

ADR, DYNAMIC (IN)JUSTICE, AND ACHIEVING ACCESS: A FORECLOSURE CRISIS CASE STUDY

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INTRODUCTION

The nature of injustice is that we may not always see it in our own times.

—Justice Anthony M. Kennedy¹

The query of this provocative Symposium, *Achieving Access to Justice Through ADR: Fact or Fiction?*, prompts two important questions: what do we mean by “justice,” and what does it look like to “achieve justice”? Of all the conceptions of justice and access to justice,² the one I find most compelling comes from Marc Galanter.³ Galanter points out that justice is not a fixed pie; instead, justice is achieved by pushing back against *in*justice, which, like it or not, is forever changing with humans’ capacity for innovation as new discoveries, changing societal norms, and evolving expectations precipitate new problems, needs, or unmet wants.⁴

This insight from Galanter helps us better understand how alternative dispute resolution⁵ (ADR) processes engage questions of justice and access

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1. *Obergefell v. Hodges*, 135 S. Ct. 2584, 2598 (2015) (delivering the opinion of the U.S. Supreme Court).

2. For definitions of “access to justice,” see *infra* notes 11–13 and accompanying text.

3. See generally Marc Galanter, *Access to Justice in a World of Expanding Social Capability*, 37 *FORDHAM URB. L.J.* 115 (2010).

4. *Id.* at 125.

5. The term “alternative dispute resolution” is not particularly helpful as a descriptor, because it clumps together a range of diverse dispute resolution processes—mediation, arbitration, negotiation, etc.—each of which could not be more different than the next. I will, however, hold to the conventions of the field and use the term ADR to mean dispute resolution processes that are *not* formal, public, judicial adjudication. More specifically, the ADR processes to which I refer are arbitration, mediation, settlement conferencing, etc.—whether privately contracted for or accessed in connection with court litigation or administrative

to justice. Indeed, to counter this “moving frontier”⁶ of injustice—or, put another way, to *access* justice—requires a diversity of approaches. This diversity should include ADR processes whose features enable them to respond nimbly in a dynamic system of justice.

While ADR processes offer methods for pushing back against injustice, they too, like any other human invention, can introduce new problems. Because an ADR process is just that, a *process* and not an *event* isolated unto itself,⁷ it can be only as “just” as the system in which it operates. When introduced in new contexts, the procedural design of ADR needs to adapt to avoid leading to new forms of injustice. Thus, in the same way that justice should be understood as dynamic, ADR as a means to access justice should also be conceived as dynamic, evolving, and in need of continual adjustment.

The dynamic system of justice and ADR’s evolving role within that system are aptly illustrated through the history of the foreclosure crisis. The rise of a secondary mortgage market and its subsequent collapse presented new kinds of injustice, in an unprecedented volume, for which the existing legal system was wholly unprepared.⁸ The deployment of foreclosure mediation and other facilitated negotiation processes created new avenues for homeowners and investors to achieve justice by avoiding foreclosure through a process that enhanced communication, preserved the dignity of homeowners, and protected trillions of dollars of economic investment.⁹ The design of these foreclosure ADR programs evolved to protect against the systemic injustices at play in the foreclosure crisis.¹⁰

This Article proceeds in two parts. Part I argues for a dynamic, rather than fixed, conception of access to justice. It then explores how ADR processes, when placed in this dynamic framework, can create new forms of injustice and intensify preexisting ones. Part II presents a case study from the foreclosure crisis to illustrate how the features of ADR processes are especially well suited to respond to dynamic injustices. It further demonstrates how ADR design must evolve to respond to the dynamic system of (in)justice in which ADR processes operate.

I. ADR AND ITS ROLE IN ACCESS TO JUSTICE

The notion of “access to justice” has a rich history and many dimensions.¹¹ At its narrowest, access to justice focuses on the “access” component—or the

dispute resolution procedures—that were integrated into the U.S. legal system during the twentieth century.

6. See Galanter, *supra* note 3, at 125 (“Advances in human capability and rising expectations result in a moving frontier of injustice.”).

7. I am grateful to Heather Scheiwe Kulp for making this important point during the Symposium discussion. Discussion with Heather Scheiwe Kulp, Alt. Dispute Resolution Coordinator, N.H. Judicial Branch, at the Fordham Law Review Symposium: Achieving Access to Justice Through ADR: Fact or Fiction? (Nov. 1, 2019).

8. See *infra* Part II.A.

9. See *infra* Part II.B.

10. See *infra* Part II.C.

11. The U.S. Department of Justice’s Office for Access to Justice identifies three guiding principles for access to justice: (1) “Promoting Accessibility—eliminating barriers that

ability for all people, not just the rich and powerful, to access “civil legal justice.”¹² And then there are the broader notions of access to justice that focus on “justice,” asking whether what is accessed is substantively “just” or whether a system of resolving disputes leads to satisfying remedies for harms suffered.¹³

But trying to fit ADR into either of these meanings of access to justice seems unhelpful. The narrower conception of access to justice, which prioritizes access as its goal, inherently renders alternatives to the civil legal justice system inferior because these ADR processes sidestep either the formal adjudication or prescribed legal remedies (sometimes both) that the civil legal system provides.¹⁴ And the broader conception of access to justice

prevent people from understanding and exercising their rights”; (2) “Ensuring Fairness—delivering fair and just outcomes for all parties, including those facing financial and other disadvantages”; and (3) “Increasing Efficiency—delivering fair and just outcomes effectively, without waste or duplication.” See *Access to Justice*, U.S. DEP’T JUST. ARCHIVES, <https://www.justice.gov/archives/atj> [<https://perma.cc/6WXH-ZU8Q>] (last visited Apr. 12, 2020). Fordham Law School’s own National Center for Access to Justice defines access to justice as “having a fair chance to be heard, regardless of who you are, where you live, or how much money you have.” See *Why Access to Justice Matters*, JUST. INDEX 2016, <https://justiceindex.org/our-vision/#site-navigation> [<https://perma.cc/9R43-EEE5>] (last visited Apr. 12, 2020). It means that a person can learn about her rights and then protect her interests through a neutral and nondiscriminatory, formal or informal, process that determines the facts, applies the rule of law, and enforces the result. *Id.*

12. DEBORAH L. RHODE, ACCESS TO JUSTICE 3–10 (2004). For Deborah Rhode, the “access” part of access to justice includes access to lawyers who can translate parties’ grievances into legal claims and then advocate on their behalf, to a judicial system that is a forum for hearing those claims, and to the remedies prescribed under law. *Id.* at 20, 117–21. For a discussion on whether it is right to assume that access to justice should mean access to law, access to legal services, and therefore access to lawyers, see generally David Luban, *Optimism, Skepticism, and Access to Justice*, 3 TEX. A&M L. REV. 495 (2016).

13. See Rebecca L. Sandefur, *Access to What?*, DÆDALUS, Winter 2019, at 49, 50. Credit for making this distinction in emphasis—on either the “access” or the substantive “justice” components of “access to justice”—goes to Jean Sternlight, who made this observation during a breakout session at a June 2019 conference at Pepperdine University Caruso School of Law. Discussion with Jean Sternlight, Founding Dir. of the Saltman Ctr. for Conflict Resolution and the Michael and Sonja Saltman Professor of Law, William S. Boyd Sch. of Law, at the Pepperdine University Caruso School of Law Conference: Appreciating Our Legacy and Engaging the Future: An International Conference for Dispute Resolution Teachers, Scholars, and Leaders (June 18, 2019).

14. Arguably, the broad institutionalization of these ADR processes makes them an integral part of our civil legal system rather than “alternatives.” Nevertheless, the critiques of dispute resolution, noting that it is not judge-led or publicly determined, raise important concerns. See Mauro Cappelletti, *Alternative Dispute Resolution Processes Within the Framework of the World-Wide Access-to-Justice Movement*, 56 MOD. L. REV. 282, 288 (1993) (discussing the risk that alternatives to adjudication may result in “second class justice”); Robert Rubinson, *A Theory of Access to Justice*, 29 J. LEGAL PROF. 89, 146–47 (2005) (responding to power critiques of mediation); Jean R. Sternlight, *Is Alternative Dispute Resolution Consistent with the Rule of Law?: Lessons from Abroad*, 56 DEPAUL L. REV. 569, 569–72 (2007) (explaining the critiques of ADR processes in the United States). Others have noted that the adversarial legal system is not necessarily the best or only avenue for achieving justice. See Frank E. A. Sander, *Varieties of Dispute Processing*, in THE POUND CONFERENCE: PERSPECTIVES ON JUSTICE IN THE FUTURE 65, 67–69 (A. Leo Levin & Russell R. Wheeler eds., 1979) (acknowledging that “encouraging the ventilation of grievances” by establishing new modes of dispute resolution may not be a good thing); see also Robert A. Baruch Bush, *Dispute Resolution Alternatives and the Goals of Civil Justice: Jurisdictional Principles for*

necessitates projecting one's own value system to determine whether remedies are satisfying or unsatisfying, just or unjust.¹⁵ Rather than shoehorn ADR into one of these restrictive meanings of "access to justice," consider instead an alternative theory of justice and, therefore, access to justice, provided by Marc Galanter.

A. Access to Justice Is Dynamic, Not Fixed

Marc Galanter offers a trenchant insight into the access to justice reform movement.¹⁶ He observes that the access to justice agenda, whether formulated narrowly or broadly, lacks an essential temporal dimension.¹⁷

[A]chievement of the "justice" in [access to justice] entails the vindication of rights and entitlements set out in the existing law and its best institutional practice—no small thing! But when we add a temporal dimension, we render the notion of Access to Justice at once more capacious and more diffuse. Justice is no longer, if it ever was, stable and determinate, but fluid, moving, and labile. . . . The justice to which we seek access is the negation or correction of injustice. But there is not a fixed sum of injustice in the world that is diminished by every achievement of justice. The sphere of perceived injustice expands dynamically with the growth of human knowledge, with advances in technical feasibility, and with rising expectations of amenity and safety.¹⁸

The nature of (in)justice changes constantly, and therefore injustice will never be eradicated nor justice fully achieved because "people are capable of identifying or inventing new problems as quickly as the old ones are solved. . . . [T]he very same human capabilities that create solutions for

Process Choice, 1984 WIS. L. REV. 893, 896 & n.4 (discussing contemporary concerns about the legal system's institutional capacity to respond to all would-be litigants); Nora Freeman Engstrom, *Run-of-the-Mill Justice*, 22 GEO. J. LEGAL ETHICS 1485, 1537–39, 1546–47 (2009) (examining how access to lawyers does not result in access to the legal system or increased delivery of justice); William L. F. Felstiner et al., *The Emergence and Transformation of Disputes: Naming, Blaming, Claiming . . .*, 15 LAW & SOC'Y REV. 631, 645 (1980) (discussing the many ways in which lawyers "shape disputes to fit their own interests rather than those of their clients"); Katherine R. Kruse, *Learning from Practice: What ADR Needs from a Theory of Justice*, 5 NEV. L.J. 389, 391 (2004) (discussing the problem with romanticizing the judicial system and the problem with assuming that lawyers are always righteous actors).

15. As Ellen Deason discussed in her contribution to this Symposium, the idea of justice is deeply personal and highly contextual: access to "whose justice"? This critique is valid not only for examining whether ADR helps improve justice but also for examining any other assertions about whether a particular system is just. See Discussion with Ellen E. Deason, Joanne Wharton Murphy and Classes of 1965 and 1973 Professor of Law, Ohio State Univ. Moritz Coll. of Law, at the Fordham Law Review Symposium: Achieving Access to Justice Through ADR: Fact or Fiction? (Nov. 1, 2019); see also Mauro Cappelletti, Bryant Garth & Nicolò Trocker, *Access to Justice: Variations and Continuity of a World-Wide Movement*, 54 REV. JUR. U. P.R. 221, 222–23 (1985); Felstiner et al., *supra* note 14, at 634 (recognizing that injurious experiences are perceived and valued differently and that the way in which a person perceives, values, and attaches meaning to an injurious experience is unique and highly individualized); Luban, *supra* note 12, at 512–13 (discussing whether access to justice, at the micro and macro levels, means access to law).

16. See generally Galanter, *supra* note 3.

17. *Id.* at 123–24.

18. *Id.* at 124.

existing problems—by fulfilling existing needs and wants—discover or create new needs, new wants, and new problems.”¹⁹ One need look no further than new technologies, like cell phones and artificial reproductive technologies, for examples of human ingenuity that, in creating solutions for certain problems, introduce a host of new troubles, like violations of privacy and eugenics.

The idea that access to justice is fluid, dynamic, and forever changing with expanding human knowledge provides a useful framework for understanding ADR’s role in achieving access to justice. As the next sections discuss, ADR processes typify the kind of human creativity needed to respond to a moving frontier of injustice; yet, simultaneously, these processes can introduce new needs, problems, and injustices that must be addressed.

B. ADR Enables Dynamic Access to Justice

The modern ADR and access to justice movements emerged together in the 1970s as part of a push to reform the U.S. legal system by improving its accountability and responsiveness to all people.²⁰ A growing recognition that the formal litigation process failed most people propelled a reform movement.²¹ The movement focused on identifying ways to help those who had been harmed find better quality justice faster.²² Reformers thought that ADR processes could serve as new, alternative avenues through which disputants could reach just resolutions.²³ Offering disputants “process pluralism,” a menu of different processes that could be used to address disputants’ different goals, served as an integral part of the access to justice mission.²⁴

A desire both to expedite the delivery of justice and enhance the quality of justice in a legal system riddled with barriers drove the institutionalization of ADR.²⁵ The argument was as follows: if accessing justice through formal

19. *Id.* at 125.

20. *Id.* at 117 (characterizing ADR, access to justice, and the dispute perspective in legal studies as “intellectual triplets” born from the same big idea); see Jeffrey W. Stempel, *Reflections on Judicial ADR and the Multi-door Courthouse at Twenty: Fait Accompli, Failed Overture, or Fledgling Adulthood?*, 11 OHIO ST. J. ON DISP. RESOL. 297, 309–19 (1996); see also Cappelletti, *supra* note 14, at 294 (identifying ADR as “a major component” of “the search for, and growth of,” access to justice). For a history of the Pound Conferences and their influence on the development of ADR, see generally Lara Traum & Brian Farkas, *The History and Legacy of the Pound Conferences*, 18 CARDOZO J. CONFLICT RESOL. 677 (2017).

21. Cappelletti, *supra* note 14, at 283–88 (establishing three waves of the access to justice reform movement—a first wave focusing on overcoming economic obstacles to justice, a second wave focusing on organizational barriers to collective or societal justice, and a third wave, which includes ADR, focusing on overcoming procedural barriers to justice).

22. *Id.*

23. See generally Frank E. A. Sander, *Alternative Methods of Dispute Resolution: An Overview*, 37 U. FLA. L. REV. 1 (1985).

24. *Id.*

25. Carrie Menkel-Meadow, *Pursuing Settlement in an Adversary Culture: A Tale of Innovation Co-opted or the Law of ADR*, 19 FLA. ST. U. L. REV. 1, 6–13 (1991) (noting and responding to the different justifications for ADR as “quantitative-efficiency claims” and “qualitative-justice claims”). The Disputes Processing Research Program at the University of

litigation was a narrow path accessible only to a wealthy minority, then ADR could open the judicial process to larger segments of the population.²⁶ In contrast to court adjudication, ADR processes could be more informal, with fewer (if any, depending on which kind of ADR process) restrictive procedural and evidentiary rules, making them easier to navigate, less costly, and, in theory, more efficient.²⁷ Further, ADR processes could provide procedural infrastructure where there previously was none; for example, mediation offers a structured process, overseen by a neutral third party, for negotiating parties who might not otherwise be successful if left to their own devices.²⁸

Added to these “quantitative-efficiency” justifications for ADR as a mechanism for increasing access to justice are the “qualitative-justice” arguments.²⁹ For this latter group of arguments, the thinking was that modes of dispute resolution other than adversarialism and its binary outcomes might be better suited to the “complexities of both modern life and modern lawsuits.”³⁰ Because individuals’ conceptions of justice are highly personalized, a one-size legal remedy may not fit all. ADR processes, many of which are party-driven, could result in more satisfying outcomes than litigation.³¹

This notion of personalized justice adheres especially to those processes that facilitate negotiations, such as mediation and conciliation.³² These ADR processes can enable parties to craft the content of their own settlements and

Wisconsin commissioned five papers that provide a more robust discussion of the “production” and “quality” arguments around ADR. See generally Robert A. Baruch Bush, *Defining Quality in Dispute Resolution: Taxonomies and Anti-taxonomies of Quality Arguments*, 66 DENV. U. L. REV. 335 (1989); John P. Esser, *Evaluations of Dispute Processing: We Do Not Know What We Think and We Do Not Think What We Know*, 66 DENV. U. L. REV. 499 (1989); David Luban, *The Quality of Justice*, 66 DENV. U. L. REV. 381 (1989); Susan Silbey & Austin Sarat, *Dispute Processing in Law and Legal Scholarship: From Institutional Critique to the Reconstruction of the Juridical Subject*, 66 DENV. U. L. REV. 437 (1989); Tom R. Tyler, *The Quality of Dispute Resolution Processes and Outcomes: Measurement Problems and Possibilities*, 66 DENV. U. L. REV. 419 (1989).

26. Cappelletti, *supra* note 14, at 287; see also Rubinson, *supra* note 14, at 144–52 (proposing the concept of “mass justice mediation” and what it would take to do it “right”).

27. Bush, *supra* note 14, at 895–907 (detailing the different views on judicial reform); Sander, *supra* note 23, at 1.

28. Lydia Nussbaum, *Mediation as Regulation: Expanding State Governance over Private Disputes*, 2016 UTAH L. REV. 361, 404 (detailing the different ways in which mediation can increase efficiency of negotiations).

29. *But cf.* Menkel-Meadow, *supra* note 25 (explaining and criticizing common qualitative-justice arguments).

30. Carrie Menkel-Meadow, *The Trouble with the Adversary System in a Postmodern, Multicultural World*, 38 WM. & MARY L. REV. 5, 9 (1996).

31. Cappelletti, *supra* note 14, at 289 (noting that sometimes “conciliatory (or ‘co-existential’) justice is able to produce results which, far from being ‘second class,’ are better, even qualitatively, than the results of contentious litigation”); Luban, *supra* note 25, at 409. “ADR’s real strength may lie in pursuing extra-legal justice within the system” or those “goods or rights that are implicit in existing institutions but to which we have no legal right.” Luban, *supra* note 25, at 409.

32. For an explanation of types of ADR, see generally Carrie J. Menkel-Meadow, *Mediation, Arbitration, and Alternative Dispute Resolution (ADR)*, in 15 INTERNATIONAL ENCYCLOPEDIA OF THE SOCIAL & BEHAVIORAL SCIENCES 70 (2d ed. 2015).

stand in striking contrast to the limited remedial options available when pursuing discrete causes of action in a court.³³ As a consequence, settlement agreements designed by parties themselves could be tailored to their needs and more durable than resolutions handed down as trial verdicts.³⁴ And, the opportunity to have voice and to be treated with dignity by a neutral third party further aids parties' sense that the outcome of an ADR process like mediation is fair.³⁵ For example, studies of small claims courts suggest that mediation participants described their experience in small claims mediation as "longer, more thorough, more open, and providing greater control over their presentation and more opportunity to tell their side of the story" than litigation.³⁶

Finally, from a macro access to justice perspective, the flexibility of ADR procedural rules and their ability to incorporate nonlegal solutions means that these processes can respond quickly to new injustices as they arise. For example, before the decision in *Obergefell v. Hodges*³⁷ extended marriage rights to same-sex couples, married gay men and women living in jurisdictions that did not recognize same-sex marriage could not go to their local courts for a divorce.³⁸ They either had to move to a same-sex marriage jurisdiction and establish residency or live separately and remain legally married.³⁹ In response, same-sex marriage "dissolution mediation" emerged as one avenue by which same-sex couples living in jurisdictions that did not recognize same-sex marriage could order their lives, their children's lives, and their finances when remedies from the civil legal justice system were not (yet) available.⁴⁰ Thus, in a world of dynamic (in)justice, ADR processes have the potential to respond more nimbly than courts to quickly changing individual and societal needs.⁴¹

33. Menkel-Meadow, *supra* note 25, at 7 (discussing the "limited remedial imagination" of courts).

34. Rosselle L. Wissler, *The Effectiveness of Court-Connected Dispute Resolution in Civil Cases*, 22 CONFLICT RESOL. Q. 55, 68 (2004) (discussing the studies of settlement durability).

35. The connection between an individual's perception of procedural fairness and their assessment that they have received fair distributive justice is discussed in much of the procedural justice literature. For a helpful synthesis, see Nancy A. Welsh, *Remembering the Role of Justice in Resolution: Insights from Procedural and Social Justice Theories*, 54 J. LEGAL EDUC. 49, 52–54 (2004).

36. Roselle L. Wissler, *Mediation and Adjudication in the Small Claims Court: The Effects of Process and Case Characteristics*, 29 LAW & SOC'Y REV. 323, 335–36 (1995). The study controlled for litigant characteristics to ensure that the differences in experience were attributable to the dispute resolution process itself and not the unique preferences of individual litigants. *Id.* at 335–37.

37. 135 S. Ct. 2584 (2015).

38. Judith M. Stinson, *The Right to (Same-Sex) Divorce*, 62 CASE W. RES. L. REV. 447, 447 (2011).

39. *See, e.g., id.* at 465.

40. For a discussion of mediation for same-sex divorcing couples, see generally Frederick Hertz, Deborah Wald & Stacey Shuster, *Integrated Approaches to Resolving Same-Sex Dissolutions*, 27 CONFLICT RESOL. Q. 123 (2009) and Mark J. Hanson, *Moving Forward Together: The LGBT Community and the Family Mediation Field*, 6 PEPP. DISP. RESOL. L.J. 295, 300–03 (2006) (describing the advantages of using mediation for the LGBT community).

41. Cappelletti, *supra* note 14, at 296 ("We have to be aware of our responsibility; our duty is to contribute to making law and legal remedies reflect the actual needs, problems and

C. *Like Any Other Human Innovation, ADR Can Lead to Injustice*

In addition to observing that justice, and therefore access to justice, should be understood as a dynamic, moving frontier, Galanter noted that, with every human innovation designed to fix a problem, new problems and injustices unavoidably arise.⁴² ADR, itself a human invention, is not immune to this phenomenon.

ADR processes—despite their potential to fix the problems of formal adjudication by offering informality, flexibility, and party-driven or individually tailored outcomes—introduce new forms of injustice. Indeed, critics have long observed that ADR processes can exacerbate existing power differentials between parties.⁴³ For example, the corporate strategy of shunting individual claims into private ADR processes deprives people of the ability to achieve systemic reform or public accountability through litigation.⁴⁴ This corporate practice becomes even more problematic when powerful players write the rules for ADR processes, like binding arbitration, in their favor and then present them to employees and consumers within contracts of adhesion.⁴⁵

In addition to concerns about informality, critics also fear that the lack of transparency or public accountability of ADR processes erodes public law⁴⁶ and enables prejudices against women and minorities to emerge and go unchecked.⁴⁷ Not only may the private, third-party neutrals exert inappropriate control over parties in ADR processes⁴⁸ but parties themselves

aspirations of civil society. Among these needs are surely those of developing alternatives to the traditional processes and remedies any time such remedies are too expensive, slow and inaccessible to the people; hence, the duty to find alternatives capable of better accommodating the urgent demands of a time of societal transformations at an unprecedentedly accelerated pace.”).

42. Galanter, *supra* note 3, at 125.

43. The power critique is not exclusive to ADR processes and exists for litigation as well. See generally Marc Galanter, *Why the “Haves” Come Out Ahead: Speculations on the Limits of Legal Change*, 9 LAW & SOC’Y REV. 95 (1974); Rubinson, *supra* note 14.

44. Deborah R. Hensler, *Our Courts, Ourselves: How the Alternative Dispute Resolution Movement Is Re-shaping Our Legal System*, 108 PENN ST. L. REV. 165, 196 (2003) (noting that litigation can be powerful for marginalized groups who otherwise have no access to political power). See generally Judith Resnik, *Diffusing Disputes: The Public in the Private of Arbitration, the Private in Courts, and the Erasure of Rights*, 124 YALE L.J. 2804 (2015); Jean R. Sternlight, *Mandatory Binding Arbitration and the Demise of the Seventh Amendment Right to a Jury Trial*, 16 OHIO ST. J. ON DISP. RESOL. 669 (2001).

45. See Jean Sternlight, *Panacea or Corporate Tool?: Debunking the Supreme Court’s Preference for Binding Arbitration*, 74 WASH. U. L.Q. 637, 674–97 (1996); see also Jeff Govern et al., “Whimsy Little Contracts” with Unexpected Consequences: An Empirical Analysis of Consumer Understanding of Arbitration Agreements, 75 MD. L. REV. 1, 3–5 (2015).

46. Owen M. Fiss, Comment, *Against Settlement*, 93 YALE L.J. 1073, 1085 (1984); Sternlight, *supra* note 14, at 570.

47. See Richard Delgado et al., *Fairness and Formality: Minimizing the Risk of Prejudice in Alternative Dispute Resolution*, 1985 WIS. L. REV. 1359, 1375–91; Trina Grillo, *The Mediation Alternative: Process Dangers for Women*, 100 YALE L.J. 1545, 1549 (1991).

48. See generally Nancy A. Welsh, *Making Deals in Court-Connected Mediation: What’s Justice Got to Do with It?*, 79 WASH. U. L.Q. 787 (2001); Nancy A. Welsh, *The Thinning*

may feel compelled to accept less than their full legal entitlement because they feel pressure to be agreeable or to prioritize harmony over justice.⁴⁹

But, here again, the dynamic model of access to justice proves helpful. Just as ADR processes were deployed as solutions to problems in the formal litigation process, they created problems and exposed new needs. Importantly, it is not the ADR processes themselves that are unjust: it is the introduction of these ADR processes into new institutions, with preexisting power constellations, that can lead to injustice—like an invasive species introduced to a new ecosystem.⁵⁰ Just like any other human innovation, ADR process design should be continually tweaked and adjusted to respond to the new problems, needs, and wants that they uncover.⁵¹ The following case study of the foreclosure crisis illustrates how ADR processes can enhance access to justice and how they must also evolve to avoid further injustice.

II. A FORECLOSURE CRISIS CASE STUDY

The story of ADR's place in the foreclosure crisis offers a valuable illustration of how ADR can provide new pathways to access justice while also introducing new problems or injustices that need redress.⁵²

The foreclosure crisis arose from the Great Recession, which, at the time, was the worst financial crisis to hit the United States since the Great Depression. Many factors contributed to the foreclosure crisis but at its epicenter was human invention: the securitization of residential mortgages and the creation of a secondary mortgage market.⁵³

Vision of Self-Determination in Court-Connected Mediation: The Inevitable Price of Institutionalization?, 6 HARV. NEGOT. L. REV. 1 (2001).

49. See generally Penelope E. Bryan, *Killing Us Softly: Divorce Mediation and the Politics of Power*, 40 BUFF. L. REV. 441 (1992); Laura Nader, *Controlling Processes in the Practice of Law: Hierarchy and Pacification in the Movement to Re-form Dispute Ideology*, 9 OHIO ST. J. ON DISP. RESOL. 1 (1993).

50. Invasive species, while harmless to their ecosystems of origin, become costly and dangerous pests when introduced to new ecosystems where natural predators do not exist. See, e.g., *Otago's Annual Great Easter Bunny Hunt Under Way*, N.Z. HERALD (Apr. 14, 2017, 11:30 AM), https://www.nzherald.co.nz/nz/news/article.cfm?c_id=1&objectid=11838396 [<https://perma.cc/3A3S-NG55>] (describing New Zealand's "Great Easter Bunny Hunt," in which people hunt invasive species such as bunnies, stoats, and ferrets).

51. Nussbaum, *supra* note 28, at 404 (advocating for mediation architecture that does not "surrender[] conflict to existing power constellations" (quoting Gunther Teubner, *Juridification—Concepts, Aspects, Limits, Solutions*, in JURIDIFICATION OF SOCIAL SPHERES: A COMPARATIVE ANALYSIS IN THE AREAS OF LABOR, CORPORATE, ANTITRUST, AND SOCIAL WELFARE LAW 3, 8 (Gunther Teubner ed., 1987))).

52. See generally Lydia Nussbaum, *ADR's Place in Foreclosure: Remediating the Flaws of a Securitized Housing Market*, 34 CARDOZO L. REV. 1889 (2013).

53. A full explanation of the complex network of factors leading to the Great Recession and the foreclosure crisis lies beyond the scope of this paper. What follows is a streamlined explanation focusing on those aspects most salient to the discussion of whether or not ADR advances access to justice. For an in-depth history and analysis of the Great Recession and the foreclosure crisis, see generally BEN S. BERNANKE, *THE COURAGE TO ACT: A MEMOIR OF A CRISIS AND ITS AFTERMATH* (2015). See also BEN S. BERNANKE, TIMOTHY F. GEITHNER & HENRY M. PAULSON, JR., *FIREFIGHTING: THE FINANCIAL CRISIS AND ITS LESSONS* (2019); HENRY M. PAULSON, JR., *ON THE BRINK: INSIDE THE RACE TO STOP THE COLLAPSE OF THE*

Securitization began when home loans that originated with banks were transformed into bonds—new securitized instruments called mortgage-backed securities—that could be bought and sold on the stock market.⁵⁴ Federal legislation passed in the 1980s loosened regulations on this secondary mortgage market, spawning a host of securities derivatives and enabling the participation of private investment firms.⁵⁵ Hundreds, if not thousands, of mortgages were bundled together and sliced up to create different securities.⁵⁶

Investment in these new mortgage-backed securities and their derivatives became a booming and highly lucrative business.⁵⁷ Demand for more mortgage-backed securities in which to invest spurred the creation of novel, “exotic” (read: risky) subprime mortgages.⁵⁸ New financial incentives for loan originators meant they issued more and more mortgages,⁵⁹ often to people who were financially incapable of performing their obligations under the lending agreement.⁶⁰ It only took a few years for homeowners to begin defaulting on their mortgages, leading to an unprecedented volume of

GLOBAL FINANCIAL SYSTEM (2010); RICHARD A. POSNER, *A FAILURE OF CAPITALISM: THE CRISIS OF '08 AND THE DESCENT INTO DEPRESSION* (2009).

54. BETHANY MCLEAN & JOE NOCERA, *ALL THE DEVILS ARE HERE: THE HIDDEN HISTORY OF THE FINANCIAL CRISIS* 4–19, 258–59 (2010) (explaining the history of mortgage-backed securities, which were first created back in the 1970s as a way to address inefficiency and the lack of predictability in mortgage markets around the country, and how credit default swaps on mortgages became traded); *see also* Nussbaum, *supra* note 52, at 1896–98 (explaining the rise of the secondary mortgage market).

55. Nussbaum, *supra* note 52, at 1897.

56. MCLEAN & NOCERA, *supra* note 54, at 8–9 (discussing the practice of “tranching”). Investors could secure an interest in different features of the bundled loans; for example, across the entire collection of loans, they might invest only in the interest payments or in the principal payments, or they could invest in the homeowners’ *failures* to repay and then default on their loans. *Id.* at 258–63. *See generally* MICHAEL LEWIS, *THE BIG SHORT: INSIDE THE DOOMSDAY MACHINE* (2010) (describing dubious lenders of subprime mortgage bonds).

57. MCLEAN & NOCERA, *supra* note 54, at 125–37 (explaining the highly lucrative business of issuing subprime mortgages). Between 1970 and 1981, the value of bonds created from mortgages on single-family homes went from a “standing start” to more than \$350 billion. *Id.* at 8. By the end of 2001, these securities were worth more than \$3.3 trillion. *Id.*

58. These “exotic” loan products include hybrid adjustable-rate mortgage loans (ARMs), option ARMs, balloon loans, interest-only loans, and deferred interest loans or negative amortization loans. Nussbaum, *supra* note 52, at 1903 n.51.

59. The secondary mortgage market led to an “originate-to-distribute” model in which mortgage brokers originated loans and then sold them to securitizing institutions, which in turn sold them to investors. Christopher J. Mayer et al., *The Rise in Mortgage Defaults* 3–4 (Fed. Reserve Bd., Finance and Economics Discussion Series No. 2008-59, 2008), <https://www.federalreserve.gov/pubs/FEDS/2008/200859/200859pap.pdf> [<https://perma.cc/YAT5-J98E>]. Mortgage brokers were paid for every new loan generated

and, because they felt none of the financial loss if a borrower defaulted, brokers had no incentive to screen borrowers carefully and every incentive to approve more loans. *Id.* at 3.

60. Subprime mortgages were targeted at people with bad credit, minimal savings, an unwillingness or inability to provide documentation of savings and income, and even at racial minorities who qualified for less expensive loans. *See, e.g.*, Winnie F. Taylor, *Eliminating Racial Discrimination in the Subprime Mortgage Market: Proposals for Fair Lending Reform*, 18 J.L. & POL’Y 263, 272–74 (2009).

foreclosures, the collapse of the housing market, and the evisceration of trillions of dollars in investments.⁶¹

To borrow the terminology of Galanter's theory of dynamic (in)justice and access to justice, the human capacity for invention introduced new and risky real estate investment practices that unleashed a host of new problems that the existing legal system could not redress. The result was mass injustice.⁶²

A. Foreclosing in the Secondary Mortgage Market: New Frontiers of Injustice

Managing the high volume of foreclosures in a post-secondary mortgage market world was truly a new frontier to which existing foreclosure laws and procedures were ill-equipped to respond. Foreclosure practices in a post-secondary mortgage market world operate very differently than they do in the primary mortgage market world, the world for which the substantive and procedural foreclosure laws on the books in 2008 were designed.

Historically, when a prospective homeowner sought a loan to buy a house, he would go to his local bank and request a loan. The bank issued the loan and, in exchange, the borrower signed a promissory note granting the bank a mortgage interest in the house as collateral for the loan.⁶³ The bank would keep the loan on its books, issuing monthly billing statements and collecting payments.⁶⁴ If a borrower failed to make payments and defaulted on the loan, the lender could exercise its legal right to foreclose—take title to the property and sell it to recoup the value of the loan—or it could negotiate an alternative to foreclosure.⁶⁵ These alternatives to foreclosure included restructuring the loan or changing the payment schedule so that the loan could “re-perform,” with the homeowner remaining in the house and continuing to make payments, thereby mitigating the lender's losses and shielding the homeowner from the financial damage of a foreclosure.⁶⁶ Presumably, a lender would have to conduct a careful cost-benefit analysis to determine whether foreclosure or some other loss mitigation would yield the most value. That analysis was a unique assessment based on the homeowner's

61. Nussbaum, *supra* note 52, at 1904–06.

62. Some of the causes of the foreclosure crisis, however, were not new or never-before-seen, such as racism, fraud, and predatory lending. Communities of color were targeted with subprime loans. Taylor, *supra* note 60, at 272–74. People were defrauded into signing up for new subprime mortgages and real estate appraisals were fraudulently inflated to increase the amount of the loan for which homeowners qualified. MCLEAN & NOCERA, *supra* note 54, at 207–08.

63. See Nussbaum, *supra* note 52, at 1893–96.

64. *Id.*

65. *Id.*

66. Alternatives could include renegotiating the terms of the loan that would enable the homeowner to remain in the home, making regular mortgage payments, or choosing another way for the lender to take title to the home without having to initiate foreclosure, such as a short sale or a deed in lieu of foreclosure, so-called “non-retention” alternatives to foreclosure. See Nussbaum, *supra* note 52, at 1893–96; see also DARRYL E. GETTER & N. ERIC WEISS, CONG. RESEARCH SERV., RL34232, THE PROCESS, DATA, AND COSTS OF MORTGAGE FORECLOSURE 1 (2008), https://www.everycrsreport.com/files/20081020_RL34232-ca7cd14c3c1dd6baedd148c2d9a48327722a17e8.pdf [<https://perma.cc/8E3Y-KH4P>].

individual financial situation, the market value of the home, and the particulars of the loan agreement.

In a post-secondary mortgage market world, however, this direct relationship changed dramatically because securitization separates ownership from the management of the loan.⁶⁷ Instead of a single-lender entity that is financially invested in the performance of the loan, the investment interest is held by a trust that serves an array of nameless and faceless market investors.⁶⁸ These market investors cannot communicate directly with homeowners or renegotiate the terms of the loan so that it meets their shared financial interests.⁶⁹

To bridge the gap between borrowers and investors, securitization introduces a third-party agent, a loan servicer. The loan servicer bears responsibility for managing homeowners' loans and serves as the only point of contact for the homeowner.⁷⁰ When a loan becomes delinquent, the loan servicer, in theory, conducts a cost-benefit analysis of whether to foreclose or to work out an alternative arrangement with the borrower to minimize the investors' losses.⁷¹

In practice, loan servicers' behavior led to serious, unforeseen consequences. Loan servicers were financially incentivized to foreclose and relied on automated practices rather than case-by-case loss mitigation assessments to do so.⁷² The lack of communication and transparency from this automated business model further compounded the problem.⁷³ As a result, homeowners faced unnecessary foreclosures or foreclosures that were not in investors' financial interests, especially as the foreclosure crisis expanded and the housing market collapsed.⁷⁴ The economic consequences to homeowners, communities, and investors proved astronomical. Homeowners lost more than \$2.6 trillion due to foreclosures and neighborhoods and communities lost additional trillions.⁷⁵ The stock market

67. See Adam J. Levitin & Tara Twomey, *Mortgage Servicing*, 28 YALE J. ON REG. 1, 16 (2011).

68. See *id.*

69. See *id.*

70. The loan servicer "issues monthly statements, collects homeowner's payments, places funds in escrow accounts for taxes and insurance, remits funds to investors, calculates the interest rate adjustments for [subprime mortgages], and reports to national credit bureaus." Nussbaum, *supra* note 52, at 1898.

71. *Id.*

72. *Id.* at 1899-900.

73. Stories about communication breakdowns between homeowners and loan servicer representatives. See *id.* at 1901-02 & nn.39-50.

74. *Id.* at 1904-06.

75. *Id.* at 1905-06 & nn.58-65. Neighborhoods with high rates of foreclosure saw decreased property values, not to mention the nuisances associated with vacant properties and blight. *Id.* at 1906 n.63. "Local governments [lost] tax revenue and also [had] increased costs associated with unpaid sewer and water bills and building code violations from unmaintained properties." *Id.*

lost more than \$8 trillion in value, wiping out many Americans' pension and retirement accounts.⁷⁶

As the foreclosure crisis expanded, it became clear that the existing legal framework could not adequately respond to the injustices caused by loan servicer behavior. Foreclosures in nonjudicial foreclosure jurisdictions, which allow lenders to foreclose without first obtaining a court order, went forward with little to no regulatory oversight. In judicial foreclosure jurisdictions, courts were overwhelmed with automated foreclosure filings. Florida's Twentieth Judicial District created a "rocket docket" to plow through a docket of more than one thousand foreclosure cases per day.⁷⁷ Many petitions lacked necessary documentation or included robo-signed affidavits.⁷⁸ It proved impossible for judges to assess accurately the merits of foreclosure petitions signed by robots and to ensure compliance with state law.

Not only was the integrity of judicial proceedings compromised but, there were also gaps in substantive standards for foreclosure. For example, to meet the legal requirements for foreclosure, loan servicers did not have to submit a cost-benefit analysis demonstrating that the investors' financial interests were served by foreclosure rather than a foreclosure alternative.⁷⁹ Foreclosure petitions also did not require the loan servicer to demonstrate that the mortgage had not been obtained through fraud.⁸⁰

Courts were not alone in their inability to provide the oversight needed to put a check on the injustices of the foreclosure crisis; other regulators were similarly stymied. States could not pass blanket legislation to end foreclosures entirely, to void subprime mortgages, or to require all mortgages be rewritten to reflect new market realities.⁸¹ Needless to say, even if these regulatory interventions were possible, it would take months or years for the state or the federal government to craft and enact appropriate legislation, which would be little comfort to homeowners facing imminent foreclosure.

76. Renae Merle, *A Guide to the Financial Crisis—10 Years Later*, WASH. POST (Sept. 10, 2018, 1:47 PM), https://www.washingtonpost.com/business/economy/a-guide-to-the-financial-crisis--10-years-later/2018/09/10/114b76ba-af10-11e8-a20b-5f4f84429666_story.html [https://perma.cc/XL8C-XQMV].

77. Nussbaum, *supra* note 52, at 1906–07 & nn.66–69.

78. *Id.* at 1907 & n.69.

79. *Id.* at 1907.

80. *See, e.g.*, Binyamin Appelbaum, *How Mortgage Fraud Made the Financial Crisis Worse*, N.Y. TIMES (Feb. 12, 2015), <https://www.nytimes.com/2015/02/13/upshot/how-mortgage-fraud-made-the-financial-crisis-worse.html> [https://perma.cc/C2YM-BFDR] (discussing how the fraudulent practice of overstating borrowers' income to obtain larger loans contributed to the foreclosure crisis).

81. Nussbaum, *supra* note 52, at 1907–08. States did enact statutes imposing moratoria on foreclosures after the robo-signing scandal was uncovered (although these moratoria did not stop the piling up of fees and penalties on homeowners in default). *Id.* at 1907 nn.69–70. But other regulation was constitutionally prohibited. *Id.* at 1907 n.71. Foreclosure is a lawful contractual remedy for lenders so, under the Contracts Clause and the Takings Clause of the U.S. Constitution, federal and state governments could not retroactively regulate existing mortgage contract terms. *Id.* And, because of securitization, foreclosure became a national economic activity that states, pursuant to the Commerce Clause, also could not regulate. *See id.*

Confronted with this crisis, state judiciaries and legislators turned to ADR for help.

B. An ADR Response to Injustice

The characteristics of ADR processes discussed above⁸²—their informality, ability to provide structure and organization for negotiations, capacity for direct communication and nonbinary, personalized remedies not available in law—made them advantageous for responding to the urgent and unprecedented injustices of the foreclosure crisis.

State legislatures and courts across the country created foreclosure mediation or settlement conference programs (collectively, “foreclosure ADR programs”)—all with different structures and program designs—to respond to the problems associated with securitized loan servicing and the foreclosure crisis.⁸³ In their most basic form, these foreclosure ADR programs brought homeowners and loan servicer representatives together for a discussion of the loan, any loss-mitigation options, or alternatives to foreclosure. These foreclosure ADR programs provided a time, place, and manner for the parties to meet and negotiate—an opportunity that did not previously exist in either judicial or nonjudicial foreclosure jurisdictions. Lawmakers could not prescribe outcomes of the negotiations ahead of time by requiring foreclosure avoidance.⁸⁴ But they did hope that, in bringing the parties together for a face-to-face meeting, the communication barriers caused by securitization could be resolved. Loan servicers would have to demonstrate good reasons to foreclose and homeowners could learn about their legal rights and obligations. Through these programs, the hope was that some homeowners could avoid foreclosure, to their personal benefit and to the benefit of the wider community.⁸⁵

Perhaps the greatest, most powerful contribution that foreclosure ADR made in the effort to push back against the injustices of the foreclosure crisis was to interrupt loan servicing automation and correct some of the loan servicing industry’s appalling communication problems. Not only did foreclosure ADR establish a time and place for a meeting between lender representatives and homeowners but it also compelled a person—a real human being—“with a name, phone number, email address, and the authority to [re]negotiate the terms of the loan, to materialize and [provide

82. See *supra* Part I.B.

83. For ad nauseam detail about the varying features of different jurisdictions’ programs, see Nussbaum, *supra* note 52, at 1915–50.

84. For an explanation of constitutional limitations, see *supra* note 81.

85. See Nussbaum, *supra* note 52, at 1909.

The objectives of foreclosure ADR programs included: 1) resolv[ing] communication barriers caused by securitization; 2) provid[ing] oversight of loan servicers’ conduct; 3) educat[ing] homeowners about their rights and responsibilities; 4) assist[ing] with a high volume of cases in court, and 5) alleviat[ing] community blight [by helping more families stay in their homes].

Id.

individualized assessment of] foreclosure alternatives.”⁸⁶ With a time and date certain, parties could exchange current documents (pay stubs, divorce decrees, bankruptcy filings, rental agreements, etc.) and have direct, structured negotiations that otherwise would never have occurred.⁸⁷ Foreclosure ADR programs became the forum in which loan servicers could conduct an individualized, transparent cost-benefit analysis to determine whether, given the homeowners’ finances and the circumstances of the local housing market, it was in the investors’ best interests to modify the loan or to recoup some of the loan value by selling the home.⁸⁸

Foreclosure ADR processes also enabled parties to explore creative alternatives to foreclosure at a time when homeowners had few, if any, available legal remedies. In mediation, loan servicers and homeowners could discuss the homeowners’ abilities to cure the default—perhaps due to new employment—or negotiate a restructuring of the loan terms, as well as whether any alternatives to foreclosure were possible.⁸⁹ Even if there were no way for homeowners to remain in the home and make payments under a modified loan agreement, they could still negotiate with the servicers for an alternative to foreclosure that had a less negative impact on their credit, such as a deed in lieu or a short sale.⁹⁰ If those alternatives were not options, homeowners could also negotiate with the loan servicer to delay foreclosure for a few months until a child finished the school year or a homeowner became eligible for Social Security or Medicare.⁹¹

Furthermore, with new federal regulations coming out on a monthly basis, foreclosure ADR programs became the vehicle through which these regulations could be implemented and applied to individual homeowners. For example, starting in 2009, the federal government required loan servicers to comply with new loan modification and loan refinancing standards and

86. *Id.* at 1914–15.

87. GEOFFRY WALSH, NAT’L CONSUMER LAW CTR., STATE AND LOCAL FORECLOSURE MEDIATION PROGRAMS: CAN THEY SAVE HOMES? 12 (2009), https://www.nclc.org/images/pdf/foreclosure_mortgage/mediation/report-state-mediation-programs.pdf [https://perma.cc/QS3E-QU46]. (“For housing counselors the programs provided a structure for negotiations. This structure saved time in establishing lines of communication with servicers. . . . Most mediation programs are designed to focus on financial calculations for workout agreements and loan modifications Attorneys who found foreclosure mediation programs helpful almost uniformly considered their major benefit to be in giving the attorney and the homeowner much-needed time to investigate the facts of a client’s case.”).

88. Nussbaum, *supra* note 52, at 1947–50. A loan servicer might determine that, for a house in Las Vegas, Nevada, which was one of the places that saw the greatest drop in home values during the foreclosure crisis, investors would see more value were the loan to be modified and the homeowner to continue to make payments than if the loan servicer were to foreclose and get very little value on resale.

89. See, e.g., *Foreclosure Mediation Program*, ST. CONN. JUD. BRANCH, https://www.jud.ct.gov/foreclosure/homeowner_qs.htm [https://perma.cc/YG4A-GSKQ] (last visited Apr. 12, 2020); see also *Foreclosure Mediation FAQs*, CLERMONT COUNTY OHIO, <https://clermontcommonpleas.com/faqs-and-more/foreclosure-mediation-faqs/> [https://perma.cc/G2LB-RRJX] (last visited Apr. 12, 2020).

90. See *supra* note 66 and accompanying text.

91. These examples come from real foreclosure mediations that I observed in Maryland’s foreclosure mediation program.

procedures.⁹² For a variety of reasons, blanket mandates for modification or refinancing were unfeasible. Thus, mediation sessions became the vehicle by which new federal regulations could be implemented for one homeowner at a time.

C. Foreclosure ADR Design Needed to Evolve

While ADR processes corrected for some of the injustices presented by the foreclosure crisis, they also introduced new ones. Foreclosure ADR did not operate in a vacuum—it was introduced into a setting with systemic communication problems, lack of transparency, and preexisting power differentials between homeowners and loan servicers, all of which raised serious concerns about the prospect of foreclosure mediation.

Many consumer protection advocates argued that sending unrepresented, uninformed, or unsophisticated homeowners into their first and only negotiation with a “repeat-player”⁹³ loan servicer representative, who was also an attorney, was grossly unfair.⁹⁴ First, the disparities between the parties in experience, bargaining power, and emotional investment in the foreclosure decision were stark.⁹⁵ Second, the loan servicing industry’s automation, lack of transparency, and incentive to foreclose rather than modify loans,⁹⁶ particularly in the first half of the foreclosure crisis, meant that they did not buy in to the idea of sitting down to negotiate with homeowners.⁹⁷ Taken together, these factors created an environment that

92. The Home Affordable Modification Program (HAMP) and the Home Affordable Refinance Program (HARP) are two of the components of the Homeowner Affordability and Stability Plan rolled out by the Obama administration that took effect in 2009. *Programs, HOME AFFORDABLE MODIFICATION PROGRAM*, <https://www.hmpadmin.com/portal/programs/index.jsp> [<https://perma.cc/H6NF-MGZJ>] (last visited Apr. 12, 2020). Both programs incentivized loan servicers to restructure home mortgages for eligible homeowners who were either behind in payments or in default. *Id.* Under HAMP, loan servicers modified the terms of the loan so that a homeowner’s monthly payments were no greater than 31 percent of her gross monthly income. See U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-11-367R, TROUBLED ASSET RELIEF PROGRAM: RESULTS OF HOUSING COUNSELORS SURVEY ON BORROWERS’ EXPERIENCES WITH THE HOME AFFORDABLE MODIFICATION PROGRAM 3 (2011), <https://www.gao.gov/assets/100/97516.pdf> [<https://perma.cc/AG3E-BKY9>]. All loan servicers that received federal bailout money through the Troubled Asset Relief Program (TARP) were required to participate in HAMP.

93. Galanter, *supra* note 43, at 97–98 (explaining “repeat players” as a type of party involved in dispute resolution processes).

94. For discussion of the consumer protection and access to justice concerns around foreclosure mediation, see generally MELANCA CLARK ET AL., U.S. DEP’T OF JUSTICE, FORECLOSURE MEDIATION: EMERGING RESEARCH AND EVALUATION PRACTICES (2011), <https://www.justice.gov/sites/default/files/atj/legacy/2012/01/05/foreclosure-mediation.pdf> [<https://perma.cc/U2VD-GJSB>].

95. See WALSH, *supra* note 87, at 12 (describing a “take it or leave it” approach from loan servicers).

96. Nussbaum, *supra* note 52, at 1901–02.

97. Natalie Sherman, *State’s Foreclosure Mediation Lacks Teeth, Advocate Say*, BALTIMORE SUN (Dec. 20, 2013, 10:53 PM), <https://www.baltimoresun.com/bs-bz-foreclosure-20131219-story.html> [<https://perma.cc/3RND-AVTZ>] (quoting one Legal Aid attorney who described the “runaround many homeowners faced in dealing with lenders and the companies that service mortgages” because the loan servicers were dragging their feet on modifications).

could make mediation a waste of time and, even worse, intimidate or harm homeowners.⁹⁸

In response to these consumer protection concerns, some foreclosure ADR programs evolved to include design improvements as countermeasures for the injustices they introduced.⁹⁹ For example, to help homeowners with their negotiations, many jurisdictions used mediation as the hook to which housing counseling or legal services attached, requiring a meeting with a housing counselor or attorney prior to attending mediation or creating buttressing representation-in-mediation assistance programs.¹⁰⁰ To compel loan servicer transparency and good behavior, jurisdictions wrote mediation rules requiring pre-mediation document exchanges¹⁰¹ and enumerating sanctionable offenses and corresponding penalties.¹⁰² Some programs required third-party mediators to ensure that loan servicers could prove ownership of the mortgage note and, once they did so, lead the parties through a checklist of topics for discussion; the checklist was then signed and filed with the program administrator to attest that all alternatives to foreclosure were discussed and examined, along with any rationales for why these alternatives were accepted or rejected.¹⁰³ Other jurisdictions designed their foreclosure mediation programs to require loan servicers to complete an analysis¹⁰⁴ of eligibility for these loan modification programs prior to the

98. NABANITA PAL, BRENNAN CTR. FOR JUSTICE, FACING FORECLOSURE ALONE: THE CONTINUING CRISIS IN LEGAL REPRESENTATION (2011), https://www.brennancenter.org/sites/default/files/2019-08/Report_Facing_Foreclosure_Alone.pdf [<https://perma.cc/6XP2-Q36S>].

99. Some jurisdictions, like Florida, decided to shutter their foreclosure mediation programs altogether due to a lack of buy-in from loan servicing and consumer advocacy constituencies. For a discussion of the challenges that the Florida program faced, see generally Sharon Press, *Mortgage Foreclosure Mediation in Florida—Implementation Challenges for an Institutionalized Program*, 11 NEV. L.J. 306 (2011).

100. Nussbaum, *supra* note 52, at 1938–41 (explaining the role of housing counselors and the different approaches programs take to connecting homeowners to housing counselors and legal representation).

101. *Id.* at 1941–44 (detailing the pre-mediation discovery and document exchange built into some foreclosure ADR program designs).

102. *Id.* at 1944–47 (identifying the available sanctions and penalties, ranging from monetary to procedural).

103. *Id.* at 1932–36 (discussing mediators' roles and responsibilities, including filing mediator reports and monitoring parties for good-faith participation). Of course, these administrative reporting requirements can sometimes create tension with mediation confidentiality protections and therefore raise questions about whether a confidential process like mediation is in fact the appropriate venue for business-consumer negotiations demanding more public oversight. Connecticut's foreclosure program asks mediators to report on the reasonableness of loan servicers' decisions to deny homeowners' requests for foreclosure alternatives. *Foreclosure Mediation Program*, ST. CONN. JUD. BRANCH, https://www.jud.ct.gov/statistics/fmp/FMP_pic.pdf [<https://perma.cc/MZ9H-7JGH>] (last visited Apr. 12, 2020). Making such a report requires a mediator with background knowledge and information about each individual case to evaluate the decision.

104. Called a “net-present-value” calculation, this analysis examines whether it is more lucrative for investors to foreclose immediately and recoup the value of the loan through a foreclosure sale or whether investors would make more money in the long run if the homeowner were to remain in the home, making interest and principal payments into the future. See *Net Present Value (NPV) Calculator*, MAKING HOME AFFORDABLE, <https://>

mediation so that the parties could enter the mediation prepared to discuss prospects for the homeowner to remain in the home.

Just like many other human inventions, foreclosure ADR was deployed to fix one set of injustices but resulted in new ones. A series of important adjustments to the procedural architecture of foreclosure ADR programs—designed to level the playing field and increase accountability—helped to correct for some of the new injustices they introduced.

CONCLUSION

The foreclosure ADR case study demonstrates how inserting ADR into foreclosure procedures helped avoid unnecessary foreclosures in the midst of a spiraling crisis.¹⁰⁵ Foreclosure ADR was not a silver bullet that could end all the injustices of foreclosure crisis. It could not address the systemic contributing factors such as fraud, predatory lending, and overleveraged banks¹⁰⁶ but it was an important part of responding to the needs of individual homeowners facing foreclosure. Foreclosure mediations forged new lines of communication in what had become a triangulated relationship involving homeowners, secondary mortgage market investors, and third-party loan servicers.¹⁰⁷ Instead of automated decision-making, homeowners and loan servicers in foreclosure ADR programs could assess the viability of the loan

www.makinghomeaffordable.gov/get-answers/Pages/get-answers-tools-NPV.aspx [https://perma.cc/P4P7-GXMQ] (last visited Apr. 12, 2020).

105. Connecticut's Foreclosure Mediation Program was among the first foreclosure mediation programs in the country and retains some of the most detailed reporting on its program performance. Connecticut reports that, since its Foreclosure Mediation Program began in 2008, 71 percent of homeowners participating in foreclosure mediation have retained their homes and 16 percent have negotiated a "graceful exit" from their homes, resulting in 87 percent of mediation settlements using foreclosure alternatives. *See Foreclosure Mediation Program, supra* note 103. Maine reports a 62 percent settlement rate for cases mediated in its foreclosure program from 2010 to 2017. FORECLOSURE DIVERSION PROGRAM, STATE OF ME. JUDICIAL BRANCH, REPORT TO THE JOINT STANDING COMMITTEE ON INSURANCE AND FINANCIAL AFFAIRS AND THE JOINT STANDING COMMITTEE ON JUDICIARY 5 (2019), https://www.courts.maine.gov/reports_pubs/reports/pdf/fdp_2018_ar.pdf [https://perma.cc/5WVX-XYL9]. Washington State reports that, from 2011 to 2018, 49 percent of mediation sessions resulted in agreements (borrowers remaining in the home in 78 percent of settled cases and leaving the home with a negotiated alternative to foreclosure in 22 percent of settled cases). *See* LISA BROWN, STATE OF WASH. DEP'T OF COMMERCE, FORECLOSURE FAIRNESS PROGRAM: ANNUAL REPORT ON PROGRAM PERFORMANCE 30 fig.9 (2019), <http://www.commerce.wa.gov/wp-content/uploads/2019/03/Commerce-Foreclosure-Fairness.pdf> [https://perma.cc/AGC4-5HDB]. Additionally, surveys of homeowners who remained in their homes as a result of foreclosure mediation found that 95 percent were still in their homes and had not defaulted. *See id.* Cook County, Illinois reports 70 percent of homeowners participating in the county foreclosure mediation program avoided foreclosure, with 67 percent of those agreements resulting in a loan modification where the homeowners remained in the home. STATE OF ILL. CIRCUIT COURT OF COOK CTY., CHANCERY DIVISION MORTGAGE FORECLOSURE MEDIATION PROGRAM: PROGRESS REPORT 4 (2016), http://www.cookcountycourt.org/Portals/0/Chief%20Judge/Court%20Statistics/Chancery_Division_Mortgage_Foreclosure_Mediation_Program.pdf [https://perma.cc/SNW7-M7EM].

106. To address these problems, we needed the Dodd-Frank Wall Street Reform and Consumer Protection Act and the Consumer Financial Protection Bureau, new federal regulations, and lawsuits brought by the Department of Justice and state attorneys general.

107. *See supra* Part II.A.

in real time, curing defaults where possible or negotiating so-called graceful exits. Additionally, this new procedural step enabled individual homeowners to access ancillary supports such as legal assistance and housing counseling.

The story of the foreclosure crisis and ADR response also illustrates Galanter's important insight that justice and injustice are dynamic and, therefore, so must be our pathways to justice. ADR processes, with their unique flexibility and adaptability in both rules and outcomes, are particularly well suited to serve as some of these pathways in a dynamic system of (in)justice.

However, as the foreclosure ADR story further demonstrates, ADR processes, like any other human innovation, can spawn new problems and injustices. These injustices emerge not because ADR processes themselves are unjust but because they do not operate in a vacuum. Like litigation, ADR processes echo the power differentials of the ecosystem in which they are introduced.¹⁰⁸ The adaptability and flexibility of ADR processes mean that they can—and should—evolve. Procedural architecture should be designed according to the contexts in which they are introduced to avoid enhancing or exacerbating power differentials.¹⁰⁹

So, to answer the Symposium question of whether ADR achieves access to justice, I reply: “Yes. And . . .”¹¹⁰ Yes, ADR processes can offer parties new pathways to just remedies not (yet) available in the existing legal system. And, in order to avoid generating injustice themselves, ADR processes must continue to innovate and adapt in response to the “expanding social and legal universe” in which they operate.¹¹¹

108. See Galanter, *supra* note 43, at 124–26, 125 fig.3 (demonstrating how built-in differences in resources can make any formal dispute resolution process unfair and noting that no dispute resolution process alone can solve the problems of injustice).

109. As Julie Macfarlane discussed in her contribution to this Symposium, the research emerging from Canada's National Self-Represented Litigants Project (NSRLP) pulls back the curtain on the stark realities facing many individuals looking for justice in Canada's courts. Discussion with Julie Macfarlane, Professor of Law, Faculty of Law of the Univ. of Windsor, at the Fordham Law Review Symposium: Achieving Access to Justice Through ADR: Fact or Fiction? (Nov. 1, 2019). See generally JULIE MACFARLANE, THE NATIONAL SELF-REPRESENTED LITIGANTS PROJECT: IDENTIFYING AND MEETING THE NEEDS OF SELF-REPRESENTED LITIGANTS (2013), <https://representingyourselfcanada.com/wp-content/uploads/2016/09/srlreportfinal.pdf> [<https://perma.cc/5WPF-LY3L>]. The 2013 NSRLP report revealed that self-represented litigants have little understanding of what mediation is and are hesitant to participate when there is an attorney representing the other side; it further uncovered antipathy from lawyers toward the mediation process when they perceived an unwillingness to settle from opposing counsel. See *id.* at 12, 45. These power differentials and lack of participant buy-in are precisely the sort of contextual problems that mediation programs must account for and evolve to respond to. *Id.* at 73–75.

110. With slight punctuation changes, I borrow this phrase, “Yes, and,” which is much-loved by improv comedians and mediators alike. See generally KELLY LEONARD & TOM YORTON, YES, AND: HOW IMPROVISATION REVERSES “NO, BUT” THINKING AND IMPROVES CREATIVITY AND COLLABORATION—LESSONS FROM THE SECOND CITY (2015); Clark Freshman, *Yes, and: Core Concerns, Internal Mindfulness, and External Mindfulness for Emotional Balance, Lie Detection, and Successful Negotiation*, 10 NEV. L.J. 365 (2010).

111. Galanter, *supra* note 3, at 126.