

ASSOCIATION FOR CONFLICT RESOLUTION  
ANNUAL CONFERENCE 2003

*THE WORLD OF CONFLICT RESOLUTION:  
A MOSAIC OF POSSIBILITIES*

*SESSION ON JUSTICE IN MEDIATION*

*[On October 15 – 18, 2003, the Association for Conflict Resolution (“ACR”) held its Annual Conference in Orlando, Florida. The Conference was entitled The World of Conflict Resolution: A Mosaic of Possibilities. This article tracks Session No. 4.08, entitled Justice in Mediation. The Cardozo Journal of Conflict Resolution (“the Journal”) would like to thank ACR for its permission to reprint an edited transcript of this session. In addition, the Journal would like to extend its deepest appreciation to Sangita Sigdya, ACR’s Chief Operating Officer, for her assistance during this project.]*

*Professor Love:*

Good morning! We are here today to explore the intersection of justice and mediation. I am Lela Love<sup>1</sup> and would like to introduce you to our wonderful panel. Nearest to me is Jim Alfini,<sup>2</sup> the president and dean of South Texas College of Law. Next to Jim is Ellen Waldman,<sup>3</sup> professor at Thomas Jefferson School of Law. Jon Hyman,<sup>4</sup> professor at Rutgers Law School, is next to Ellen. Finally, Josh Stulberg,<sup>5</sup> professor at the Moritz College of Law at the Ohio State University, is seated on your far left. This remarkable group of law professors have written about justice in mediation, have trained mediators, and, perhaps most important, are practi-

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<sup>2</sup> James J. Alfini is Dean and President of South Texas College of Law. During his tenure at Florida State University School of Law he served as Director of Education and Research of the Florida Dispute Resolution Center.

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188 *CARDOZO J. OF CONFLICT RESOLUTION* [Vol. 5:187]

tioners who appreciate the challenges of practice, as well as those of developing coherent theory.

I have long enjoyed and I expect those of you who serve as mediators have enjoyed the belief that justice and mediation reside in the same house. Mediation has cornerstones that support that belief, both in terms of procedure and outcome.

On the procedural side, in an ideal mediation, disputing parties are given a voice, an opportunity to tell their story and be heard, both by the neutral and by the other side. Mediators are evenhanded and impartial neutrals. They treat each party with dignity, and respect in their attentive listening, and with their actions promote understanding and responses to concerns raised. These are claims to procedural justice.

On the substantive side, the outcomes in mediation are those outcomes chosen by the parties, who most intimately understand the situation and who presumptively care about fairness. Such outcomes can repair past wrongs or make injured parties whole—reparative justice.<sup>6</sup> Such outcomes can distribute resources in a way that reflects party standards of equity and need—distributive justice.<sup>7</sup> The woman who was wronged more, receives more, for example. The poorer man gets more money because the wealthier party can afford to pay. In addition, mediation can promote individual and community healing, restore harmony and stabilization after conflict, revive relationships, and enable parties to act with generosity and to forgive each other. These are claims to justice.

Critics of mediation, on the other hand, point to a house built not on cornerstones of justice but on expediency, inequities and secrecy. Professor Owen Fiss<sup>8</sup> eloquently made such a critique.<sup>9</sup> Fiss complained that mediation sacrifices a so-called “just” result, a result in keeping with law and social norms, for mere expediency and convenience.<sup>10</sup> He argued that parties settle to rid themselves of disputes, not because an agreed-on compromise is “just.”<sup>11</sup> Fiss also pointed to inherent power imbalances, differences in bargaining skills, which might lead to settlements that society should not

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<sup>6</sup> See Jonathan M. Hyman & Lela P. Love, *If Portia Were a Mediator: An Inquiry Into Justice in Mediation*, 9 *CLINICAL L. REV.* 157, 166-67 (2002).

<sup>7</sup> See *id.* at 168-71.

<sup>8</sup> Owen M. Fiss is a professor at Yale University, involved in the Alexander M. Bickel Public Law Program.

<sup>9</sup> See Owen M. Fiss, *Against Settlement*, 93 *YALE L.J.* 1073, 1085-86 (1984).

<sup>10</sup> *Id.*

<sup>11</sup> See *id.*

2004]

ACR ANNUAL CONFERENCE 2003

189

endorse.<sup>12</sup> The private nature of mediation, that it is conducted with assurances of confidentiality behind closed doors, without public scrutiny or the oversight of courts, creates a potential for injustice.<sup>13</sup>

Another critique of mediation is that mediators are schooled in tricks to manipulate parties into agreements.<sup>14</sup> For example, many sessions here at ACR will provide new ideas about ways to move parties towards “yes,” towards settlements. It is hard to sync up mediator manipulation, informed only by a desire to get an agreement, with justice. Other critics say that mediation is “Western-centric,” favoring ethnic groups who are more comfortable with talking and problem-solving.<sup>15</sup>

In trying to make sense of these waves of enthusiasm and criticism, a big problem is the lack of a clear definition of mediation. Mediation, as the term is used, spans activities that include “trashing” and “bashing,”<sup>16</sup> as Dean Alfini describes, as well as activities aimed at transforming parties through empowerment and recognition.<sup>17</sup> That is a broad range of activities! It may be impossible to have a coherent theory of justice without first defining mediation itself. Our panelists may be challenged to deal with this dilemma as we proceed.

Cicero once said: “*Summum ius summa iniuria*. [The strictest following of the law can lead to the greatest injustice.]”<sup>18</sup>

Let us turn to our panelists.

Here is our format. Based on the published or expressed view of each panel member, I will ask each member a question and they will each have ten minutes to respond. Another panel member will then comment on what was said. In this way, we will then move through all four panel members. If you have a comment or question, please make a note because at the end of these four commen-

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<sup>12</sup> See *id.* at 1076-78.

<sup>13</sup> See *id.*

<sup>14</sup> James R. Coben, *Mediation's Dirty Little Secret: Straight Talk About Mediator Manipulation and Deception*, Volume 2, No. 4, JOURNAL OF ALTERNATIVE DISPUTE RESOLUTION IN EMPLOYMENT 4 (Winter 2000).

<sup>15</sup> See, e.g., Trina Grillo, *The Mediation Alternative: Process Dangers for Women*, 100 YALE L.J. 1545, 1575 (1991).

<sup>16</sup> See James J. Alfini, Symposium: *Trashing, Bashing, and Hashing it Out: Is This the End of “Good Mediation”?*, 19 FLA. ST. U. L. REV. 47 (1991).

<sup>17</sup> See ROBERT A. BARUCH BUSH & JOSEPH P. FOLGER, *THE PROMISE OF MEDIATION: RESPONDING TO CONFLICT THROUGH EMPOWERMENT AND RECOGNITION* (1994).

<sup>18</sup> MARCUS TULLIUS CICERO, *DE OFFICIIS (ABOUT DUTIES)* I. 10, 33.

190 *CARDOZO J. OF CONFLICT RESOLUTION* [Vol. 5:187]

taries, we are going to get ideas, questions, and comments from the audience, as time allows.

The first question goes to Dean Alfini. Jim, you have talked about mediators “trashing” and “bashing” parties. That sounds like the new Governor of California.<sup>19</sup> Are trashing and bashing compatible with “justice”? If there is no justice rationale for activities like “trashing” and “bashing,” should we house those activities under the roof of a courthouse?

*Dean Alfini:*

Good question. Lela’s references are to an article that I wrote back in 1991 that appeared in the Florida State University Law Review entitled *Trashing, Bashing and Hashing It Out: Is The End of “Good Mediation”?*<sup>20</sup> The inspiration for this article came from a workshop that we conducted in 1988 in Tallahassee at the dawn of the court-sponsored mediation movement in Florida. During the workshop, Albie Davis<sup>21</sup> commented, “This is the end of good mediation”<sup>22</sup> when referring to lawyers being brought into the mediation process as both representatives of the parties in mediations and as the mediators themselves. So again, at the dawn of the court-sponsored movement, like Don Quixote,<sup>23</sup> I set off on this quest to find out if this was the end of good mediation by looking first for the mediation setting where lawyers are most prevalent in Florida. That happened to be, of course, in the circuit court programs. Circuit court mediation in Florida handles high-stakes civil cases for the most part, cases where lawyers are almost always present, where lawyers play a big part in the mediation process and where lawyer-mediators under the Florida rules are almost always used in those cases. So what I did was interview, with the help of Sharon Press<sup>24</sup> and others, mediation participants to inquire whether court-annexed mediation marked the end of “good” mediation. I am going to change it a bit, and I think Albie would be willing to allow me to do this. Is this the end of “just” mediation?

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<sup>19</sup> See John M. Broder, *Davis is Out, Schwarzenegger is In by Big Margins in California Recall*, N.Y. TIMES, Oct. 8, 2003, at A1.

<sup>20</sup> See Alfini, *supra* note 16, at 47.

<sup>21</sup> At the time of Dean Alfini’s article, Ms. Davis was the Director of the Mediation Administration Office of the District Court of Massachusetts.

<sup>22</sup> Albie Davis, Remarks at the Workshop on Mediation in the Judicial Environment (Feb. 25, 1988).

<sup>23</sup> See MIGUEL DE CERVANTES SAAVEDRA, *DON QUIXOTE* (P.F. COLLIER & SON CO. 1914).

<sup>24</sup> Ms. Press is the Director of the Florida Dispute Resolution Center.

2004]

ACR ANNUAL CONFERENCE 2003

191

What I think this means is that mediation is no longer just, or perhaps unjust. Instead, does it fail to adhere to the core values of mediation or does it fail, as Lela suggests, to give the parties a voice in mediation, to yield an impartial mediator, or to permit parties' self-determination during the course of the mediation? Here, I owe a debt of gratitude to people on this panel and people like Nancy Welsh,<sup>25</sup> who have looked long and hard recently at whether the court-sponsored programs are compromising certain core values in mediation. Nancy has analyzed current court practices in court-sponsored programs in a procedural justice context.<sup>26</sup>

One of the practices Nancy found most problematic in the present court-sponsored mediation context was the tendency towards the abandonment of the joint session. That is, the tendency towards, early in the mediation process, putting the parties in separate rooms and keeping them there sometimes for the entire mediation.<sup>27</sup> Going back to the Florida study and the "trashing" style of mediation, let me just read to you a brief excerpt from the article that describes the style:

The mediators who employ a trashing methodology spend much of the time 'tearing apart' the cases of the parties. Indeed, one of these mediators suggested the 'trasher' characterization: 'I trash their cases. By tearing apart and then building their cases back up, I try to get them to the point where they will put realistic settlement figures on the table.' To facilitate uninhibited trashing of the parties' cases, the overall strategy employed by these mediators discourages direct party communication. Following the mediator's orientation and short (five to ten minutes) opening statements by each party's attorney, the mediator puts the parties in different rooms. The mediator then normally caucuses with the plaintiff's attorney and her client in an effort to get them to take a hard look at the strengths and weaknesses of their case.<sup>28</sup>

The problem from a procedural justice standpoint and from a party satisfaction standpoint - and they might be roughly the same - is that it tends to minimize party participation in the process. Par-

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<sup>25</sup> Nancy A. Welsh is an Associate Professor at the Pennsylvania State Dickinson School of Law and serves as the Associate Director for Dickinson's Center for Dispute Resolution.

<sup>26</sup> See Nancy A. Welsh, Symposium: *Disputants' Decision Control in Court-Connected Mediation: A Hollow Promise Without Procedural Justice*, 2002 J. DISP. RESOL. 179 (2002).

<sup>27</sup> See Nancy A. Welsh, *Making Deal in Court-Connected Mediation: What's Justice Got To Do With It?*, 79 WASH. U. L.Q. 787 (2001).

<sup>28</sup> Alfini, *supra* note 16, at 66.

192 *CARDOZO J. OF CONFLICT RESOLUTION* [Vol. 5:187]

ties are deprived of the opportunity to meet and discuss face-to-face. There is a tendency for the attorneys to take over and the process then becomes much less “party-centric” and much more “lawyer-centric.”

The “bashing” methodology was described in the article as:

Unlike the trashers, the mediators who use a bashing technique tend to spend little or no time engaging in the kind of case evaluation that is aimed at getting the parties to put ‘realistic’ settlement figures on the table. Rather, they tend to focus initially on the settlement offers that the parties bring to mediation and spend most of the session bashing away at those initial offers in an attempt to get the parties to agree to a figure somewhere in between. The mediation sessions thus tend to be shorter than those of the trashers, and they tend to prefer a longer initial joint session, permitting direct communication between the parties. Most of the bashers interviewed were retired judges who draw on their judicial experience and use the prestige of their past judicial service to bash out an agreement.<sup>29</sup>

To the extent that this style erodes party self-determination, I would think in most cases it does because this is a highly evaluative technique. The mediator is substituting the mediator’s judgment in many cases for that of the parties. This, I think, is problematic from a procedural justice standpoint. The mediator has a tendency to limit a party’s decision-making.

Finally, the “hashing it out” style was described as:

The hashers tend to take a much more flexible approach to the mediation process, varying their styles and using techniques such as caucusing selectively, depending on their assessment of the individual case and the needs and interests of the parties. When asked to describe the mediator’s role in one sentence, a hasher responded, ‘facilitator, orchestrator, referee, sounding board, scapegoat.’ The hasher generally adopts a much less directive posture than the trashers and bashers, preferring that the parties speak directly with one another and hash out an agreement.<sup>30</sup>

From a procedural justice standpoint, I would think that the “hashing it out” style is much more consistent with our notions of procedural justice or what we might expect from a mediation setting. To summarize, “trashing” and “bashing” erodes certain norms or core values, if you will, or has a tendency to do that. It

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<sup>29</sup> *Id.* at 68-69.

<sup>30</sup> *Id.* at 71.

2004]

ACR ANNUAL CONFERENCE 2003

193

has a tendency to pull the parties apart physically, and in the course of doing that, allows the parties less of a voice in the mediation setting, at least the “trashing” style does, and the “bashing” tends again to limit a party’s decision-making. My general take on it is that, as in 1991, I think that there is probably still “trashing” and “bashing” today. In reading Nancy’s articles recently, there were a lot of things that still rang the same bells.<sup>31</sup> Her concern again over the tendency to abandon the joint session<sup>32</sup> is probably a good example of the fact that lawyer-mediators and lawyers in mediations are tending to encourage certain behaviors that are problematic from a justice standpoint.

*Professor Love:*

Thank you, Jim. I am going to ask Ellen Waldman to respond. Jim, would it be fair to say then if you were omnipotent, you would forbid “bashing” in the name of justice under the roof of a court?

*Dean Alfini:*

Yes, I guess that is fair to say.

*Professor Waldman:*

It has been my assigned task to comment on Jim’s work and I think his article has had a tremendous impact on the mediation literature.<sup>33</sup> Coming from Southern California and taking a cue from the current leadership,<sup>34</sup> I of course do not look at all amiss at “trashing.” I see that as really part of all our spectrum of mediation behaviors. I share Jim’s concern for the erosion of procedural justice in mediation and I think that we should be vigilant in preserving the aspects of the process that enhance party participation and voice. On the other hand, at least with regard to the “trashing” *modus operandi*, case evaluation or bringing in norms from the legal system have always been a part of at least certain mediations as they occur in certain contexts. Therefore, I do not think that aspect of “trashing” *per se* is contrary to the mediation pro-

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<sup>31</sup> See Welsh, *supra* note 26, at 810.

<sup>32</sup> See *id.*

<sup>33</sup> See Alfini, *supra* note 16, at 47.

<sup>34</sup> On October 7, 2003, California voters recalled the reigning governor from office, installing instead superstar bodybuilder-turned movie action-hero, Arnold Schwarzenegger. Campaigning throughout the state, Schwarzenegger was known for his promise that once ensconced in Sacramento he was going to “kick some butt.”

194 *CARDOZO J. OF CONFLICT RESOLUTION* [Vol. 5:187]

cess. The “bashing” approach, in my view, is much more problematic because it is entirely unprincipled. When a mediator does a case evaluation, at least the mediator is assessing the parties’ viewpoints according to existing reigning norms. When the mediator simply sees that it is his or her role to chip away at the parties’ bottom lines in an effort to somehow “split the baby” and meet in the middle, there is no principle involved. There is no effort to ascertain whether an important norm has in fact been enforced. Therefore, “bashing” is actually the model that I find most disturbing. If I were omnipotent, I would ban that as well. I am not sure that I would ban the “trashing” model. I would simply make a space in the “trashing” model for greater party participation and I do not see this as an either/or proposition. Case evaluation can occur in conjunction with traditional party ventilation and negotiations. So I think we should get away from false dichotomies that, to some degree, have been very prevalent in our discussions.

*Professor Love:*

Thank you. We are going to turn now to a question for Josh Stulberg, but do make a note if you want to come back to this issue. Josh, you have argued that mediators should not be responsible for the fairness of agreements that result from the process that they oversee, except, perhaps, insofar as those agreements are downright illegal.<sup>35</sup> How do you square that with mediation as a process that promises fairness and justice?

*Professor Stulberg:*

I want to try to make an argument about the relationship between mediation and justice in a way that hopefully is both engaging and defensible. In the end, I want to raise some questions about the position I take that continue to nag at me, even though I believe my basic position is persuasive.

I start with several propositions: First, to build on Lela’s initial comments about mediation and justice residing in the same house, I strongly believe that using mediation advances and secures a more just society; if it does not, then none of us should be doing it. Second, I believe in an ethics of self-government rather than authority. Whether a person is my boss, supervisor, rabbi, or Presi-

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<sup>35</sup> See Joseph B. Stulberg, *The Theory and Practice of Mediation: A Reply to Professor Susskind*, 6 VT. L. REV. 85, (1981). See also Joseph B. Stulberg, *Fairness and Mediation*, 13 OHIO ST. J. ON DISP. RESOL. 909 (1998).

2004]

*ACR ANNUAL CONFERENCE 2003*

195

dent of the United States, that fact alone, and that role that she plays, does not mean that whatever she decides or suggests is the right thing to do, morally speaking. Third, I believe strongly that substantive principles of justice are predicated on notions of equality. People have the right to be treated as equals, not simply to equal treatment; that means people have the right to be treated with equal dignity and respect.<sup>36</sup> Fourth, I believe that the legal positivist is correct to claim that it is perfectly plausible to say that a rule is legal and that a citizen has a legal obligation to comply with it, yet simultaneously note that a person can fiercely criticize that rule as being undesirable or repugnant from a moral point of view. And finally, I believe that justice is only one virtue among many; it is an important one but it is not the only one.

How does that framework apply to a mediator's work? I do not want my remarks to be misunderstood or appear to be casually and carelessly flippant. I deeply value living in an ordered, civil society. In important ways, it is an historical accident that we live at the time and in the country that we do, but I cherish the level of political freedom and economic wealth of our current civilization. Having said that, it strikes me that the core values of mediation support a theoretical and practical approach to dealing with challenges that supports persons articulating their concerns and developing options for resolving them in ways they find acceptable, even if those arrangements are not endorsed by the law. That is, I am not bothered if those outcomes conflict with the law because I believe that, in many such instances, persons are promoting just, if not lawful, outcomes.

I want to press this point using other perspectives and norms as well. The basic inquiry is: Is it desirable for people to communicate with one another and, based on those exchanges, develop settlement options that they find acceptable, even if a "rule" or "expert" stipulates that the outcomes violate an "accepted" norm? My answer is affirmative and that is mediation's link to concepts of justice. Consider the following: Suppose that divorcing parents agree that their only child is best off not seeing one of the parents and that an expert psychologist believes that arrangement to be ill-founded on the basis of theories regarding child development. I am very comfortable with letting the parents decide what they believe the most favorable arrangement to be, even if that arrangement is contrary to the child psychologist's judgment regarding the

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<sup>36</sup> See RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* 227 (Gerald Devekworth & Co. 1977).

196 *CARDOZO J. OF CONFLICT RESOLUTION* [Vol. 5:187]

child's best interest.<sup>37</sup> If disputing parties agree to resolve economic matters in a way that financial planners or investment advisors describe as inefficient or counterproductive business practices, I believe that an ethics of self-government should support their decision. It is their life and it is their freedom to choose. I think that the mediation process, distinctive from all others, is committed to the notion of helping people generate outcomes that they find acceptable to themselves. That is the vision of mediation that I embrace.

This vision of mediation, and its consequence for party autonomy, is not consistent with the notion of justice as being a rule-governed practice. Why does that vision of mediation encounter resistance? At one level, I believe the simple explanation is that most of us simply do not have the patience to support the process working that way; most of us want others to comply with rules we find useful. For instance, in my parental role, I instruct my children to do things for which there is no justification other than it is convenient for me that they act in a particular way. But the resistance goes deeper. The core connections between mediation and justice considerations are grounded in an ethics of self-governance and concepts of equality; that leads us to reject viewing justice as being a rule-governed process. But I believe that many mediators, particularly those who profess to be evaluative mediators—actually embrace a vision of mediation that denies the separation of law and morals that positivists so constructively advance. Their vision of mediation erroneously suggests that the answer to the question, “What is the fair thing to do?” is provided by answering the question, “What rule or standard governs this situation?”

So much for stating my position. The challenge to my viewpoint then becomes the following: Does my account mean that I am wedded to the notion that the mediation process is, in Rawlsian terms, one of pure procedural justice?<sup>38</sup> Rawls describes a system of pure procedural justice as being one for which there is no independent standard against which to access the outcomes of that procedure.<sup>39</sup> Is this the position that I am advocating, where in essence the fundamental claim becomes that whatever settlement terms persons agree to are, in an important sense, immune from

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<sup>37</sup> In some jurisdictions, it would be contrary to statutory provisions regarding required shared parenting arrangements. *See, e.g.*, MINN. STAT. § 518.167 (2003).

<sup>38</sup> *See* JOHN RAWLS, *A THEORY OF JUSTICE* 74-75 (Harvard Univ. Press 1971).

<sup>39</sup> *See id.* at 75.

2004]

ACR ANNUAL CONFERENCE 2003

197

being criticized as unfair, unjust or in some other way morally wrong?

I want to highlight several concerns I have about trying to defend this conceptual position. Let me first say, though, that at a practical level, I do believe that what people come up with by themselves and find acceptable probably comports with a justifiable sense of fair play and a “just outcome.” So, at a practical level, I endorse training mediators in a facilitative orientation, and encouraging parties and mediators to be patient in the discussion and problem-solving process. I believe that we should slow things down, temper our misplaced passion for efficiency, and help people work things out.

Having said that, let me highlight several concerns I have about the viability of viewing mediation as a process of pure procedural justice. The first stems from questions regarding how mediation should address the balance of power among parties and whether a person in any context, mediation or otherwise, should have a right to perform unreasonable actions. Let me begin by building on an example first suggested to me by Amy Gutmann.<sup>40</sup> An elderly woman suffers from asthma; she is on a three-day train ride in Europe and riding in a closed compartment. One of the passengers wants to smoke cigarettes while traveling; if he does so in that enclosed cabin, the woman will die within forty-eight hours. This woman, when she became a widow, inherited great wealth that her daughter and her grandchildren were expecting to pass to them in substantial measure when she expired. In fact, however, the widow has spent all of the inheritance; because she was embarrassed by her spendthrift ways, she has not told her daughter or grandchildren the truth about their expected inheritance. While the woman is on the train in her compartment, another passenger pulls out a cigarette to smoke. The woman says, “Please do not do smoke,” and the passenger complies. They travel for another day and the passenger who wants to smoke the cigarette says to the elderly woman, “Look, I would really like to smoke.” He has gotten to know her and proposes the following: “I am a very wealthy man. If you let me smoke one cigarette, I will give to you ten million dollars. In that way, even though you will not survive, you can pass on a significant inheritance to your daughter and grandchild-

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<sup>40</sup> See Amy Gutmann, *How Not to Resolve Moral Conflicts in Politics*, 15 OHIO ST. J. ON DISP. RESOL. 1, 3-4 (1999). Amy Gutmann is the Provost at Princeton University, and Laurance S. Rockefeller University Professor of Politics and the University Center for Human Values.

198 *CARDOZO J. OF CONFLICT RESOLUTION* [Vol. 5:187]

dren.”<sup>41</sup> With all of today’s current technology, we can assume that these parties could execute a binding document so that the money would be certain to pass. The question is this: Is this negotiated outcome a fair outcome? If they had been parties to mediation, would you as a mediator have had any problem with this agreed-upon result? Conceptually, the question is: Are there any independent standards governing what is a just outcome that trumps party acceptability? Given certain assumptions about party capacity, I have no problem with the outcome the parties developed. It is an exercise of an individual’s reasonable judgment as long as we are confident that each person – and here, particularly, the elderly woman – knew what was going to happen and was not mentally impaired. The alleged imbalance of power deriving from unequal economic positions does not undermine party capacity to decide; there is no evidence that the woman in any meaningful sense was coerced into agreeing to the proposal.

Let us consider two other situations that I believe are much more problematic. There was a recently reported incident of a person keeping a tiger in his apartment<sup>42</sup>. Presume that a neighbor files a complaint about there being a tiger next door and that case is referred to a mediation center. You are the mediator. The neighbor who keeps the tiger makes the following proposal to his neighbor: “I will give you money to move – indeed, lots of money – if you keep your mouth shut that I have this animal here.” The neighbor quickly agrees. Would you as the mediator be comfortable with that outcome? Obviously the question is whether the potential physical harm to other neighbors not present at the mediation trumps considerations of party-generated fair outcomes. I think this is a much closer call. While what the mediator is supposed to do in such a situation is a separate question (i.e., to me, though perhaps not to others, it is clear that the mediator should not automatically “report” the presence of the tiger to appropriate officials), the situation is problematic to my basic position that this “agreed-upon outcome” is a “just” outcome because it results from a process of “pure procedural justice.” Physical harm to another person certainly appears to be a commanding moral consideration that should trump what some parties are willing to agree to do. Perhaps what we might say of this situation is that the agreed-upon

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<sup>41</sup> *Id.*

<sup>42</sup> See Alan Feuer & Jason George, *Police Subdue Tiger in Harlem Apartment*, N.Y. TIMES, Oct. 5, 2003, at A35.

2004] *ACR ANNUAL CONFERENCE 2003* 199

outcome is a fair outcome but not the morally right outcome. The other situation was a reported incident in Pennsylvania.

*Professor Love:*

Jon, can you cede a minute or two of your response time so Josh can conclude?

*Professor Hyman:*

Yes.

*Professor Love:*

Okay, Josh, please go ahead.

*Professor Stulberg:*

Thank you. I cannot attest personally to the facts of this case but they were reported in a newspaper article shortly after the Rush Limbaugh ESPN incident.<sup>43</sup> As I understand it, an about-to-be father demanded of a hospital administrator that only Caucasian support staff attend to his pregnant wife during the preparation and delivery of their child; the hospital representative agreed to the request.<sup>44</sup> Now suppose there had been an initial dispute between the father and the hospital personnel on this matter and they agreed to participate in a mediation session to try to resolve their differences. The parties participate in the process and everybody agrees to the father's desired outcome. Is there a problem with this? I think there is a serious problem and it results from our failing to ask: Who did and did not participate in the mediated conversation? While this situation differs from the two considered previously in that no one here is physically harmed, there is still, I believe, an important sense in which a non-participant has been harmed. That is, any hospital employee who is a person of color might be harmed by this outcome in terms of their career development, personal aspirations, or the dignity with which they are treated. Presume I am correct that a significant harm occurred. What is offensive about this situation in terms of justice claims? I believe the answer is non-participation by a stakeholder. This can

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<sup>43</sup> See *Limbaugh's Barbs on McNabb Turn Heads*, SUN SENTINEL, Oct. 1, 2003, at 9C.

<sup>44</sup> See Oliver Prichard, *Why a Local Hospital Gave in to a Racist Demand*, PHILADELPHIA INQUIRER, at [http://www.philly.com/mld/inquirer/news/local/states/pennsylvania/cities\\_neighborhoods/philadelphia/6919504.htm](http://www.philly.com/mld/inquirer/news/local/states/pennsylvania/cities_neighborhoods/philadelphia/6919504.htm) (last visited Feb. 29, 2004).

200 *CARDOZO J. OF CONFLICT RESOLUTION* [Vol. 5:187]

be gleaned by asking the following: What if an affected stakeholder, or their representative, participated in the discussion and agreed with the proposed outcome? As much as I find the outcome personally undesirable, I would be comfortable believing that justice considerations had been adequately addressed.

I conclude, then, as follows: Mediation suitably conceived and executed can and should be characterized as a process of pure procedural justice. Justice claims, though, may be appropriately overridden by a suitably tailored harm principle.

*Professor Love:*

Thank you. Jon?

*Professor Hyman:*

I may have this wrong— I picked up the story by glancing at other peoples' tabloids on the subway in New York<sup>45</sup> – but I think that the tiger got into the public eye not because a neighbor was put in jeopardy by the tiger but because the neighbor wanted to know how to care for the tiger. The guy who had the tiger in his apartment was injured and had to go for treatment. He asked some friend or neighbor to take care of the tiger. The neighbor then called a public official and asked, "What do I feed a tiger?" So we should not always presume that others who might be affected see the potential harm the same way that we do.

The issue of justice in mediation raises the potential conflict between what the parties think is a fair and reasonable resolution, and what the mediator thinks is fair and just. This conflict raises two issues that we should bear in mind in trying to understand how much independent judgment a mediator should use in considering the fairness or justice of a proposed resolution. First, we need to distinguish between ideas as trumps and ideas as integrated strands of a discussion. Should mediators' ideas of justice trump some decision that parties want to make, or should mediators' ideas of justice only be integrated into the mediation discussion? This is a critical distinction. Our training as mediators generally leads us in a direction of the integration story, not the trumping story. But at the same time, our training as lawyers, or our living in a culture that has rules, leads us in the opposite direction, towards the trumping story. The law works through trumping; it makes categories and one trumps another. Our discussion of the role justice

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<sup>45</sup> See Feuer & George, *supra* note 42, at A35.

plays in mediation is always shadowed by this troublesome distinction between trumping and integrating. The borderline between the two is what we have to play with. We cannot disregard one story and simply embrace the other. Somehow they are both there; we have not worked out good ways to put them together. I agree that when we try to bring into mediation the issue of avoiding harm to others, we raise a justice issue, we give justice a role in mediation, but we run the risk of having the mediator trump the concerns of the parties. But the role of justice in mediation is more complex than simply trumping. We have not worked out how to put our concerns about justice into the mediation without having them trump how the parties view the matter. Learning how to deal with is why we are having this discussion.

My second point relates to the working idea of procedural justice. The argument is that we can only sensibly talk about procedural justice in mediation because there is no trustworthy substantive standard of justice on which mediators can rely. Stuart Hampshire<sup>46</sup> has written a book along the same lines entitled *Justice is Conflict*, taking the philosophical position that the only sensible way to talk about justice is to talk about processes for dealing with conflict.<sup>47</sup> This is very attractive to mediators who do not want to think about what is right and what is wrong but who instead want to leave those questions entirely to the parties. I do not find Hampshire's argument all that useful for mediators, as useful as it might be for a debate in the highest levels of ethical philosophy. We live in a world where, all of us, mediators and parties, all have ideas about what is right and what is wrong. We cannot stop thinking those ideas just like that. We are all speaking prose even though we did not realize it was such a fancy thing to do. We are always thinking about fairness and right or wrong and being people as mediators. We cannot completely put that out of the way. We react to other people. I think our task as mediators is to find a way to integrate our perceptions about justice sensibly into our mediation work, rather than trying to play trumps and completely dominate things. This does not answer any specific questions about what a mediator should do about the lady in the train compartment except that next time I have to teach Contracts, I will use that as a hypothetical.

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<sup>46</sup> Stuart Hampshire was a Fellow of All Souls College, Oxford, and has held professorships at Princeton and Stanford Universities. He is a member of the British Academy and the American Academy of Arts and Sciences.

<sup>47</sup> See STUART HAMPSHIRE, *JUSTICE IS CONFLICT* (1999).

## 202 CARDOZO J. OF CONFLICT RESOLUTION [Vol. 5:187]

*Professor Love:*

Okay, thank you. The next question is to Ellen Waldman. Ellen, you have argued that there are some versions, some iterations, to the mediation process where the mediator enforces societal norms while then enabling bargaining around those norms.<sup>48</sup> In asking neutrals to enforce societal norms and also to facilitate bargaining and presumably self-determination, are you not asking them to serve two masters in a process which is thinly disguised adjudication?

*Professor Waldman:*

I think there are two questions there and I will take them one at a time. The notion that there are certain cases where certain mediators should not only educate the parties about social norms, but should work towards their enforcement, does that require the mediator to serve two masters? The answer is yes. Sometimes serving two masters is not only appropriate, but it is imperative.

Let me just give a couple of examples outside the mediation context. In striving to preserve public safety in a post-9/11 era, public officials work both to tighten measures that will prevent terrorist attacks while being mindful of safeguarding individual liberties. We think that is right and appropriate. In considering environmental legislations, state legislators must balance constituent concerns. So state legislators have to, in the environmental context, balance a desire to preserve local environmental resources as well as the needs of various homegrown industries. When an artist like Shakespeare sat down to write *Hamlet*,<sup>49</sup> he sought both to say something profound about disorder, people, and kingdoms, and also to satisfy an Elizabethan audience's healthy appetite for sexual innuendo and comic farce. So every ambitious and complex endeavor involves serving two masters. We cannot escape that when we seek to do justice and mediation. I think it is important to say first that I do not recommend that mediators discuss, let alone enforce, social norms in every single case. Shakespeare did not

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<sup>48</sup> See Ellen A. Waldman, *Identifying the Role of Societal Norms in Mediation: A Multiple Model Approach*, 48 HASTINGS L.J. 703 (1997).

<sup>49</sup> See WILLIAM SHAKESPEARE, *THE TRAGEDY OF HAMLET PRINCE OF DENMARK*, reprinted in WILLIAM SHAKESPEARE: *THE COMPLETE WORKS* (S. Wells & G. Taylor eds. 1986) (1601).

have anything profound to say in every play; *Much Ado About Nothing*<sup>50</sup> is largely word banter.

In many cases, the mediator can ignore the law and other social norms. First, let me set out those categories and cases where I think it is acceptable and sensible for mediators to pretty much ignore social norms. The first set of cases involves situations in which social or legal norms are simply not invoked. They are not relevant either because there are no guiding norms on point or there are too many norms on point. That is, a variety of divergent norms may exist, but none of them are authoritative. In that setting it is perfectly appropriate for the mediator to essentially exclude legal norms from the discussion. The second set of cases involves disputes which implicate guiding social norms, but adherence to those norms is inconsequential when compared to the competing objectives of promoting party empowerment or preserving relationships. The examples here are numerous and you have all mediated them.

Imagine a neighbor-neighbor dispute where a zoning ordinance states that noise levels in certain residential areas must be reasonable. Does anyone doubt that enforcement of the ordinance, even if we have case law that sets out what is reasonable with regard to noise levels after eleven o'clock at night, is unimportant compared to giving the neighbors the tools to talk to one another and enhance their confidence to work out the next dispute that comes down the road?

Similarly, in a complex franchise dispute, there might be norms relating to the duties owed to the franchisor by the franchisee. Again, adherence to those norms is likely overshadowed by the importance of keeping the relationship on track. What about the many cases where the liability is clear but damages are fuzzy? What is the damage from opening a restaurant a week later than scheduled? There is no definite norm that gives us the answer. There are too many variables, so it is more important to let the parties decide how best to make things right. So in many, perhaps most disputes, I do not think the mediator's role includes that of norm-enforcer. Having said that, it is important to identify those cases where norm-enforcing should be part of the mediator's goal. Those cases fall into two categories in my view. The first category is where the conflict implicates important social concerns extending far beyond the narrow interests of the two disputants. I

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<sup>50</sup> See WILLIAM SHAKESPEARE, *MUCH ADO ABOUT NOTHING*, reprinted in WILLIAM SHAKESPEARE: THE COMPLETE WORKS (S. Wells & G. Taylor eds. 1986) (1599).

204 *CARDOZO J. OF CONFLICT RESOLUTION* [Vol. 5:187]

think those are the cases that keep Josh up at night when he thinks about the conflict between letting parties always have the final say as to what is fair.

I was struck by Josh's example of the arrogant exercise of power. Josh worries about the unbridled discretion judges have in deciding cases and the possibility that arrogance or hubris will taint the exercise of that discretion. It seems to me there is a connection to be made here. What one thinks about the role of legal norms in mediation directly mirrors one's belief that legal norms encompass immanent notions of justice. Concomitantly, one's belief that mediation best proceeds unencumbered by intrusions of external norms relates to one's confidence that people, left to their own devices, will reach resolutions that not only meet their own needs, but correspond to more objective, global conceptions of fairness. When Josh was talking about the arrogant exercise of power by the judge, my concern was also of the arrogant exercise of power by one disputant vis-à-vis another. Therefore, we each are going to have different and perhaps overlapping concerns vis-à-vis the exercise of power.

*Professor Love:*

Thank you. Jim, would you like to make some comments?

*Dean Alfini:*

I think Ellen has made some very important contributions here to our thinking, focusing on things we have tended to waltz around in the past. Although I have a great deal of sympathy for what she says, I think the problem here is one of possibly compromising some core values, particularly party self-determination, by forcing a bargaining context on the parties they may not be prepared for. I think this is risky unless you have full disclosure to the parties in advance and you get their consent. The problem here is that the need to invoke these norms or enforce these norms usually comes up in the context of mediation almost on an ad hoc basis.

Probably the best analogy here is to mediations that are sponsored by various religious groups. When a Christian or a Jewish group, for example, sponsors a mediation, the parties are told beforehand that the mediation is going to take place in the context of the norms of that particular religious order. Consequently, during the mediation, references are made to biblical passages, or passages from the Torah are invoked. Now the parties might disa-

2004]

ACR ANNUAL CONFERENCE 2003

205

gree with the interpretation that the mediator offers, but at least everyone has that text in mind and has that text in front of them to adequately, appropriately, and fairly discuss what that text means in that context. There are problems then in invoking societal or legal norms during mediations that largely have to do with the unfairness in not announcing to the parties beforehand what those societal or legal norms are, and giving them some ability to prepare for a mediation in that context. What it does if you do not do that is that it anoints the mediator with the power to prepare and invoke the text. There is also too much potential for surprise and manipulation. A party might find that the invocation of that norm during the mediation is very persuasive and might be decisive in the mediation, only to go home to think of another norm that might conflict with the application of that norm and feel very unhappy with the outcome of that mediation. Again, I have a great deal of sympathy for what Ellen is saying and, in fact, I am sure I have done that on occasion. However, it does make me feel very uneasy from a party self-determination standpoint.

*Professor Love:*

Okay, thank you. Finally, Jon, after having thought about this for a long time, you proposed an ethical rule for mediators to encourage mediators to bring consideration of justice into the process. There is such a proposed rule in the conference notebook.<sup>51</sup> I understand you have a new draft of a proposed rule. Could you please describe the new proposed rule and your thinking about it?

*Professor Hyman:*

Yesterday I was at a conference for about eight hours dealing with medical malpractice. I was sitting between a plaintiff's lawyer and a defendant's lawyer and the defendant's lawyer was complaining about what plaintiffs' lawyers do. In the end, it turned out he was not really complaining, but at a deeper level was agreeing. When the plaintiff's lawyer gets up in front of the jury, he or she says to the jury, "Ladies and gentlemen of the jury, this is the only

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<sup>51</sup> Promotion of Justice: Mediators should seek to avoid injustice in the process of mediation and in mediated agreements. Commentary: Concepts of justice play a role in mediation. Mediators should avoid actions that can make the process of mediation unjust. And they should try to help the parties find terms of agreement that the parties do not view as unjust. In addition to concern for the place of justice in particular mediations, mediators should strive to improve the practice of mediation in general, so that it can lead to agreements that are more fair and just.

206 *CARDOZO J. OF CONFLICT RESOLUTION* [Vol. 5:187]

place that my client is going to get justice.” The defense lawyer’s first reaction was to call the argument unfair and rhetorical overkill, designed to prejudice a jury. On reflection, however, he said that he agreed with it. This was the only place that *his* client, the defendant, could get justice. How does the defendant get justice? He or she uses the jury to obtain justice against an unjust charge, justice against a greedy, overreaching plaintiff. When I heard this, however, I said to myself, “This cannot be right.” This might be how the lawyers are thinking, but maybe a better formulation would reverse things. The trial isn’t the only place to get justice. It might better be said, “This is the *last* place that my client can get justice.”

Now, the word “last” can have two meanings. You might understand it as a reference to a point in time: “All the previous efforts to get justice have failed, so this is the one remaining place for it.” I think this is a fair description. Sometimes you can indeed get justice in the courts, and people are very happy with the wisdom of the jury. Lawyers who practice in front of juries will often say that. And they believe it, although not always true.

The second meaning may appeal more to mediators. The second meaning is that justice is not really possible in courtroom adjudications, at least in most cases. Trials are the *last* place to seek justice because the odds against obtaining a just result are so high. Under this meaning, it would be better for us to seek justice through some other method, such as mediation.

Let me now turn to the question raised by Lela: whether the ethical standards used by mediators should contain some notion of justice. You should know, first off, that I originally heard the idea of putting the word “justice” into the ethical standards or rules that mediators adopt from Jim.

*Dean Alfini:*

I will have you know that Jon was once my teacher.

*Professor Hyman:*

He negotiates plea bargains terrifically. When you look through the standards that are being developed for mediators, the word justice does not appear. We are all, as this discussion indicates, very concerned about what that might mean. When lawyers believe that the jury trial and the decision of the judge are the only place to get justice, the consequence is that anything other than

what lawyers do is mere expediency. Is mediation the profession of expediency? If mediators are going to see themselves as part of a profession and have a profession that has equal stature and substance to what the legal system has, mediators' standards have to include some kind of idea of justice.

When I first started working on this, I took a stab at what such an ethical standard might be. This is what appears in your book<sup>52</sup>. As I looked at it again, however, I began to wonder what the legal writing instructor down the hall from me might say about this language. I decided not to talk to her, however, because even I could see so many double negatives and run-on, complicated constructions. So I would like to try again.

Well, what about lawyers? What should we expect lawyers to do? Maybe there is some kind of model we should use. So I went to what Deborah Rhode<sup>53</sup> says. What she says is not necessarily accepted by a majority of lawyers, but to me it describes well what a lawyer's sense of justice should include. I took what she said about the standards that should govern lawyers and substituted the word "mediators" for "lawyers":

[Mediators] should make decisions as [mediators] in the same way that morally reflective individuals make any ethical decision. [Mediators'] conduct should be justifiable under consistent, disinterested, and generalizable principals. . [Mediators] have responsibilities to prevent unnecessary harm to third parties, to promote a just and effective [mediation] system, and to respect core values such as honesty, fairness and good faith on which that system depends.<sup>54</sup>

A lot of that sounds very familiar. Much of it is built into our written standards and our ethical debates as mediators. We want to act under consistent, disinterested, and generalizable principals. We want to respect values of honesty, fairness, and good faith. The question about preventing unnecessary harm to others is troublesome and is exactly what Josh talked about earlier today.

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<sup>52</sup> *See id.*

<sup>53</sup> Deborah L. Rhode is an Ernest W. McFarland Professor of Law and Director of the Keck Center on Legal Ethics and the Legal Profession at Stanford Law School. A past president of the Association of American Law Schools and Senior Counsel for the House Judiciary Committee on impeachment issues during President Clinton's impeachment proceedings; she is now Chair of the American Bar Association Commission on Women in the Profession.

<sup>54</sup> Robert F. Cochran, Jr. et al., Symposium: *Client Counseling and Moral Responsibility*, 30 PEPP. L. REV. 591, 603 n.44 (2003) (discussing DEBORAH L. RHODE, IN THE INTERESTS OF JUSTICE: REFORMING THE LEGAL PROFESSION 66-67 (Oxford Univ. Press 2000)).

208 *CARDOZO J. OF CONFLICT RESOLUTION* [Vol. 5:187]

But what about that other one: “promote a just and effective mediation system?” Let us start small in articulating a standard for mediation of what is a just. How about: “Mediators have a responsibility to promote a just and effective mediation system.” If you are worried about the word “just,” we could take out the word “just” and then we would have the principle: “Mediators have a responsibility to promote an effective mediation system”. That does not sound quite right. It seems to overemphasize efficiency and is getting close to those court administrators who tell my students when they mediate in court, “Fifteen minutes is all you’ve got to mediate. Hurry it up in here!” Justness must involve more than speed and low cost.

As I was trying to articulate before, I do not think that we, being people at the same time we are mediators, can actually think about the problems the disputants present to us without thinking something about justice and fairness. We just simply cannot remove it from our thought processes. Even if we try to bury it, it is going to pop up. Here is a more ambitious formulation for including a concept of what is just into ethical standards for mediators: “Mediators have a responsibility to permit disputants to consider the justice and fairness of their agreements”. That honors the parties’ self-determination. It does have implications for how you handle mediation in terms of the “trashing” and “bashing.”<sup>55</sup> If, during a mediation, a disputant says about a proposed resolution “That is not fair!” what should the mediator say? If the mediator says “We are not talking about fairness here. We are just trying to get this case resolved.” the mediator has made a choice to take fairness out of the discussion, even if one of the parties wishes to put it in. Under the ethical standard I have just proposed, the mediator will have gone too far. He or she would not be permitting a disputant to consider the justice and fairness of their agreements. What if one of the parties wants to raise the issue of fairness, but the other party does not want to? The proposed standard does not address this specific situation. Consistent with the standard, however, perhaps the mediator should elicit a discussion about whether fairness should be discussed.

Here is another proposed standard that goes even further: “Mediators have a responsibility to consider the justness and fairness of the disputants’ agreements.” In my current thinking, this one that makes the most sense. If we accept the second formulation, and permit the disputants to talk about justness and fairness

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<sup>55</sup> See Alfini, *supra* note 16, at 47.

2004]

ACR ANNUAL CONFERENCE 2003

209

as they see it, we cannot as mediators be involved in their discussion without having some kind of thoughts of our own about justice and fairness. The standard only says to consider justice and fairness. It does not say what mediators should do with that consideration.

Two key conceptual steps are important here. One is to separate out justice and fairness from what the law is. I agree with Josh that we should consider the law in a positivist way. It is its own system. It has its own set of rules about what is right and what is wrong. If that overlaps with our sense of what is just and fair, fine, so be it. But outside of the courtroom the law does not trump our own sense of what is just and fair. We have to be able to think about, articulate, and discuss our own sense of justice and fairness. As mediators, in the interest of self-determination of the parties, we cannot allow our own views of the law, or our own views of justice and fairness, to trump—to overcome—the views of the parties. For a mediator to have a thought about justice and fairness is not the same thing as imposing it on the parties. That is the key distinction that Josh had mentioned. The distinction between trumping the disputants' views and seeking integration of them is the key, dynamic area with which mediators have to struggle.

*Professor Love:*

Josh, can you see this standard?

*Professor Stulberg:*

I do not want to get into wordsmithing, so let me just try to take it to a different level of generality. The broad challenge is whether it is valuable for us to develop a statement addressing these justice notions that we then incorporate into a mediator code of conduct. The challenge arises at several levels. The first is to understand clearly what the standard prescribes, and the second is to develop standards or criteria that enable us to check whether a mediator has considered the justice or fairness of a disputant's agreement or that the parties considered justice requirements.

My own take on this approach is to be very cautious about legislating such matters. We have examples in statutes that prescribe mediation's use to insure that it promotes a public's sense of a desirable, fair outcome. For instance, a Minnesota statute states: "The purpose of mediation in a family setting is to develop an agreement assuring the child's close and continuing contact with

210 *CARDOZO J. OF CONFLICT RESOLUTION* [Vol. 5:187]

parents after the marriage is dissolved.”<sup>56</sup> I find that purpose statement very contestable and would prefer that the statutory language be less restrictive of people’s right to structure their relationship. Another example is statutory efforts to prescribe good faith participation in mediation.<sup>57</sup> While laudably motivated, I believe these attempts fail to be helpful because key terms and enforcement criteria are so elastic.

I believe that our efforts in this regard are more successful when we focus on identifying and prescribing procedural justice requirements. I would let it go at that and leave it to the spirited participation and rhetoric of the parties to tap into their sense of what substantive justice claims require.

*Professor Love:*

Thank you. We would like to hear from others in the audience. Please feel free to make comments about justice that might not have been covered by the questions that were asked.

*Ron Kelly:*<sup>58</sup>

I have a brief comment and then a question for the panelists. I have not thought a lot about this, but it seems that people are looking at a system of justice that is very either/or. One party wants justice, meaning they will win, and the other one wants justice, meaning they will win. It is either/or. We have plaintiff/defendant and an either/or choice. Guilty or innocent. I think one of the promises of mediation, among many, is the notion that we can do something more complex and nuanced than you are guilty or you are innocent, you did it or you did not do it. I am conducting training in two weeks for EEO enforcement officers<sup>59</sup> who are presumably committed to the rights of people in the workplace to be free of discrimination and harassment, and have spent their years deciding, “Is this harassment or is it not? Is this discrimination or is it

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<sup>56</sup> Minn. Stat. § 518.619 (2003).

<sup>57</sup> See, e.g., Ariz. Rev. Stat. Ann. 8-116.01(G) (West 2001); Ind. Code Ann. 14-26-2-23(3)(A) (West 2001).

<sup>58</sup> Ron Kelly is a professional business mediator and arbitrator, specializing in real property and construction cases. He has been mediating voluntary settlements since 1970, and also arbitrates through the American Arbitration Association, local courts, state agencies, and his own offices.

<sup>59</sup> The EEO or EEOC is the United States Equal Employment Opportunity Commission. Information about the Commission is available at <http://www.eeoc.gov> (last visited Jan. 12, 2004).

2004]

ACR ANNUAL CONFERENCE 2003

211

not?” I would love to hear a sentence or two from each of you, if you were doing the introduction to this two-day training, how would you describe the difference between their role as enforcement and investigative officers in the EEO context and their role as in-house mediators?

*Professor Love:*

Ellen?

*Professor Waldman:*

I have a student who is actually interning with the EEO mediator locally in San Diego and the student continually comes into my office and says, “This is such a trip.” It is clearly a model of mediation that is quite a bit different from the model that he learned in class. In an introduction, I would talk a little bit about the integrations that Jon has suggested: Mediation involves affirming the rights of people to be free of discrimination. It will allow the parties to achieve a richer understanding of each other’s perspective and problem, and show their relationships on the job can be improved. Again, I do not see a conflict between norm enforcement and private bargaining. One of the points that I did not get to make is that even in norm-advocating mediation, these norms are articulated at such a high level of generality that there is plenty of room for private bargaining. If the ADA<sup>60</sup> requires reasonable accommodation, I would argue that what constitutes a reasonable accommodation in any particular setting is a topic that could be discussed and negotiated at great length.

*Professor Love:*

Jon?

*Professor Hyman:*

My students and I represent charging parties in EEOC cases in the mediation context. We are their counsel in the EEOC mediation. We see all kinds of mediators. The EEOC mediators who are lawyers, sometimes tend to think in terms of the law’s view of justice: They ask the question “Is this discrimination or not?” That is a categorical distinction. How does that play into the mediation?

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<sup>60</sup> See Americans With Disabilities Act of 1990, 101 P.L. 336; 104 Stat. 327; 1990 Enacted S. 933; 101 Enacted S. 933.

212 *CARDOZO J. OF CONFLICT RESOLUTION* [Vol. 5:187]

The most obvious way is as a kind of justice that surrounds the mediation. People are imagining what would be the ultimate judicial decision in the absence of settlement. What category would this case fall into if the process went ahead? So they say let us make an agreement now in light of our predictions of the chances of the outcome. It is that sort of invoking a shadow of the law and the justice that surrounds the dispute.

But I think that it is also important to focus on the justice in the mediation itself, not just the thing casting the shadow over the mediation. The parties have a sense of what is fair about who did what, and they make that part of the discussion. They go beyond considering what the legal outcome might be. Very often you will find parties in those situations. Apart from legal wrongs, there are also all sorts of other unfair acts ; that seem unjust in the parties' own perceptions, such as the ways people treated each other in the circumstances that gave rise to the dispute. . The external standard about what is legal and what is not legal is a real part of their world. But getting the mediators to focus more on letting the parties articulate their own views about what is fair and unfair, both about what happened and what they would like to see happen, is a way to bring out more of the justice that is in the mediation, not just the formal justice that overshadows the mediation.

*Professor Love:*

Okay. There was a question. Yes sir?

*Claus Brinnitzer:*<sup>61</sup>

I have a commentary. Sometimes you sound more like arbitrators than mediators. With that I have a problem because as mediators we are supposed to be completely neutral. I am a county court mediator. I am not a lawyer. When we go into mediation, I know participants are not alike. Their temperament is different. Their outlook may be different. Their sense of what is just and what is fair is different. I am just supposed to mediate and not arbitrate.

*Professor Love:*

Thank you. Another comment?

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<sup>61</sup> Claus Brinnitzer is a certified mediator for the Citrus County Court in Inverness, Florida.

2004]

ACR ANNUAL CONFERENCE 2003

213

*Alan Gross:*<sup>62</sup>

I appreciated this discussion, but it has been largely conceptual. Maybe that is an occupational hazard of law professors. Although it did come down a notch, I think Josh said maybe we should have more effective strategies but he did not say what. Jonathan said we have a responsibility to consider the fairness of disputants, but he did not say how. I mediate and I would really like to know because I obviously consider these issues, whether you should trump or whether you should integrate, whether you should self-determine or impose, and so forth and so on. But, for example, the only examples you gave were relatively extreme hypotheticals about smoking and tigers.<sup>63</sup> Can you give us one or two on the ground practical hints about what do you do when there is injustice, an obvious injustice, or contradiction of a norm in a mediation? Do you wait until the agreement is in and then overturn it in an appellate court, or do you intervene? When? How? What? I would like one of the panelists to give an example of how or when they might intervene or what techniques they would use to intervene, regardless of the specific example.

*Professor Stulberg:*

I will try. Suppose that as part of a settlement, two parties agree to an employment arrangement off the books. They then turn to me, the mediator, and ask me to draft it. I would not. I do not think, however, that it is the mediator's role to announce that their agreement is in violation with the norm and they are prohibited from agreeing to it. I would not tell them that. The hospital case I referenced earlier, however, does raise that question.<sup>64</sup> Suppose in that mediation, the parties were engaged in a conversation and I, as mediator, thought that the fundamental interests of a non-represented third party was about to be overrun by the parties' proposals. What would I do? I would, hopefully, have the sense to raise that concern directly with each of the parties in caucus. I would indicate that I was not comfortable continuing to serve them and that I would not serve them effectively unless they were willing to bring into the conversation the affected nurses and other persons involved. If they refused to permit them to participate, I

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<sup>62</sup> At the time of this session, Alan Gross was acting director of the Safe Horizon Mediation Program in Brooklyn and Manhattan, New York.

<sup>63</sup> See Gutmann, *supra* note 40, at 3-4. See also Feuer & George, *supra* note 42, at A35.

<sup>64</sup> See Prichard, *supra* note 44.

214 *CARDOZO J. OF CONFLICT RESOLUTION* [Vol. 5:187]

would withdraw. But let's take it the final step. Assume the disputing parties in that scenario agreed to let members of the nursing staff participate in the discussion. Having heard racially discriminatory comments coming at them across the table, those nursing staff members who are persons of color respond by stating: "Fine with us. Let only Caucasian personnel treat this pregnant woman. If they do not want us to treat them, that is their problem, not ours." If that were said, I would think I had served the parties in raising justice considerations, and I would obviously let those settlement terms prevail, even though I find them significantly objectionable.

*Professor Love:*

We are out of time. Thank you so much for this engaging conversation. I look forward to continuing it elsewhere!