

INSTITUTIONAL CHANGE THROUGH INTERSTITIAL EMERGENCE:

The Growth of Alternative Dispute Resolution in U.S. Law, 1970-2000 //

Calvin Morrill¹

Keywords

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Summary

- 1 Introduction**
- 2 Unpacking Interstitial Emergence**
- 3 The Interstitial Emergence of U.S. ADR, 1970-2000**
 - 3.1 Perceived Institutional Failure and the Problem of Minor Disputes
 - 3.2 The Innovation Moment
 - 3.3 The Mobilization Moment
 - 3.4 The Structuration Moment
- 4 Summary and Implications**
- 5 References**

Abstract

How can be explained the dramatic changes in the growth of informal dispute resolution as “alternatives” to adjudication between 1970-2000? This article gives an answer to this question by using the historical case of U.S. Alternative Dispute Resolution (ADR) in the last third of the 20th century to ground empirically a theory of interstitial emergence. By focusing on interstitial emergence, the article demonstrates how informal interaction across multiple organizational fields can provide cultural accounts for new formal structures. The analysis furthers the integration between institutional analysis in organizational and legal sociology, but does so by borrowing conceptual leads from social movement theory to elaborate and develop a framework for understanding institutional innovation and change. In doing so, it draws specific attention to issues of agency and emergent signification. The remainder of the article contains sections that narratively illustrate interstitial emergence and its dimensions using evidence from the U.S. ADR case. The conclusion extends the argument beyond ADR to consider alternative developments in the U.S. medical field and implications for institutional analysis, more generally.

1 Stefan A. Riesenfeld Professor of Law, Professor of Sociology, and Associate Dean for Jurisprudence and Social Policy / Legal Studies at the University of California, Berkeley. Portions of this article were presented at the Law & Society Association Annual Meetings, Aspen, Colorado, 1998. I wish to thank for helpful comments: Richard Arum, James Atleson, Bernard Beck, Albert Bergesen, Bruce Carruthers, Elisabeth Clemens, Stephen Cornell, Ellen Dannin, Lauren Edelman, Kirk Emerson, Steven Epstein, Wendy Espeland, Gary Alan Fine, Michael Hannan, Jeff Haydu, Carol Heimer, Ron Jepperson, Dan Jones, Richard Lempert, Richard Madsen, Peter Manning, Tom McFadden, Jason Owen-Smith, Woody Powell, Akos Rona-Tos, Marc Schneiberg, W. Richard Scott, Susan Silbey, Arthur Stinchcombe, Alisa Wabnik, members of the Social Organization Seminar and Udall Center for Studies in Public Policy at the University of Arizona, and audiences at Cornell University, Northwestern University, Stanford University, and the University of California, San Diego.

MUDANÇA INSTITUCIONAL ATRAVÉS DA EMERGÊNCIA

INTERSTICIAL: o crescimento da Resolução Alternativa de Disputas no Direito dos Estados Unidos, 1970-2000 // *Calvin Morrill*

Palavras-chave

mudança institucional / emergência intersticial /
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Resumo

Como explicar as mudanças dramáticas consistentes no crescimento da resolução informal de disputas como “alternativas” à adjudicação entre os anos 1970-2000? Este artigo dá uma resposta a essa questão, utilizando o caso histórico da Resolução Alternativa de Disputas (ADR) dos Estados Unidos da América (EUA), no último terço do século XX para fundamentar empiricamente uma teoria da emergência intersticial. Ao focar a emergência intersticial, o artigo demonstra como a interação informal em vários campos organizacionais pode fornecer versões culturais para novas estruturas formais. A análise aprofunda a integração entre a análise institucional na sociologia organizacional e jurídica, mas o faz tomando emprestado os principais conceitos da teoria dos movimentos sociais para elaborar e desenvolver um quadro conceitual para entender mudanças e inovações institucionais. Fazendo isso, o artigo presta especial atenção para questões de agência e significação emergente. O restante do artigo contém seções que ilustram a emergência intersticial e suas dimensões por meio da narrativa de evidências do caso ADR nos EUA. A conclusão estende o argumento além do caso ADR nos EUA, para considerar desenvolvimentos alternativos no campo médico dos EUA e implicações para a análise institucional, de forma mais geral.

1 Introduction

In 1970, fewer than a dozen courts in the United States officially offered mediation, negotiation, and other types of informal dispute resolution as “alternatives” to adjudication. By 2000, court-based alternative dispute resolution (ADR) programs were common: Forty-five states had enacted legislation creating ADR programs.² Two-thirds of all states had functioning ADR programs for small claims, superior, domestic relations, and landlord/tenant courts. In thirty-six states, many types of civil disputes were required to be processed through mediation prior to adjudication (Filner, Ostermeyer, and Bethel 1995).

The pervasiveness of ADR in the U.S. legal system is a part of more general changes in the U.S. legal field – the organizations and institutionalized practices within which legalized dispute resolution occurs (Edelman 2016). Alternatives to the classic trial-by-jury have been a feature of the legal field since the introduction of commercial arbitration in the 1880’s. With the exception of domestic relations (“conciliatory”) courts, the adversarial process remained firmly at the center of these earlier alternatives. The ADR of

² ADR comprises a family of techniques whose practitioners and proponents claim are less formal procedurally than adjudication. Included in these techniques are negotiation, mediation, conciliation, judicial settlement, arbitration, and mini-courts (sometimes called mini-trials). Dispute negotiation refers to a “problem-solving process in which [two or more disputants] attempt to reach a joint decision on matters of common concern in situations where they are in disagreement and conflict” (Gulliver 1979: xiii). Mediation is sometimes called “supervised negotiation” (Fuller 1971) because mediators are typically not empowered to pronounce case outcomes, instead facilitating structured communication among disputants with the intention of reaching a mutually beneficial resolution. Mediation can be court- or organizationally-based and conducted by specially trained personnel or “peers” (as in school-based peer mediation programs). Conciliation is a form of mediation that focuses on disputants’ relationships. In some states (e.g., California), if resolution is not reached through mediation, court-based mediators are empowered to engage in arbitration to pronounce a judgement. Judicial settlement mixes conciliation and mediation to achieve resolution. Arbitration is a structured settlement process in which third parties can pronounce judgements on cases, but enforcement of the judgement is left to the disputants. Mini-courts are private arbitral forums, typically presided over by a former judge, in which procedures approximate those of a court and judgements are enforced by the disputants. Adjudication differs from arbitration in the complexity of its procedures and that its judgements are enforceable by the state. (For full reviews, see: Nader and Todd 1978; Black and Baumgartner 1983; Morrill 1995; Morrill and Rudes 2010; Albiston, Edelman, and Milligan 2014).

the past three decades, by contrast, features nonadversarial dispute resolution processes.

How can these dramatic changes be explained? In this article, I answer this question by using the historical case of U.S. ADR in the last third of the 20th century to ground empirically a theory of *interstitial emergence*. As I use the concept, interstitial emergence begins with pragmatic innovation of alternative practices among informal networks of players in overlapping organizational fields as they respond to real or perceived institutional failure and delegitimation. I identify four mechanisms of interstitial emergence that facilitate institutional change: critical masses to lead reform efforts, resonant frames for alternative practices, resource mobilization, and professionalization efforts. The emergence of alternative practices into the mainstream can lead to institutional change manifested as new organizational forms, as well as shifts in legitimating ideologies for new and existing formal organizations. This approach also resonates with what scholars call “inhabited” theoretical perspectives that underscore how persons and groups construct lines of action from the interplay between local contestation over meaning and guidelines for action offered by broader institutional logics (Hallett and Ventresca 2006; Binder 2007; Hallett 2010).

In the U.S. ADR case, judges and other players operating in the legal and related fields used mediation and negotiation informally during most of the 20th century (Harrington 1982). Until the 1970’s, the majority of the judiciary and the legal profession largely ignored these practices and dismissed them as idiosyncratic departures from adjudication. During the late 1960’s and 1970’s, informal networks of judges, lawyers, mediators, therapists, social scientists, and social workers working alone or in local court-based pilot programs attempted to manage a range of legal cases for which adjudication held few answers. These networks coalesced into critical masses around two competing ADR frames: the “community mediation model” and “multidoor courthouse.” The multidoor courthouse became the dominant organizational form of ADR as it articulated with public philosophies of state federalism and de-institutionalization during the 1980’s and 1990’s, thus facilitating the construction of an emergent professional ju-

risdiction for ADR practitioners. These changes also signal a shift in legitimating legal ideologies and accounts: From liberal legal ideology, which portrays law as an autonomous, rights-based system where judges are independent triers of fact, to a managerial harmony ideology (Nader 1990), which portrays law as a socially embedded system where judges are administrators attempting to keep the peace efficiently (Galanter 1984).

My concentration on interstitial emergence attempts to bridge the divide between the “old” and “new” institutionalisms in organizational and sociolegal analysis. Whereas the old institutionalism demonstrated how the “shadowland of informal interaction” in organizations can subvert *and* support rationalized formal structures (Selznick 1949, p. 260), the new institutionalism underscores the irrationalities contained within formal structures themselves. Neoinstitutionalists argue that the firm establishment of particular formal structures does not result solely from their success at performing intended functions, but also from the persuasiveness of cultural accounts about them (DiMaggio and Powell 1991). By focusing on interstitial emergence, I demonstrate how informal interaction across multiple organizational fields can provide cultural accounts for new formal structures.

As I conceptually and empirically investigate informal relations across organizational fields, I also draw on insights from multiple subfields within sociology. Institutional analysis in organizational and legal sociology shared many common practitioners during the early twentieth century, including Max Weber and Emile Durkheim. Since that time, institutional analysis in the two subfields has experienced less integration. Nearly thirty years ago, Philip Selznick (1969) provided a notable exception with his research on the institutionalization of organizational due process. More recently, Lauren Edelman (1990, 1992, 2016) and others have pursued integration of the two fields by investigating cultural, political, and cognitive constructions of legal and extra-legal rule systems in organizations.³ My analysis furthers the integration

3 Edelman (2016), Suchman and Edelman (1996), Sutton (1996), and Powell (1996) provide numerous possibilities for the further reintegration of institutional analysis in organizational sociology

between institutional analysis in organizational and legal sociology, but does so by borrowing conceptual leads from social movement theory to elaborate and develop a framework for understanding institutional innovation and change. In doing so, I draw specific attention to issues of agency and emergent signification (see Zald 1992, for an analysis of these issues in social movement research).

I begin with a theoretical discussion of interstitial emergence. The remainder of the article contains sections that narratively illustrate interstitial emergence and its dimensions using evidence from the U.S. ADR case.⁴ I close the article by extending the argument beyond ADR to consider alternative developments in the U.S. medical field and implications for institutional analysis, more generally.

2 Unpacking Interstitial Emergence

Proponents of the new institutionalism recognize that institutions leave opportunities for noninstitutionalized action and change (Powell 1991, 1996; Scott 1991). Meyer and Rowan (1977), for example,

and the sociology of law.

4 Empirical evidence for ADR's interstitial emergence is based on the collection of documents covering a thirty-year period (1970-2000) from two sources: the American Bar Association (ABA) and the National Institute of Dispute Resolution (NIDR). ABA subcommittees participated in the introduction of ADR to the legal profession and elite judges during the 1970s, producing several pamphlets and reports describing their efforts. I also draw on several documents from NIDR (founded in 1980) and other national non-profit conflict resolution organizations that merged into the Association for Conflict Resolution in 2001. I also reviewed print media at the national and local levels over the same period for mentions of community and court-based ADR, including the: *New York Times*, *Los Angeles Times*, *Washington Post*, *The Arbitration Journal*, *American Lawyer*, *Arizona Daily Star*, *Arizona Republic*, and *Arizona Attorney*. I supplemented these sources with: (1) participant observation at ADR organizations (including working as a volunteer mediator at a community mediation center, 1990-2000, serving on the Arizona Supreme Court ADR advisory/regulatory committee, 1994-1999, and working with the Arizona Dispute Resolution Association as a volunteer consultant, 1996-1999) and (2) conversational interviews at social events related to the Arizona Supreme Court ADR Committee and other ADR conferences with key players from: Arizona, California, New Mexico, and Virginia/Washington DC. These conversations focused on how the individual became involved in ADR; how ADR (as a field as a practice) has changed from when they entered it; what they thought the key challenges were for ADR and its future in the United States.

note that social networks of players between and in organizations can alter organizational action, the effects of which can be disaggregated from institutionalization effects. Jepperson (1991) further argues that collective action can constitute a source of extra-institutional change, although activists often draw on institutionalized cultural accounts as rhetorical resources (Meyer, Boli, and Thomas 1987; Fligstein and McAdam 2012). Despite these observations, the emphasis in the new institutionalism on cultural accounts for formal structures tends to mute conceptual elaboration and empirical analysis of informal, noninstitutionalized sources of formal structures that can flow from informal relations and networks. Interstitial emergence provides an analytic window onto these processes.

In his social history of power, Michael Mann (1986) draws from Karl Marx's writings on the rise of capitalism in Europe to discuss interstitial emergence metaphorically (e.g., human beings create "tunnels" around existing institutions or change occurs through the "pores" of society) and descriptively to label historical change over long periods of time (e.g., the transformation of European feudalism to capitalism), without specifying its components. Further complicating his usage of the concept is that it is simultaneously a location in social space (an *interstice*), a process (of *emergence*), and an effect (resulting in *change*).

A useful way to begin disentangling these ideas is to identify the social domains relevant to interstitial emergence.⁵ These domains are nested within each other and create multiple levels of analysis, beginning at the supra-organizational level of analysis with the institutional context. The institutional context consists of both material and symbolic elements that enable multiple and sometimes contradictory patterns of human activity to be organized, made sense

⁵ This typology leaves out the larger sociocultural contexts which are constituted by wider cultural myths and social structures (e.g., the "Western cultural tradition") and in which institutional contexts are embedded (Meyer, Boli and Thomas 1987). Also left out of this typology is the oft-used concept of "organizational population" used by organizational ecologists (Hannan and Freeman 1989). For ease of presentation and usage in the present analysis, I limit the discussion to three levels of analysis.

of, and navigated. Among the central institutions in the West are the market, state, bureaucracy, family, liberal democracy, and religion (Friedland and Alford 1991). Subsumed within the institutional context are organizational fields, comprised of aggregates of organizations producing similar services and/or products, their constituencies, their relevant regulatory agencies, and the ties among them (DiMaggio and Powell 1983). The legal field, for example, contains courts, prisons, regulatory agencies, and policing agencies are all part of the state, yet overlap with other organizational fields (Edelman 2016). The institutional context and organizational fields are only disembodied constructs until they manifest themselves in practices by individuals and groups who enter "enter into the character" they "inherit" from these larger domains (Bourdieu 1981, p. 309). Individuals and groups, however, do not slavishly obey unambiguous scripts ("habitus") dictated to them by larger domains. First, multiple logics of practice exist in the institutional context that provide different legitimating narratives for action. For example, "guaranteeing justice" and "maintaining order" often oppose one another as legitimating rationales for the existence of law. At the level of practice, these two rationales translate into political contestation over the multiple meanings and means of crime control and dispute settlement. Second, the differential availability of material resources constrains some lines of action while enabling others. Third, individuals under certain conditions can act pragmatically on their local surroundings to innovate beyond existing institutionalized scripts. Finally, individuals' identification with generalized expectations about their behavior can vary.

Against this backdrop, I define an *interstice* as a mesolevel location that forms from overlapping resource networks across multiple organizational fields in which the authority of the dominant resource network does not prevail. Interstices typically arise when problems or issues persistently spill over from one organizational field to another. An example of an interstice would include the overlaps between practitioners in the fields of medical and therapy organizations, on the one hand, and various folk organizations on the other. It is in this interstice that the authority of orthodox medicine was weakened and alternative prac-

tices of healing developed as a way to treat complex, chronic illnesses (Kleinman 1996). Another example is the cross-traffic along networks between the fields of commercial biotechnology and basic biomedical science. In this interstice researchers and organizations linking universities and commercial activities are engaged in practices that fit neither the logics of “basic” or “applied” research (Powell and Sandholtz 2012).

Many interstices experience a lack of social visibility as they are forming vis-a-vis a majority of players in relevant organizational fields. Because most social attention and authority is concentrated on conventional practices, many people in a given organizational field will tend to be unaware of initial work in the overlaps between fields. Even when interstitial emergence results in reform movements, cognitive, normative, and material elements of existing institutions can mitigate against recognizing the implications that alternative practices carry for conventional practices, even as explicit social control efforts become directed at repressing interstitial emergence.

Interstitial emergence suggests three conceptually distinct, yet empirically interpenetrating historical moments: The first involves *innovation* when interstitial networks of players experiment with alternative practices to solve problems they perceive affecting multiple organizational fields. Such problems can appear initially as minor perturbations, but provide the opportunities for innovation if they persist and if conventional practices have little answer for them – similar to the ways persistent, unexplainable natural occurrences or internal contradictions weaken scientific paradigms and open up opportunities for innovation (Kuhn 1962).⁶ Accompanying the development of alternative practices are critiques of conventional practices. Such critiques can take competing forms of broad attacks on institutional underpinnings or as

6 The idea that “problems” in an organizational field precipitate interstitial emergence begs the question of where and why such problems originate. It is beyond the purview of the present study to fully consider this question. Suffice to say that problems arise from a variety of sources including: political and economic shocks, social movements that define and raise consciousness about social problems, mutual influence of organizations and their institutional logics across multiple organizational fields, contradictions between institutional logics that manifest themselves in organizational fields, and demographic and natural environmental changes.

criticisms of particular practices within organizational fields. During this moment, early innovators begin to label critiques and alternative practices, thus increasing their rhetorical portability. A second *mobilization* moment requires the development of critical masses of supporters and resonant frames for alternative practices. A third *structuration* moment occurs to the extent that alternative practitioners are able to carve out legitimated social spaces for their practices through the establishment of professional organizations and various symbolic, cultural, and normative boundaries. Structuration ultimately can modify the institutionalized narratives used to account for formal, organizational practices and reconfigure the institutional context by creating new organizational fields that compete with and modify established fields.⁷ Taken together, the three moments of interstitial emergence – innovation, mobilization, and structuration – operate as a dynamic model with the accomplishment of each moment serving as a value-added factor, thus increasing the likelihood of a succeeding moment. Below, I elaborate the mechanisms that enable the accomplishment of each moment.

During the innovation moment of interstitial emergence, alternative practices crop up at various organizational sites in the overlaps of organizational fields.⁸ The heterogeneous nature of interstices means that

7 Here again, the most “successful” forms of interstitial emergence will move beyond the institutional context to the sociocultural level thereby reconfiguring wider cultural narratives.

8 My perspective on interstitial emergence suggests an “agentic orientation” in that individuals and groups pragmatically attempt to solve problems they encounter by “imagining alternative possibilities” to conventional practices (DiMaggio 1988; Emirbayer and Mische 1998). I do not mean to imply that players scan the environment for the most efficient solutions or that the solutions that stick will solve whatever problems are identified. Decision-making at the interstices takes on the characteristics of the classic “garbage can model”: Preferences will be problematic, relevant technologies will be unclear, and there will be fluid participation in search, choice, and implementation processes (Cohen, March and Olsen 1972). Perhaps such ambiguities encourage incumbents to recombine conventional practices into alternative practices or engage in bricolage whereby ideas from disparate and often far-flung sources are put together in new ways (Powell and Sandholtz 2012). Claims of efficacy made by advocates of alternative practices typically will be fraught with ambiguity. Although most cases of interstitial emergence occur in response to some perceived problem, this discussion does not preclude the possibility that problems will be invented for solutions (March 1988).

they contain multiple (and sometimes contradictory) institutional logics and organizational archetypes, thus facilitating innovation through recombination and idiosyncratic interpretations of existing practices (Clemens 2005). Heterogeneity itself varies with the diversity and number of organizational fields involved in the interstice. Thus, the greater the heterogeneity of an interstice, the less likely it is for players to adopt an existing institutional logic whole cloth. Diffusion of alternative practices initially can occur as local innovators face similar problems and engage in sporadic contact with one another to handle those problems. For the diffusion of alternative practices to “take off,” they must be spurred on by “critical masses” of supporters who articulate critiques of conventional practices, identify with alternative practices, and exert interpersonal influence to add alternative practitioners and supporters to the cause (Kim and Bearman 1997). Critical masses also are crucial for developing resonant frames for alternative practices and mobilizing resources (Benford and Snow 2000).

As used here, an alternative practice frame refers to the interpretive schemata that enable people to “locate, perceive, identify, and label” problems and practices that do not fit into conventional lines of action (Goffman 1974, p. 21; Snow et al 1986). Frames enable boundaries to be drawn around problematic issues, as well as alternative practices, and thus become a source of critical discourse and potential solutions. In this sense, frames give coherence to problems and practices that increase their likelihood of being included on the agendas of organizational and institutional decision streams (Heimer and Stinchcombe 1999).

An important component of resonance in a frame is legitimacy, for alternative practice frames often suffer from various technical and normative stigmas, each of which suggests compensating strategies that can emerge as frames are promulgated. The first involves “scientific evaluations” and anecdotal testimonials that support the technical superiority of alternative practices relative to conventional practices (Tolbert and Zucker 1983). Stigma is overcome by borrowing from the technical legitimacy of science and substantive findings that support the efficacy of alternative practices. A second strategy addresses

normative stigma and can begin as a version of what Wuthnow (1983) calls “cultural articulation”: The balancing act of demonstrating that alternative practices provide non-redundant solutions to extant problems, yet also can be accommodated by conventional practices, institutional logics, and wider political philosophies. Within this strategy, frames take on a kind of “elasticity” as they are stretched to accommodate the interests and perspectives of various constituencies within both conventional and alternative camps. Under extreme conditions of elasticity, frames can lose their distinctiveness and be replaced by other, more distinctive frames. At its most fevered pitch, cultural articulation can be led by critical masses who take the roles of moral entrepreneurs (Becker 1963) to legislate jurisdictions for alternative practices at the local and national levels (Abbot 1988). Interstitial emergence can therefore evolve into a moral crusade (Gusfield 1963) to which individuals, organizations, and ultimately institutional logics must be converted.⁹

Alternative practice frames also aid in the identification of available resources because they create recognizable symbols and organizational templates behind which elites and others can throw their material support. In this way, resonant frames provide the link between groups and successful resource mobilization. Such resources, however, can exert powerful influences on frames, particularly if significant material support originates from those with vested interests in or who closely identify with conventional practices. Under these conditions, cultural articulation will favor less the moral crusade than the accommodative stance, thereby blunting the critical discourses in alternative practice frames.

If critical masses succeed in creating resonant frames and mobilizing resources, alternative practices will further be instantiated through institutional isomorphic processes such as imitation, governmental requirements, or explicit professional standards

⁹ Note that moral entrepreneurs are not necessarily social elites. Interstitial emergence can evolve into a moral crusade that attracts elites as it gains momentum, but less typically involves cohesive elite collective action at the outset of the movement (Kim and Bearman 1997). The point is that interstitial emergence is an ambiguous process in which it is often difficult to discern who is in control of the processes at any one time.

(DiMaggio and Powell 1983).¹⁰ Through these mechanisms, emergent alternative practice fields are structured and eventually can become a jurisdiction replete with normative, cognitive, and material boundaries vis-a-vis existing jurisdictions.

My conceptual model of interstitial emergence is summarized below:

1. An innovation moment of interstitial emergence begins with pragmatic innovation in overlapping resource networks across organizational fields to solve perceived institutional failures.
2. A mobilization moment is activated through the collective efforts of multiple, sometimes competing critical masses who resonantly frame alternative practices to secure legitimation and resources from key organizational players in existing organizational fields.
3. A structuration moment occurs to the degree that alternative practitioners are able to form a structured organizational field, legislatively claim a professional jurisdiction, and modify the institutionalized ideologies used to account for conventional practices and formal structures in relevant fields.

I turn now to a narrative illustration of this model using the case of U.S. ADR.

3 The Interstitial Emergence of U.S. ADR, 1970-2000

I begin with a brief discussion of the problem of minor disputes that beset U.S. courts in the 1960's. The discussion then shifts to an examination of the inno-

¹⁰ This discussion could leave the impression that the movement from alternative to conventional is a smooth process without conflict that typically results in institutional change. Many, if not most, alternatives fail to climb out of the interstices to firmer social terrains precisely because of conflict. Conflict can occur over the meanings and logics of new practices relative to the old ones. Conflict and competition can also exist among competing alternative frames, resulting in frame disputes (Benford 1993). Frame disputes can evolve into professional jurisdictional disputes (Abbott 1988) or culture wars if alternative practices feed into the wider cultural context (Hunter 1991). Other conditions also militate against alternatives becoming conventional, such as the vested power of particular groups in existing practices and the perceived immutability of particular institutions (e.g., Weber's "iron cage" of rationalization).

vative emergence of ADR and the critical masses that formed among professional and semi-professionals who processed minor disputes in the interstices between the legal field and other organizational fields. These critical masses in turn generated resonant frames that contained critical discourses aimed at the courts and provided solutions that claimed technical superiority as they articulated with existing institutionalized accounts and wider ideologies. The ability of these critical masses to attract resources and to professionalize ADR further facilitated its spread through the legal field and other, overlapping organizational fields.

3.1 Perceived Institutional Failure and the Problem of Minor Disputes

During the late 1950's and 1960's, critiques of U.S. courts frequently prophesied their "doom". Poor service, high costs, and trial delays, so the critiques went, would eventually bankrupt the law as a remedy system for private and public ills. Critics found one source of the law's failure in mismanagement and poorly designed procedures (Frank 1969). Another source resided in so-called "minor disputes" – commercial conflicts over small amounts of money, domestic disputes (including divorce and child custody), and neighborhood squabbles -- which placed intractable and complex demands on the courts. Yet a third source erupted during the 1970's and was dubbed the "litigation explosion." Here the problem focused on the excessive use of adjudication to solve all manner of problems from complex civil cases to minor disputes (Lieberman 1983). Some scholars question whether a gusher of minor disputes actually flooded the courts during this time period and whether the courts suffered from pervasive mismanagement (Galanter 1983). No one debates the existence of a widespread public discourse that framed one of America's chief social ills as the inability of the courts to meet the demands increasingly placed upon them by minor disputes. The organizational tensions between efficiently processing minor disputes, maintaining order in civil society, and delivering substantive justice to a wide constituency (including minorities, women, and poor people who had limited access to law) left many disputants without a sense of having had "their day in court" (McGillis and Mullen 1977). Whether in small claims

court (intended to handle financial disputes of small amounts of money), conciliatory or family courts (intended to sort out disputes between family members and divorcing couples), or other lower courts, questions arose about whether adjudication was capable of sorting out the relational issues implicated in daily conflict (Buckle and Thomas-Buckle 1982). The legal profession proved no better at servicing these cases. Mayhew and Reiss (1969: 318) noted that: “the legal profession provides relatively little professional representation and advice in relation to a broad panoply of problems surrounding...daily matters.”

3.2 The Innovation Moment

In the 1960's, lawyers, social workers, community organizations therapists, and judges working for the courts, social work agencies, mental health agencies, and community organizations (including churches), began to use a variety of so-called “informal” methods for handling minor disputes that circumvented “formal” adjudication. The nature of minor disputes meant that disputants often circulated through a variety of organizations searching for resolution, justice, or therapy to deal with their problems. As a result, personnel from organizations in different fields interacted with one another to process minor disputes through multiple referrals.

Figure 1 illustrates these referral relationships at the level of practice in Phoenix, Arizona during the early 1970s. This figure derives from interviews I conducted in 1995 and 2000 with well-placed personnel in the legal and social services fields.¹¹ The numbered circles consist of occupations and the lines between

them represent the perceptions of my informants of the informal referral flows between occupations. Single-headed arrows represent asymmetrical referral relationships between occupations; double-headed arrows indicate symmetrical referral relationships between occupations. In Figure 1, judges, social workers, and mental health workers received the most minor dispute referrals and social workers referred the most disputes to other occupations. Also illustrated in Figure 1 is the number of referral relationships that crossed the border between the legal and social services fields, thus suggesting a cross-fertilization of knowledge and sometimes frustration about minor dispute handling among incumbents in diverse occupations. A lower-court judge remembers his experiences sitting on the bench in the early 1970s handling minor disputes:

Adjudication couldn't handle these kinds of cases. They were complex with emotional and interpersonal issues. You would need a social worker, a clergyman, or psychologist to help sort it all out so I would end up referring a lot of people out of my court to see someone like that [i.e., a social worker, clergyman, or psychologist]. People would come in [to court] and tell me what a social worker or psychologist tried to do with them and why it didn't work. A lot of times I would just shake my head and do the best I could. I didn't know what to do these cases either. We had so many of these types of cases coming in. It was uncharted water for the courts.

Practitioners in the social services field also found themselves in “uncharted waters,” as one social worker noted:

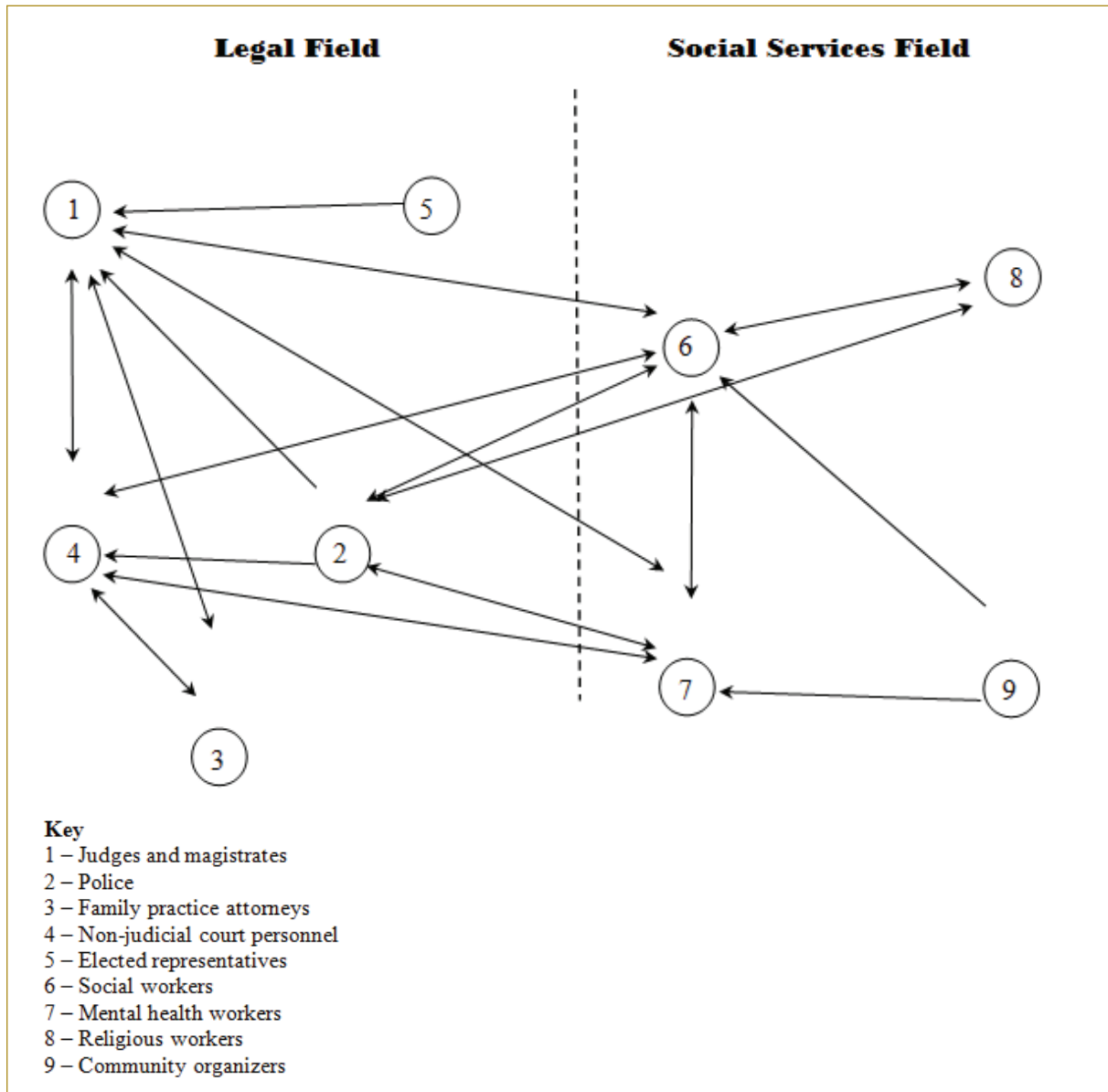
I used to get cases that I didn't know what to do with; uncharted waters, I guess. Maybe a judge should deal with. But they [the judges] didn't know what to do with 'em either, so they send 'em back to me. In the old days you'd go talk to the minister and they'd solve it, but they people didn't do what the minister told 'em so the minister, he don't know what to do either. I'd send people [disputants] to a lot of people – judges, police, psychologists, ministers – in those days trying to help 'em solve their disputes. And I would get people coming to me who had been to the judge or the minister. They would

¹¹ Figures 1 and 2 derive from in-depth interviews with highly knowledgeable informants in 1995 and 2000 who had least three decades experience in what they called the Phoenix fields of “law” and “social services”: four judges, two police officers, three attorneys, three social workers, five mediators, and three mental health workers (one of whom also worked in the clergy). Interviews lasted from 45 minutes to 1 ½ hours and consisted of the following questions: 1) Where did you typically refer unresolved minor dispute cases during the early 1970s? (in 2000?) 2) Who did you receive unresolved cases from during the early 1970s? (in 2000?) Which of the two fields, the legal or the social services field, would you identified with during the early 1970s? (in 2000?) Others in your occupation? Matrices of the perceived referral flows between occupations were then constructed and a sociogram was drawn. Referral linkages were established only if two or more informants in the same occupation reported the same link.

tell me what those people tried to do for them and why it didn't work. I would try to do is sit down with 'em and try to help 'em talk it out just like the minister used to do back where I come from in North

Carolina. We had all kinds of community empowerment stuff going on too, so you'd try to get the people take responsibility for their actions -- in some ways like some types of mediation today [2000].

Figure 1. Informal Minor Dispute Referral Network, Phoenix, Arizona, c. 1970



As the social worker's comments underscore, the techniques used to resolve minor disputes came from many sources. Some techniques traced back to informal methods used by clergy and town officials in communities through out the U.S.; some derived from the domestic relations courts; others approximated labor arbitration in the 1930's; others could be traced to informal methods used in tightly-knit ethnic enclaves (Auerbach 1983); and still others could be

traced to the growth of anti-authoritative strategies of political decision making and community mobilization of the sixties. Community activists and social workers used therapeutic techniques and strategies for preserving and strengthening the social bonds of community through open discussions of conflict (Alinsky 1971). Judges and other magistrates used mediation and negotiation in small-claims court settings and in conciliatory (divorce) courts to settle

cases quickly and manage the emotional side of such cases. Some lower-court judges regarded informal negotiation and mediation in civil cases as akin to pretrial criminal diversion programs that attempted to route defendants away from the courts to externalize processing costs.¹² Lawyers used informal negotiation in their offices far more than they went to court, although there was little formal education in such techniques and practitioners generally learned them on the fly through experience (Ray 1982a and 1982c). For those few people who called themselves mediators – a diverse aggregate of social workers, therapists, and educators – mediation was often ancillary to institutionalized practices of conflict resolution drawn from their professions (Tomasic 1982).

3.3 The Mobilization Moment

Two critical masses of supporters arose in the 1970's from the diverse network of individuals and organizations that had experimented in fragmented ways with alternatives to adjudication. Social workers, community activists, legal services lawyers, law professors, and anthropologists formed the first critical mass that framed ADR as “community mediation.” These individuals had worked and studied in the courts, social service agencies, Ford Foundation-funded community centers, and in Nonwestern settings that used informal dispute resolution. They criticized the courts for being unable to handle minor disputes in a satisfactory way and for limited access for less privileged disputants (i.e., poor people, ethnic and religious minorities, women, and the disabled). Judges, lawyers, and law professors formed a second critical mass that characterized ADR as a “multidoor courthouse.” This group criticized the inefficiency of the courts, also linking their critiques to the litigation explosion and the influx of minor disputes. They wished to save adjudication for the most serious cases, leaving ADR to deal with the majority of minor disputes.¹³

12 In this way, some of the informal methods used to handle minor disputes linked with other techniques of the “deinstitutionalization” of various forms of state social control that appeared during the 1970's (see generally, Scull 1977; Palumbo, Musheno, and Hallett 1994).

13 Silbey and Sarat (1989) argue that these three critiques – legal access, quality, and saving adjudication -- had three critical masses associated with them. My reading of the literature on ADR and in interviews with practitioners at the local and national level

Community mediation took early shape in 1968 when the Ford Foundation began funding community programs to mediate racial conflicts. The Foundation funded the National Center for Dispute Settlement in 1968 (which later became the Community Dispute Service Center) with organizational support from the American Arbitration Association, and in 1970 funded the Institute for Mediation and Conflict Resolution. Both of these programs trained community “interveners” to mediate intergroup conflict (Harrington 1985: 87-90). While the community interveners worked in the neighborhoods, the community mediation frame (also referred to as the “neighborhood justice model”) took shape in a series of articles by anthropologists and law professors. The central ideas in these articles focused on the possibility of transplanting non-Western community “moots” to urban U.S. settings as a means to handle minor disputes (Danzig 1974; Danzig and Lowy 1975; Felstiner 1975; Fisher 1975). Anthropologists had studied indigenous moots in which small groups of community members gathered to facilitate discussion among disputants, to provide therapy via group discussion between victims and offenders, and to reintegrate the principals back into the local community (Lowy 1973). Legal services lawyers interested in access to law had been interested in how poor disputants could solve their conflicts. The two groups formed something of an uneasy and unconventional alliance, meeting under the auspices of newly formed interdisciplinary academic organizations (e.g., the Law & Society Association and the Society for the Study of Social Problems) and in small groups in older organizations (e.g., the American Anthropological Association). Out of these interdisciplinary encounters, the community mediation model received its most widely circulated treatment in a 1974 *Stanford Law Review* article by Richard Danzig.¹⁴

suggests that groups producing and using the access and quality critiques typically overlapped both in membership and in solution frames (i.e., they all bought into variants of the community mediation frame). The greater difference exists between the community mediation and multidoor courthouse frames both in problem diagnosis and solutions. Therefore, I treat these two critiques as belonging to the same critical mass and frame.

14 As Danzig (1974, p. 49-52) wrote: “[A] moot might handle family disputes, some marital issues (e.g., paternity, support, separation), juvenile delinquency, landlord-tenant relations, small torts and breaches of contract involving only community members, and misdemeanors affecting only community members...Typically,

According to Danzig, the most appropriate raw materials of community mediation organizations were not the racial conflicts of the community service programs, but those intractable minor disputes that crowded the court dockets, and which were seldomly handled to anyone's satisfaction. Such disputes spanned the criminal and civil sides of the legal system, often blurring the boundaries between the two. The core dispute settlement process would be a "therapeutic" discussion among the principals, facilitated by a third party, and aimed at dealing with underlying issues prompting the conflict in order to arrive at a mutually agreeable solution. Mediation was therefore at the heart of Danzig's community moot. He argued that salaried "counselors" (but not "professionals") should coordinate the scheduling of cases in the community moots, with volunteers and paid staff mediating disputes. Despite the emphasis on nonprofessional staffs, nonadversarial dispute settlement, community control, and volunteer staffing, Danzig argued that his proposal should "complement" the existing legal system. Most of the cases handled by the community centers would be referred by existing legal and social agencies, although he assumed that a vast sea of disaffected disputants existed, which would generate a large voluntary case load as community moots' effectiveness became known. Ultimately, then, the goals of the community mediation model were threefold: unburden the courts (both criminal and civil) with so-called minor disputes, address the underlying causes of disputes (thus preventing future disputes), and empower disputants and the community (Harrington and Merry 1988; Morrill and McKee 1993).

In contrast to the community mediation frame, the multidoor courthouse emerged out of an alliance between high-powered elites: the American Bar Association

moots might function by the counselor asking the complainant to state his grievances and his requested remedies, by having the personal complainant respond, and then by allowing general discussion and questioning between all those present...The usefulness of nonprofessionals assembled through the forum of a moot is suggested by therapeutic practices which secure progress with personal and family problems by building a pattern of supportive conduct among friends and neighbors...The moot as recommended would be unique in prompting community discussion about situations in which community relations are on the verge of breaking down (*italics in the original*).

(ABA) and the U.S. Justice Department (Goldberg, Green and Sander, 1985). For the ABA, ADR appeared to be a means to judicial control and a way to clean up the "nightmare" of minor disputes in the courts. Various ABA planning committees provided the Justice Department's Law Enforcement Assistance Administration (LEAA) with early plans for developing linkages between the LEAA's crime control and civil justice programs that would address minor dispute processing (Harrington 1985: 74). These programs also blurred the boundaries between the criminal and civil sides of the legal system, although early programs leaned decidedly toward the criminal side. The LEAA funded some of the earliest court-based ADR programs, which typically involved streamlined adjudication (e.g., the Boston Urban Court) or prosecutorial, pre-trial diversion (e.g., the Columbus Night Prosecutor). In 1976, the ABA sponsored the "Popular Dissatisfaction with the Administration of Justice" Conference (referred to as the "Pound Conference"), bringing together judges, attorneys, and mediators to discuss the possibilities of ADR in the U.S. That same year Frank Sander, a Harvard professor of family law and clinical practice, wrote what was to become the most influential, early statement on the multidoor courthouse.¹⁵ The multidoor courthouse converged with the community mediation model in its condemnation of the "over-adjudicated" nature of the legal system and in the idea that not all disputes belonged in the courts.

But in other points, it sharply diverged from community mediation. Table 1 provides a summary of the points of contrast between the two models. The multidoor courthouse's goals were primarily bureaucratic: the efficient disposition of cases (Hedeon

15 Sander (1976, p. 131-133) summarized the essence of the multidoor courthouse: "What I am thus advocating is a flexible and diverse panoply of dispute resolution processes, with particular types of cases being assigned to different processes (or combinations of processes....[O]ne might envision by the year 2000 not simply a court house but a Dispute Resolution Center, where the grievant would first be channeled through a screening clerk who would then direct him to the process (or sequence of processes) most appropriate to his type of case. The room director in the lobby of such a Center might look as follows:" Screening Clerk, Room 1; Mediation, Room 2; Arbitration, Room 3; Fact Finding, Room 4; Malpractice Screening Panel, Room 5; Superior Court, Room 6; Ombudsman, Room 7.

2003). Although the community mediation model claimed it too could unburden the court of minor disputes, the ultimate gains from that model derived more from preventing future conflict than from the quick disposition of cases. The models also diverged in their legitimating ideologies. Whereas the community mediation model was grounded in the obligation to preserve social relationships as a basis for community, the multidoor courthouse was based in the idea that an expanded dispute processing repertoire would ultimately save the courts for cases at the heart of liberal political order, namely, disputes ultimately involving constitutional issues (Sander 1976: 133). Divergent legitimating ideologies also led to different uses of coercion in the two models. Danzig argued that moots could refer disputants back to the courts for adjudication (as an incentive to settle in the moot), but he implied that these measures should be held in reserve for recalcitrant cases. Community moots are primarily “private [and] noncoercive” (Danzig 1974: 53). The multidoor courthouse would have the power to mandate the “best” forum for disputes, presenting disputants with the paradox of mandating participation in dispute settlement processes, which is portrayed as consensual and voluntary, while also requiring settlement.

Table 1. Comparison of Community Mediation and Multidoor Courthouse Models

	<i>Community Mediation</i>	<i>Multidoor Courthouse</i>
Goals	Unburden the courts with minor disputes Address underlying causes of conflict Community empowerment	Fit dispute to proper form case disposal
Dispute Settlement	Non-adversarial	Non-adversarial and adversarial
Legitimizing Ideology	Harmony	Liberal-legal & harmony
Role of Coercion	None except in recalcitrant cases	Mandated dispute resolution Process choice and settlement
Clients	Exclusively community members	Non-exclusive

Organizational Control	Volunteers and paid support staff	Paid staff and volunteers
Primary Resource Strategies	Foundation grants & donations Federal government	Local government
Professionals	Excluded	Included

Perhaps the greatest differences in the two frames appear in the organizational forms to which each corresponded. Such differences can be fateful: Socio-political changes are frequently instantiated in rival organizational forms, and the triumph of a particular form signals the victory of an underlying frame (Clemens 1996). Professionals (judges, lawyers, case workers) would staff the multidoor courthouse financed by municipal and state budgets. By contrast, the community mediation centers would rely on private grants, federal funding, and some local governmental funds in return for handling court referrals. The multidoor courthouse thus articulated with the decentralized state federalism building in the late 1970's, which took full shape during the Reagan and Bush Administrations in the 1980's. Community mediation articulated with a fading “Great Society” vision of grass roots activism and federally funded social programs.

During the late 1970's, ADR appeared headed toward nationwide institutionalization and diffusion via comprehensive federal mandates and various sources of foundation funding (especially from the Hewlett Foundation). Although widespread evaluation was sparse, the critical masses pushing for community mediation and the multidoor courthouse claimed efficacy for their models, citing the scientific evaluations and technical performance of early demonstration projects. Indeed, early evaluations of ADR reported satisfaction rates among disputants approaching ninety percent in some programs, although definitive studies of the cost effectiveness and efficiency of ADR, as well as the durability of dispute resolutions reached through ADR, were relatively rare (Morrill and McKee 1993). Nevertheless, community mediation and multidoor court house supporters continued to proclaim how ADR would relieve the courts of minor disputes, uplift communities, and provide disputants with greater satisfaction and more sustainable resolutions than adjudication

(Salem 1985). These claims struck a chord with local and national judicial elites, among them Chief Justice Warren Burger, who strongly endorsed ADR, particularly the multidoor courthouse, as a way to move away from sole reliance on adversarial dispute resolution and more efficiently process disputes within state court systems (Burger 1984). The House and Senate passed the Dispute Resolution Act in 1980, which would have established start-up federal funding for multidoor courthouses (to be locally funded in the long-term) and sustained funding for community mediation centers through out the U.S. But the only part of the Act funded by the Reagan Administration was the National Dispute Resolution Center, an information-clearing house.

Without comprehensive sponsorship, ADR diffusion moved unevenly through the U.S. The multidoor courthouse received small boosts from the LEAA, which continued to fund limited, court-based ADR programs until its demise as a federal program in the early 1980's. The Ford Foundation, the United Way, Hewlett Foundation, and some national religious organizations also continued sporadic funding for community mediation centers and other ADR-related activities (Ray 1983). By 1983, seventeen states had passed various ADR bills to establish informational resource centers, fund court-based initiatives, and study the possibilities of community mediation centers (Harrington 1985). During this time, the ABA created a standing committee on minor dispute processing chaired by Larry Ray. Chief Justice Burger stepped up his calls for the Dispute Resolution Act to be funded. The dispute processing committee sponsored a series of smaller conferences similar to the Pound conference. The National Dispute Resolution Center and later the National Institute for Dispute Resolution (NIDR; also funded by the Ford Foundation) began to dispense ADR information on a national basis through regular newsletters and conferences.

Although the 1976 ABA Pound Conference brought into light the potential for a "cultural shift" in dispute settlement from liberal-legal to harmony ideology (Nader 1987), ADR still did not enjoy institutionalized sponsors who could diffuse it via government requirements, professionalization, or university-based education (DiMaggio and Powell 1983). The lawyers

and judges who embraced the multidoor courthouse as a solution to the crisis of court capacity carefully measured their support against their colleagues' suspicions that ADR could impinge upon their livelihoods or create a second-class system of justice (Ray, 1982a). Clinical law professors, such as Sander, continued to push for the multidoor courthouse, but encountered resistance to ADR education in law schools (Sander 1984). Mediators would seem to have been ripe for a professionalization project because they did not neatly fit into any of the established professions. The majority of mediators working in the late 1970's and early 1980's came from semi-established professions of education, social work, and counseling (Pipkin and Rifkin 1984). Their allegiances to their old professions waned, but there was not yet a new, organized jurisdiction of mediation to which new ties could be developed and that could push ADR as a coherent set of practices. Moreover, a well-defined setting did not exist within the legal field in which mediators could apply their wares legitimately. Judges wanted minor disputes out of their courtrooms, but the minor disputing arena was an ambiguous and lower-status category within the dispute settlement hierarchy. Organized groups from the lay-public did not clamor for ADR. Consumer advocacy groups, for example, believed that the Dispute Resolution Act "was trying to do too much with too few resources...[and that] a program that combines the barking dog with the broken toaster will ultimately be ineffective in increasing access to justice to either kind of dispute" (Harrington (1985: 79). As ADR was threatened by conservative, anti-social services sentiments, one of the doors of the multidoor courthouse – leading to divorce and child custody mediation – opened wide enough to provide a huge boost to the entire ADR effort.

Divorce represented a most difficult type of minor dispute: relationally complex, emotionally charged, and with high stakes for each party, but not, typically, for the court. Popular perception held that adversarial legal processes were inadequate to handle divorce cases. No-fault divorce statutes sought to "eliminate the adversarial nature of divorce and thereby reduce the hostility, acrimony, and trauma characteristic of fault-oriented divorce" (Weitzman, 1985: 15). No-fault divorce officially changed part of the rules of the game for marriage and family, enabling either spouse

to declare that irreconcilable differences made their marriage untenable. During the 1970's, lawyers and therapists working inside the ABA developed the Uniform Marriage and Divorce Code (UMDC), which articulated well with the multidoor courthouse frame. Supporters intended the UMDC to help find the proper forum for divorce and custody disputes within the courts by creating a series of rationales for mediation and other forms of nonadversarial dispute resolution. No-fault divorce spread like "prairie fire" across the U.S., articulating with several social trends, including the increasing economic independence of women, changing normative conceptions of the family, the women's moment, and the civil rights movement (Jacob 1988). By 1981 only South Dakota and Illinois lacked no-fault divorce law on the books and by 1985 thirty states had joint child custody statutes (Weitzman 1985: 438, 430-435).

The divorce/custody arena provided a legitimate pulpit for ADR practitioners to preach the benefits of ADR and reinforced the increasing dominance of the multidoor courthouse. Unlike the ambiguous arena of minor disputes, domestic relations courts increasingly defined ADR practitioners as "family mediators" and embedded them firmly in the courts. In those states with joint custody statutes, mediators played even more prominent roles in the divorce process because of the opportunities for on-going disputes among parents with joint custody arrangements (Milne and Folger 1988).

3.4 The Structuration Moment

If no-fault divorce spurred on the interstitial emergence of ADR, it also brought mediators directly into conflict with the legal profession over who would control the disputing process. Lawyers and judges, associated with the adversarial process, now faced professional jurisdictional competition from an emergent group with practices that corresponded with the nonadversarial intentions of no-fault divorce law. ADR practitioners thus rode the wave of the divorce revolution toward organized professionalization and the creation of a protofield for mediation with distinctive technical and normative boundaries. During the late 1970's and early 1980's, family mediators joined with mediators handling other types of minor disputes to begin professionalization activi-

ties along four key dimensions: (1) the development of a common body of knowledge, (2) the founding of professional organizations, (3) the codification of normative standards, and (4) the development of university-based training (Wilensky 1964; Larson 1977; DiMaggio 1991).¹⁶

O. J. Coogler, a family lawyer and marriage counselor, published *Structured Mediation in Divorce Settlement* in 1978, which became a central source of knowledge about divorce mediation. Academic and practitioner journals also appeared and carried the "good word" about divorce mediation specifically, and mediation and ADR, more generally (e.g., *Family Advocate*, *Mediation Quarterly*, *Journal of Conflict Resolution*, *Negotiation Journal*). These venues also touted other forms of ADR as well, such as arbitration, judicial settlement, and the mini-court. Family mediators also began founding organizational vehicles to push their collective interests. They formed committees and interest groups for themselves in established organizations, such as the ABA, and the Association of Family and Conciliation Courts.¹⁷ As they became more organizationally invested, family mediators codified a body of normative standards about mediation: the ABA's "Standards of Practice for Lawyer Mediators in Family Disputes" and the Association of Family and Conciliation Courts' "Model Standards of Practice for Family and Divorce Mediation." These standards in turn fed into more general mediation standards promulgated by NIDR and the Society of Professionals in Dispute Resolution (SPDR) for a wide range of disputing contexts.

These developments enabled NIDR and SPDR to take the lead in uniform training curricula for family mediators and mediators working in other areas of the

¹⁶ Here again, I draw and diverge from Silbey and Sarat (1989). They view the emergence of U.S. ADR as market phenomena driven by competition over legal services. My argument is that such competition did not occur until after the innovative moment of interstitial emergence occurred, critical masses and frames were developed, and ADR professionalization projects had begun. Thus, we agree on the social, political, and economic processes that defined the diffusion of ADR, but not on their timing.

¹⁷ In SPDR (founded by therapists, attorneys, and social workers), mediators played increasingly definitive roles in governance and vision for the society. The first national professional mediator organizations appeared during this time, including the Academy of Family Mediators (1981) and the Family Mediation Association (1982).

law and the community. In turn, these curricula laid the groundwork for the first attempts to produce university trained ADR experts. George Mason University began the Center for Conflict Analysis and Resolution in 1980 and in 1988 admitted its first class of doctoral students in conflict analysis and resolution. By the 1990's several degree-granting programs existed in colleges and universities across the U.S. (Avruch 1991). Some law schools, such as Harvard in the 1980s, had established classes in mediation as part of their clinical programs despite early resistance from some wings of the faculty. In the 1990s, multiple elite law schools (e.g., Northwestern, Berkeley, Yale) offered a full complement of mediation, arbitration, and negotiation classes as part of the lawyer's dispute resolution "toolkit".

Following on the heels of these professionalization efforts by family mediators, ADR became increasingly organized on several key dimensions that fostered its diffusion (DiMaggio and Powell 1983). One, NIDR, SPDR, and other national ADR professional organizations increased the flow of information between ADR practitioners, legal officials and other interested parties through news letters, ADR case studies, and instructional videos. Two, involvement in conference presentations and presentations to state bar committees, as well as small demonstration grants made by NIDR increased the density of interorganizational contacts between local courts and ADR professional organizations and programs. Finally, these activities reinforced an emergent collective definition of ADR (which was and continues to be split between mediation and other forms of ADR mentioned above) and its increasingly taken-for-granted place in the U.S. legal field (Scimecca 1991).

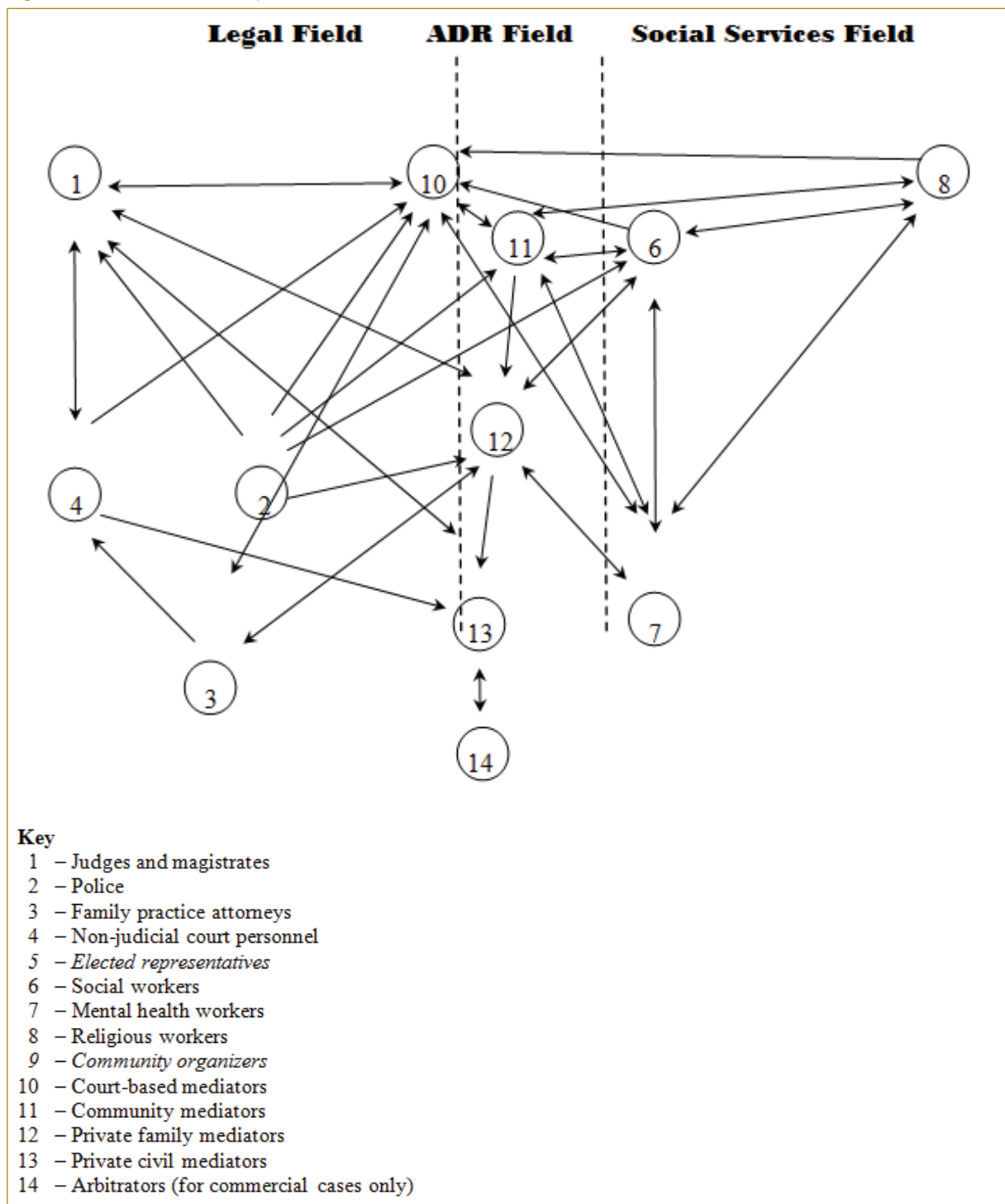
As mediators become more legitimized and organized vis-a-vis the courts, judges increased their *de facto* practice of ADR in the lower courts, particularly small-claims cases (McEwen and Maimen 1984). When they engaged in ADR, judges most commonly engaged in "judicial settlement" in which the judge, rather than simply presiding over litigation, became actively involved in fashioning an agreement between disputants. In 1983, amendments to Rule 16 of

the Federal Rules of Civil Procedure gave federal judges the explicit authority to "facilitate settlements" (Goldschmitt 1994: 17-18). Within eighteen months of the amendment's passage, 16 states passed statutes that increased the authority of judges to mandate ADR across several types of cases.

During the late 1980's and 1990's, the implementation of ADR at the state-level has been spearheaded by various 'advisory boards' attached to state supreme courts. On these boards sit a range of interested players, among them judges, professional mediators, lawyers, social workers, therapists, and lay persons. Advisory boards typically pursue multiple goals, including awarding county courts state funds for ADR pilot programs, expanding existing court-based ADR programs, educating the public on the benefits of ADR, setting standards for the delivery of mediation and other ADR practices, and in some instances providing a first cut at regulating court-based ADR. In Arizona, for example, the ADR advisory board wrote a "uniform rule" for ADR that would establish uniform procedures for ADR intervention into legal disputes fees for court-based ADR. At this writing, fourteen states are also implementing professional certification in mediation through state-level ADR professional organizations and bar associations.

All of these processes provide sites for jurisdictional conflicts over ADR. The various interests on advisory boards (typically commissioned by state-level supreme court justices and operated by state court administrative staff) in some ways replicate the specialties and professions that first experimented with ADR in the 1970's. As result, advisory boards are as much about political contestation over the fate and direction of ADR they are about creating a professional jurisdiction and further widening the legitimate niche for ADR in the legal field. State certification efforts, in particular, appear to be headed to pitched jurisdictional battles between mediators who increasing define ADR as mediation and lawyers who view mediation and arbitration as additional, legitimate strategies in their out-of-court settlement repertoires.

Figure 2. Informal Minor Dispute Referral Network, Phoenix, Arizona, c. 2000



Although many state-level and lower-court judges openly supported and participated in ADR programs, judges opposed to ADR worry that their direct involvement in settlement processes “tarnish[es] their position and that they were appointed (or elected) to adjudicate, not arbitrate or mediate,” that judicial settlement “was overly time consuming,” or even “il-

legal” (Galanter 1985). Nonetheless, ADR techniques have become a central feature of courts at all levels, particularly drawing from the multidoor courthouse imagery funding, professionalization, and court-linkage components. In a mid-1990s national survey of “mediation center” program managers, for example, 57% of respondents reported local public moneys

as the “primary” source of funding for their center (McKinney, Kimsey, Fuller 1996: 158), nearly 50% reported employing professional staff members (1996: 166), and nearly all respondents reported extensive formal linkages with or being located in courts (1996: 159). Moreover, mediation and other ADR techniques are an increasingly routine practice in law firms and a pervasive form of dispute settlement organizations (Sutton, Dobbin, Meyer, and Scott 1994; Edelman and Suchman 1999).

Figure 2 dramatically illustrates the changes that have occurred at the level of practice (in Phoenix) between the innovation and structuration moments. In contrast to Figure 1, a number of different kinds of ADR practitioners now straddle and operate between the legal and social services fields. Among the most active ADR practitioners are court-based mediators who have referral relationships with eight other occupations in all three fields. Notice, as well, that elected representatives and community organizers dropped out of the perceived referral network – at least from the perspective of the informants who generated Figure 1.¹⁸

In sum, the professionalization of mediation and the ubiquitous appearance of ADR statutes and court-based programs in the U.S. capped off three decades of interstitial emergence during which ADR was transformed from a set of little-noticed techniques used in the shadows of the legal and other fields to an increasingly conventional set of practices used both by practitioners within and between established fields. Although liberal-legal ideology still provides the institutional underpinnings and adjudication the processual heart of the courts, nonadversarial ADR challenges conventional ideas about adversarial dispute settlement, rights, and due process. Moreover, ADR

¹⁸One reason for the exit of community organizers lies in the difference in funding and political opportunities for community organizing. Simply put, community organizing, especially in a politically conservative states like Arizona, has become largely extinct. More puzzling is why elected officials exited the 2000 perceptual referral network for minor disputes, particularly in light of Nader’s (1980) observations about how elected officials routinely handle various sorts of minor disputes. One informant offered this folk theory: “In the last thirty years, Phoenix has gone from medium sized city to a huge metro area. Elected officials pulled back from dealing with [minor disputes] to the point where the average citizen feels that they’re [elected representatives] too remote to help.”

has reconfigured the division of dispute resolution labor to include professional mediators, and it eventually may form a competing field to adjudication.

Evidence of this last claim is also found in the emergent competition between the multidoor model and an emergent “private provider” model associated with the market of ADR professionals (Rogers and McEwen 1998). In the private-provider model, courts are required to maintain rosters of ADR practitioners. If disputants choose to participate in an ADR process, they can then choose a service provider from the roster and are responsible for paying the practitioner’s fees. The private-provider model thus moves away from the in-house staffing of the multidoor courthouse to a hybrid logic: ADR personnel drawn from the market and cases drawn from the court. This private-provider model, should it be widely adopted, will further facilitate the creation of an ADR field.

4 Summary and Implications

In this article I have provided a conceptual model for analyzing institutional change that is organized around three moments of interstitial emergence: innovation, mobilization, and structuration. In doing so, I incorporate some of the insights of the “old” institutionalism -- namely, the importance of informal interpersonal relations and networks for institutional innovation and change – into the new institutionalism. From this perspective, institutionalization is a core process that defines and constructs contemporary social life. But it is not a process that is wholly top-down, emanating from elite government policies. In the interstices created by overlapping resource networks across organizational fields, rules, identities, and conventional practices are loosened from their taken-for-granted moorings and alternative practices can emerge, particularly in the face of perceived institutional failure. In these contexts, interstitial emergence occurs via a variety of mechanisms: (1) the capacity of critical masses to create resonant frames, (2) the mobilization of resources, and (3) the carving out of a professional jurisdiction for alternative practices. The establishment of jurisdictions for formerly alternative practices also will signal shifts in legitimating ideologies and accounts for existing and new types of formal organizations.

The liberal-legal ideological underpinnings of adjudication portrays disputes as affairs of rights and justice, and disputants as rights bearers and users. The harmony ideological underpinnings of ADR, by contrast, focus on disputes as tears in the fabric of the social order and disputants as bundles of “needs.” Dispute processing becomes less a forum for the expression and protection of rights than one for the satisfaction of needs through efficient, managed settlement. These distinctions mean that the interstitial emergence of ADR is redefining the means and meaning of dispute processing as it reconstitutes the meanings of disputes and disputants (Silbey and Sarat 1989). At the same time, mediators as yet have been unable to push their collective, professional interests to institutional hegemony. In jurisdictional conflicts over ADR, judges and lawyers may beat emergent ADR professionals to the punch by expanding their services to include ADR within the mantle of legitimacy afforded them by legal profession. Thus, changes in the U.S. legal field may not be as straightforward as the simple images – from adversarial to nonadversarial and from liberal-legal to managerial harmony ideology – suggested at the outset of this article.

My analysis also raises general questions about whether other cases in which alternative practices have emerged and competed in conventional fields follow the same path as ADR. To extend the argument, briefly consider the case of “alternative” medicine: acupuncture, homeopathy, naturopathy, manual therapies, mental therapies, and faith healing.¹⁹

19 Here I provide brief definitions for the alternative medicinal practices noted in text (for a full review of these practices, see Aakster 1986; Wardwell 1994). Acupuncture refers to physical healing by rebalancing bio-energy imbalances in the body through the insertion of silver needles at strategic points between internal organs. Homeopathy attempts to restore the self-healing capability of the individual by introducing small doses of disease symptoms into an individual. This technique also extends symptomology from the body to mental functioning and environmental conditions. Naturopathy also focuses on the ability of individuals to heal themselves through regulation of interaction (eating, breathing, relaxing, meditating, etc.) with natural, physical, social, spiritual, and psychological environments. Herbalism focuses on physical and mental healing through the ingestion of various herbs, spices, and other plants and minerals. Manual therapies include osteopathy and chiropractic that concentrate on relieving deformations or jammed nerves/artries in and around the spinal column through physical manipulation. Mental therapies include bio-energetics, Gestalt therapy, bio-release, rebirthing, unitive

Although these practices overlap to some degree and have varied applications, they all share a “holistic” approach to healing by linking physical ailments with psychological, environmental, and spiritual factors. Alternative medicine thus departs from the biological particularism of conventional medicine. Just as ADR emerged from the interstices between legal, therapeutic, and community organizational fields, alternative medicine emerged from the interstices between orthodox medicine, religious organizations, and a highly differentiated, somewhat unbounded aggregate of folk and community practices (Frohock 1994).

Like ADR, some components of alternative medicine have existed for thousands of years and have enjoyed a recent catapult into mainstream, orthodox medical practice. Biofeedback and those elements of homeopathy, naturopathy, and herbalism focused on environment and diet have made great inroads into mainstream medicine (Wardwell 1994). Although these alternatives are applied to every malady an individual might experience, they emerged into the light of day over the past three decades as an answer to orthodox medicine’s inability to cure chronic illnesses, most notably cancer (Weil 1983). The connection of cancer and other chronic illnesses to a burgeoning array of environmental, genetic, psychological, and spiritual sources created the opportunity for practitioners operating at the interstices between numerous fields to recombine a variety of orthodox and alternative techniques. As in ADR, the (re)combination of alternative and conventional practices developed first as a pragmatic innovation among innumerable practitioners faced with similar treatment challenges. Such practices have spread more rapidly through the efforts of critical masses.

One critical mass formed around holistic disease prevention framed as “the healthy lifestyles approach” during the 1970’s. Orthodox practitioners preaching such approaches in the 1950’s and 1960’s were often suspect of prescribing “unproven” or even “unscien-

psychology, and autogenetic training. All of these practices eschew the schism between mind and body assumed by orthodox medicine, approaching healing from the perspective that mental functions play key roles in healing the body and vice-versa. Faith healing includes charismatic religious cures in which healing occurs through spiritual practices.

tific” medical treatments for their patients. Patients who consistently followed this advice were labeled as “health nuts” because they ate “health foods” (e.g., diets high in fiber and low in saturated fats), exercised regularly, and attempted to relieve chronic stress. In the 1970’s and 1980’s, healthy lifestyles became a part of the conventional health wisdom as a form of self-administered disease prevention. The claims thus articulated with more general cultural shifts toward individual responsibility for health (Cooter 1988) and individualistic market logic solutions for the enduring crisis of rising medical costs (Scott, Ruef, Mendel, and Caronna 2000).

Yet another critical mass can be found among practitioners who treat chronic illness through a variety of techniques that combine orthodox and alternative regimes emphasizing diet and various forms of meditation. Here again, orthodox practitioners have begun to innovate, combining elements from naturopathy, herbalism, mental therapies, faith healing, and orthodox techniques to treat chronic illness with complex etiologies (Gross, Hitzler, and Honer 1985).

Also similar to ADR, the increasing conventionality of alternative practices has been facilitated by claims to legitimacy based on technical performance. A plethora of scientific studies purport to demonstrate the benefits of healthy lifestyles and various kinds of diets for the prevention, and in some instances, the treatment of chronic illness. Controversy and contradictory findings simultaneously characterize this literature, creating enormous ambiguity about the efficacy of such treatments (Wardwell 1994). Perhaps a more powerful facilitator of the success of alternative medicines is professionalization. Alternative practitioners have developed several professional organizations, evaluative standards in various specialties, professional journals, training centers and medical colleges, and alternative medicine fairs and conferences that increase the density of networks of alternative practitioners and information sharing (Cooter 1988).

Despite the similarities between the emergence of ADR and alternative medicine, there are key differences between the two cases. Unlike the ABA, the American Medical Association (AMA) has engaged in several legal and political jurisdictional disputes with alter-

native fields of medicine, most notably chiropractics and homeopaths, both of which professionalized early. Homeopaths had the status as something of a pseudo-profession during much of the nineteenth century. Chiropractors professionalized early (relative to many U.S. professions) in the late nineteenth century and developed their own training centers just as orthodox medicine was consolidating its professional hold on medical practice (Wardwell 1994; see also Starr 1982). As such, homeopaths and chiropractors offered readily identifiable targets among alternative medicine practices and continued to do so until homeopathic medicine has nearly ceased to exist in its nineteenth century form. Chiropractors, on the other hand, blended their practices with orthodox practices in neurology and orthopedics until they gained significant strength in the 1970’s to challenge legally their ban by the AMA from hospitals and prescribing drugs. By contrast, ADR emerged at time when the legal field faced problems for which it had few answers, but could be posed as a complementary solution to those problems. Most conventional practitioners either continued to ignore ADR or experimented with it as a nonthreatening practice. Only later, as ADR enjoyed an identifiable niche in the legal field, did mediators fight jurisdictional disputes with judges and lawyers for control of dispute resolution. By this time, ADR had taken hold in the legal and related fields to resist efforts to prohibit its practice.

Another difference between the two cases can be found in the role of the general public in voicing complaints about orthodox practice. As noted earlier in this article, ADR has not enjoyed the status of a “popular” movement with wide-ranging publics clamoring for its existence. It is a practitioner led and focused movement, which in some cases has encountered resistance by the public (namely, consumer advocate and some environmental groups). Alternative medicine, by contrast, has enjoyed support by various patient advocacy and other formally organized support groups for patients with chronic illnesses. This divergence has translated into different relationships between elites and other institutionalized sources of support. Whereas ADR has pervasive presence in the legal system, has alternately wooed support from highly visible and influential elites (e.g., Supreme Court Justices), and shows signs of creat-

ing an overlapping field in competition with the legal and social services fields, alternative medicine continues to navigate rough waters, in some contexts labeled as means of last resort for “distressed” patients (Burstein et al 1999). Thus, the two cases share some similarities in their processes of interstitial innovation, the emergence of critical masses and resonant frames, but illustrate very different experiences with regards to nonprofessional and elite support, the consequences of professionalization, and jurisdictional conflict.

Viewed more abstractly, this article suggests some amendments to extent studies of institutional change. First, the picture of institutional change portrayed in this article is not one of simple power or co-cooptation. Previous analyses of legal change involving ADR tend to focus on the contradictions of governmental authority in “late” capitalism, particularly the managerial interests of state elites (especially judges; e.g., Abel 1982; Harrington 1985). Social power has also been used as a key explanatory variable in other institutional accounts of organizational change, for example, in corporations (Fligstein 1990) and higher education (Brint and Karabel 1991). To be sure, elite authority and material resources wielded by judges and other professional elites (e.g., lawyers and law professors) played crucial roles in selecting *which* ADR model – the multidoor courthouse or the community mediation model – eventually succeeded in local arenas and at the national level. But ADR’s foothold in the legal field is far from a simple “power wins out” story. ADR exists in a plurality of competing juridical and nonjuridical forms of dispute processing (Silbey and Sarat 1989, p. 497). The diffusion of ADR and the on-going social (re)construction of the legal and adjacent fields emerged (and continues to unfold) from the interplay and sometimes unintended consequences of multiple levels and sources of social power. Elites often knew little about ADR until they were “educated,” so to speak, by critical masses pushing one or another of the ADR frames. Although elites used ADR for their own purposes, their conversion to it has not left them or dispute settlement processes unaffected by ADR. As Clemens (1997, p. 13) argues, “...[political processes] with multiple challengers, diverse tactics, and poorly understood links between action and outcomes,” create difficulties for answering the question of who ultimately

coopts whom. Indeed, a case could be made that it is ADR practitioners who are powerfully reshaping and re-imagining dispute resolution practices in the legal system, especially in business and professional contexts (Hensler 2003). But the present analysis underscores the idea of mutual influence as groups with various sources and degrees of symbolic and material power each use the other for their own interests, in the process transforming their own interests and muddying the rules of the game.

Second, the analysis raises methodological issues about the theoretical underpinnings of the levels of analysis used in institutional analysis. DiMaggio (1991:286) noted long ago that studies of organizational and institutional change concentrate on narrowly delimited local or geographical settings, neglecting the wider environments of which they are a part. His analysis of the development of the U.S. museum system, for example, focuses on the construction and control of a national organizational field, which, in turn, influenced the development of local museums. Although the categories “local,” “national,” and “global” make intuitive sense, it is unclear how they map on to theoretically meaningful categories drawn from neoinstitutional theory. Changes in the meaning and guarantee of national sovereignty on the world stage further blurs the distinctions and causal relationships between traditional constructs, such as “domestic” and “international” (Meyer, Boli, and Thomas 1987; Dezalay and Garth 1996; Soysal 1994). The present study illustrates the use of levels of analyses drawn from neoinstitutional theory: institutional context, organizational field, and practice. These levels could be further elaborated to include organizational subfields and levels of practice in workplaces (e.g., Hoffman 2001; Lounsbury 2001). The point is to link theoretical categories in meaningful ways to examine the interplay between levels, rather than reify levels of analysis into traditional dichotomies or assume that institutional change operates in unilinear, bottom-up or top-down directions.

Finally, the analysis of ADR and its brief comparison to the emergence of alternative medicine suggests that the timing and breadth of professionalization play critical roles for whether alternative practices (and practitioners) will challenge an institutional-

ized field, be repressed, or merely forgotten. Neoinstitutionalists tend to regard professionalization as a unilateral process that facilitates institutionalization. However, the early professionalization of U.S. chiropractics led to an opposite effect: Long-term legal repression by orthodox medicine. By contrast, U.S. ADR professionalized after it had diffused throughout the U.S. legal field, thus making it harder to repress. This implies that alternative practitioners that professionalize before they are widely known and have diffused their critiques of conventional practices are likely to face intense and potentially more effective repression. Under these conditions, social control efforts can be directed toward a small, relatively concentrated movement, lengthening its time (and perhaps permanently keeping it) in the interstices of established organizational fields. By contrast, diffusion coupled with structuration (e.g., professionalization and governance mechanisms metaphorically create a many-headed hydra difficult to kill and not easily forgotten.

Future studies of institutional change need to address the interstitial emergence of alternative practices, as well as methods and imageries for handling multiple levels of analysis, multiple causal relations, and the timing of alternative professionalization relative to conventional fields. Insights drawn from agentic orientations in organizational and social movement theory can be particularly useful in this regard. Attention to these issues and constellations of ideas will yield an initially messier picture of institutional change than currently exists in neoinstitutional and legal analysis, but it will bring us closer to understanding the complexities and possible trajectories of such changes.



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