues generate a bewildering array of substantive issues—common-law, statutory, regulatory, constitutional—for the creative lawyer, if only a lawyer takes the time to conduct an in-depth analysis of them. 112 The continuing flux in this area, given the welfare reform of recent years, only intensifies the confusion. Such extraordinarily complex matters could easily occupy teams of law firm associates if only someone (or something) were willing to pay a law firm to make it worth its while to do so, which, of course, there is not. 113

Public benefits law is not all unique in its complexity. Many other areas of poverty law are fiendishly complex, including public and subsidized housing, 114 landlord-tenant, 115 consumer cases, 116 and prisoner civil rights cases. 117

109. Garthy, supra note 39, at 943 (“[L]arge business cases inside or outside the courts are considered the most challenging and attract the best lawyers . . .”). The partner who criticized me leaving “cutting edge legal work” in favor of public interest work employed this complexity rationale. See supra text accompanying note 6.

110. Indeed, in my research for this Article, I have encountered untold examples of the complexity assumption; I have not encountered a single challenge to it. See infra text accompanying notes 126–29.


112. See id. at 602–40 (exploring possible claims by welfare beneficiaries subjected to privatized welfare and including state and federal constitutional issues, statutory issues, regulatory issues, and potential common-law claims).

113. Similarly, given that public benefits law is not a lucrative source of business for lawyers, there is a dearth of comprehensive public benefits treatises except in the few areas where a client pool of relative affluence consults lawyers in this area, such as in elder law practices.

114. For a taste of the complexity in this area, see HUD HOUSING PROGRAMS: TENANTS’ RIGHTS (3d ed. 2004). Issues in this area include the bewildering array of Section 8 programs, rules relating to tenant applications, the determination of rents, required lease provisions, grievance procedures prior to the initiation of eviction proceedings, and guidelines regarding tenant associations. What makes this area particularly challenging is that this array of federal statutory and regulatory law must be construed in conjunction with state statutes, rules, and regulations regarding real property, landlord-tenant relations, civil procedure, and the operation of public housing authorities.

115. Landlord-tenant is a classic instance of what appears simple from a distance is often complex when actually litigated, that is, treated as if it were not part of mass justice. Apart from the overlay of issues generated when tenants live in public or subsidized housing, see supra note 114, in some jurisdictions, particularly New York, rent regulations have made landlord-tenant law, in the words of one commentator, of “Einsteinian complexities.” Stephen Dobkin, Confiscating Reality: The Illusion of Controls in the Big Apple, 54 BROOK L. REV. 1249, 1257 (1989). For a description of the tangle of overlap-
Second, there is no question that a massive repository of judicial decisions, legislative history, regulatory authority, and expert commentary governing commercial disputes warrants specialized knowledge and extensive experience to master. It is, however, illogical to assume that this arises from an inherent complexity as to the underlying disputes; it is just as likely the result of the riches of legal and decisional resources—which have themselves been generated by market forces—that are lavished on such disputes. Indeed, it seems perfectly logical that the large commercial interests who usually are plaintiffs in mass justice cases want them to be simple and routine, or at least want those cases to appear that way, because complexity breeds individualized adjudication, which will cost them more in terms of legal services, which is the enemy of mass adjudication. Third-party actors in mass adjudication cases agree. These players, under the grand nomenclature of the “administration of justice,” similarly want—indeed need—these matters to be routine; complexity is hardly a welcome ingredient when processing thousands of cases per day with minimal process.

A third fallacy of the complexity rationale involves the meaning of complexity itself. Law school and, to a certain extent, the public have long characterized the law as a learned profession, with the learning having to do with mastering a set of legal principles or, in the usual term, “doctrine.” The law school curriculum has long adhered to this emphasis on doctrine—an emphasis that has remained largely unabated since the time of Christopher Columbus Langdell. While, as I have said, doctrinal issues facing

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117. See, e.g., David C. Leven, Justice for the Forgotten and Despised, 16 TOURO L. REV. 1, 11 (1999) (noting prisoner’s civil rights cases “require expertise that few lawyers have”).

118. Marc Galanter took note of this process in 1974, albeit using different terms and a different litigation terrain, when he noted that when repeat players sue repeat players, “we might expect that there would be heavy expenditure on rule-development, many appeals, and rapid and elaborate development of the doctrinal law.” Galanter, supra note 18, at 112–13.

119. ROBERT STEVENS, LAW SCHOOL: LEGAL EDUCATION IN AMERICA FROM THE 1850S TO THE 1980S (1983). I have offered a critique of this tendency in a different context in Robert Rubinson, Atror-
low-income disputants match or exceed the complexity of business disputes, the complexity of poverty law cases goes well beyond doctrine. Poverty breeds lives brimming with interlocking social and legal problems, including landlord-tenant, family law (including a higher percentage of domestic violence and failures to pay child support), consumer (including possible bankruptcy), medical benefits (including the availability of prenatal, pediatric, mental health assistance, or nursing home care under Medicaid or a patchwork of State-funded programs), subsistence benefits (including modest, albeit critical, housing subsidies, food stamps, utility assistance, and the crazy quilt of cash assistance programs that have arisen in the wake of federal welfare reform), and immigration. These legal programs arise in the context of social ills bred by poverty: substance abuse, unsafe housing, the lack of medical insurance, crime, inadequate public education, and childcare, to name a few. As any public interest lawyer will say after a week on the job, complex does not begin to describe the range of challenges generated by this type of practice.  

All of this said, the "complexity rationale" is, in the end, utterly beside the point. Even if mass justice cases are simple or routine—which they are not—this offers no food to the hungry or shelter to the homeless. A legal system with any measure of integrity must allocate sufficient resources for matters where the stakes are high—and matters of subsistence, life, and death surely fall into this category. The fallacies of the complexity rationale add a jarring, almost sickening quality to the persistent inequities in allocating dispute resolution resources.

2. "Stakes"

In addition to the complexity rationale, popular and professional conceptions of what is at "stake" in a given dispute also rationalize disparate allocations of RDR.  

Whatever is being disputed is virtually always of some importance to the disputants themselves. If it were otherwise, it would not be worth disputing. For reasons psychological or otherwise, this vision of consequence extends even to matters that would be deemed trivial by virtually all outside


120. In contrast to the prevailing doctrinal focus in legal education, scholars who write from a clinical perspective have generated a body of scholarship that takes such non-doctrinal complexity seriously. For some notable examples, see, e.g., Lucie E. White, Subordination, Rhetorical Survival Skills, and Sunday Shoes: Notes on the Hearing of Mrs. G., 38 BUFF. L. REV. 1 (1990); Gary L. Blasi, What Lawyers Know: Lawyer Expertise, Cognitive Science, and the Functions of Theory, 45 J. LEGAL EDUC. 313 (1995); AMSTERDAM & BRUNER, supra note 82.

121. Another consequence of "high-stakes" cases is a popular misconception about the quality of the advocacy and decision-making available to the vast majority of individuals in non-high-stakes cases. See Rhode, supra note 10, at 1790.
observers, such as small claims (I mean this in the procedural sense) of no
great financial import to the litigants.\footnote{122}

But this does not get us anywhere in terms of justifying disparate RDR
allocations. Rather, RDR theory promotes the perspective of only certain
disputants as more important than others. A collections case for an unpaid
bill of $3,000 is hardly high-stakes to a large medical provider; the stakes
only become high when such claims are viewed in the aggregate. Similarly,
large landlords hold numerous properties; individual claims for unpaid rent
are of modest interest, while, in the aggregate, the landlord makes a profit
by collecting rent and evicting those who do not pay. The interest of the
plaintiff in these instances, then, is to minimize the cost of litigating each
claim, thus serving what is really at stake—the rapid, inexpensive adjudica-
tion of large numbers of cases which reach significance only in the aggre-
gate.

Of course, from the perspective of the debtor struggling to subsist on
minimal wages or government benefits, a $3,000 judgment and succeeding
garnishment of meager wages compromise her ability to survive with a
modicum of dignity or, in some cases, to survive at all. The problem, of
course, is that the judicial system, controlled by RDR theory, recognizes the
provider’s stakes as legitimate by administering mass justice with minimal
process in a way that virtually guarantees success in the aggregate to the
higher-resourced party.\footnote{123} The debtor’s or tenant’s interest—far greater
from virtually any moral or ethical perspective—is minimized.

Apart from participants, another class of individuals who conceive of
stakes in disputes is non-participant observers. These fall into two classes:
academics and the public. To many academics, disputes that matter are
those that generate reported decisions by judges and that address engaging
or controversial aspects of the law. Decisions of the United States Supreme
Court, by definition, fall into this category. Of greatest interest of all are
constitutional issues, particularly those with political or values content, such
as cases involving abortion, First Amendment, Equal Protection, and so
forth. This is not to say, of course, that there is no academic attention fo-
cused on other areas, such as the representation of clients or the provision of
legal services; there plainly is, but the broad law-focused characterization I
offer describes the vast bulk of pedagogical and scholarly interest of the
legal academy.

From the perspective of the observing public, at least as reflected
through popular media,\footnote{124} matters of consequence tend to involve celebrities

\footnote{122. For a discussion of “small claims” cases from a jurisdictional perspective, see infra the text accompanying notes 135–51.}
\footnote{123. See supra text accompanying notes 41–49.}
\footnote{124. It is beyond the scope of this Article to engage in the simmering issues surrounding the extent to which popular media reflects what interests the public or influences what is of interest to the public. As with most “chicken-egg” arguments, the answer is, almost certainly, that both influence and mutually reinforce the other. In any event, there is no question that the media, if nothing else, are experts at cov-}
or persons otherwise of note, such as wealthy corporate executives who are embroiled in legal entanglements of some sort or non-public figures accused of criminal acts that are particularly heinous or shocking. Because of the compelling morality-play quality of criminal cases, relatively few civil cases reach the hysterical level of attention paid to celebrity criminal proceedings. The sole consistent exception involves divorcing celebrities and public figures. The public, through the media, lavish extraordinary attention on such matters.

The perspective of the legal profession, including judges, is perhaps toughest to define because the legal profession is comprised of numerous subgroups based on affluence, organizational model (as in a large firm versus a solo practitioner), practice area, and geography. That said, to the extent the Model Rules of Professional Conduct represent some sort of consensus, albeit not one to which all attorneys would ascribe, the following offers some clues:

Competent handling of a particular matter includes inquiry into and analysis of the factual and legal elements of the problem, and use of methods and procedures meeting the standards of competent practitioners . . . . The required attention and preparation are determined in part by what is at stake; major litigation and complex transactions ordinarily require more extensive treatment than matters of lesser complexity and consequence.

This quote reveals that “major litigation” and “complex transactions” are high-stakes. The conjunction of “complexity” and “consequence” hints that the two are linked; that is, “transactions” which are “complex” tend to be of greater consequence.

The assumptions underlying this quote are pervasive, particularly since it just so happens that the higher-prestige segments of the legal profession tend to focus on matters involving so-called complex transactions. 

125. The appearance of such things on the radar screen of popular culture appears to be expressed by the following equation: \( S \) (star power) x \( T \) (tawdryness of legal problem) = \( I \) (popular media radar screen intensity). Thus, a big star (large \( S \)) might have an otherwise modest or unremarkable legal predicament (low \( T \)) yet make the news. A modest or forgotten star (low \( S \)) might have an otherwise shocking or tawdry legal predicament (high \( T \)) and thus make the news. On occasion, an otherwise anonymous member of the public (an \( S \) that approaches 0, but the equation works only if every human being is assigned some quantity for \( S \), even if vanishingly small) might be accused of spectacularly gruesome or brutal acts (exceptionally high \( T \)) and thus make the news. Of course, the real cultural earthquakes happen when \( S \) and \( T \) are both high. Examples should come immediately to mind.


127. Justice Antonin Scalia, for example, has alluded to how cases of “major importance,” such as “major commercial litigation,” were more common in the federal courts in 1960 than in succeeding decades. Galanter, supra note 40, at 921–22, 944. Apart from the simple inaccuracy of this account, see supra text accompanying notes 39–40, Justice Scalia conflates “importance” with “high-stakes” commercial cases—a conflation that is extraordinarily common among judges and the practicing bar.

128. See supra text accompanying notes 12–14.
In this regard, the obliviousness of the public-at-large to most complex and sophisticated business litigation does not matter, since elite firms hold disproportionate influence in defining high-stakes cases among the practicing bar.

At the risk of valuing generalization over nuance, the perspectives of these groups of participants and observers, while not overlapping in all particulars, do generate aggregations of what most of the public, academia, practitioners, and judges view as high-stakes cases. The following lists matters that attract both substantial attention and, not coincidentally, substantial RDR:

- Commercial disputes with substantial amounts of money at stake.

- “Major litigation.” Major litigation would ordinarily include high-profile civil litigation that involves significant resources or matters of public policy or both, such as the Microsoft antitrust case or the tobacco litigation.

- Matters involving novel or controversial questions of law, usually of constitutional dimension, and including most cases decided by the United States Supreme Court.

- Matters involving public figures, such as politicians and especially celebrities, or those who are accused of spectacularly gruesome or brutal acts.

This list is another way of identifying matters that attract prodigious amounts of RDR. Each has an RDR profile—high legal representation resources that generate high third-party actor resources—which are fully consistent with the operation of RDR theory.

What is missing from these high-stakes cases are the legions of low-income disputants engaged in disputes where the well-being of children, food and shelter, life and death, are at stake.

3. Judicial Economy

It is a commonplace that courts strive for “judicial economy.” This serves to justify a whole range of phenomena: the enthusiasm with which

129 While rare, there are occasions where “business litigation” does become the subject of public attention. This is often because of the mammoth economic impact of a few cases (such as the Pennzoil litigation) or the glamour or interest associated with a particular enterprise (such as the Microsoft antitrust litigation).
courts enforce agreements to arbitrate, the embrace of mediation as an alternative to adjudication, the limitation of judicial intervention to "actual cases and controversies," and untold numbers of procedural and substantive decisions which, if decided otherwise, would impose greater burdens on an already overburdened judiciary.

The best way to summarize how the idea of judicial economy rationalizes RDR allocations is as follows: Judicial economy matters most when disputes matter least. Indeed, RDR allocations are at their most lavish when disputes, in fact, matter least but just appear to matter most because RDR theory could not operate legitimately otherwise.

From the perspective of the cold calculations of RDR theory, therefore, disputes matter least when, under the Third Principle, there are few or no legal services resources at play. And, sure enough, these just happen to be the areas where mass justice—the most "efficient" of all courts—comes into being. Such efficiency invariably vindicates the claims of high-resource parties. Apart from the all-powerful RDR theory influence, there is nothing inherent in the nature of dispute resolution that would prevent efficient vindication of the rights of the low-resourced as against the high-resourced. As Richard Abel has trenchantly observed, "[i]t is simply untrue that we cannot design and operate a court that efficiently enforces a high volume of rights: Look at the way housing courts process evictions or small claims courts attach wages to pay debts!"

In any event, to ask a question that has been a recurrent refrain of this Article: Should efficiency matter when shelter, food, and life are at stake?

**B. Enablers**

**1. Jurisdiction**

Apart from generating the series of rarely challenged (or even recognized) assumptions that I have been describing, RDR theory operates through the rules of subject matter jurisdiction. Presented to first-year law students as bland, technical principles elaborated through (as is most everything else in law school) appellate decisions, their role is much more sinister when considering access to justice issues. If such rules were people, they would be the hatchet men of RDR theory.

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131. See infra text accompanying note 224.
133. See supra text accompanying notes 41–49, 76–81.
State courts divert cases to different fora based primarily on the "amount in controversy." The less the amount in controversy, the more likely a rule will direct a case into a forum with fewer procedural safeguards, more congested dockets, and less qualified judges. The reasoning behind this is so natural that it is almost not worth repeating. Cases with modest amounts in controversy have lower stakes, are simpler, and, thus, can and should be adjudicated more swiftly. Mixing them in with major litigation dilutes the ability of judges to focus on these more important matters and thus hampers judicial efficiency. Moreover, there are considerably more pro se litigants in such low stakes fora, and burdening them with such technicalities as the rules of evidence and discovery merely adds expense, delay, and inefficiency in adjudication.

In light of my previous discussion, each of these rarely questioned justifications is more than questionable. Many "simple cases'' are simple only because there are no attorneys available with the time and resources to vigorously contest them. The "simplified procedures'' of such fora jettison activities that are approached with the utmost seriousness and vigor in full adjudication. Imagine the hue and cry (and the loss of billable hours) if the time and expense of discovery and the delay generated by application of the rules of evidence led to their abolition in all adjudication!

Most troubling of all is the stakes rationale. In a society of even remotely just distribution of wealth, where $1 to Bill Gates is roughly equivalent to $1 to the working poor, as so eloquently described by Barbara Ehrenreich, there might be some rough justice in allocating RDR based on the amount in controversy. As it stands now, the amount in controversy standard, despite its veneer of objectivity, is anything but; it devalues the stakes of disputants of modest or no means even though their cases often implicate their ability to subsist and survive with a modicum of dignity.

What such rules really do is operationalize RDR theory. The amount in controversy stands well for the likely legal services RDR allocation at play in a given dispute. So RDR theory gets down to business: The larger the

135. See EXAMINING THE WORK OF STATE COURTS, supra note 37, at 10 (referring to how "state trial court systems are organized into courts of general and limited jurisdiction," with the civil docket of the latter "primarily small claims cases"). In the interests of technical accuracy, sometimes these diversions are by administrative fiat to particular "parts" of an existing court and, thus, not a rule of "subject matter jurisdiction." This difference is utterly irrelevant to a disputant who still physically is forced to adjudicate a defense (or, more rarely, a claim) in a specific forum and does not care (or, much more likely, does not know) that the forcing can or is being done through a state constitution, statute, or "rule" of an administrator of the court system. For both a graphic description of an administratively created "court" that purportedly limited jurisdiction to certain landlord-tenant claims and a rare appellate court's strongly-worded rejoinder that such a jurisdictionally limited court could not exist without legislative authority, see generally Williams v. Housing Authority of Baltimore City, 760 A.2d 697 (2000).

136. See Neal Kauder, National State Court Caseload Trends, 1984-1993, CASELOAD HIGHLIGHTS, Aug. 1995, at 1, 1 ("All states have at least one court of general jurisdiction, the highest trial court in the state, where... high-stakes civil matters are handled.") (emphasis added).

137. BARBARA EHRENREICH, NickEL AND DIMED: ON (NOT) GETTING BY IN AMERICA (2001).
amount in controversy, the larger the legal services allocation, the larger the third-party actor allocation. Rules of subject matter jurisdiction skip the intervening steps and move straight from amount in controversy to third-party allocation. Given the huge numbers and variety of cases involved, jurisdictional rules are remarkably effective at doing the job of implementing RDR theory. Only the rare low-income disputant finds herself outside of her appointed place through some fluke of law or fact, and she often becomes the proverbial stranger in a bar in the Old West; she is run out of town with dispatch.

b. The Federal Courts

The jurisdictional rules of the federal judiciary reflect RDR theory as much as state courts do, albeit with distinctive twists.

Despite the prestige accorded the federal judiciary and federal adjudication in general, federal courts handle only a tiny percentage of adjudication in the United States. 138 The primary bases of federal subject matter jurisdiction—diversity and federal question—are constitutional in origin 139 and are therefore artifacts of a very different time and place. That said, they serve today as an effective bar to this most exclusive and highly resourced of all fora to most low-income disputants. Apart from the occasional automobile accident case—matters hardly relished among the third-party actors of federal court who typically view themselves as above the seedy world of personal injury—most diversity cases involve business disputes because businesses, not individuals, tend to operate across state lines.

As to federal question jurisdiction, most of the bread and butter poverty law issues—landlord-tenant and family law—are governed primarily by state law. While another huge category of cases—collections cases—often implicate federal consumer protections statutes, low-income disputants are invariably defendants, and it is fair to say that the last place a collections case plaintiff would likely file a case is in federal court.

There are, however, three areas where the federal courts are forced to adjudicate substantial numbers of cases involving low-income disputants: prisoners' civil rights cases, social security appeals, and bankruptcy petitions. As to the prisoner cases, the United States Supreme Court, as with school desegregation cases, 140 has helped resolve the problem presented by this large docket by developing procedural and substantive law that is extraordinarily harsh and unforgiving, 141 and, thus, most of these cases can be

138. Of the almost 100 million case filings in the United States in 2001, less than 3% were in the federal system. EXAMINING THE WORK OF STATE COURTS, supra note 37, at 13.
140. See supra text accompanying notes 82–93.
141. See, e.g., Melissa L. Koehn, The New American Caste System: The Supreme Court and Discrimination Among Civil Rights Claimants, 32 U. MICH. J.L. REF. 49, 51 (1999) ("Plaintiffs who are prisoners or who sue police officers generally confront an amazing thicket of procedural snarls which often prevent federal courts from hearing the merits of their claims.").
summarily dismissed. Congress has also contributed by passing the so-called “Prison Litigation Reform Act”\textsuperscript{142} which establishes filing fees and procedural restrictions designed to make these cases less likely to be filed and, if filed, more likely to be summarily dismissed.\textsuperscript{143} Legal services restrictions and further cuts to prisoner legal services offices\textsuperscript{144} force inmates to draft complaints themselves, with the result that even well-meaning judges and clerks cannot fathom whether a claim is meritorious or not, with, again, dismissal the inevitable result.

In the case of Social Security Disability, only a tiny percentage of such cases reach federal court; the aptly-named administrative requirement of “exhaustion of administrative remedies”\textsuperscript{145} insures that many years of time and effort are required to get to court, thus discouraging all but the most hardy and resilient of claimants. Even those who do make it then encounter formal and informal mechanisms that divert these cases to magistrates and establish streamlined procedures—yet another example of the stakes, complexity, and judicial efficiency rationales at work in the service of RDR allocations.\textsuperscript{146} And, of course, generations of law clerks and law students clerking in judges’ chambers have cut their teeth on these cases: Most federal judges view themselves as having more important matters to attend to.

Finally, there remains the case of bankruptcy. Comprising almost fifty-five percent of the federal court filings,\textsuperscript{147} federal district courts have exclusive jurisdiction over bankruptcy petitions.\textsuperscript{148} Congress created a separate unit of federal district courts to adjudicate bankruptcy cases.\textsuperscript{149} Like family law cases, this forum is unusual in that it includes a mixture of a few high-resource parties mixed in with large numbers of low-income or indigent parties. As RDR theory would suggest, low-income petitioners either cannot afford representation or can afford only high-volume, low-quality representation, with predictable results: They are accorded minimal process, with the result being large numbers of unnecessary filings, filings which are not made but should be, filings dismissed due to technical deficiencies, a failure to pursue adversarial proceedings for discharge of otherwise non-

\textsuperscript{143} For an overview of this “disgraceful piece of legislation” and its consequences, see Leven, supra note 117, at 14–16.
\textsuperscript{144} See The United State Supreme Court, as usual, has promoted this state of affairs. Bounds v. Smith, 430 U.S. 817 (1977) (holding that prisoners have “meaningful access to courts” merely by having access to law libraries). The legal services restrictions prohibit recipients from “participat[ing] in any civil litigation on behalf of a person who is incarcerated in a Federal, State or local prison.” 45 C.F.R. § 1637.3 (2005). See generally Leven, supra note 117 (describing crises in providing access to justice for inmates).
\textsuperscript{146} See Judith Resnik, Housekeeping: The Nature and Allocation of Work in Federal Trial Courts, 24 GA. L. REV. 909, 958–60 (1990) (detailing how large numbers of social security cases—viewed as “lesser work” by Article III judges—are referred to magistrate judges).
\textsuperscript{147} EXAMINING THE WORK OF STATE COURTS, supra note 37, at 13.
dischargeable debts, and other consequences that petitioners who can afford high-quality, individualized representation do not suffer. As predicted by the Third Principle, minimal third-party actor resources are accorded to these actors. As a result, in practical operation for the vast majority of bankruptcy petitioners, bankruptcy court is a court of mass justice, federal-style.

2. Due Process and Equal Protection

Do constitutional requirements of due process and equal protection limit the operation of the Principles of RDR? The short answer is—not a whit. Instead, at most, the veneer of these constitutional protections legitimizes otherwise appallingly inequitable circumstances.

The United States Supreme Court, in Mathews v. Eldridge, articulated a balancing test in determining whether a set of procedures accord with constitutional requirements of due process:

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\text{[T]}\text{he specific dictates of due process generally requires consideration of three distinct factors: First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.}
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As is often true of balancing tests, there is minimal or no guidance as to which consideration should be given greater weight. Filtered through RDR theory, though, the only factor that would come into play is the last—the third-party actor allocation, which, in turn, is generated by the magnitude of legal services brought to bear in a dispute. Sure enough, that is precisely the case: The Mathews test has generated an overwhelming presumption in favor of the constitutionality of whatever process has been put in place, whatever the stakes to the disputants.

150. See Engler, supra note 26, at 2052-57 (collecting authorities on the increasing numbers of unrepresented litigants in bankruptcy court and characterizing the consequences for these litigants as "devastating").
151. Id. at 2055-56. See also Susan Block-Lieb, A Comparison of Pro Bono Representation Programs for Consumer Debtors, 2 AM. BANKR. INST. L. REV. 37 (1994).
155. Mathews, 424 U.S. at 349 ("[S]ubstantial weight must be given to the good-faith judgments of the individuals charged by Congress with the administration of social welfare programs that the procedures they have provided assure fair consideration of the entitlement claims of individuals.").
Consequently, RDR theory illuminates how the *Mathews* test misleads at two levels. First, *Mathews* purports to establish a baseline as to what constitutes constitutional due process through articulation of a complex set of factors. In fact, however, only one of the *Mathews* factors—the last—matters. As I have said, RDR would predict this because the other two factors—the private interests at stake and "the risk of an erroneous deprivation of such interest"—are irrelevant to the allocation of RDR, while, conveniently, the third consideration implicates the Third Principle. Second, *Mathews* treats the third consideration as if it represented some sort of autonomous and thoughtful decision by the government as to the amount of process that would be appropriate—what Justice Powell called "the good faith judgment of individuals." This assumption is a sham; RDR theory holds that third-party allocations are contingent upon legal services allocations, which are, in turn, contingent upon the resources that disputants have at their command. *Mathews* fails to address the ultimate source of the magnitude of process accorded disputants, and, unsurprisingly, *Mathews* offers no meaningful way to attack whatever magnitude of process happens to be generated by considerations that *Mathews* fails to acknowledge.

As to the Equal Protection Clause, the Supreme Court has long refused to hold that the poor constitute a suspect class. Any equal protection attack on the injustices generated by RDR theory must face that infamous dead end of Supreme Court jurisprudence, the "rational basis test." The end result is that there is not the remotest chance that any litigation challenging access to justice on equal protection grounds will succeed.

In the end, principles of due process and equal protection as articulated by the Supreme Court are, at best, hollow. Indeed, they enable the unfettered operation of RDR theory to generate yawning inequities in access to justice.

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156. *Id.*
157. *Id.*
158. See *id.* A related dead end of due process protections emanates from the famous case of *Goldberg v. Kelly*, 397 U.S. 254 (1970), which held that welfare rights were a form of property and, thus, entitled to due process protections. In *Board of Regents v. Roth*, 408 U.S. 564, 577 (1972), however, the Court held that such property only existed where one had reasonable expectations of it as defined by state law. This opened the door for the principle that what constitutes property in this area is a creature of statute—an opening seized upon with a vengeance when Congress passed the Personal Responsibility and Work Opportunity Reconciliation Act in 1996, which explicitly claimed that benefits provided under the act were not an entitlement. See supra text accompanying notes 111–13.
3. The Job Market for New Lawyers

As a final enabler of RDR allocations, we can now come full circle and return to the market for legal services.

I have already argued that the market for legal services, in conjunction with the American norm of disputing through agents, triggers the processes described by RDR theory, which, in turn, generate massive disparities in RDR allocations.160 As a result, narrow segments of the disputing world—primarily commercial litigators and transactional lawyers at large firms—have a voracious appetite for more lawyers. Clients demand them (they need them under the First Principle of RDR) and firms demand them to accommodate the demands of clients and because, not coincidentally, billing out associates for more than associates get paid generates handsome profits for the firm.

The challenge for large firms, then, is to attract huge numbers of new lawyers. This is something of a challenge; it is no secret that the work hours at large firms are prodigious and the nature of the work, particularly for new associates, tends to be dull and repetitive. At the same time, it is no secret that there are substantial incentives to join these places. A primary one, of course, is compensation. As of this writing, average compensation for first-year associates at larger firms is about $125,000,161 which, including substantial bonuses, is far in excess of compensation for lawyers in smaller practices, let alone legal services attorneys.162 The ultimate brass ring is partnership: At the larger firms, compensation for partners routinely goes into the many millions.163

But money is not the only lure. Only the best get hired at these places. The “best” is usually shorthand for graduates from elite schools or, on occasion, graduates from less elite schools with exceptional academic records. These firms need the best because the best, presumably, have the greatest aptitude for cutting edge legal work, and that, these firms say, is what they do—the complexity rationalization I have already described.164 Large firms need the best because the complexity of the work so demands it. This feeds the intellectual ego of the applicant. Rarely, if ever, is this complexity rationale exposed as false as, I have shown, it is.165

Another lure is the stakes rationale. Money talks in our culture, and a large firm’s involvement in multi-million dollar transactions demon-

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160. See supra text accompanying notes 8–36.
162. The grossly disproportionate compensation for lawyers at large firms is part of a longstanding trend in which “the law, always the most unequal of professions, is probably becoming still more unequal.” Sander & Williams, supra note 10, at 440. What is also remarkable is the apparent ability of large firms to maintain and continue to enhance income levels despite whatever economic retrenchment might be occurring in other realms of the legal profession or the country at large. Id. at 465.
163. Id.
165. Id.
strates—either implicitly or explicitly—the importance and consequence of the firm’s work in the world of finance and, indeed, to the world-at-large. Again, this equivalence between money and consequence is never open to question as, indeed, it should be.\textsuperscript{166}

These three lures—money, the challenge of a complex practice, and the high stakes involved—combine to generate a corps of able-bodied associates ready to contribute their time and energy to the already vastly inflated RDR allocated to business disputes.

This is, in and of itself, a sad state of affairs, but it only tells half the story. While there is no question that some law students have an interest in business law, there is also no question that many—if not many more—are attracted to law to help people, to contribute to society, or to promote social change.\textsuperscript{167} Four realities—all, to a certain extent, consequences of RDR theory—inhibit or extinguish these impulses and encourage new lawyers to instead join the legions practicing business law.

First, while compensation for large firm positions escalates, compensation for public interest positions has lagged further and further behind—a trend that has only accelerated with time.\textsuperscript{168} Apart from those with a well-compensated spouse or access to family resources, taking a public interest position is fast becoming not merely a financial sacrifice but a financial impossibility. The compensation differential has become one of kind, not of degree. Indeed, compensation for public interest positions sometimes flirts with eligibility for public assistance.\textsuperscript{169} It takes a single-minded commitment to public interest of extraordinary intensity to voluntarily enter the ranks of a workforce struggling to meet daily expenses when affluence is a plausible alternative.

Second, many law students graduate with substantial student loans. One study estimated that a law school student carries debt upon graduation of nearly $46,000 for a graduate of a public law school and almost $73,000 for a graduate of a private law school.\textsuperscript{170} While loan forgiveness programs do exist and, in some instances, can help ease the burden at a limited num-

\textsuperscript{166} See supra text accompanying notes 121–29.

\textsuperscript{167} Howard S. Erlanger & Charles R. Epp, Law Student Idealism and Job Choice: Some New Data on an Old Question, 30 L. & Soc. Rev. 851 (1996) ("Commentaries and empirical studies over the past several decades have consistently suggested that while a substantial proportion of incoming law students are interested in careers in 'public interest law,' that interest wanes significantly during law school.").

\textsuperscript{168} In 1992, the median entry-level salary for public interest positions was $26,000, while the median entry level salary for private firms was $47,500. Nat’l Ass’n for Law Placement, Jobs & J.D.’s: Employment and Salaries of New Law Graduates—Class of 1992, at 19 (1993). For 2003—the last year for which data is available—the figures were $38,342 for public interest positions and $83,913 for private firms. 2003 NALP Report, supra note 161, at 30, 43.

\textsuperscript{169} One new staff attorney for a Legal Aid Bureau in a mid-Atlantic city was both horrified and bemused to learn that his starting salary qualified him for a “Section 8 voucher”—a federal housing assistance program for the indigent. Interview with Robert L. Durocher, Apr. 16, 2004.

relying on a public interest salary that slide in many instances into impossibilities. Third, even after all of these financial burdens are taken into account, RDR theory dictates that the market generates a miniscule number of public interest positions. Indeed, as I have noted, apart from volume practices, which, for the most part, offer inferior quality of service to clients and, in any event, do not create large numbers of lawyer positions, the market generates virtually no demand for public interest lawyers not because there is no demand from potential clients, but because the potential clients doing the demanding have no resources to back up their demands with money. As a result, funding must come from non-market forces, such as charitable donations, foundation grants, and state and federal legislatures, none of which can fund more than a tiny percentage of the needed services. Needless to say, this is in marked contrast to the market forces that operate through RDR theory to generate voracious appetites for newly minted business lawyers.

Fourth, there is evidence suggesting that law school itself, both in terms of its traditional pedagogy and in terms of the content of its courses, tends to tamp down or extinguish law students’ zeal for public service. The final twist to these processes—and perhaps the greatest enabler of all—is that the decisions new lawyers make to engage in a business law practice tend to be durable and permanent. Many a lawyer will enter into a large firm practice in anticipation of the day when they can do what they really want to do because student loans will be paid off, savings accounts will be plentiful, and college savings accounts will be adequately funded. For the vast majority, this day never comes. Apart from what appears to be a rigid psychological mandate to spend whatever you make, many find that the norms of modern American culture are expensive norms, and it is notoriously difficult to give up what one has as opposed to simply not having

171. Id. at 17. The growth of such loan forgiveness programs—usually referred to as “Loan Repayment Assistance Programs” (LRAPs)—is hardly uniform; restrictive school budgets have both limited the ability of some schools to add such programs and, in some instances, impose stringent eligibility requirements. See id.

172. Id. at 15 (noting that typical monthly payments to repay a student loan “are about one-quarter to one-third of a starting public interest attorney’s monthly take-home salary ..., leaving very little for necessities such as housing, food and transportation”). See also ABA COMM’N ON LOAN REPAYMENT & FORGIVENESS, LIFTING THE BURDEN: LAW STUDENT DEBT AS A BARRIER TO PUBLIC SERVICE 9 (2003) (“Despite their deep commitment to ensure access to justice for all citizens, many law school graduates” find that the due to the rising cost of a legal education, they are “forced to forego their dreams of public service.”).

173. See supra text accompanying notes 16–27.

what one has never had.\textsuperscript{175} There is the additional disincentive of retooling one's professional expertise; few have the courage and energy to toss away years devoted to understanding the intricacies of securities regulation, bond funds, ERISA, reinsurance, and so forth to learn for the first time complex bodies of so-called poverty law with which they are utterly unfamiliar.

The end result is that the many thousands of law graduates who enter a business law practice each year stay there for the rest of their careers. The locus of the practice might be the same or different: Some make partner in a large, medium, or small firm; some go in-house which involves, in effect, having one business client instead of many; some work for the many state and federal agencies that regulate commerce (in a way, this particular group is moving from the legal services to the third-party actor component of RDR, albeit still in the service of resolving business disputes); and a small number move into academia where they teach business law courses. Only a tiny percentage move into a practice that could at all be characterized as public interest.

\section{VI. Is There a Way Out?}

There are unquestionably social costs to dispute resolution. While some of these costs are borne by parties and some are borne by taxpayers, there always seems to be enough RDR deployed in just the right places to serve the interests of affluent parties, typically commercial interests. But even more importantly, the set of mutually reinforcing factors that I have outlined generates a cost for all of us: Legal resources are becoming increasingly intensified on commercial disputes, and the best, most elite forms of dispute resolution—judicial or otherwise—are becoming specialized, elite processes where elite, specialized lawyers work to resolve commercial disputes.

It is impossible to know whether this circumstance is reversible, although current trends do not bode well, at least for the near future. That said, the initiatives that have virtually no chance of success are those that seek to work within the norms of a system locked into the principles of RDR theory. What remains are a number of fresher strategies that operate outside the framework I have been sketching. For that very reason, these have, at least, the possibility of gaining traction against almost overwhelming forces.

\subsection{A. Initiatives that Face Long Odds}

The following is a list of initiatives that are proposed and undertaken with the best of intentions and, not infrequently, generate real assistance to individual clients. In my view, however, these initiatives will never spur

\begin{quote}
175. Cognitive scientists have characterized this tendency as "loss aversion." See Daniel Kahneman & Amos Tversky, Conflict Resolution: A Cognitive Perspective, in Barriers to Conflict Resolution 44 (Kenneth Arrow et al. eds., 1995).
\end{quote}
substantial change, due to the set of mutually reinforcing and intensifying
phenomena that I have detailed, which are simply too entrenched and
powered by economic self-interest to allow for much reform except at the
margins, if even there.

1. Pro Bono

Pro bono initiatives will never significantly redress the disproportionate
allocation of RDR. Pro bono lawyers, while providing extraordinary as­
sistance to underserved disputants and, in some instances, allocating sub­
stantial legal services resources otherwise available only to high-resource
disputants, will always be fighting a losing battle against the market for
legal services and the three principles of RDR. It would be difficult for
even optimistic proponents of pro bono to expect that most lawyers will not
continue to be attracted to lucrative segments of the profession and that the
basic principles of RDR will not continue to operate to allocate RDR in the
ways I have described. Indeed, available data about the lack of success of
pro bono initiatives confirms this gloomy assessment.

In addition, there is an aspect to pro bono initiatives that renders them,
at least systemically, counterproductive. These activities tend to be well­
publicized and often present accomplished and otherwise well-compensated
lawyers fighting for the “little guy.” Without being dismissive of the very
important work undertaken in this regard, these activities may promote a
sense of complacency among the public and, more importantly, within the
profession that the problems about the allocation of RDR are not as urgent
and tragic as they are. A related point is that, in light of the complexity and
stakes rationales, a substantial component of pro bono work tends to be
focused on certain cases with a constitutional or high-visibility dimension,
leaving those so-called simple and routine cases—landlord-tenant, family
law, government benefits—unaddressed. In the rare instances where pro
bono lawyers do engage in those seemingly routine poverty law cases, there
exist risks of incompetent representation because such lawyers have neither
the experience nor the training to gain expertise in these challenging ar­
 eas.

176. See supra text accompanying notes 11–34.
177. Despite perennial calls from bar associations for initiatives and incentives to promote pro bono
participation, most commentators agree that, barring a sea change in the bar’s distaste for mandatory pro
bono, pro bono work will never act as more than an incremental step towards redressing the inequities I
describe. Rhode, supra note 10, at 1808–14, 1819.
178. Greg Winter, Legal Firms Cutting Back on Free Services to the Poor, N.Y. TIMES, Aug. 17,
2000, at A1; Rhode, supra note 10, at 1808 (noting that in terms of the performance of pro bono work,
the performance of the bar as a whole remains at shameful levels).
180. I can speak to this from personal experience. In my years litigating in Brooklyn’s Housing
Court and in Baltimore’s Rent Court, I do not recall once seeing a pro bono attorney representing a
tenant.
181. See supra text accompanying notes 121–29.
2. Enhanced Funding for Individual Representation Through Subsidized Legal Services

Even if politically feasible, which it is currently not nor is it likely to be in the foreseeable future, increased funding for subsidized legal services for individual representation will not achieve more than marginal improvements in the lot of most low-resource disputants. The reason is straightforward: Assuming (and this is a huge assumption) that there is such an increase in funding, the First and Second Principles of RDR mean that high-resource disputants will respond by allocating more resources to their own private legal services to ensure a fair chance of success. While the Third Principle holds that mass justice fora might thereby expend more resources per case as a result, subsidized legal services would have to attract more and more money in order to keep up with the greater expenditures on legal services by high-resource disputants. Even the most optimistic projections about enhanced subsidies for legal services could never generate enough to fund such an arms race. Sooner or later, subsidized legal services—and the clients they serve—will lose. The end result would be a different equilibrium with, perhaps, more total RDR per dispute, but one that will still favor high-resource disputants. In short, RDR theory suggests that there is an absolute limit to how successful such efforts can be.

That said, there has been some creative retooling of legal services offices and innovative proposals to enhance the scope, efficiency, and integration of the legal services network.\(^\text{182}\) Proposals to "unbundle" legal services\(^\text{183}\) or to provide limited legal services\(^\text{184}\) and to employ the Internet,\(^\text{185}\) among other initiatives, offer not only greater efficiency in the use of existing funds but, perhaps, fresh ways of approaching legal services work so as to empower clients—an important way to move outside the RDR box to which I will return in some detail shortly.

\(^{182}\) For a thoughtful and comprehensive plan along these lines, see Houseman, supra note 22, at 394–433.

\(^{183}\) A leading proponent of the notion of unbundling legal services is Forrest Mosten. Forrest S. Mosten, Unbundling of Legal Services and the Family Lawyer, 28 Fam. L.Q. 421 (1994). Unbundling seeks to break the traditional dichotomy between either representing a client or not representing a client by enabling the client to "be in charge of selecting from lawyers' services only a portion of the full package and contracting with the lawyer accordingly." Id. at 423.

\(^{184}\) See generally ABA SECTION OF LITIG., HANDBOOK ON LIMITED SCOPE LEGAL ASSISTANCE: A REPORT OF THE MODEST MEANS TASK FORCE (2003).

\(^{185}\) For one on-line example, see the Maryland People's Law Library, available at http://www.peoples-law.info/Home/PublicWeb (last visited Mar. 22, 2005)
3. Easing Unauthorized Practice of Law Restrictions

One set of proposals that seems to have garnered the most support among academics is easing unauthorized practice of law restrictions in order to enable paraprofessionals to serve clients who otherwise cannot obtain legal advice. As proponents of such initiatives recognize, a primary challenge here is the bar's vigorous opposition to even modest exceptions to its professional monopoly on legal services, even in areas where lawyers dare not tread because there is no money to be made. Such initiatives are often set forth in conjunction with other proposals to simplify legal procedures and forms to better enable pro se litigants and paraprofessionals to navigate legal issues facing indigents.

Assuming opposition from the organized bar can be overcome—again, a large if—such proposals, in my view, have merit only in narrowly circumscribed circumstances. The following statement by Deborah Rhode, an otherwise eloquent and persistent critic of inequities in access to justice, illustrates why:

Reducing the need for professional assistance calls for strategies along several dimensions: increased simplification of the law; more self-help initiatives; better protection of unrepresented parties; greater access to nonlawyer providers; and expanded opportunities for informal dispute resolution in accessible out-of-court settings. As critics have long noted, American legal procedures are strewn with unnecessary formalities, archaic jargon, and cumbersome rituals that discourage individuals from resolving legal problems themselves. Simplified forms and streamlined procedures could expand ordinary Americans' opportunities to handle routine matters such as governmental benefits, landlord-tenant disputes, and consumer claims.

It is hard to argue, in theory, with the efficacy of such proposals, and, indeed, the potential uses of ADR—albeit in very specific forms—is something I will advocate shortly. The problem, however, is that these and similar proposals risk further intensifying and instantiating the procedural and substantive hierarchies that I have been describing. Why are issues involving governmental benefits, landlord-tenant disputes, and consumer claims merely routine? Does this mean they are simple, which is false? Does this mean that they are common, which, of course, is true, but is this not more of an indictment of the failure of society to redress poverty than an

186. See e.g., Abel, supra note 73, at 1027; Rhode, supra note 10, at 1817.
187. See Abel, supra note 73, at 1027.
188. See e.g., Rhode, supra note 10, at 1816–17.
189. Id. at 1816 (footnote omitted).
190. See infra text accompanying notes 198–229.
opportunity to make poverty law cases "routine" in a procedural and substantive sense? Indeed, should it not be the goal of a just system to make such matters non-routine? Should matters critical to life and health be subjected to "simplified forms and streamlined procedures," particularly given the record of mass justice courts that have, at least nominally, adopted such reforms? Why should these of all cases be entrusted to a corps of paraprofessionals, the assumption being that such routine matters do not need the full panoply of skills that attorneys, at least in theory, bring to bear in legal representation?

I do not wish to overstate my case here. I do see a role for the initiatives that Professor Rhode and others have proposed. I also see extraordinary dangers that lurk in making incremental reforms to a system that has shown great power to transform even well-meaning initiatives into yet more ways to stack the deck against indigent disputants.

B. Breaking the Stranglehold of the Principles of RDR

As I have noted, RDR theory is not a universal law of nature; it is, rather, contingent on certain conditions, albeit conditions that have long operated as assumed norms. These conditions are, first, a disputing-through-agents model where, second, market forces determine the availability and selection of agents representing parties in particular disputes.

Alternatives do exist that have at least the promise of operating outside these conditions, thereby bypassing the inevitabilities of RDR theory. One alternative—mediation—minimizes the "agents" condition, but not in the way Professor Rhode proposes. A sophisticated, well-funded, adequately housed mediation program, while not necessarily eliminating the need for attorneys, limits or, in some cases, eliminates the role of attorneys. Instead, from an RDR perspective, it injects available resources into the mediation session itself. In so doing, mediation also draws upon a resource that is largely untapped in adjudicative models of dispute resolution: the parties themselves. Parties, not lawyers or judges or arbitrators, play a central role in mediation. By this, of course, I do not mean that the parties provide economic resources to lawyers to resolve disputes. Rather, parties in mediation act as the primary and direct means through which disputes are resolved.

This is truly something new. It points to an untapped source of RDR that heretofore has been completely overlooked: the disputants themselves. By doing so, it breaks apart the tightly locked set of principles that gener-

191. See supra text accompanying note 189.
192. Id.
193. Available evidence suggests that many disputants would welcome this central role in dispute resolution. Young, supra note 16, at 574 (noting that, in interviews with applicants for subsidized legal services, subjects described how "they want to be in control of their own legal destiny, knowing they can make their own decisions.").
ates current RDR allocations because the Principles of RDR draw their lifeblood from the centrality of legal services to disputing. By moving such services to the margins, mediation (and by this I mean *adequately funded* mediation services—a crucial caveat) bypasses the tight control that those disputants who have the economic power to meaningfully participate in that market exert over the allocation of RDR. The First Principle no longer applies if the provision of legal services no longer holds the key to sophisticated and individualized dispute resolution, and if the First Principle no longer applies, the Second Principle becomes irrelevant. The introduction and validation of a third component of RDR—the disputants themselves—breaks the iron grip that the quantity and quality of legal services has on the quantity and quality of third-party actors. By marginalizing legal services and introducing the parties as carriers of RDR, there is, at long last, the possibility of some rough measure of equality in the allocation of RDR.

Another alternative—a significant expansion of the bounds and involvement of the private bar and public interest lawyers in “community lawyering”—achieves some similar results through very different means. Community lawyering draws its power by working with and empowering low-resource communities to attract more resources to their communities. 194 Given that this is primarily—although not exclusively—a transactional practice, it minimizes the “third-party actor” component of RDR. 195 This is the ultimate in preservation of “judicial resources”: This type of practice does not involve litigation (or, for that matter, mediation), so judges (and mediators) need not apply.

Moreover, like mediation, community lawyering seeks to draw ideas, energy, and initiative from low-resource communities themselves. In this respect, it too introduces disputants (or, more accurately in this context, communities which, of course, are made up of individuals) as an untapped resource distinct from lawyers and third-party actors. Indeed, a thread in the literature and practice of community lawyering displays an unusual and refreshing humility as to the power of lawyering to effect social change: Lawyers hold no monopoly on how to achieve it and, indeed, perhaps should play a more subsidiary, supporting role.

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195. *Id.*
Before moving on to a more detailed discussion of these alternatives, the following Table displays the RDR profiles of mediation and community lawyering.

### TABLE 2
**RDR PROFILES OF AN ADEQUATELY FUNDED MEDIATION PROGRAM FOR INDIGENTS AND A COMMUNITY LAWYERING PRACTICE**

**Mediation for Indigents (Adequately Funded)**
- Resource Level of Parties: Low
- RDR Allocated to Legal Services: Moderately low (or nonexistent)
- RDR Allocated to Third-Party Actors: High
- RDR Carried by Disputants: High

**Community Lawyering**
- Resource Level of Parties: Low
- RDR Allocated to Legal Services: Moderate
- RDR Allocated to Third-Party Actors: Nonexistent (usually)
- RDR Carried by Disputants: High

The RDR profiles set forth here achieve something that the traditional forms of dispute resolution set forth in Table 1 do not: They supplement RDR by drawing upon the non-monetary resources available through the creativity, time, and energy available to disputants themselves. This characteristic breaks the causative chain whereby resources of legal representation necessarily demand and receive amounts of third-party assistance adequate to vindicate the interests of the high-resource party—an ironclad correlation that always operates against the interests of low-income disputants.

All of this might sound promising in theory and in tables. A critical question, however, is what these proposals really mean and what they require in practice.

**1. A Mass Justice Mediation Alternative?**

Jerold S. Auerbach, in the quote that opened this Article, wrote how the "Haves usually are better served by legal formalism." But what about legal informalism, such as that embodied in mediation?
a. What Is Mediation?

Mediation, to the surprise of those who consider it merely a settlement conference under a different name, can be an extraordinarily rich, challenging, and satisfying process that arises from entirely different premises than adjudication. As I have noted elsewhere, the danger in approaching mediation in its more sophisticated forms is in not recognizing it as the strange thing it is, particularly as compared to adjudication.\(^{198}\)

A full treatment of mediation is beyond the scope of this Article, but a brief overview is not. Unlike adjudication, mediation does not rely on the historical reconstruction of what happened as a means to order the rights and obligations of the present. Rather, the here-and-now—which may, of course, include perspectives on the past—is what matters most.\(^{199}\) Mediators do not act as decision-makers; indeed, in some forms of mediation, it is anathema for mediators to evaluate or offer opinions as to the strength or justice of each party’s claim. Rather, mediators facilitate, and their power emerges from their success in doing so, not from the imposition of some externally granted authority.\(^{200}\) Mediation has few formal procedures; its pragmatic goal is to facilitate problem-solving through “whatever works.”\(^{201}\)

While lawyers can and do participate in mediation, mediators want parties to own the process themselves and thereby encourage parties to engage fully, directly, and vigorously in the resolution of their own disputes. In this regard, a primary goal of mediation is dispute resolution not through agents “but through autonomy and self-determination” on the part of parties.\(^{202}\)

In light of these differences and many others, mediation and adjudication are entirely different activities, like house-painting and bookkeeping.\(^{203}\) This is a critical point that is often lost when the role of mediation as a form of dispute resolution is discussed.

What I have been describing is “good mediation,” and, unfortunately, there is plenty of bad mediation that goes under its name. This distinction will have an important influence on the proposals that I will sketch out.

\(^{198}\) The principles I discuss in the following paragraph are described in much greater detail in Robert Rubinson. *Client Counseling, Mediation, and Alternative Narratives of Dispute Resolution*, 10 CUN1CALL. REV. 833, 846–58 (2004).

\(^{199}\) *Id.* at 852–53.

\(^{200}\) *Id.* at 850–52.

\(^{201}\) *Id.* at 853.

\(^{202}\) Nolan-Haley, supra note 98, at 49.

\(^{203}\) An important consequence is that despite the prevalence of former judges as mediators, “[t]here is . . . no obvious match between the characteristics that make for excellent judging and the skills required for successful mediation.” Harry T. Edwards, *Alternative Dispute Resolution: Panacea or Anathema?*, 99 HARV. L. REV. 668, 670 (1986).
For every study or commentator finding mediation for indigents brimming with promise, others find it overblown or downright dangerous. It is necessary to pause, albeit briefly in this setting, over these critiques.

The crux of the most pointed critiques of mediation in the context of poverty law is that it instantiates power imbalances. Straightforwardly put, this critique holds that the very informality of mediation, as well as its confidentiality and its lack of judicial review, means that disempowered parties will have their disempowerment recapitulated in mediation.

This risk is, in my view, no doubt real. Problems arise for this critique, however, in its implicit and sometimes explicit praises of adjudication as somehow an effective power neutralizer. Courts, for example, minimize prejudice in the following ways:

[T]he formalities of a court trial—the flag, the black robes, the ritual—remind those present that the occasion calls for the higher, “public” values, rather than the lesser values embraced during moments of informality and intimacy. In a courtroom trial the American Creed, with its emphasis on fairness, equality, and respect for personhood, governs. Equality of status, or something approaching it, is preserved—each party is represented by an attorney and has a prescribed time and manner for speaking, putting on evidence, and questioning the other side. Equally important, formal adjudication avoids the unstructured, intimate interactions that, according to social scientists, foster prejudice. The rules of procedure maintain

204. See, e.g., Judith V. Caprez & Micki A. Armstrong, A Study of Domestic Mediation Outcomes with Indigent Parents, 39 Fam. Ct. Rev. 415 (2001) (finding “that domestic mediation with indigent clients is equally as effective as domestic mediation with nonindigent clients”); Carol J. King, Burdening Access to Justice: The Cost of Divorce Mediation on the Cheap, 73 St. John’s L. Rev. 375, 459–60 (1999) (“Mediation programs provide an opportunity for productive discussion of divorce issues between . . . pro se litigants.”); Houseman, supra note 22, at 409 (noting that concerns about ADR for the poor “can be addressed without depriving low-income persons of their rights or abilities to resolve disputes in an equitable manner”); Zimmerman, supra note 45, at 201 (stating that author is “convinced that there are opportunities to use ADR in poor communities as well as in existing programs . . .”).

205. See, e.g., Richard Delgado et al., Fairness and Formality: Minimizing the Risk of Prejudice in Alternative Dispute Resolution, 1985 Wis. L. Rev. 1359; Larry R. Spain, Alternative Dispute Resolution for the Poor: Is It An Alternative?, 70 N.D. L. Rev. 269 (1994). A particularly pointed critique has been developed by Richard Abel, who maintains that mediation and other forms of “informal justice” act to minimize concerted action and promote “social control” by moving claims for justice away from public adjudication to private fora which only resolve individual disputes, not systemic issues. See, e.g., Richard L. Abel, The Contradictions of Informal Justice, in 1 The Politics of Informal Justice 267 (Richard Abel ed., 1982); Richard L. Abel, Conservative Conflict and the Reproduction of Capitalism: The Role of Informal Justice, 9 Int’l J. Sociology 245 (1981). One plausible response to these critiques is embedded in this Article: While such critics often claim that “formal adjudication” protects less powerful disputants, the much vaunted procedural safeguards designed to protect the less powerful hardly exist in the “mass justice” courts I have described.

206. There are, of course, detailed responses to this “power critique.” See, e.g., Carrie Menkel-Meadow, Portia in a Different Voice: Speculations on a Women’s Lawyering Process, 1 Berkeley Women’s L.J. 39 (1985) (arguing that, in some instances, mediation is more suitable for “female needs” than litigation).
distance between the parties. Counsel for the parties do not address one another, but present the issue to the trier of fact. The rules preserve the formality of the setting by dictating in detail how this confrontation is to be conducted. 207

Apart from being simply wrong—“each side is represented by an attorney” presents an ideal, not the reality of most adjudication in America 208—this statement, at least as it plays out in the mass justice fora I have described, 209 describes with some accuracy the care courts use to present the trappings of justice. The problem, of course, is that there is none of the substance. As Marc Galanter has put it, in overload situations typical of mass justice courts, “there are more commitments in the formal system than there are resources to honor them—more rights and rules ‘on the books’ than can be vindicated or enforced.” 210 Indeed, such courts’ professed “emphasis on fairness, equality, and respect for personhood,” and their ultimate inability to vindicate these values, makes the profession of them all the more empty and, given the interests at stake, offensive.

c. Mass Justice Mediation Done Right

Can mediation do any better? I believe it can, if we keep in mind an obsessive goal that must be reiterated again and again: Mediation cannot be co-opted by forces that stack the deck in favor of high-resource parties. This can be accomplished in terms of RDR theory by moving the legal services component of RDR to a more peripheral role and by bringing a formerly untapped resource—the disputants themselves—into a central role in dispute resolution.

My proposal is simple, albeit one that, as of this writing, does not exist in practice: How about a corps of well-trained, dedicated, well-compensated mediators supported with substantial resources to facilitate matters involving low-income disputants? Done properly (this is worth repeating—done properly), such a program would, I believe, enable poverty law advocates and disputants to actually trust a process—something heretofore (with good reason) heretical. A properly constituted mediation program could break the mutually reinforcing concentration of the resources of dispute resolution of RDR theory. Dispute resolution resources—time and money for compensation and training of mediators, adequate time and resources for holding mediation sessions, and, most of all, the power and time of disputants themselves which costs the state nothing at all—can be focused on problem-solving.

207. Delgado et al., supra note 205, at 1388 (footnote omitted).
208. See supra text accompanying notes 10–29.
209. See supra text accompanying notes 41–49, 76–81.
210. Galanter, supra note 18, at 122.
The heart of a successful mediation program lies with creating a corps of dedicated, able mediators. A rigorous training process, complete with a period of apprenticeship and co-mediation, should be required of all candidates. Depending on the nature of the cases the mediator intends to mediate, candidates could be drawn from professions other than law, especially mental health professionals, teachers, or other "helping" professions. The current standards that have been established in many jurisdictions—usually 16 to 40 hours of combined lecture and simulations—fall far short of insuring that mediators have adequate experience and expertise. It would be preposterous to unleash judges on litigants with comparable credentials, and, of course, no judicial system does or would ever do so. Mediators in these programs must receive meaningful compensation competitive to the compensation received by judges in a given jurisdiction. Moreover, as with judges, there must be a meaningful grievance procedure for disputants who believe mediators have acted inappropriately or are biased, and a continuing quality-control review procedure—perhaps accomplished through a peer-review system with other mediators.

Second, caseloads for these mediators must be carefully controlled. One tragic component among many of the mass justice courts is the numbness that tends to descend upon judges who are faced day after day with overwhelming dockets. If the administrative imperative to process huge numbers of cases does not crush individualized attention to litigants, sheer judicial burnout surely will. If anything, mediation requires even greater amounts of attention and concentration than judging. Too many cases can turn the most dedicated, sophisticated mediator into an impatient, irritable mediator, and an impatient, irritable mediator is worse than no mediator at all.

There also needs to be adequate space and time to conduct mediation sessions properly. For once, RDR should be deployed with an eye on the needs and limitations of indigent parties. Facilities need to be in an area (or, even better, in multiple areas serving different neighborhoods) that is reasonably accessible to disputants who must rely on public transportation or who are homebound. Available times for sessions should include early

211. As I have noted, mediation is an entirely different activity from adjudication. The advocacy skills often associated with legal training are, if anything, an impediment to a successful career as a mediator. See supra text accompanying notes 198–203.
212. See, e.g., KImBERLEE K. KOVACH, MEDIATION PRINCIPLES AND PRACTICE 435 (3d ed. 2004).
213. I do not share the hopefulness of some commentators that volunteer mediators can meet this need. See, e.g., King, supra note 204 at 463. There has long been an impulse away from part-time or volunteer judging, and for good reason; judging is a full time job that takes dedication and experience. It is difficult to see why mediation—in many respects a role that implicates an even greater range of "intellegences" and skills than does judging—should not be mediated by full-time, experienced mediators. Moreover, proposals to employ "volunteer mediators" replicate the two-tiered dispute resolution system that my proposal seeks at all costs to avoid. If commercial interests are entitled to the services of taxpayer-funded, full-time judges in federal and state courts over a course of months or years, why should indigent disputants—with issues of homelessness and subsistence at stake—not be entitled to taxpayer funded, full-time mediators?
214. See King, supra note 204, at 467.
mornings and evenings as well as weekends to accommodate work schedules and child-care responsibilities. Just as, at least in theory, there is no set time limit for adjudication, there should be no administratively or statutorily imposed deadlines for the conclusion of mediation sessions.215

Moreover, there must be a highly trained, well-compensated staff that could aid disputants in making determinations as to whether mediation is appropriate in a given case. This, too, is a time-intensive, challenging activity requiring expertise and sensitivity. Indeed, despite attempts to identify categories of cases that are not appropriate for mediation—especially cases involving domestic violence—this task is simply too complex and multifaceted for deceptively easy and efficient cookie-cutter solutions.216 It can, however, be provided by lawyers or, better yet, by mental health or social service professionals with expertise in a given area.

Next, there must be opportunities for interdisciplinary interventions. Another tragic consequence of mass justice and, indeed, of the legal system in general is its tendency to reduce multifaceted, complex circumstances into a set of legal issues.217 There is no question, for example, that family law cases involve psychological, sociological, economic, and medical issues, as well as many other things. Such issues almost invariably extend to other poverty law matters as well.218 The program I am proposing would move away from the assumption that dispute resolution should not sully itself with such questions; mediators would be fully aware of the range of supports available to disputants and would be in a position to make referrals when appropriate.219 Indeed, evidence suggests that the addition of other

215. This is one of the most misunderstood aspects of mediation. In terms of my RDR model, many seem to view the “mass justice” courts as something of an ideal for mediation in terms of processing vast numbers of cases. As a result, in the zeal for “judicial efficiency,” it is not unusual for cash-strapped court-annexed mediation programs to impose time deadlines on mediation. Virtually anyone who has done or understands mediation, however, recognizes that it is a time-intensive process that can and often does require multiple sessions in order to be effective. See, e.g., King, supra note 204, at 466 (“[F]amily and divorce mediation is seldom concluded in one session.”).

216. A classic example is the oft-retold position that cases involving domestic violence are inappropriate for mediation. In fact, while there is no question that instances of domestic violence might well be inappropriate for mediation, a detailed examination of the circumstances is necessary before reaching that conclusion. See, e.g., King, supra note 204, at 445 (noting that “the presence or absence of domestic violence is too crude a screening measure for evaluating mediation programs”). One commentator notes that it should be the province of the “victims of domestic violence . . . to make an informed choice about which divorce process—mediated or adversarial—will best meet the needs of their families.” Ver Steegh, supra note 77, at 147. See also Alexandria Zylstra, Mediation and Domestic Violence: A Practical Screening Method for Mediators and Mediation Program Administrators, 2001 J. DISP. RESOL. 253.

217. This tendency is so pronounced that it warrants revising de Tocqueville’s famous observation that “[t]here is hardly a political question in the United States which does not sooner or later turn into a judicial one” into “there is hardly [any] question in the United States which does not sooner or later turn into a judicial one.” ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 270 (J.P. Mayer ed., 1969).

218. Many considered proposals regarding the expansion of legal services to the poor take this into account. See, e.g., Houseman, supra note 22, at 373 (proposing legal assistance that “would coordinate and collaborate with human services providers and community organizations to deliver holistic and interdisciplinary services”).

219. Interestingly, one model for this view of lawyering is present in some public defender and prosecutor offices which employ social workers and other support personnel to assist defendants with issues of substance abuse. See, e.g., David E. Rovella, The Best Defense . . . : Rebuilding Clients’ Lives
professionals to mediation—especially psychotherapists in divorce mediation—substantially enhances the benefits of the process.220

I also propose a new rule regarding the presence of attorneys in these mediation sessions: Attorneys are welcome to attend and both protect their clients and facilitate the process, but each party must have an attorney. In other words, either all parties are represented at mediation, or no parties are represented at mediation.221 No exceptions. In the event neither party has an attorney present at the mediation session, the mediator would have had extensive training and experience in addressing “power differentials” that might arise, including, if necessary, the termination of the mediation.

As a related development, I propose that a mediation program employ a corps of lawyers who will represent mediation participants who otherwise cannot afford a lawyer. In the spirit of the trend towards unbundling legal services,222 the representation will be limited to three goals: (1) insure that disputants understand what mediation is; (2) advise disputants about what legal remedies might be available; and (3) review any final agreements reached in mediation. It would not be contemplated that the lawyer will attend the mediation session. These discrete roles will enable each lawyer to represent many disputants, thus limiting the cost of the legal services RDR, while insuring that disputants will not bargain away substantial rights of which they have no knowledge.223

In terms of administration of these programs heretofore, mediation programs have invariably sprung up as adjuncts to the judicial system. Judges refer cases to mediation, mediations often take place at courthouses, clerks’ offices maintain lists of potential mediators, and, most importantly, programs are funded through the budgets of the judiciary. Such arrangements—the norm today—reflect the perspective of “judges [who] view mediation as a tool of good court management.”224 Inevitably, a judicial system obsessed with clearing dockets pressures mediators to settle cases whether the disputants want to do so or not.225

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220. JANET R. JOHNSTON & LINDA E.G. CAMPBELL, IMPASSES OF DIVORCE: THE DYNAMICS AND RESOLUTION OF FAMILY CONFLICT 198 (1988); King, supra note 204, at 472–73. There indeed seems to be something of a trend, even among lawyers, to examine solutions to social problems that draw upon resources and ideas that are extra-legal. See generally Goodmark, supra note 79.

221. This, in and of itself, is an important step in redressing the hideous power inequities that characterize “mass justice” courts and fears of how “power differentials” can play out in mediation. See Zimmerman, supra note 45, at 191.

222. See supra text accompanying notes 183-84.

223. For a discussion of the risk of this happening in mediation, see Engler, supra note 26, at 2010–11.


225. See, e.g., Engler, supra note 26, at 2010–11. Of course, when parties refuse or are unable to reach an agreement in mediation, the case is referred to the mass justice courts I have already described,
I propose to sever the pervasive relationship between the judicial system and mediation programs. Obsessive care must be lavished on avoiding the taint of RDR commonplaces like “judicial economy,” the perversions of mass justice, and, more generally, of the norms of how things have been done for too long. This is not to say that referrals should not be made between these two systems: They should, but mediation must be a co-equal unit, not another example of mass justice under a different name. Indeed, my mediation program would accept both matters that are the subject of pending litigation and matters that are not.

And, of course, these mediation services must be free or at a nominal cost that can be waived when a party is indigent. Mediation, done properly, takes time and resources. My proposal may indeed serve judicial economy in that judges are less likely to be involved in dispute resolution, but it does nothing for “mediator economy,” which, if the sole criteria, would be singularly ill-served. My proposal, moreover, does not do much for the rapidity of dispute resolution. As I have noted, mediation, done properly, will win no dispute resolution speed races; it takes time, energy, and focus for all participants. This is not to say that mediation is not an efficient mode of dispute resolution, however; litigation often forces parties to expend substantial time and money on the peripherals of and preparation for dispute resolution—motion practice, discovery, witness preparation, and so forth. In contrast, the relative informality of mediation means that time spent is spent almost exclusively actually in the mediation working on resolving disputes.

That said, in terms of RDR efficiency, my proposal arguably provides a decent return. It has long been an article of faith among supporters of mediation that the direct involvement of stakeholders in crafting settlement agreements promotes continued compliance, and some empirical evidence bears this out. Many indigent disputants encounter the legal system numerous times; successful mediation reduces this, thus preserving dispute
resolution resources that would otherwise have to be allocated in the future. Moreover, while I have elsewhere argued that lawyers have a productive role to play in mediation,229 the presence of lawyers, it has long been recognized, is not critical to mediation and, depending on the lawyer and the situation, can be counterproductive.230

Whatever the ultimate balance sheet tallies, such a program would, at long last, provide what has been lacking for so long: A sensitive, individualized, and focused mechanism for resolving disputes involving low-income disputants. While mediation might well be a more efficient mode of dispute resolution, this fact seems to me beside the point. Mediation can generate more satisfying, comprehensive solutions to desperate problems. Where are resources better directed than to situations where human dignity and survival are at risk?

The crux, as always, is there is currently no mediation program that looks remotely like my proposal. A process called mediation can be used for good or ill, and therein lurks the danger of proposals like mine.

2. Community Lawyering

There has been an explosion of interest in "community lawyering."231 Like many trends of genuine significance, the nature of "community lawyering" is not easy to pin down. Indeed, in its more sophisticated forms, community lawyers do not presuppose what legal services a community wants or needs; the indeterminacy of such wants and needs, and the lawyer's role in organizing individuals to develop means to such shared ends, is one of the challenges and possibilities of community lawyering itself.232

229. Rubinson, supra note 198, at 858-74.
232. For a thoughtful exploration of this point, see White, supra note 231. See also Martha R. Mahoney et al., Social Justice: Professionals, Communities, and Law 763 (2003). In the text, the authors state:

Movements for transformation take place through the lives and work of people and communities for whom lawyers are at most a small part of the story. Therefore, an important question
a. What Do Community Lawyers Do?

Community lawyers engage in a range of activities. Attracting and maintaining affordable housing in low-income communities is often a primary goal, and to that end, community lawyers often work with non-profit community development organizations, government agencies, legislators, tenant groups, and private developers on projects and transactions—including projects that qualify for the Low Income Housing Tax Credit. Some community lawyers represent community organizations in gaining 501(c)(3) tax status, drafting corporate organization and governance documents, and providing general counsel on transactions and projects in which such organizations are engaged. Others assist community entrepreneurs in attracting capital, organizing as commercial entities, and providing general advice so that small businesses owned and run by community residents serve the communities in which they are located. Still others work with community organizations to identify services a community needs—child-care facilities, banks, youth centers—and help to develop means to bring these services into being. Others lobby for legislation or engage in political activism on behalf of economic justice for low-income communities.

These frequently productive lawyering (or, in some cases, quasi-lawyering) activities can help low-income individuals who live in low-income communities. While not classically providing "access to justice" in the individual litigant's sense of the term, community lawyers can certainly channel and address conflict and enable groups to gain control of their lives in ways that, to use an overused term, end in greater empowerment, and empowerment is, after all, the ultimate end that access-to-justice initiatives seek to achieve.

Moreover, a classic critique of funding for conventional legal services is that it drains funding from social services that would directly benefit low-income individuals. While this argument is demonstrably false, community lawyering sidesteps this issue; it resonates with rhetoric about self-reliance and personal responsibility that is so prevalent in political dis-

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for lawyers working on social justice issues is how to carry out their professional work in ways that empower the people whose lives are involved.


235. Cummings & Eagly, supra note 231, at 476-78.

236. See Cummings, supra note 231, at 443.

237. Cummings & Eagly, supra note 231, at 476-77.

238. Cummings, supra note 231, at 444-45.

239. See Houseman, supra note 22, at 408.

240. Two responses among many are, first, there is no reason to believe (and many reasons to disbelieve) that funds taken away from legal services would somehow find their way into social service programs, and, two, the administrative and judicial systems are so stacked against low-income disputants that denying legal representation is tantamount to denying them what they are entitled to by law.
course,\textsuperscript{241} which, in turn, can attract and has attracted funding from government and non-governmental sources.\textsuperscript{242} Such a rare circumstance is cause for celebration, even if based on faulty assumptions about what causes poverty and the nature of the lives of the indigent.\textsuperscript{243}

\textit{b. How Community Lawyering Allocates RDR}

The legal skills that are brought to bear in many forms of community lawyering are primarily transactional, not litigation-oriented. From the perspective of the allocation of RDR, this carries enormous advantages by reconfiguring the unyielding principles that otherwise control the allocation of RDR.\textsuperscript{244} While mediation injects RDR into a new type of third-party decision-maker instead of old style judging and, what is more, minimizes attorney involvement in the process, community lawyering focuses RDR into a new style of lawyering and, in many instances, eliminates entirely the necessity for a separately funded third party. As opposed to the overwhelming task of representing individuals in dispute resolution systems that are, as this Article demonstrates, unyieldingly unreceptive to the needs of low-income disputants, community lawyering cuts this Gordian knot by largely, if not entirely, bypassing conventional dispute resolution and turning instead to markets, legislative advocacy, and political activism.

In addition, an intriguing byproduct of community lawyering from an RDR perspective relates to the source of community lawyers. There is one source where such lawyers cannot come from: Federal regulations prohibit attorneys working in Legal Services Corporation-funded entities from “initiat[ing] the formation, or to act as an organizer, of any association, federation, labor union, coalition, network, alliance, or any similar entity,”\textsuperscript{245}—a prohibition that implicates many community lawyering activities. That said, non-LSC-funded organizations have sprung up, financed through grants from foundations or state agencies, to do this work,\textsuperscript{246} and creative organizing can even, at times, engage in community lawyering while sidestepping

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\textsuperscript{242} \textit{See supra} note 231, at 401–04.

\textsuperscript{243} While much welfare policy relies on stereotypes and simplifications about the causes of poverty, the truth is far messier, embodying a complex amalgamation of numerous economic, demographic, historical, political, and cultural factors. See Michele Estrin Gilmian, \textit{Communitarianism and Social Welfare}, 66 U. PIT. L. REV. (forthcoming 2005).

\textsuperscript{244} \textit{See supra} text accompanying notes 30–34.

\textsuperscript{245} 45 C.F.R. § 1612.9(a) (2004).

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the LSC restrictions. Law school clinics in community lawyering have begun to proliferate and engage in important work in the field—a development that not only provides representation to communities but also augurs well for a time when more private attorneys have exposure to this sort of practice.

But even apart from these new conceptions of what a full-time poverty law practice can look like, community lawyering offers the possibility of attracting at least a percentage of the legions of transactional lawyers who dismiss pro bono as inevitably involving litigation and thus not requiring their expertise. Indeed, programs and initiatives designed to attract transactional lawyers to community lawyering initiatives have begun to appear. While, as I have noted, pro bono cannot be an answer to access of justice inequities, there remains a huge untapped resource of lawyering expertise—often concentrated at large firms—whose practice is transactional and who otherwise view themselves as unqualified and uninterested in the classically litigation-oriented vision of representing low-income clients.

Thus, community lawyering has the potential to (1) bypass the third-party actor component of RDR as a necessary condition to enhance the lives of the poor; (2) attract a previously untapped source of legal services by enticing transactional lawyers to engage in pro bono or reduced fee practice on behalf of low-income communities; (3) draw upon the creativity and energy of low-income clients to, as with mediation, do an end-run around the disputing-through-agents condition of RDR theory and add a third element—parties' own energy, time, and creativity—that contributes to total RDR allocations.

247. Trubek, supra note 246, at 804.
248. Peter Pitegoff, Law School Initiatives in Housing and Community Development, 4 B.U. PUB. INT. L.J. 275 (1995). Increasing numbers of law schools have community lawyering clinics, including schools of law at Temple University, the University of Baltimore, the University of Maryland, and the University of New Mexico.
249. See, e.g., Matthew Diller, Lawyering for Poor Communities in the Twenty-First Century, 25 FORDHAM URB. L.J. 673, 677 (1998) (noting that community lawyering "provides new opportunities for collaborations between poverty lawyers and the private bar" and "holds the potential to expand pro bono work beyond the litigation departments of law firms by tapping into the skills and expertise of corporate lawyers").
251. There is even the possibility of appealing to the market sense of the private bar. One thread of community economic development literature touts how "low-income communities [are] underutilized markets with rich economic opportunities for businesses." Cummings, supra note 231, at 402. While recent commentators suggest that such ideas vastly minimize the profound importance of the social and political realities underlying poverty in America, id., the fact remains that some community lawyering initiatives might generate attorney's fees either immediately or in the future—something that rarely if ever happens in most traditional forms of litigation on behalf of low-income clients.
As with mediation, however, all of this sounds well and good in terms of RDR, but simply arguing that more community lawyering is the answer to problems of access to justice is vastly simplistic, if not misleading. The intractability of poverty as a cultural, social, and political fact remains enormously troubling. Some have convincingly argued that community lawyering, in its more market-based incarnations, has been ineffective and assert that attacking poverty at its roots requires a return to progressive political activism and organization or "economic justice." It is unclear whether such an organizational and political focus, if indeed this is necessary, can achieve much except at the margins. Moreover, the very focus of community lawyering on communities masks enormous complexities. After all, what precisely is a community? To what degree do the interests of individuals within a community converge or diverge? To what degree do individuals identify with many distinct cultural, racial, social, as well as geographic communities, and what does this mean for a community lawyering practice?

These are difficult questions, perhaps even discouraging ones in terms of predicting the ultimate value of initiatives undertaken under the umbrella of community lawyering. The answer might well be the same as it is with mediation: What else is there? It is a shot, and a shot that potentially breaks free of the paralyzing rigidity of RDR allocations.

VII. CONCLUSION

This Article has examined a double tragedy in how we allocate the resources of dispute resolution. The first tragedy is how appallingly inequitable this allocation is. The second is that the larger world of popular and political discourse seems utterly disinterested in the first tragedy. It is astonishing that the principle of equal justice—a principle enshrined in virtually every articulation and embodiment of civic virtue and pride in our democracy, from courthouse facades, to the Pledge of Allegiance, to the iconography of "blind justice"—remains so obviously and utterly hollow and illusory.

I have no illusions that this Article will be heard when so many others have not. I have tried to open up fresh ways of conceptualizing these tragedies and articulating potential solutions. Individual calls from a crowd can sometimes combine to transform indifference into action. Or so we can only hope.

253. For a particularly compelling examination of this perspective, see generally Cummings, supra note 231.