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## **Court-Ordered Arbitration: An Alternative View**

*Deborah R. Hensler, Ph.D.†*

In policy and scholarly debates over the wisdom of mandating arbitration for civil lawsuits, discussion usually focuses on differences between arbitration and trial, and on values that litigants may forfeit if the court requires them to arbitrate their disputes, rather than take them to trial. In these debates, critics often view the requirement that litigants arbitrate as a denial of adjudicatory process or, at least, as an obstacle to obtaining adjudicated resolutions of disputes. In this Article, I argue, quite to the contrary, that in many metropolitan courts in the United States today, arbitration is the only adjudicatory mechanism actually available to most litigants with ordinary civil cases. Because litigants must wait two, three or even five years for cases to reach trial, and because many lawyers are unwilling to invest their time in trying smaller value cases, litigants' real choice in courts that offer arbitration is between arbitration and settlement. Policymakers and scholars should, therefore, give more attention to the differences between these two dispute resolution mechanisms. After carefully considering the strengths and weaknesses of arbitration and settlement procedures, I believe that many current critics of arbitration would conclude that it offers a higher quality of justice than settlement processes. Moreover, by ensuring easy access to arbitration, strengthening arbitrator selection procedures, setting standards for the arbitration hearing process and publicly reporting arbitration outcomes, courts can further increase arbitration's contributions to due process.

This Article first describes court-ordered arbitration and distinguishes it from other dispute resolution procedures. It then summarizes the development of court arbitration programs and places this development within the context of the alternative dispute resolution ("ADR") movement. Next, it reviews policy and scholarly concerns that have been expressed about the expanding role of court-mandated arbitration. Drawing on evaluations of arbi-

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tration programs and procedural justice research, the Article then details empirical findings on: (1) the consequences of adopting court-ordered arbitration programs, (2) litigants' standards of due process, and (3) litigants' assessments of the degree to which various court processes—including arbitration—satisfy these standards. The Article closes with a discussion of the implications of these findings for legal policymaking.

### I. COURT-ORDERED ARBITRATION DEFINED<sup>1</sup>

As the name implies, all court-ordered arbitration programs involve a mandatory referral of a particular class of civil suits to an arbitration hearing. Typically, the jurisdiction of such programs is limited to civil suits for money damages up to a statutorily-defined monetary limit. Some courts require attorneys to file a form indicating certain characteristics of the case—for example, the amount of monetary damages the plaintiff seeks. If the form indicates that the case meets the eligibility requirements, a clerk will refer it to the program.<sup>2</sup> In other courts, an administrator or judge will meet with the attorneys to discuss the case and to determine its eligibility.<sup>3</sup> In still other courts, all cases involving money damages are assigned to the program and attorneys must petition to remove the cases that they believe are ineligible.<sup>4</sup>

The court manages the arbitration process, but arbitration hearings may take place in a variety of settings, including the courthouse, a special public facility designed for the program or the offices of attorneys or other private arbitrators.<sup>5</sup> Arbitrators are typically volunteer lawyers or retired judges whom the court appoints and pays a modest honorarium. These arbitrators may sit singly or in panels of two or three. When panels are used, the court selects arbitrators who represent the different sectors of the bar that are typically associated with arbitration-eligible cases—for example, the plaintiff and defense personal injury bars.

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<sup>1</sup> For a discussion of common design features of court-ordered arbitration programs, see Elizabeth Rolph, *Introducing Court-Annexed Arbitration: A Policymaker's Guide* 10-30 (RAND Corp., 1984).

<sup>2</sup> Jane Adler, Deborah Hensler and Charles Nelson, *Simple Justice: How Litigants Fare in the Pittsburgh Court Arbitration Program* 10 (RAND Corp., 1983).

<sup>3</sup> Deborah Hensler, Albert Lipson and Elizabeth Rolph, *Judicial Arbitration in California: The First Year* 31 (RAND Corp., 1981).

<sup>4</sup> Robert MacCoun, et al, *Alternative Adjudication: An Evaluation of the New Jersey Automobile Arbitration Program* 6 (RAND Corp., 1988).

<sup>5</sup> Rolph, *Introducing Court Annexed Arbitration* at 20-22 (cited in note 1).

The parties of record attend the hearings and usually testify. Hearings are not open to the public. The proceedings are adversarial, but the rules of evidence are relaxed. Witnesses other than the parties may appear but are not required, and cases may be decided wholly or partly "on the papers." Parties are usually represented by counsel. Hearings may be as brief as 30 minutes and rarely last for more than a few hours. Usually, no record is made of the hearing. The arbitrators confer and announce their decision soon after the hearing. If they decide in favor of the plaintiff, they indicate the amount of money the plaintiff should receive. They are not required to give their reasons for the decision and generally do not do so.<sup>6</sup>

The decision rendered by the arbitrators does not bind the parties. If any party is dissatisfied with the arbitrators' decision, that party may reject the award by filing an appeal to the trial court. When this occurs, the case returns to the trial calendar. If the case does not subsequently settle, the trial is held de novo—that is, neither the judge nor jury learns the outcome of the arbitration hearing that preceded it. The jury does not even learn that an arbitration hearing took place. The judge may infer this because he or she knows that the court has a mandatory arbitration program.

In many programs, a litigant who rejects the award must pay a fee that reimburses the court for all or some of the arbitrators' fees before the case is returned to the trial calendar. In some jurisdictions, if the party who rejected the arbitrators' decision does not obtain a better result at trial, that party must pay a penalty.<sup>7</sup> Various state courts have upheld the constitutionality of such proceedings, but have sometimes set limits on the type or amount of penalties that can be imposed.<sup>8</sup>

Despite its name, court-ordered arbitration differs significantly from the more familiar form of arbitration that occurs in private fora outside the courts, most often in the context of commercial and labor disputes. The latter form of arbitration produces a binding outcome that the parties have a contractual obligation to accept. Court-ordered arbitration also differs significantly from mediation, another popular dispute resolution approach, where

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<sup>6</sup> Deborah Hensler, *What We Know and Don't Know About Court-Administered Arbitration*, 69 *Judicature* 270, 271 (1986).

<sup>7</sup> Patricia Ebener and Donna Betancourt, *Court-Annexed Arbitration: The National Picture* 9-10 (RAND Corp., 1985).

<sup>8</sup> Rolph, *Introducing Court-Annexed Arbitration* at 26-27.

mediators try to help the parties resolve their dispute but have no explicit authority to determine the outcome. In contrast, court-appointed arbitrators hear the dispute, deliberate and then announce a decision. If neither of the parties vetoes the decision, it is recorded as a court judgment, and the winning party can call on the court's authority to enforce it.<sup>9</sup> Court-ordered arbitration may therefore be termed a quasi-adjudicatory procedure.

## II. COURT-ORDERED ARBITRATION AND THE ADR MOVEMENT

What we now think of as the alternative dispute resolution "movement" began in the late 1960s as a populist attempt to return the dispute resolution process to disputants. Early ADR proponents championed mechanisms, such as neighborhood justice centers, that took disputes out of the court. These ADR proponents wanted to substitute mediation, which lets disputants fashion their own solutions to problems, for adjudication, which gives control of outcomes to neutral third parties. ADR proponents believed that through these "alternative" processes, disputants would negotiate outcomes that would be more appropriate to their situation, more satisfactory, and more likely to contribute to the continuation of long-term relationships than the court process. Some of these ADR proponents also had a broader objective: they wanted to shift the locus of political control in society from elite groups, which in their view governed the courts, to the community at large.<sup>10</sup>

In the late 1970s, the ADR movement moved into the courts themselves. Rather than suggesting that disputes be removed from the courts altogether, proponents of court-based ADR wanted to divert cases from trial. Although some proponents of court-based ADR procedures shared the populist ideals of the movement's founders,<sup>11</sup> most had other objectives in mind. In court settings, ADR became an efficiency mechanism, designed to speed disposition and decrease transaction costs by offering a satisfactory sub-

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<sup>9</sup> For a discussion of differences between mediation and arbitration, see John Cooley, *Arbitration vs. Mediation—Explaining the Differences*, 69 *Judicature* 263, 263-69 (1986).

<sup>10</sup> For an early history of the ADR movement, see Jerold Auerbach, *Justice Without Law?* (Oxford Press, 1983). Ironically, as ADR became more successful, some critics charged that it had become a mechanism for maintaining elite power. See, generally, Richard Abel, ed., *The Politics of Informal Justice: The American Experience* (Academic Press, 1982).

<sup>11</sup> For example, in California, then-Governor Edmund G. Brown, Jr., originally proposed that attorneys should volunteer their time as arbitrators as a community service. See Hensler, Lipson & Rolph, *Judicial Arbitration in California* at 20 (cited in note 3).

stitute for trial.<sup>12</sup> If these court reformers had any larger objective, it was to provide litigants who brought their disputes into court with a variety of procedural options for resolving their cases.<sup>13</sup> Unlike the populist reformers, court reformers did not seek to change either the outcomes of court disputes or the core rules underlying court dispute resolution.<sup>14</sup> Nor did they seek to substitute lay decisionmakers for professional legal decisionmakers.<sup>15</sup> Court reformers' enthusiasm for ADR led them to design some procedures that seemed genuinely new, such as summary jury trials, early neutral evaluation and minitrials.<sup>16</sup> But, in other instances, procedures that previously had been considered court management tools, such as judicial settlement conferences, were now re-conceived as ADR techniques.<sup>17</sup>

Court-ordered arbitration falls into this category of "re-conceived" procedures. It was first used in 1952, when the Philadelphia Court of Common Pleas, under local rule, mandated non-binding arbitration as an approach to reducing court congestion and delay. It then spread to other courts in Pennsylvania.<sup>18</sup> By the 1960s, courts in several neighboring states had adopted similar

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<sup>12</sup> Some arbitration enabling statutes explicitly mention these efficiency goals. See Judicial Arbitration Act, Cal Civ Proc Code § 1141 (West 1982); Compulsory Automobile Liability Insurance Act, NJ Stat Ann §§ 39:6A-24 to 39:6A-35 (West 1973).

<sup>13</sup> Frank Sander, *Varieties of Dispute Resolution*, 70 FRD 111, 114 (1976).

<sup>14</sup> Rolph, *Introducing Court-Annexed Arbitration* at 28 (cited in note 1).

<sup>15</sup> Hensler, 69 *Judicature* at 272 (cited in note 6).

<sup>16</sup> In summary jury trials, attorneys for each side present the essentials of their case in much-abbreviated form to selected members of the jury pool. The "jurors" deliberate and deliver an advisory verdict, which may help to settle the case. Minitrials are also abbreviated trial proceedings, but are used primarily to resolve corporate disputes outside of court settings. Rather than trying the case to a mock jury, the attorneys make their arguments to the principal disputants, in an effort to better acquaint them with their opponents' position, thereby promoting settlement. Early neutral evaluation programs require parties and their attorneys to meet with a neutral third party early in the litigation process to identify the key issues in the cases and formulate a discovery plan. For descriptions of these and other ADR procedures, see Erika Fine, ed, *ADR and the Courts: A Manual for Judges and Lawyers* (Butterworth, 1987); and John Wilkinson, ed, *Donovan Leisure Newton and Irvine ADR Practice Book* (Wiley Law Publications, 1990).

<sup>17</sup> For example, in its draft report, the Federal Courts Study Committee recently wrote: "The term 'alternative dispute resolution' has come to cover a broad range of approaches to dispute processing apart from traditional pretrial and trial under courts' general procedural rules. . . . The word 'alternative' however, may exaggerate the distance between many ADR devices and judicial dispute processing, for courts are making increasing use of 'ADR' techniques—and those techniques themselves, such as various forms of judicial involvement in settlement discussions, often took place before the current movement made people think of classifying them as 'alternatives.'" Federal Courts Study Committee, *Tentative Recommendations for Public Comment* 38 (Dec 22, 1989). See also Marc Galanter, *The Emergence of the Judge as a Mediator in Civil Cases*, 69 *Judicature* 256, 258-59 (1986).

<sup>18</sup> See Adler, Hensler & Nelson, *Simple Justice* at 8-9 (cited in note 2).

programs. Outside the mid-Atlantic region, however, court-ordered arbitration remained relatively unknown. A second wave of adoption occurred in the early 1970s, again driven by concerns about court congestion and delay; it was in this period that arbitration moved into other regions of the country.<sup>19</sup> In 1979, the federal courts implemented an arbitration experiment in three district courts: Eastern Pennsylvania, Northern California and Connecticut.<sup>20</sup> To date, 20 states (including the District of Columbia) have implemented mandatory, non-binding, court-ordered arbitration programs either statewide or in major metropolitan trial courts.<sup>21</sup> Ten federal district courts are currently participating in a pilot mandatory arbitration program that Congress has recently expanded to include an additional ten districts.<sup>22</sup> Other state and federal jurisdictions have adopted voluntary court-administered programs. Although there is no central registry of such programs, it seems likely that some form of court arbitration now exists in several hundred courts nationwide.<sup>23</sup>

Arbitration program caseloads vary across jurisdictions. A few programs apply to all civil damage suits, but most have either an upper dollar limit, a substantive limitation, or both. Although many programs were initially limited to smaller-value suits, there has been a tendency to increase monetary limits over time. Today, seven of the mandatory state programs and all of the federal district court programs have limits above \$25,000. A number of jurisdictions arbitrate cases with values up to \$150,000.<sup>24</sup>

### III. THE DEBATE OVER COURT-ORDERED ARBITRATION

Court-ordered arbitration has not been without its critics. Indeed, as it has become more popular among judges, administrators and legislators—as evidenced both by its spread across the country and by the expansion of jurisdiction for existing pro-

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<sup>19</sup> On the spread of court-ordered arbitration, see Patricia Ebener, *Court Efforts to Reduce Pretrial Delay* 51-52 (RAND Corp., 1981); Ebener & Betancourt, *Court-Annexed Arbitration* at 5-6 (cited in note 7); Susan Keilitz, Geoff Gallas and Roger Hanson, *State Adoption of Alternative Dispute Resolution: Where Is It Today?*, 12 *State Ct J* 4, 5-11 (1988).

<sup>20</sup> E. Allan Lind and John E. Shapard, *Evaluation of Court-Annexed Arbitration in Three Federal District Courts* xi (Federal Judicial Center, revised ed 1983).

<sup>21</sup> Hensler, 69 *Judicature* at 271 (cited in note 6), reports 18 states adopted, with 17 in some stage of implementation. Since 1986, the District of Columbia, Hawaii and Massachusetts have implemented court-ordered arbitration programs.

<sup>22</sup> *Judicial Improvements and Access to Justice Act*, 28 USC § 652 (b)-(d) (1988).

<sup>23</sup> Hensler, 69 *Judicature* at 271.

<sup>24</sup> Keilitz, Gallas & Hanson, 12 *State Ct J* at 6-7 (cited in note 19).

grams—scholars have become more concerned about its consequences. Although many of these critics are apparently willing to believe that court-ordered arbitration will prove more efficient than the traditional court process, these scholars reject the notion that such efficiencies can be obtained without impairing the quality of justice.<sup>25</sup>

In brief, some legal scholars have criticized court-ordered arbitration because they believe that since it omits the procedural protections of the trial process—openness to the public, formality of setting, deliberativeness, opportunity to cross-examine witnesses, assurance that a record is kept and the presence of judge and jury, it cannot and does not provide due process. Moreover, some scholars are concerned that reliance on arbitration will reduce the number of opportunities for judges and juries to articulate normative standards. Unlike the trial process, these scholars say, arbitration sets no precedents. Even if it serves individual litigants well, these critics fear that reliance on arbitration will impair the public dimension of the civil justice system.<sup>26</sup> Finally, and perhaps most importantly, scholars fear that over the long run, promoting court-ordered arbitration to dispose of the bulk of civil disputes—even if there is a formal option of rejecting an award and going to trial—will lead to the withering away of the trial process, which they view as an important political institution.

Of course, scholars are not the only critics of court-ordered arbitration. When states first began to adopt court-ordered arbitration, some judges viewed it as an inappropriate intrusion into their sphere of authority.<sup>27</sup> Some practitioners were concerned that it would produce less satisfactory outcomes for their clients than the traditional settlement-or-trial process.<sup>28</sup> But as concerns about court congestion and delay have mounted, the view that significant procedural changes are necessary to combat court overload has prevailed, and court-based ADR procedures have proliferated.

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<sup>25</sup> Professor Wood discusses these concerns in her article in this volume. Diane P. Wood, *Court-Annexed Arbitration: The Wrong Cure*, 1990 U Chi Legal F 421. Concerns about the trade-offs between efficiency and quality extend beyond court-administered arbitration. See, for example, Marc Galanter, *Compared to What? Assessing the Quality of Dispute Processing*, 66 Denver U L Rev xii (1989); Owen Fiss, *Against Settlement*, 93 Yale L J 1073, 1085-86 (1984); Carrie Menkel-Meadow, *For and Against Settlement: Uses and Abuses of the Mandatory Settlement Conference*, 33 UCLA L Rev 485, 487 (1985).

<sup>26</sup> Judith Resnik, *Due Process: A Public Dimension*, 39 U Fla L Rev 405, 424-25 (1987).

<sup>27</sup> For example, California state judges initially opposed the adoption of a court-ordered arbitration program. See Hensler, Lipson & Rolph, *Judicial Arbitration in California* at 9 (cited in note 3).

<sup>28</sup> Hensler, 69 *Judicature* at 275, 278 (cited in note 6).

Nevertheless, some judges and practitioners remain troubled about the effects of court-ordered arbitration and other court-based ADR procedures on due process.<sup>29</sup>

#### IV. EMPIRICAL FINDINGS ABOUT THE CONSEQUENCES OF COURT-ORDERED ARBITRATION

Court-ordered arbitration is unique among ADR mechanisms in that it has been subjected to systematic empirical study by scholars at multiple institutions for more than a decade. Researchers have examined a variety of state and federal court-ordered arbitration programs operating for varying lengths of time in different regions of the country. These studies include examinations of the legislative records associated with arbitration-enabling statutes in order to identify the objectives of programs,<sup>30</sup> analyses of aggregate and case-level program statistics in order to measure program effects on court caseloads, costs and time to disposition,<sup>31</sup> and surveys of attorneys and litigants in order to determine program impact on private litigation costs and attitudes towards the arbitration process and its outcomes.<sup>32</sup>

Like policymakers and scholars, researchers began their studies by focusing on the differences between arbitration and trial.<sup>33</sup> Not too surprisingly, these analysts found that arbitration hearings were, on average, shorter than trials, involved less attorney preparation time than trial, cost both courts and private litigants less than trials, and generally required less time in the schedule queue

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<sup>29</sup> H. Lee Sarokin, *Justice Rushed is Justice Ruined*, 38 Rutgers L Rev 431, 437 (1986).

<sup>30</sup> See, for example, Hensler, Lipson & Rolph, *Judicial Arbitration in California* at 13-23 (cited in note 3).

<sup>31</sup> See, generally, Hensler, Lipson & Rolph, *Judicial Arbitration in California* at 24-84; Adler, Hensler & Nelson, *Simple Justice* at 55 (cited in note 2); Lind & Shapard, *Evaluation of Court-Annexed Arbitration in Three Federal District Courts* at 25-72 (cited in note 20); David Bryant, *Judicial Arbitration in California: An Update* 20-38 (RAND Corp., 1989); Stevens Clarke, Laura Donnelly and Sara Grove, *Court-Ordered Arbitration in North Carolina: An Evaluation of its Effects* (University of North Carolina, 1989).

<sup>32</sup> Lind & Shapard, *Evaluation of Court-Annexed Arbitration in Three Federal District Courts* at 56-69 (cited in note 20); Adler, Hensler & Nelson, *Simple Justice* at 60-85 (cited in note 2); Clarke, Donnelly & Grove, *Court-Ordered Arbitration in North Carolina* at 53-76 (cited in note 31); E. Allan Lind, et al, *The Perception of Justice: Tort Litigants' Views of Trial, Court-Annexed Arbitration, and Judicial Settlement Conferences* vii-viii (RAND Corp., 1989); E. Allan Lind, *Arbitrating High-Stakes Cases: An Evaluation of Court-Annexed Arbitration in a United States District Court* (RAND Corp., 1990).

<sup>33</sup> See, generally, Hensler, Lipson & Rolph, *Judicial Arbitration in California* (cited in note 3); Adler, Hensler & Nelson, *Simple Justice* (cited in note 2).

than trials.<sup>34</sup> But researchers soon realized that simply comparing the arbitration process with trial was inadequate for determining the consequences of court-ordered arbitration programs. In most metropolitan state courts and federal district courts today, no more than ten percent of tort and contract suits are tried.<sup>35</sup> Therefore, to understand the consequences of court-ordered arbitration, one needs to examine its impact on the entire litigation process, including, most importantly, settlement behavior. To do this, the analyst has several options: compare litigation patterns in similar courts with court-ordered arbitration programs to litigation patterns in courts without such programs; compare litigation patterns in a single court before and after it adopts an arbitration program; or, using an experimental design in which a court randomly selects some cases for arbitration, compare the outcomes of cases assigned to arbitration to the outcomes of a control group of cases that remain on the traditional trial track. All three approaches have been used to study court-ordered arbitration.<sup>36</sup>

The results of these analyses have proven surprising to some. Contrary to what many supporters and opponents of arbitration expected, court-ordered arbitration produces mixed results with regard to efficiency. Litigants and lawyers alike give arbitration high marks for fairness, however, both with regard to the hearing process and the ultimate outcome. The reason why court-ordered arbitration has confounded supporters and critics alike is that, in most instances, the arbitration process does not divert cases from trial, but rather provides an alternative to a settlement reached without hearing. In courts that require arbitration as a precondition for trial, one-third to one-half of the cases that are referred to arbitration actually go to hearing.<sup>37</sup> As a consequence, two to ten times as many civil cases receive some form of adjudicative process in courts that have mandatory arbitration programs, as compared

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<sup>34</sup> Hensler, 69 *Judicature* 270 (cited in note 6), reviews these findings, which are discussed in more detail below.

<sup>35</sup> Terence Dungworth, *Statistical Overview of Civil Litigation in the Federal Courts* 28-29 (RAND Corp., 1990).

<sup>36</sup> The experimental design is the most rigorous approach. It provides the strongest basis for statistical inference. But it is also difficult to use in a court setting. See Federal Judicial Center Advisory Committee on Experimentation in the Law, *Experimentation in the Law* (Federal Judicial Center, 1981).

<sup>37</sup> Hensler, Lipson & Rolph, *Judicial Arbitration in California* at 46 (cited in note 3); MacCoun, et al, *Alternative Adjudication* at 33 (cited in note 4); Bryant, *Judicial Arbitration in California* at 34 (cited in note 31); Clarke, Donnelly & Grove, *Court-Ordered Arbitration in North Carolina* at 26 (cited in note 31).

to courts that do not.<sup>38</sup> In sum, rather than diverting cases from adjudication, arbitration provides an alternative form of adjudication to many cases that would not otherwise be heard.

#### A. Effects on Trial Rates

The primary objective of court-ordered arbitration is to divert cases from trial—the key to saving time and money for courts and private litigants alike. But most court-ordered arbitration programs do not significantly reduce the number or the rate of trials.<sup>39</sup> Since most arbitration programs process hundreds or even thousands of cases, and most studies have found that few of the cases assigned to arbitration ever reach trial,<sup>40</sup> many court administrators and practitioners in jurisdictions with court-ordered arbitration programs believe that arbitration must be substantially reducing the numbers of cases tried.<sup>41</sup> But in many metropolitan courts, trial rates for the kinds of cases that are typically assigned to court-ordered arbitration programs were already in the two to three percent range prior to the inception of arbitration. After arbitration is put in place, the trial rate for these same cases remains about two to three percent. In other words, even though the vast number of arbitration-eligible cases are not tried, because the parties either settle or accept the arbitrators' award, the arbitration process appears to have little net effect on the rate at which cases go to trial.<sup>42</sup>

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<sup>38</sup> MacCoun, et al, *Alternative Adjudication* at 33 (cited in note 4); Lind, *Arbitrating High-Stakes Cases* at 36 (cited in note 32). Clarke, Donnelly & Grove also conclude that arbitration diverts cases more from settlement than from trial. *Court-Ordered Arbitration in North Carolina* at 78.

<sup>39</sup> The rate of trial is usually defined either as the total number of tried cases divided by the total number of cases filed, or the total number of tried cases divided by the total number of cases answered.

<sup>40</sup> Hensler, Lipson & Rolph, *Judicial Arbitration in California* at 32-34 (cited in note 3); Adler, Hensler & Nelson, *Simple Justice* at 47 (cited in note 2); MacCoun, et al, *Alternative Adjudication* at 27 (cited in note 4); Bryant, *Judicial Arbitration in California* at 23 (cited in note 31); Lind, *Arbitrating High-Stakes Cases* at 30.

<sup>41</sup> In my visits to jurisdictions with arbitration programs, I have often been told by enthusiastic program supporters that arbitration programs are saving hundreds or thousands of trials. Program observers believe this because they assume that all or most of the cases processed through arbitration would otherwise have gone to trial. When I point out that prior to the inception of arbitration, litigants would have settled these cases without trial, these individuals agree that this is true, but are reluctant to accept the implication that arbitration cannot be reducing the number of trials as substantially as they first believed.

<sup>42</sup> Assessing the statistical significance of differences observed in trial rates and interpreting the meaning of significance tests pose problems for arbitration program analysts. First, the analyst's ability to infer that percentage changes are statistically significant de-

## B. Effects on Court Costs

When court-ordered arbitration has little effect on the number of cases tried, it has little effect on the caseloads of trial judges. Since trials account for a large fraction of the public cost of the court system,<sup>43</sup> court-ordered arbitration does not significantly reduce court costs. Moreover, even court-ordered arbitration has its costs. Programs need to be administered, and the success of any court program depends to some extent on the amount of resources allocated to it.<sup>44</sup> In addition, all court-ordered arbitration programs provide for arbitrator honoraria. Although the amounts are quite modest,<sup>45</sup> fee payments for all arbitrated cases can total hundreds

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depends on sample size. To be able to infer that very small changes—for example, reductions in trial rate from three percent to two percent—are significant would require samples of several thousand cases, which are beyond the resource constraints of most studies. Second, the fact that analysts observe differences in trial rates—for example, pre- and post-arbitration—that are not statistically significant does not mean that arbitration produced no change, but rather that any change observed may have been a matter of chance. In New Jersey, MacCoun and his collaborators found that trial rates dropped from three percent overall before the arbitration program was put in place to 1.5 percent overall after the program was put in place. MacCoun, et al, *Alternative Adjudication* at 30-33 (cited in note 4). In the post-arbitration period, however, the trial rate for arbitrated cases was higher (3.66 percent) than the trial rate for cases that were ineligible for arbitration (2.86 percent). *Id.* This suggests that there may have been a general downward trend in trial rates in New Jersey from 1983 to 1985, but that arbitration may actually have contributed to increasing trial rates somewhat. But none of these differences were large enough to be judged statistically significant. *Id.*

In California, Bryant found no difference in trial rates, but his data were more qualitative. Bryant, *Judicial Arbitration in California* at 23 (cited in note 31).

In the Los Angeles Superior Court, Kakalik and his collaborators found a trial rate of 2.8 percent among arbitrated cases, compared to one percent among all motor vehicle personal injury cases, two percent among all other personal injury cases, and four percent among all contract disputes. James Kakalik, Molly Selvin and Nicholas Pace, *Averting Gridlock: Strategies for Reducing Civil Delay in Los Angeles Superior Court* (forthcoming). They conclude that arbitration does not appear to have a significant effect on trial rates. *Id.*

In the Middle District of North Carolina, Lind found a trial rate of 4.1 percent among cases that had been randomly assigned to arbitration, compared to a rate of 5.5 percent among "control" cases. Lind, *Arbitrating High-Stakes Cases* at 39 (cited in note 32). But this difference was not statistically significant. However, Clarke, Donnelly and Grove report a statistically significant decrease of nine percent in the trial rate resulting from arbitration in North Carolina's state program, suggesting that arbitration may sometimes decrease trial rates. *Court-Ordered Arbitration in North Carolina* at 48-49 (cited in note 31).

<sup>43</sup> J.S. Kakalik and R.L. Ross, *Costs of the Civil Justice System: Court Expenditures for Various Types of Civil Cases* xi (RAND Corp., 1983).

<sup>44</sup> For a discussion of the role of resources in implementation success, see Hensler, Lipson & Rolph, *Judicial Arbitration in California* at 94-96 (cited in note 3).

<sup>45</sup> Some jurisdictions pay on a daily basis, others on a per case basis. Rolph reports fees in jurisdictions that pay on a daily basis running from about \$25 to \$30 per hour. Rolph, *Introducing Court-Annexed Arbitration* at 29 (cited in note 1). In California, the fee is \$150 per case. Bryant, *Judicial Arbitration in California* at 27 (cited in note 31). In New Jersey, the fee is \$250 per case. MacCoun, et al, *Alternative Adjudication* at 5 (cited in note 4).

of thousands of dollars.<sup>46</sup> As a result, court-ordered arbitration programs may not decrease overall costs even when, or if, they achieve some reductions in the total number of trials in a jurisdiction: the savings accrued from eliminating a few trials are outweighed by the costs of processing a large number of cases through the alternative program.<sup>47</sup>

### C. Effects on Time to Disposition

A primary objective of court-ordered arbitration programs is to reduce time to disposition. A number of factors influence a program's ability to achieve this goal, including the court's scheduling rules and procedures and the effect of arbitration on settlement behavior. As a result, arbitration speeds disposition in some courts, has little or no effect on time to disposition in others, and may actually lengthen the disposition process in certain jurisdictions.

Some courts do not determine eligibility for arbitration until they have held a pretrial conference, scheduled shortly before the trial date. In a court where the interval between filing and trial is relatively short, this approach is cost efficient: a judge will only have to review those cases that the attorneys have been unable to settle prior to the conference. On the other hand, if there is a lengthy wait for a trial date, there will be almost as long a wait for an arbitration hearing date, and arbitration will not significantly expedite disposition.<sup>48</sup> Most courts, therefore, adopt special procedures to identify and expedite arbitration-eligible cases. For example, in Allegheny County, Pennsylvania, the court requires plaintiffs' attorneys to certify whether cases are eligible for arbitration at the time they file the complaints. If a case is certified as eligible, the court sends notification of the hearing date (three months from the filing date) to defendants with the notification that a suit has been filed against them.<sup>49</sup> In North Carolina's pilot program, the court automatically schedules eligible cases for an arbitration hearing 60 days after the answer is filed.<sup>50</sup>

Arbitration rules often specify certain time periods from case-filing to hearing in order to permit, for example, the defendant to

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<sup>46</sup> For example, Bryant reports that California spent more than \$2.2 million in arbitrators' fees in fiscal 1985-86. Bryant, *Judicial Arbitration in California* at 25.

<sup>47</sup> Hensler, Lipson & Rolph, *Judicial Arbitration in California* at 39-44 (cited in note 3), review the arithmetic behind this observation.

<sup>48</sup> *Id.* at 75-80.

<sup>49</sup> Adler, Hensler & Nelson, *Simple Justice* at 9-12 (cited in note 2).

<sup>50</sup> Clarke, Donnelly & Grove, *Court-Ordered Arbitration in North Carolina* at 4 (cited in note 32).

answer the plaintiff's complaint, or the parties to exchange discovery materials.<sup>51</sup> In California, strict adherence to such time limits would allow cases to reach an arbitration hearing within seven months of filing;<sup>52</sup> in New Jersey, which operates under somewhat different rules, cases would reach an arbitration hearing within about five months.<sup>53</sup> But some courts have difficulty meeting these time deadlines.<sup>54</sup> Despite the constraints that scheduling rules and practices impose, in most instances parties wait less time to reach an arbitration hearing than they would have to wait for a trial date in their jurisdiction.<sup>55</sup> As a result, practitioners and administrators may believe that court-ordered arbitration is reducing average time to disposition. Again, empirical analyses sometimes point to a contrary conclusion. For example, in New Jersey, MacCoun found that the introduction of the arbitration program increased average time to disposition by about one-third.<sup>56</sup> In Rochester, Weller, Ruhnka and Martin found that arbitration had no significant effect on average time from filing to final disposition.<sup>57</sup> In three federal district courts that experimented with court-ordered arbitration in the late 1970s, Lind and Shapard found that the program reduced average time to disposition in two courts but had no measurable effect on time to disposition in a third.<sup>58</sup> In a more recent study of the Middle District of North Carolina, Lind found that cases randomly assigned to arbitration took about the same time, on average, to reach disposition as comparable non-arbitration cases.<sup>59</sup>

What explains the results of the studies detailed above? Researchers find that, absent arbitration, there are several different points in the litigation process at which litigants are likely to re-

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<sup>51</sup> Rolph, *Introducing Court-Annexed Arbitration* at 19-20 (cited in note 1).

<sup>52</sup> Bryant, *Judicial Arbitration in California* at 21 (cited in note 31).

<sup>53</sup> MacCoun, et al, *Alternative Adjudication* at 37 (cited in note 4).

<sup>54</sup> Hensler, Lipson & Rolph, *Judicial Arbitration in California* at 76 (cited in note 3); MacCoun, et al, *Alternative Adjudication* at 37 (cited in note 4).

<sup>55</sup> See, for example, Bryant, *Judicial Arbitration in California* at 22 (cited in note 31). But in the early years of California's court-ordered arbitration program, the arbitration process actually took longer than the trial process in some courts. See Hensler, Lipson & Rolph, *Judicial Arbitration in California* at 74.

<sup>56</sup> MacCoun, et al, *Alternative Adjudication* at 35-37.

<sup>57</sup> Steven Weller, John Ruhnka and John Martin, *Compulsory Civil Arbitration: The Rochester Answer to Court Backlogs*, 20 *Judges J* 36, 43 (1981).

<sup>58</sup> Lind & Shapard, *Evaluation of Court-Annexed Arbitration in Three Federal District Courts* at 45-52 (cited in note 20).

<sup>59</sup> Lind, *Arbitrating High-Stakes Cases* at 41 (cited in note 32).

solve their cases.<sup>60</sup> Some cases are disposed of immediately after the plaintiff files a complaint, and before the defendant ever files an answer.<sup>61</sup> In state courts, the proportion of disposed cases in which there is no record of a defendant's answer is quite high, as much as 40 to 50 percent in some jurisdictions.<sup>62</sup> Among cases in which defendants do file answers, some cases settle soon after the answer is filed. The remainder of the cases may linger in the litigation process for some months or even years, depending on how long it takes for litigants to receive a trial date. During this time the lawyers may conduct their discovery, or they may simply shelve the cases until they hear from the court. Typically, another spurt of settlement activity occurs a short time before the pretrial conference and a final spurt occurs just prior to trial—the proverbial settlement “on the courthouse steps.”

When arbitration is implemented in a court where the resolution process fits the description above, it appears to change the incentives that the parties would otherwise have to settle early in the litigation process. A change in incentives is particularly likely if the arbitration program offers a hearing date within months of filing in a court in which litigants would otherwise have to wait years for trial—precisely the sort of court that has been most eager to adopt arbitration. After arbitration is adopted, defendants tend to answer and await the arbitrators' suggestion regarding the proper value of the case, rather than settle without even bothering to file an answer. Plaintiffs faced with recalcitrant defendants are less ready to drop a case, knowing they can obtain a hearing in a relatively short time without great expense.<sup>63</sup> Similarly, once a case is joined, both parties have an interest in waiting relatively few months to hear what the arbitrators feel the case is worth before

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<sup>60</sup> Kakalik, Selvin & Pace, *Averting Gridlock* (cited in note 42), map the process of case resolution in the Los Angeles Superior Court, showing the proportions of cases resolved at different stages of the litigation process.

<sup>61</sup> Presumably, plaintiffs drop some of these cases, while in others they reach a settlement with defendants. If the defendant does not answer, courts rarely will have any record of the true nature of the disposition.

<sup>62</sup> MacCoun, et al, *Alternative Adjudication* at 16-17 (cited in note 4); Kakalik, Selvin & Pace, *Averting Gridlock* (cited in note 42).

<sup>63</sup> In New Jersey, MacCoun and his collaborators reported an increase in the answer rate from 42 percent before the establishment of arbitration to 56 percent after the program was put in place. MacCoun, et al, *Alternative Adjudication* at 16-17. In the Middle District of North Carolina, Lind reported an answer rate of 64 percent among contract cases that were randomly selected for arbitration, compared to 43 percent among contract cases in the control group. He also found a smaller but nevertheless statistically significant difference in the answer rate for tort cases. Lind, *Arbitrating High-Stakes Cases* at 34 (cited in note 32).

agreeing on a settlement. As I discuss below,<sup>64</sup> parties also may value highly the opportunity to have their cases heard by a third party, regardless of the outcome. The consequence of this shift in incentives is that some settlements that otherwise would have occurred very early in the litigation process do not occur until just before or just after an arbitration hearing.<sup>65</sup> Because, as I have shown, arbitration does not generally reduce trial rates significantly, court-ordered arbitration may then have the overall effect of increasing average time to disposition for the total caseload—thereby disappointing many of its supporters.

#### D. Effects on Private Litigation Costs

Not surprisingly, researchers have found large differences between attorneys' costs to arbitrate cases and attorneys' costs to try cases. Studies show that attorneys spend considerably less time preparing cases for arbitration than they would have spent preparing them for trial, and that arbitration hearings take less time than the typical trial. As a result, when attorneys charge by the hour, their fees for cases resolved through arbitration are substantially less than their fees for cases they try.<sup>66</sup> But because, as I have shown, most arbitration-eligible cases would not have been tried

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<sup>64</sup> See text accompanying note 78.

<sup>65</sup> MacCoun and his collaborators show just such a shift from early to late settlements that explains the overall increase in average time to disposition. MacCoun, et al, *Alternative Adjudication* at 35-37 (cited in note 4). Although Lind and Shapard did find decreases in average time to disposition in two of the three federal district courts they studied, their data also show that in two courts arbitration cases were less likely to settle very early in the process than comparable non-arbitration cases. Lind & Shapard, *Evaluation of Court-Annexed Arbitration in Three Federal District Courts* at 46, 51 (cited in note 20). Weller, Ruhnka and Martin found that arbitration did not reduce time to disposition overall, even though it expedited dispositions after cases were answered, because these gains were outweighed by an increase in the time between filing and answer. Weller, Ruhnka & Martin, *Compulsory Civil Arbitration* at 43 (cited in note 57). Although Weller and his collaborators do not discuss this, the latter increase may have been attributable to a change in early settlement patterns. Lind reports that there was no statistically significant difference in time to disposition between arbitration cases and comparable non-arbitration cases in the Middle District of North Carolina, but he found that non-arbitration cases were more likely than arbitration cases to reach resolution early in the litigation process. Lind, *Arbitrating High-Stakes Cases* at 41 (cited in note 32). Clarke, Donnelly & Grove report a substantial decrease in time to disposition for both uncontested and contested cases assigned to arbitration in the North Carolina state arbitration program. *Court-Ordered Arbitration in North Carolina* at 35-38 (cited in note 31). By setting cases for hearing relatively early in the litigation process—60 days after the answer is filed—North Carolina's rules may eliminate any need for those who would naturally be "early settlers" to change their behavior in order to get a hearing.

<sup>66</sup> Hensler, Lipson & Rolph, *Judicial Arbitration in California* at 81-83 (cited in note 3); Adler, Hensler & Nelson, *Simple Justice* at 37-38 (cited in note 2). Plaintiffs who pay on

anyway, the key question for litigants remains: Are the costs associated with arbitrating cases greater or lesser than the costs associated with settling cases without arbitration?

Some researchers have found little difference between attorneys' hours and fees for arbitrated cases and their hours and fees for settled cases.<sup>67</sup> Because most arbitration-eligible cases are routine (for example, consumer disputes or "fender-benders"), involve relatively small sums of money and are not expected to go to trial,<sup>68</sup> attorneys have developed cost-effective routines for preparing them for settlement negotiations. Arbitration hearings themselves appear to require little preparation time. Therefore, defense attorneys' fees do not vary much depending on whether a case is settled or arbitrated. On the plaintiff's side, since many of the cases are tort suits, contingency fee arrangements are common. There is little evidence that instituting arbitration affects fee ratios.<sup>69</sup>

If, however, arbitration were to reduce the cost of preparing a case for settlement, litigants might save money on attorneys' fees. These savings would be more likely when larger-value, more complex cases are involved because attorneys for these cases have more discretion with regard to how much total time to invest at different stages of the litigation process. Arbitration might reduce the total time spent to prepare such cases if hearings were held relatively early in the litigation process, if limits were placed on prehearing discovery activities or if discovery must be completed before hearing.<sup>70</sup> More generally, many observers believe that larger-value

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a contingent fee basis, however, will not experience any savings unless the attorney's rate for arbitrated cases is lower than the rate charged for tried cases.

<sup>67</sup> For example, in New Jersey, MacCoun and his collaborators found that defense attorneys reported a median of 15 billable hours to settle cases, regardless of whether the case was assigned to arbitration or not. Plaintiffs' attorneys, who charged on a contingent fee basis, reported a median of 19 hours to settle cases that were assigned to arbitration, compared to 20 hours to settle cases that were not assigned to arbitration. The difference was not statistically significant. MacCoun, et al, *Alternative Adjudication* at 41-42 (cited in note 4).

<sup>68</sup> For a description of typical arbitration cases, see Adler, Hensler & Nelson, *Simple Justice* at 12-20 (cited in note 2).

<sup>69</sup> In Allegheny County, scholars report that some attorneys who have high-volume arbitration practices charge flat fees of a few hundred dollars. Adler, Hensler & Nelson, *Simple Justice* at 38. This practice has not been noted elsewhere.

<sup>70</sup> Lind found that litigants' costs were reduced by about 20 percent as a result of the arbitration program in the Middle District of North Carolina, which fits this characterization. Lind, *Arbitrating High-Stakes Cases* at 38 (cited in note 32). Barkai and Kassebaum have reported similar results for Hawaii's arbitration program, which also applies to high value cases and imposes discovery limits. J. Barkai and Gene Kassebaum, "The Impact of Discovery Limitations on Cost, Satisfaction, and Pace in Court-Annexed Arbitration" (pa-

cases result in more discovery activities and that lengthy litigation processes lead to more discovery;<sup>71</sup> if this is true, then any program that shortens the discovery process, including arbitration, may reduce settlement costs.

### E. Litigant Satisfaction

When researchers have asked litigants and their attorneys to evaluate court-ordered arbitration, the responses have been consistently positive, regardless of whether the particular arbitration program appears to be achieving its efficiency goals. In every jurisdiction studied to date, both plaintiffs and defendants, and their attorneys, whether winners or losers, said they were highly satisfied with the arbitration process and its outcome.<sup>72</sup> This result has puzzled some observers because it seems inconsistent with the more objective data on arbitration's effects. For an explanation of this seeming inconsistency, we turn to research on "procedural justice."

## V. PROCEDURAL JUSTICE: LITIGANTS' STANDARDS OF DUE PROCESS

Procedural justice research began with a series of experiments conducted on university campuses by John Thibaut and Laurens Walker to determine what individuals want from dispute resolution processes. In particular, Thibaut and Walker sought to determine which attributes of dispute resolution procedures lead individuals to believe that they have been treated fairly or unfairly. In recent years, the hypotheses that Thibaut and Walker derived from their laboratory research have been tested in a variety of real-

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per presented at the Annual Meeting, Law and Society Association, June 1988). Clarke, Donnelly and Grove report cost savings for routine cases. *Court-Ordered Arbitration in North Carolina* at 68-69 (cited in note 31). But their data on this point are somewhat unclear: attorneys were asked to compare costs for arbitration cases with costs for similar cases litigated before the arbitration program was established. *Id.* In responding to the questionnaire, they may have been focusing on the difference between arbitrated and tried cases rather than the difference between arbitrated cases and cases settled without arbitration.

<sup>71</sup> For a general discussion of this viewpoint, see Brookings Institution, *Justice for All: Reducing Costs and Delay in Civil Litigation* (Brookings Institution, 1989).

<sup>72</sup> Lind & Shapard, *Evaluation of Court-Annexed Arbitration in Three Federal District Courts* at 60-62 (cited in note 20); Adler, Hensler & Nelson, *Simple Justice* at 61-63 (cited in note 2); MacCoun, et al, *Alternative Adjudication* at 43; Barkai & Kassebaum, "The Impact of Discovery Limitations"; Lind, et al, *The Perception of Justice* at viii-ix (cited in note 32).

life settings, including courts.<sup>73</sup> This procedural justice research on the resolution of civil damage suits set out to discover:

- (1) whether concerns about procedural values would prove as important to litigants who had real case outcomes at stake as they were to individuals who participated in laboratory simulations;
- (2) which attributes of procedure lead litigants to believe that they have been treated fairly or unfairly; and
- (3) whether objective differences in procedural attributes of trial, court-ordered arbitration and other court dispute resolution procedures would be reflected in litigants' assessments of the fairness of each procedure.

The research showed that both lay litigants who are relatively naive about legal procedures and institutional litigants, such as corporate representatives who have considerable legal experience, care equally about the attributes of dispute resolution procedures. Moreover, where real cases and outcomes are at stake, disputants want from the dispute resolution process exactly what Thibaut and Walker found their experimental subjects wanted: namely, for their cases to be heard by a neutral third party in a process over which they themselves feel they have some control. What lay litigants want most from the dispute resolution process is a hearing, conducted in a dignified and careful fashion, before an impartial third party. Contrary to some of the propositions put forward by ADR enthusiasts, lay litigants do not consistently prefer informality over formality. Nor do they care, generally, whether hearings are public or private.<sup>74</sup>

Institutional litigants share most of these views of the lay litigants, but they have a preference for more formal hearings.<sup>75</sup> Both lay and institutional litigants are more likely to believe they have been treated fairly when their cases receive a hearing, and they are more likely to express satisfaction with the litigation process when they believe they have been treated fairly, regardless of whether they won or lost.

Surveys of litigants whose cases received an arbitration hearing show that court-ordered arbitration satisfies these definitions

<sup>73</sup> For a review of the extensive experimental and field research on procedural justice, see E. Allan Lind and Tom Tyler, *The Social Psychology of Procedural Justice* (Plenum Press, 1988).

<sup>74</sup> Lind, *Arbitrating High-Stakes Cases* at 63-64 (cited in note 32). But see also MacCoun, et al, *Alternative Adjudication* at 53-54 (cited in note 4).

<sup>75</sup> Lind, *Arbitrating High-Stakes Cases* at 51.

of procedural justice.<sup>76</sup> In fact, the desire to be heard perhaps explains why arbitration sometimes delays case disposition: litigants apparently are willing to spend a little more time in the litigation process in order to obtain a hearing for their case, in preference to settling without any hearing.<sup>77</sup> The fact that arbitration provides easy access to a hearing also explains the high marks arbitration receives from litigants even when it does not substantially reduce time to disposition or private costs.<sup>78</sup> Since trials also provide a hearing of the case, researchers have found that litigants whose cases are tried are likewise satisfied and feel they have been treated fairly. Although some ADR enthusiasts have assumed that litigants view trials negatively,<sup>79</sup> empirical researchers have discovered that litigants find trial procedures neither uncomfortable nor difficult to understand.<sup>80</sup>

In fact, litigants whose cases have been tried and litigants whose cases have been arbitrated feel much the same way about their litigation experiences. The empirical research shows that litigants whose cases are arbitrated are about as likely to feel they have been treated fairly and to express satisfaction with the litigation process as litigants whose cases are tried. Both are significantly more positive about the litigation process than litigants whose cases are settled in court-mediated conferences. Litigants whose cases are settled at such conferences are less likely to believe the process was fair, dignified or careful, compared to litigants whose cases are arbitrated or tried.<sup>81</sup>

As with research on the efficiency consequences of arbitration, research on litigants' perceptions of procedural justice has emphasized comparisons between those who have experienced arbitration and those whose cases were tried. But the finding that litigants believe that both arbitration and trial are more fair than settlement conferences may be the most significant for legal policymakers, because settlement conferences are by far the most common ADR procedure in use in state and federal courts today.<sup>82</sup> Al-

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<sup>76</sup> Adler, Hensler & Nelson, *Simple Justice* at 63-71 (cited in note 2); MacCoun, et al, *Alternative Adjudication* at 43.

<sup>77</sup> MacCoun, et al, *Alternative Adjudication* at 73.

<sup>78</sup> For more on the relationships among perceptions of fairness, costs, time to disposition and satisfaction, see, generally, Lind, et al, *The Perception of Justice* (cited in note 32).

<sup>79</sup> See, for example, Warren Burger, *Isn't There a Better Way?*, 68 ABA J 274, 274-75 (1982).

<sup>80</sup> Lind, et al, *The Perception of Justice* at 64-65 (cited in note 32).

<sup>81</sup> *Id.* at 46, 70.

<sup>82</sup> Deborah Hensler, *Court-Annexed ADR*, in John Wilkinson, ed, *Donovan Leisure Newton and Irvine ADR Practice Book* 352-54 (Wiley Law Publications, 1990).

though Resnik, Fiss and others<sup>83</sup> have written critically about the pressures courts apply to settle cases, most scholarly critics of arbitration have not confronted the issue of how arbitration compares to its most frequent alternative, the judicial settlement conference. Although arbitration may offer litigants a process with fewer procedural safeguards than trial, settlement frequently provides no process at all to the disputants themselves, who are often excluded entirely from conferences with judges. Settlement conferences are governed by few if any formal rules. They are typically held out of the hearing of the disputants themselves and away from the public view. Moreover, by many reports, settlement conferences are almost entirely outcome-driven.<sup>84</sup> In my conversations with practitioners in jurisdictions with active settlement conference programs, I have often heard lawyers object to specific judges' practices with regard to settlement, but I rarely hear comments suggesting that these same lawyers are generally uncomfortable with settlement as a mode of dispute resolution. Procedural justice research suggests that many lay litigants do not share this comfort.

## VI. POLICY AND SCHOLARLY IMPLICATIONS

The empirical research reviewed above suggests that litigants continue to view trial as a desirable form of dispute resolution.<sup>85</sup> But in most large metropolitan jurisdictions today, public resources allocated to courts will allow only a small fraction of civil disputes actually to be tried.<sup>86</sup> Moreover, plaintiffs' attorneys are reluctant to take smaller-value cases to trial, because their costs would exceed commonly accepted contingent fee ratios. Thus, although as a matter of law plaintiffs have the right to trial in civil disputes, as a practical matter, they can exercise this right only rarely.<sup>87</sup> Those who believe that access to trial is a critical component of due process should view this situation with concern.

Various responses to this situation are possible. First, critics could press policymakers to provide more funds for the court system, new judgeships and the construction of additional courts, per-

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<sup>83</sup> Judith Resnik, *Managerial Judges*, 96 Harv L Rev 374 (1982); Owen Fiss, *Against Settlement*, 93 Yale L J 1073 (1984); H. Lee Sarokin, *Justice Rushed is Justice Ruined*, 38 Rutgers L Rev 431 (1986).

<sup>84</sup> For a particularly vivid view of outcome-driven settlement negotiations, see Peter Schuck, *Agent Orange on Trial: Mass Toxic Disasters in the Courts* (Belknap Press, 1986).

<sup>85</sup> Lind, et al, *The Perception of Justice* at 70 (cited in note 32).

<sup>86</sup> For a discussion of the cost of supporting a civil trial system, see Kakalik, Selvin & Pace, *Averting Gridlock* at xiv (cited in note 42).

<sup>87</sup> Brookings Institution, *Justice for All* at 5-6 (cited in note 71).

haps thereby providing the opportunity for more cases to be tried. However, in the face of increased demands for social welfare program funding and continued public resistance to taxation, this strategy seems unlikely to prove successful.<sup>88</sup> Moreover, providing the funds necessary to increase the number of judges and courtrooms available to try cases would not solve the problem of the high *private* costs of litigation.

A second response would be to implement new legal rules that would exclude a substantial number of cases from court—for example, by eliminating diversity jurisdiction in the federal courts, by establishing mechanisms to screen out “frivolous” cases, or by raising filing fees substantially. Those cases that remained in the system might have greater access to judges. Moreover, there would be less pressure to settle these cases rather than take them to trial. For example, the Federal Courts Study Committee recently proposed to further limit access to the federal courts in order to permit judges more time to resolve what committee members seem to view as more weighty cases.<sup>89</sup> But raising new barriers to filing cases is scarcely likely to attract support from those who want to expand access to the system. In fact, the most common response to declining access to trials is simply to decry the phenomenon and call for an end to court-based ADR procedures. Ironically, the critics have been most successful in opposing procedures, such as arbitration, that have historically required statutory authorization, while procedures such as settlement that are typically adopted without such authorization, have expanded virtually unchecked. As a result, those concerned with due process have foregone opportunities to strengthen procedural safeguards that could be associated with formally adopted ADR procedures, while contributing, perhaps unwittingly, to the expansion of procedures that involve few formal procedural safeguards.

Rather than *opposing* arbitration as a matter of principle, I would like legal scholars to consider how to *modify* arbitration rules to strengthen due process. For example, to guard against decisions that disadvantage women and minorities, courts could be instructed to assure that arbitrators represent the diverse groups within communities and to publish periodically lists of current ar-

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<sup>88</sup> Kakalik, et al, estimate that it would cost approximately \$75 million per year to add enough judges to the Los Angeles Superior Court system to provide timely trial of civil disputes. See Kakalik, Selvin & Pace, *Averting Gridlock* at ix.

<sup>89</sup> Federal Courts Study Committee, *Tentative Recommendations for Public Comment* 7-12 (Dec 22, 1989).

bitrators for public scrutiny. To guard against awards that systematically disadvantage plaintiffs or defendants, courts could also be instructed to publish statistical data on the distribution of arbitration awards on a regular basis.<sup>90</sup> To expand access to arbitration programs, plaintiffs' attorneys could charge lower fees for taking a case to arbitration than for taking a case to trial—a practice not currently uniform in jurisdictions with arbitration programs. These lower fees might encourage more plaintiffs to take their cases to hearings, rather than settle them without any court process. Moreover, those who are concerned about the effects of arbitration on due process might focus more attention on the issue of disincentives for trial *de novo*. Clearly, as fees and penalties for proceeding to trial increase, the potential for trials to serve as a corrective mechanism for arbitration errors will decrease. Finally, those who want to protect and expand access to courts might oppose a growing trend to charge litigants a special fee for arbitration hearings.<sup>91</sup>

At the same time, I would urge those who are interested in improving the arbitration process to resist what might otherwise be their natural impulse: to make arbitration hearings increasingly resemble trials. If arbitration required live witnesses and recorded testimony, if hearings were held in formal settings before specially qualified third party neutrals, if, in short, arbitration hearings became trials by another name, clearly the private and public cost differential between arbitration and trial would diminish and congested arbitration calendars might become as common as congested trial calendars. As a result, arbitration might become as inaccessible to most litigants as trials are today, and a significant opportunity to offer more litigants an adjudicative process would be lost.

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<sup>90</sup> In the course of the my research, I have found that many jurisdictions routinely tally these results for their own purposes.

<sup>91</sup> Support for such a fee policy has grown as courts and legislatures have recognized that they are unlikely to realize cost savings from arbitration. The Michigan mediation program, for example, charges parties a \$75 fee for an attorney-run settlement conference to which parties are not invited. K. Shuart, *The Wayne County Mediation Program in the Eastern District of Michigan* 6-7 (Federal Judicial Center, 1984). In 1987 in California, the legislature temporarily withdrew state funding for the program, leading some to suggest that courts should impose special fees on litigants who sought arbitration hearings. See Bryant, *Judicial Arbitration in California* at 2 (cited in note 31).