

MEDIATION AND JUSTICE: WHAT STANDARDS GOVERN?

*Joseph B. Stulberg*¹

I. INTRODUCTION

I find it challenging to write about mediation and justice for several perplexing reasons. The concept of justice is constitutionally ambiguous; trying to analyze it concretely is a challenging task for both writer and reader. Despite the concept's ambiguity, however, each of us can readily describe situations that instantly appall us for reasons that we intuitively identify as constituting acts or occasions of injustice. The irony then, and hence the challenge, is that we know that the concept of justice is an important phenomenon to address, yet we have difficulty saying something constructive or useful about it.

I want to approach this analysis in an appropriately cautious way. By cautious, I mean the following: I want to be as concrete as possible. I want to try to say something useful. I want to be attentive to the analytical complexities of the topic, and if that requires that my analysis focus on more conceptual issues, then I need to go there. Finally, while I want my discussion to be coherent and shaped, I do not want to pretend that it is exhaustive or comprehensive. The late American philosopher, Robert Nozick, suggested that one did not have to have the final say about a topic in order to have some say about it,² and in that spirit, I proceed.³

Practicing mediators and mediation scholars, including myself, often characterize mediation as a process in which a neutral intervener, invited or accepted by the negotiating parties, attempts to

¹ Associate Dean, Professor of Law, and Director, Program on Dispute Resolution, Moritz College of Law at The Ohio State University. B.A., Kalamazoo College; J.D., New York University School of Law; Ph.D., Philosophy, University of Rochester. Member of New York Bar. I want to thank Seth Lieberman for his sustained, patient commitment to the development of the symposium and initial journal volume and to current members of the staff of the *Cardozo Journal of Conflict Resolution* for their assistance in helping me bring this publication to fruition. I owe a special thanks to Professor Lela P. Love and Dean Nancy H. Rogers for their continual encouragement in examining these matters.

² See ROBERT NOZICK, *PHILOSOPHICAL EXPLANATIONS* 24 (1981).

³ Though, clearly, I proceed without the hubris of believing that this analysis reflects the subtlety and depth of Nozick's work.

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develop a better understanding of the situation among the parties. Based on that improved understanding, the neutral intervener helps parties identify resolution options that are acceptable to them. If the outcomes are acceptable to the parties, then the process has succeeded.⁴ There are many important questions that can be raised about this account of mediation, but the central thesis I want to examine is the following: if the mediation process succeeds in these ways, has justice been promoted or secured? Stated differently, is it sufficient, on considerations of justice, for the outcome to be acceptable to the parties or must those settlement terms match the requirements of some external standard of evaluation?

To analyze this question, I posit the following points without elaboration.⁵ First, when discussing a concept of justice, I will presume that we are discussing concepts relevant to considerations of distributive justice – i.e. the scheme in which we assess whether life's particular rewards or burdens are “justly” distributed among individuals. Second, I, like many others, subscribe to the tradition of treating justice as a part, but not the whole, of morality; that is, I find it perfectly intelligible to believe that some act or practice may be just or unjust and inquire thoughtfully thereafter whether that act or practice is morally right or wrong.⁶ Third, I focus my analysis on justice assessments where mediation is used to resolve individual interactions rather than examining how justice principles are used to establish the basic governmental or organizational structures within a given society.⁷

In Part I, I consider some initial defenses and critiques of the thesis that party acceptability is identical to justice outcomes. I conclude that defenders of this thesis, including myself, must develop a stronger conceptual framework to support their claim than the initial defenses offer. In the remaining parts, I try to provide that framework by analyzing whether the mediation process can be

⁴ A more accurate account would be that the process has “succeeded at multiple levels.” Most persons would argue, correctly I believe, that if the mediator facilitates a discussion in which everyone gains an improved understanding of the situation and decides, in light of that, to pursue non-negotiated outcomes, the mediation process has “succeeded” in an important sense. The discussion regarding criteria for assessing “success” warrants significant analysis.

⁵ I believe that each of these propositions can be persuasively defended, but doing so requires important, extended discussions of related philosophical topics that would extend the scope of this symposium contribution beyond any reasonably targeted focus.

⁶ See ROBERT L. HOLMES. *BASIC MORAL PHILOSOPHY* 177 (1993).

⁷ This contrasts with the approach that John Rawls takes in his analysis in *A THEORY OF JUSTICE* 6 (rev. ed. 1999). While I will borrow his analytical approach in Part III, I recognize that he explicitly indicates that his analysis applies to basic structures of society and not individual interactions.

defended as an example of what Rawls referred to as a process of “pure procedural justice.” In Part II, I describe the elements of the mediation process that, when present, violate our intuitions regarding a fair result,⁸ even though the parties report that the outcome is acceptable to them. Building on those observations, I try in Part III to identify affirmatively those principles that, if present and respected in the design and implementation of the mediation process, justify our confidence in respecting mediation as a process of pure procedural justice. This is clearly the most conceptual – some will say unrealistic or ambiguous – aspect of the project, but I believe it suggests the type of analytical framework required in order to successfully support the claim that party acceptability generates outcomes we accept as just. In Part IV, I return the discussion to its practical context to identify how design principles and policies operate to make mediation a process of pure procedural justice.

In the end, while I acknowledge that more is required to sustain and complement the thesis that party acceptability is synonymous with fairness, I believe that the claim constitutes a far more powerful thesis than its critics acknowledge and that the claim carries with it significant critical implications for how much legal mediation⁹ is practiced today.

II. THE INTELLECTUAL PUZZLE: “JUSTICE FROM BELOW”

Hyman and Love characterize rule-governed systems, such as a legal system or a grievance arbitration process, as examples of processes that generate “justice from above.”¹⁰ Such systems capture the central image of a justice system consisting of the impartial application of “properly created standards or rules to ‘facts’ as determined by the adjudicator.”¹¹ What grounds our conviction that the process is fair is that the rules, whatever their content, are ap-

⁸ I use the terms fairness and justice interchangeably. More accurately, I assume that Rawls’ account of justice as fairness, with the stated principles, offers a fundamentally compelling account of our notions supporting distributive justice.

⁹ For a thoughtful text on this subject, see DWIGHT GOLANN, *MEDIATING LEGAL DISPUTES* (1996). I believe it is a short descriptive jump from providing an account of mediating legal disputes to characterizing that activity as legal mediation. If that jump is not warranted, my claim still remains that practices suggested by Golann and many others for mediating legal disputes do not fit snugly within a conception of justice in mediation that is grounded in party autonomy and acceptability.

¹⁰ Jonathan M. Hyman & Lela P. Love, *If Portia Were a Mediator: An Inquiry into Justice in Mediation*, 9 *CLINICAL L. REV.* 157, 160-61 (2002).

¹¹ *Id.*

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plied to all cases (the uniformity requirement) and to each rule violator (the consistency requirement).

By contrast, in a process that generates “justice from below,” disputants shape the outcome they find acceptable, whether that outcome comports with a result required by a standard or rule that others embrace. Hyman and Love note that in mediation,

[t]he rules, standards, principles and beliefs that guide the resolution of the dispute . . . are those held by the parties. The guiding norms . . . may be legal, moral, religious or practical. Parties are free to use whatever standards they wish, not limited to standards that have been adopted by the legislature or articulated by the courts.¹²

The mediation process, according to Hyman and Love, constitutes a stunning example of “justice from below.” I want to use the framework that Hyman and Love deploy as a point of departure for examining mediation and justice. I believe that one fair way to state the intellectual principle embedded in the Hyman and Love thesis is as follows: in a “justice from below” process – i.e. mediation – whatever outcome the parties agree upon is a “just” outcome. That is, there are no standards independent of the process against which to assess whether or not the outcomes are “just.” This is a provocative thesis at both an epistemological and jurisprudential level. Is it persuasive?

In other contexts, this epistemological claim is not compelling. For example, simply because two people agree that a particular lake is frozen and will support the weight of an all-terrain vehicle does not make it true that the lake is sufficiently frozen to support it. We can appeal to independent standards to determine the truth of the assertion. Does an epistemological basis exist for treating concepts of justice differently? A typical response is that moral terms, such as justice, have no truth value or objective content, so agreement, *per se*, accounts for the terms’ meanings. But that is not compelling conceptually¹³ or practically, for we certainly do not believe that it is morally fair to discriminate against women when allocating workplace promotions because a large group of all male individuals agree that such a practice is acceptable. So, if it is initially plausible to assert, “I know that the two of you find this out-

¹² *Id.* at 160.

¹³ In recent history, for example, persons propounding an emotivist theory of meaning for moral terms, such as A.J. Ayer or C.L. Stevenson, could be interpreted as claiming that the only truth value in moral discourse was party endorsement – i.e. acceptability. That analytical approach, though, has been widely discredited.

come acceptable but it is still not just,” then the notion of “justice from below” loses some of its force. I respond to this important type of epistemological critique in Part II below.

The jurisprudential basis for advancing the “justice from below” thesis is more immediately salient and, at least initially, attractive. What elements might support a critique of the “justice from above” perspective?¹⁴ First, some positive laws in our respective jurisdictions¹⁵ are clearly unjust in that they deny persons an equal opportunity to live a free life. Miscegenation statutes¹⁶ and “Jim Crow” laws¹⁷ are obvious examples; others might include marriage dissolution statutes that denied economic relief to the wife if she had committed any act of adultery, irrespective of her experience in or capacity to participate successfully in the workforce. Rules developed in an organizational setting can also generate distributions of benefits and burdens that inappropriately advantage some individuals over others; for instance, the Boston Athletic Association had a rule that prohibited a female from obtaining an official entry number and running in the Boston Marathon. One jurisprudential point is therefore compelling: simply because something is required by the “law” or the “organizational rule” does not mean that “justice” has been secured, even if a judge applies those rules uniformly and consistently. “Justice from above,” ironically, may be a source of significant injustice.

Second, it is possible that positive laws appear on their face to be fair but the manner in which they are applied can generate morally perverse – and unjust – outcomes. The appalling tales of how Caucasian prosecutors, judges and juries conducted criminal trials involving African American defendants¹⁸ confirm the conceptual observation that there is no guarantee that rules that might be fair in appearance are so applied in fact. The “access to justice” con-

¹⁴ I am not attributing the following claims to Hyman and Love, though I believe they are consistent with, and supportive of, their account.

¹⁵ The examples I cite appeal to experiences in the United States, but the basic jurisprudential point can be made about any rule-governed system. The critique rests on what I take to be the persuasiveness of the Legal Positivist’s account of the separation between law and morals. For the most elegant basic account of that perspective, see H.L.A. HART, *THE CONCEPT OF LAW* (2d ed. 1994).

¹⁶ See *Loving v. Virginia*, 388 U.S. 1, 5 (1967), in which the U.S. Supreme Court held unconstitutional a Virginia law making it illegal for any white person in the state to marry a non-white individual.

¹⁷ The Civil Rights Act of 1964 made it illegal to discriminate against persons of color in public accommodations.

¹⁸ See, e.g., ROBERT CARO, *THE YEARS OF LYNDON JOHNSON: THE MASTER OF THE SENATE* 703-06.

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trovsky raises the related point that even laws that are fair on their face do not help to promote justice if persons illegally harmed by rule violations do not have access to vindicate their claims in court.

In contrast to these limitations, the processes advancing a “justice from below” perspective enable individuals to participate in the decision-making process, experience party empowerment, and craft solutions that are nuanced and reflective of party autonomy; participants in that type of process would not agree to settlement terms that constitute distorted distribution of benefits and burdens. Hence, the argument runs, using mutual acceptability as the measure of justice rather than adherence to independent legal norms increases the probability that the outcome comports with our considered judgments about fair treatment.

There is another significant impetus for rejecting the jurisprudential notion that “justice from above” is desirable: as Hyman and Love sensitively point out, the legal process (or any other rule-governed process), even if immune from the shortcomings noted above, might not recognize as a “legal cause of action” a particular harm or set of harms – a set of injustices – that a person has suffered. This insight is not that the system *per se* is constitutionally vulnerable to the possibility of promoting injustices but that there are institutional or conceptual limitations on what a “system” can do. Rule-makers may decide, for reasons of efficiency or effective enforcement, that it is not possible or desirable to promulgate a law to prevent conduct that some citizens experience as acute acts of injustices. For instance, a public school system might assign a student to a particular classroom teacher. That teacher may, deliberately or inadvertently, interact with that student in ways that discourage her from learning to read or otherwise be motivated to learn; despite the parents’ appeal to transfer their child to another section, the student’s placement remains unchanged. Although the harm is genuine, no public laws, typically, would regulate that level of interpersonal interaction. The Hyman and Love criticism that “justice from above” fails in this situation is that injustices occur not because the rules themselves are unjust or that they are applied in an arbitrary manner but rather because there is no rule that prohibits the harm.¹⁹

These jurisprudential critiques of a “justice from above” process are compelling; they typically drive our effort to design an alternative dispute resolution system that avoids such drawbacks.

¹⁹ See Hyman & Love, *supra* note 10, at 161.

However, that move may be premature, for there are responses to these critiques that should retard a desire to jettison a “justice from above” approach. Two are especially prominent.

First, while one can acknowledge that “being lawful” and “being morally just” are not synonymous, it is also clear that a public law might precisely capture our considered convictions regarding fair arrangements. That is, public law can correct injustices as well as perpetrate them; the thrust and appeal of Fiss’s celebrated critique of ADR²⁰ is just that. Examples abound: laws mandating non-discrimination practices should be lauded as signs of social progress. Laws prohibiting murder or assault comport with our beliefs that one person should not be vulnerable to losing his or her material possessions or physical health because someone else is physically stronger and intimidating. Positive laws, such as minimum wage laws or occupational safety and health laws, while perhaps more controversial in detail, reflect principles about fair treatment that address alleviating economic and social injustices among individuals. One powerful response to those who critique “justice from above” is, therefore, that if parties agree to outcomes that are inconsistent with a law’s mandate and that law itself promotes morally desirable practices, then supporting party acceptability in those circumstances might be to support (morally) unfair arrangements.

Second, it is accurate to observe that a legal system does not recognize every harm as a legal harm. Rather than viewing that as a criticism of the system, though, we typically celebrate such perspective taking. While having a system of laws is a central feature of a stable civil society, a legal system is not the only valuable institution in a free society. Debating whether or not a particular harm should be prohibited by law involves analyzing whether government might become too intrusive in a citizen’s life; citizens can genuinely disagree, for example, as to whether it is desirable to regulate the diet of all teenagers so as to minimize the harm they might experience as either anorexic or obese individuals. Additionally, it is important to analyze whether, as a matter of administrative efficiency, it is effective to have the legal system regulate the targeted behavior. These discussions about whether to regulate particular behavior or the administrative inefficiencies attached to regulating such behaviors are significant conversations in a democratic society. For many individuals, it is desirable to have a legal system that is both efficient and non-intrusive, and the result of

²⁰ See Owen M. Fiss, *Against Settlement*, 93 YALE L.J. 1073 (1984).

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such convictions is to applaud (perhaps appropriately tempered) rather than bemoan the fact that some harms may not be redressed through law.

I believe that these responses to the critiques of “justice from above” are sound. What additional arguments or alternative perspectives can be advanced, then, on behalf of the “justice from below” perspective – i.e. on behalf of the proposition that mutually-agreed upon outcomes by the parties more closely reflect our convictions about the demands of distributive justice than those outcomes generated by a rule-governed system?

I believe that analyzing justice in terms of party acceptability gains traction by viewing mediation – and justice in or arising from mediation – as a system that Rawls characterizes as one of pure procedural justice.²¹ A system of pure procedural justice is one for which there is not an independent standard of justice or fairness against which to assess whether a particular process secures or advances that standard. That is, there is no independent criterion for assessing whether the process generated the correct result. A poker game exemplifies a practice of pure procedural justice: presuming that every participant voluntarily participates in the game, knows the rules, and plays by them, we conclude that any resulting distribution of earnings and losses is fair, even if it leaves one participant financially destitute and another wealthy. Of course, we can also say that the outcome is regrettable or unfortunate or any other number of things (i.e. we can assess the outcome according to other moral values) but what we cannot say is that it is unjust. Another example of a system of pure procedural justice, some might argue, is the operation of a capitalist economy: persons participate freely when making choices about what to buy and sell, and whatever the resulting distribution of wealth results from those transactions is fair.

In contrast to a system of pure procedural justice, according to Rawls, are those that are either imperfect or perfect.²² What unites these two perspectives is that for each one, we presume that we can identify the right result independent of the process. We can then evaluate the desirability and efficiency of a given process by assessing how effectively or ineffectively it secures the correct result. The right result of a criminal justice system is to convict those individuals who, in fact, committed the prohibited act and to exonerate those who are innocent of the charges. We describe our criminal

²¹ See JOHN RAWLS, *A THEORY OF JUSTICE* 74-75 (rev. ed. 1999).

²² See *id.*

justice system as “imperfect” if we know that, despite our best efforts, there will be occasions in which innocent persons are convicted; that is, they are “wrongly” (“unjustly” or “unfairly”) convicted of a crime that they did not commit. In a criminal justice system of perfect procedural justice, these processes would operate correctly each time.

Rawls, as noted earlier, applies his analysis to those principles of justice that shape the basic structure of society, not to individual transactions within it.²³ Despite his focus, though, I believe it plausible to explore transplanting that analytical framework to individual transactions occurring within the mediation process and examine whether such an account is persuasive. If it is plausible, it provides an important way to escape the unsatisfactory and sterile debate between such ADR critics as Fiss and Delgado who argue that mediation promotes peace, not justice, and those who, in trying to defend mediation’s capacity to ensure justice, compromise their argument by licensing a mediator to evaluate the legal merits of a case in an effort to gain party acceptability.²⁴ As Robert Bush so perceptively noted, if the goal is to secure the protection of legal rights or promote efficiency, mediation may be a poor process to advance them.²⁵ Alternatively, if the goal is to secure justice, it might be the most promising vehicle.

III. MEDIATION AS A MATTER OF PURE PROCEDURAL JUSTICE: IDENTIFYING THE CHALLENGES

My goal is to construct a system of mediation that contains within its operation those features that lead us to conclude that if these features are present, then any outcomes the parties agree to are just.²⁶ The intellectual strategy for this approach borrows heavily on Rawls’ notion of reflective equilibrium: first identify the justice-based criticisms that can be lodged against the process, then build conditions or constraints into the conception of the mediation

²³ See RAWLS, *supra* note 7.

²⁴ See Majorie Corman Aaron in DWIGHT GOLANN, *MEDIATING LEGAL DISPUTES: EFFECTIVE STRATEGIES FOR LAWYERS AND MEDIATORS* 267-305 (1996).

²⁵ See Robert A. Baruch Bush, *Efficiency and Protection, or Empowerment and Recognition: The Mediation’s Role and Ethical Standards in Mediation*, 41 FLA. L. REV. 253 (1989).

²⁶ If I understand the transformative mediation framework, this question of distributive justice is not a matter of concern, for supporting party empowerment and recognition does not speak to questions of whether outcomes should be viewed as acceptable or unacceptable from a justice perspective.

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procedure that minimize or escape the impact of those criticisms.²⁷ I believe that the presence of any of the following six features would lead us to conclude that a mediation outcome is unjust, even if acceptable to the parties. These features, and an example of each, include:

1) *At least one party makes non-voluntary decisions.* I believe that any outcome that results from coercion is troublesome, for we would not be confident that the terms of agreement reflected what each party was actually willing to do.

For example, assume that a divorcing couple participating in a mediation session is negotiating the division of property. The husband, whose income has been the primary revenue source for the family, proposes that he keeps the home and automobile, thereby leaving the wife with their two infant children without a home or any means of private transportation. The wife agrees to the proposal for fear that, if she protests, the husband will physically assault her when the mediation session ends. Her statement, "I agree to the proposed settlement terms," carries the surface picture of there being an agreement about the settlement terms; hence, it would be a presumptively "just" outcome. But we reject that conclusion because we believe that a component of a fair process is that individual participants shape their future relationship in a way that reflects, in the most fundamental sense, "his" or "her" commitment; if we are concerned that a person agreed to an outcome because she feared physical harm, then we legitimately question whether the commitment is hers.

2) *One party alienates a basic interest that most human beings believe should not be subject to irretrievable waiver.* We embrace the conviction that each person living in a modern democratic society is entitled to exercise a range of fundamental liberties; we view these liberties, such as the freedom to pursue a personal calling or career, travel freely, and read widely, as central to our capacity to shape a meaningful human existence. If an individual agreed to relinquish such liberties, particularly for a long period of time, we are appropriately circumspect about the circumstances leading to that "agreement" and might be persuaded to modify or nullify enforcement of that bargain.

One example illustrates this concern. Mary contracts with Ben to become his permanent mistress in exchange for Ben finan-

²⁷ For a most thoughtful, clear defense of this form of analysis as it relates to moral theory in general, see Joel Feinberg, *Justice, Fairness and Rationality*, 81 *YALE L.J.* 1004 (1972), in which he offers his review of the original publication of Rawls' *A THEORY OF JUSTICE*.

cially underwriting a medical surgery that will save the life of Mary's child. Ben pays for the surgery and the child survives, but two months later, Mary reneges on her contractual commitment. Ben sues for enforcement²⁸ and the case goes to mediation. Would we feel comfortable if Mary, on reflection during the mediation conference, agrees to abide by her contractual obligations? While one can develop a factual background that might make this case less troublesome, I think that in the situation described, most persons believe that it would be fair for Mary to withdraw from the arrangement as a dimension of her freedom to pursue her own life's aims and objectives, even though she had entered into the arrangement knowingly and without physical coercion. We believe that an individual who enters into an arrangement that results in her being another's slave – i.e. work for that person or organization “for life” – should, on grounds of justice, have the capacity to withdraw from that situation.

3) *Parties agree to settlement terms that violate that jurisdiction's positive law.* Public laws, as noted above, can promote fair treatment among individuals or reduce severe inequities in the distribution of economic or social advantages. Further, even if some laws are subject to moral criticism, we might tolerate some inequities because, overall, the presence of a functioning, broad-based legal system promotes social order and provides individual citizens with reliable, public procedures by which they can predictably shape their current and future social interaction. Therefore, if disputants agree to an outcome that is acceptable to them but contrary to the requirements of the public law system, the situation raises concerns regarding the continuing viability of the broad-based system and, in consequence, the important values that a credible legal system advances. Is it fair, then, to let people agree to arrangements known by them to be illegal?

Consider the following: In a mediation session involving a case of employment termination, A agrees to settle the case by rehiring B, his terminated employee, but only on the condition that B agrees to be paid in cash and otherwise work “off the books.” B agrees. What is troublesome in this situation? We have already acknowledged that there is no necessary relationship between doing that which is legal and doing that which is morally just; these settlement terms might promote overall resource allocations in a manner that minimizes inequitable distributions and thereby ad-

²⁸ See JOEL FEINBERG, *THE MORAL LIMITS OF THE CRIMINAL LAW: HARM TO SELF* 253 (1984).

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vance justice considerations. This agreement works, though, only if the parties keep the arrangement secret. These parties depend upon others, including the mediator, not to divulge this arrangement, for not only is the arrangement non-enforceable but there might be other legal liabilities the parties suffer if its terms became public.²⁹ In essence, the agreement “works” because the parties are free-riders. They assume an entitlement to be treated differently not necessarily by the particular law in question (for others might want to change that as well) but by the fact that everyone else must be law-abiding individuals while they are free to decide which laws they choose to comply with and which ones they can discard.

4) *Agreement terms violate or ignore a significant dimension of a person’s human dignity.* We would be uncomfortable believing that justice was promoted or secured if persons resolved their controversies in a manner that enabled one party to ignore or be non-attentive to a significant dimension of its bargaining counterpart’s human dignity. That is, we can acknowledge that one party might control the discussion agenda in such a way as to skew the conversation, thereby promoting agreement on some matters but avoiding discussion of or reaching agreement on matters of fundamental interest to the other party. That is, the parties can have reached agreement, but it was not about matters that meant the most to at least some of the parties; were that to occur, the fact of “acceptability” would not ease our concern about possible unfairness.

A recent controversy in the world of opera hints of this dimension.³⁰ The Royal Opera at Covent Garden decided to drop the world’s leading soprano from a title role in a forthcoming production. The reported reason for breaching the contract was that the soprano was too physically heavy to wear a slinky black dress that the director now views as central to the definition of the character’s role. The contract was consummated five years earlier. The presumption is that the singer will be compensated for those cancelled performances and related monetary damages.

Although the singer reports that she made efforts to lose weight, there was no reported discussion of whether the parties addressed the understandable embarrassment and humiliation the

²⁹ The employer, for example, might have tax liability for failure to pay social security tax, worker compensation tax, etc. The employee presumably would have not declared these payments as income and, thus, would face income tax liabilities.

³⁰ See Anthony Tommasini, *A Dress or a Voice: What Makes a Diva?*, N.Y. TIMES, Mar. 10, 2004, at B1.

singer must have endured as a result of the director's apparently unilateral decision to change directions in his conception of the opera. It appears that the injuries are viewed as those for which money damages will have to suffice.

From a justice perspective, the apparent outcome appears inadequate. In the interests of freedom and liberty, persons should be able to enter arrangements but then subsequently change their minds and pursue different ideas and options. Legal remedies are designed to facilitate that process. But the missing ingredient in this scenario is that the company was able to act in a unilateral fashion and create harms, of which only some were addressed, and perhaps these were not the most important harms to the individual. Fair dealing, in this instance, might require those decision makers to consult with the individual before deciding, share the perspective of the new direction, and structure the conversation in a way that enables the singer to identify how the news of the announced change might create embarrassments for her that the company could mitigate, if not completely eliminate.

5) *Agreement terms are accepted with "full knowledge" of the possible alternatives.* We do not applaud the situation in which persons reach settlement terms that would likely have been different had one of the parties known of other options or possibilities. That is, we critique acceptability as not being fair if one of the parties agrees to an arrangement without adequate information regarding her rights or practices.

Poignant examples arise in the family area. Presume a separating mother agrees to accept a proposal from her estranged husband regarding the levels of financial support for the children or the denial of his retirement benefits to her. However, had she known that the legally mandated minimum support guidelines in her jurisdiction provided a richer basis for resolution, or that the law indicated that she was entitled to a significant portion of her husband's pension benefits, she might have resisted the proposal. Similarly, if a defendant had realized that her fear of being legally vulnerable to an employment discrimination charge was unfounded because the statute of limitations had expired on the plaintiff's claim, then the defendant might have simply refused to continue discussions about a proposed job reinstatement. In each instance, our notion is that mutually acceptable outcomes based on ignorance taint the fairness of those outcomes.³¹

³¹ See Jacqueline Nolan-Haley, *Informed Consent in Mediation: A Guiding Principle for Truly Educated Decisionmaking*, 74 NOTRE DAME L. REV. 775, 812 (1999).

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There is another dimension in which knowledge influences the justice of the decision making process. Elster refers to this as “sour grapes.”³² It is the phenomenon of someone who, by virtue of his or her life experiences, background or intellectual imagination, does not envision the possibility of alternate and improved conditions.³³ For example, Babcock and Laschever³⁴ claim that it does not occur to women in the workforce to ask for a raise for certain types of job changes or to ask for the same size raise that a male would seek; when one calculates those financial differentials over the course of a working lifetime, the difference in earning power between females and males raise serious questions of fair distribution. This justice challenge emanates from a person not envisioning that it was possible to ask for something, not from a power-hungry individual who denied it to her.

6) *Agreement terms are inconsistent with fundamental values of the concept of a person that is embraced by the larger community.* Persons might agree to outcomes they find acceptable, but those outcomes are inconsistent with fundamental values presumptively shared by a broader community. To put it sharply, how are conflicts emanating from cultural differences resolved fairly in mediation?

Presume that a Somalian father and mother living in the U.S. seek unsuccessfully to have a U.S. doctor perform a clitoridectomy and infibulation on the parents’ fourteen year old daughter.³⁵ The practice, a cultural norm in Somalia, is reportedly undertaken

. . . not for reasons of health or because they are religiously prescribed . . . but rather, because the surgeries are ‘thought to be crucial to the definition of a beautiful feminine body, the marriageability of daughters, the balance of sexual desire between the sexes, or the sense of value and identity that comes from following the traditions of the group.’³⁶

³² See JON ELSTER, *SOOR GRAPES: STUDIES IN THE SUBVERSION OF RATIONALITY* (1983).

³³ See *id.* at 109, 125-33.

³⁴ See LINDA BABCOCK & SARA LASCHEVER, *WOMEN DON’T ASK* (2003).

³⁵ This fact pattern is a variation of the Seattle case. See AMY GUTMANN, *IDENTITY IN DEMOCRACY* 64-65, 69-70 (Princeton Univ. Press 2003). The matter is analyzed in terms of legal arguments in wonderfully lucid prose by D. Coleman, *The Seattle Compromise: Multicultural Sensitivity and Americanization*, 47 *DUKE L. J.* 717 (1998).

³⁶ *Id.* (citing Carla Obermeyer, *Female Genital Surgeries: The Known, the Unknown, and the Unknowable*, *MED. ANTHROPOLOGY Q.* 13 (1), 92 (1999)).

The dispute is referred to mediation. Irrespective of the legal status of the practice in a given jurisdiction,³⁷ would the agreement of the doctors and parents to conduct the procedures be sufficient to make this a just outcome? The procedures are fundamentally criticized as unacceptable acts of female genital mutilation (FGM) that inflict irreversible injury in adolescent girls by causing substantial pain later in the girl's life and decreasing her capacity for sexual pleasure.³⁸ But there certainly are competing claims about cultural norms and practices that have shaped a community's style of life for a sustained period that warrant respect. If the parties to the conversation agreed to go forward with the procedure, I believe the one clear concern, from a justice-perspective, that must be addressed is whether the person directly affected by the outcome – i.e. the daughter – had an opportunity to participate in the decision-making process. If we were convinced that the individual was sufficiently mature to participate thoughtfully in discussions regarding these practices affecting her body, we would be deeply troubled by her exclusion. But, absent that, I believe it is a much closer call to determine that one outcome is, on justice considerations, clearly warranted and the other prohibited.

So I conclude as follows: in order to support the thesis that party-generated outcomes acceptable to the parties are also just, we must develop a conception of mediation that minimizes or eliminates any or all of these six features from determining the outcome.

IV. MEDIATION AS PURE PROCEDURAL JUSTICE: GOVERNING ELEMENTS

For each challenge noted above, we must affirmatively identify the principle that, if respected, minimizes the concern that justice will not be secured. The principle must necessarily be stated at a high level of generality; the challenge then becomes, both in this Part and in the final section, to shape its concrete application.

The six principles can be stated as follows:

1. *Voluntariness*. Persons will participate in a consensual dispute resolution process if, and only if, they possess the ca-

³⁷ To make the matter somewhat less troublesome and to distinguish sharply this dimension from that discussed in Section Four above, presume that the legal status of the practice in the jurisdiction was ambiguous.

³⁸ See GUTMANN, *supra* note 35, at 64.

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- capacity to exercise meaningful choices regarding two or more possible courses of action.
2. *Inalienability of interests.* Persons will participate in a consensual dispute resolution process if, and only if, they do not irrevocably relinquish their ability to enjoy fundamental freedom throughout the course of a normal life.
 3. *Publicity of outcomes.* Persons will participate in a consensual dispute resolution process if, and only if, the outcomes can be publicly known and justified.
 4. *Dignity and respect.* Persons will participate in a consensual dispute resolution process if, and only if, the settlement terms are mutually accepted for reasons that a reasonable person cannot reasonably reject.³⁹
 5. *Informed decision-making.* Persons will participate in a consensual dispute resolution process if, and only if, the participants have access to a reasonably rich life experience to suggest that a person capably envisions and appreciates the value of alternative courses of action for living a life of normal duration.
 6. *Toleration of conflicting fundamental values.* Persons will participate in a consensual dispute resolution process if, and only if, they possess a reasonably intelligent capacity to envision and shape a life's plan according to a considered vision of a life over a reasonable life span.

These principles deter the conduct and outcomes highlighted in Part II, but their meaning, when stated at this level of generality, requires elaboration.

1. *Voluntariness.*
Persons will participate in a consensual dispute resolution process if, and only if, they possess the capacity to exercise meaningful choices regarding two or more possible courses of action.

We endorse using mediation, in part, because we believe that mediation, distinct from any rule-governed process, supports the concept of individual autonomy. This respect for autonomy lies at the core of a democratic lifestyle. Mediation is based on the belief that parties to a controversy have the right and responsibility to decide for themselves what constitutes an acceptable resolution. A central feature of a person's identity is her capacity to exercise judgment and choice over a broad domain of personal or commu-

³⁹ See T. M. SCANLON, WHAT WE OWE TO EACH OTHER 189-247 (2000).

nity issues, from trivial topics to fundamental life matters. We believe an individual should have the right to decide what career she wants to pursue, where she wants to live, what she eats for breakfast and whom she wants to love. To the degree that she permits other persons to make such choices for her, we lose respect for her sense of maturity. If public policies constrain such choices, we believe that the burden is on those advocating the restriction to justify the proposed constraint.

This is fundamental. This is not a claim that a person can live her life however she pleases, with no consideration for how her conduct affects others. A person does not have to like other people or want to associate with them in order to know that she must shape her behavior so that she does not harm another person's fundamental interests. But those are broad parameters. Absent indices of harm, the point is straightforward: we want her to make the choice.

Scanlon notes that there are at least three reasons for valuing choice.⁴⁰ The first is instrumental: given a range of options, the person making a choice has better information regarding which option fits her overall interest scheme; that is, she knows better than others how selecting one option over another is congruent with, or operates at cross purposes with, the myriad of other goals and aspirations the individual is simultaneously pursuing. Hence, it enhances the probability of advancing the individual's overall enjoyment if she makes the choice. Second, there is a representative value. This relates to the fact that it is the individual who makes the choice, wise or not, so that others can interpret and attribute values or reactions to that decision-maker; for instance, if it is the landlord who agrees to accept a reduction in rent in full satisfaction of arrears, the tenant can accord that individual a level of graciousness and respect for his having made that decision, whereas that tenant response is not available if a judge were to order the landlord to accept such terms. Third, choice has a symbolic value; it represents "my" having chosen to do something, thereby affirming "my" worth or eligibility as a decision maker.

But there is more, I believe. Exercising choice is not simply symbolic: it is critical to enabling someone to live her life as she believes most worthy. Each of us has differing attitudes towards risk, adventure, reflection and the like; exercising choice enables us to advance our judgments and dispositions in a way that makes

⁴⁰ See *id.* at 251-56.

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each of us distinctive. Some persons enjoy dance; others want to chew tobacco. Some are fascinated with the operations of the stock market, while others enjoy working with their hands on pottery or wood-working projects. To restrict the range of choice is to impose a cookie-cutter set of values on our human experiences. If one cherishes freedom, choice is essential. And unless we are harming another person in a fundamental sense when we exercise that choice, we believe we should have the right as individuals to live as we so choose, even if those choices are not always wise, prudent, fully informed, or ultimately in our best interest.

It is important to stress that this claim is not a pragmatic one. I am not stating that there should be no rule governing how many hours a night a child must spend on homework, prohibiting smoking tobacco, or restricting groceries we buy, because such rules would be too insensitive to meet the needs of a particular situation. Nor am I claiming that having so many rules would be administratively cumbersome and, hence, inefficient. My criticism is more fundamental. It is a claim that a person's capacity to engage in the process of making such decisions, and to have her choices respected, is essential to her being; one cannot be a person without making such decisions and assuming responsibility for their outcome.

Mediation, as a dispute resolution process, incorporates and builds upon party autonomy. If autonomy flourishes, then the outcome as it relates to the distribution of benefits and burdens is significantly grounded in a person's positive assessment that the proposed arrangement is congruent with her life's plans. By contrast, if the outcome appears to reflect settlement terms that result from a person either being coerced into accepting them or some other dimension of non-voluntariness (e.g. lack of capacity), we properly pause to endorse its outcome. Quite explicitly, it is not the substantive outcomes *qua* outcomes that concern us in this situation. Rather, we reject the mutually acceptable outcome, because we are concerned either that one's bargaining counterparts improperly influenced the decision-making process or that the mediator, acting paternalistically ("I know what is best for you, even if you don't agree"), prodded one party into accepting the proposed terms; in each instance, what is unacceptable is that participants have failed to respect the decision maker's autonomy.

2. *Inalienability of Interests.*

Persons will participate in a consensual dispute resolution process if and only if they do not irrevocably relinquish their

ability to enjoy fundamental freedom throughout the course of a normal life.

We respect mediation as a dispute settlement process if it generates outcomes that embody a respect for the fundamental liberties of each individual. Of course, persons can agree to limit the exercise of a given liberty, and there is no guarantee that all liberties can be simultaneously maximized; there will be conflicts for which priorities among basic liberties must be established. But we certainly are more confident about the integrity of a dispute resolution process – i.e. we think the process “got it right” – if the results are such that each person’s basic interests are not inappropriately constrained over the course of a normal life.

Political philosophers offer thoughtful insights regarding the nature of this challenge. I want to assess them by considering a hypothetical, and some variations, on a fact pattern proposed by Amy Gutmann.⁴¹ An elderly widow is a passenger on a train; she suffers from asthma. Her life expectancy, given this condition, is two years. The train, European in style, has enclosed cars. A middle-aged male passenger enters the car and sits down. Two hours later, the male passenger pulls out a cigarette container and takes a cigarette from it. The woman asks the man to refrain from smoking in the car, indicating that if he were to smoke, she would die within two hours. Assume that there is no other available space on the train for the woman to sit or the man to smoke. Finally, let us assume that the train will not stop for sixteen more hours.

Gutmann considers several options for resolving this dispute. Assume that four other people are in the compartment and they take a vote to determine whether to permit the man to smoke; the vote is five-to-one to permit the smoking. Has something gone wrong? In political theory terms, this appears to be the type of situation in which a person’s fundamental interest is at stake and our belief is that it should be protected from being extinguished by majority or mob rule. This certainly seems correct. To establish the point more strongly, let us modify the story in the following way. We interview the voters following the outcome and ask them to explain their vote. The woman and smoker’s explanation are straightforward. But the remaining participants offer the following comments: “I think anyone over sixty-five has no right to stay alive.” “If it were a man suffering from asthma, I’d vote differ-

⁴¹ See Amy Gutmann, *How Not to Resolve Moral Conflicts in Politics*, 15 OHIO ST. J. ON DISP. RESOL. 1, 3-5 (1999).

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ently.” “She’s from England; let her expire.” “If she were pretty, I’d vote for her.” It is clear why we oppose using the majoritarian voting process to resolve disputes involving such interests: we accurately believe that there is no moral justification for terminating a person’s life on the basis of features such as age, sex, national origin, or physical features over which a given individual has no control, and those are precisely the grounds these voters cited to explain their vote.

Alternatively, and more germane to mediation, assume that the woman and man engage in a negotiation about what to do. The woman, feeling pity for the man or not wanting to be hated by him and all the others, agrees to let him smoke; he does, and she soon thereafter expires. Again, Gutmann contends, bargaining over certain matters should not be allowed; certain rights should always trump individually negotiated arrangements because of the pervasive mischief that can arise from power disparities among the negotiators.

That is a forceful insight, but I believe that the conclusion is drawn too quickly. This latter account describes the situation in a significantly misleading way, for it portrays the situation as a choice between protecting or securing a fundamental right of the woman and using a dispute resolution process bargaining that places that right in jeopardy. In the vernacular, when a fundamental right, such as the right to life, is in jeopardy, one cannot justify, according to Gutmann, using a dispute resolution process such as voting, bargaining or flipping a coin that leaves open the possibility that the right, from a moral point of view, can be arbitrarily overridden.

Nevertheless, I am not confident that this alternative is the most constructive way to frame and analyze the situation. Rather, consider the following. The widow and smoker engage in a conversation about whether he can light the cigarette. The widow first describes her medical condition. She then proceeds to convey her desire to remain alive so that she can continue to be with her grandchildren, sustain her professional productivity, attend classical music concerts, and participate in religious traditions. She is eloquent. The smoker, in turn, describes his love of smoking cigarettes. He reports that he has smoked for 35 consecutive years and, despite medical warnings of its danger, has never contemplated quitting. He notes that while he derives immense pleasure from listening to classical music, reading poetry, and studying the paintings of great artists, those pleasures pale by comparison with the joy he experiences when smoking a cigarette.

They are at a standoff. Neither has advanced a proposal regarding the request to smoke a cigarette in that car that the other has found acceptable. What happens next? What Gutmann might be properly worried about is that the impasse will be resolved by the unilateral exercise of power by one of the participants: the man lights the cigarette, the woman is unable physically to overpower him, and she dies. That is not fair. And that is correct: it is not fair. But that is not a bargaining result; it is a result emanating from the failure of bargaining parties to reach a settlement. And I believe Gutmann is correct substantively when she states that we should support having policies and institutions in place that would prevent that type of power disparity to play out in that way.⁴² It is in this important sense that the context in which the mediation process is used is of fundamental significance in insuring that negotiated outcomes meet minimal justice demands.

3. *Publicity of outcomes.*

Persons will participate in a consensual dispute resolution process if, and only if, the outcomes can be publicly known and justified.

One dimension of a concept of fairness is that persons in similar situations are treated similarly. We take pride in asserting that a rule governs everyone, that no one, for example, is “above” the law. Mediation, however, celebrates tailoring outcomes to meet individual needs and situations. Mediation proponents urge parties who are considering settlement terms that differ from traditional outcomes to be comfortable with, not apprehensive about, such possibilities.

But there is an additional dimension as well. Distributive justice is a comparative notion; we want to assess how outcomes for one group of disputants compare with those of another. What is troublesome about parties agreeing to settlement terms that meet individual needs but differ from what other people would likely accept, or that are inconsistent with their individual legal obligations is not that justice might not be advanced. Rather, what is troublesome is that the success of the mediated outcome may be contingent upon all non-mediation participants being ignorant of the agreement terms and acting in ways that enable the disputing parties to capitalize on that ignorance. The result is that the negotiating parties have taken advantage of all non-participants in a way that undermines considerations of fair treatment. In order for

⁴² See *id.* at 14-17.

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us, therefore, to be confident in the fairness of the parties' mutually acceptable settlement terms, there must be a procedural requirement that the mediated outcome, in principle, be known to others.

This publicity requirement does not mean that citizens cannot use a mediation process as an instrument of social change. On the contrary, persons should be able to negotiate arrangements that, if not authorized by present law, signal the arrangements that the parties, as citizens of a political community, believe should be embraced by public policy. But in such an instance, the parties, knowing that their negotiated outcomes should be capable of being made public, would also be likely to negotiate a mutually agreed upon procedure for taking steps to try to reform current legal or administrative practice that enables them to implement their settlement terms.⁴³

4. *Dignity and respect.*

Persons will participate in a consensual dispute resolution process if, and only if, the settlement terms are mutually accepted for reasons that a reasonable person cannot reasonably reject.

We value mediation as a process because it advances a dialogue form grounded by principles that require persons to communicate and interact in a manner so that they treat one another with a threshold degree of dignity and respect. These principles structure both the way in which individuals communicate and behave and the substantive arrangements they consider.

Different dispute resolution processes permit or require persons to treat one another in particular ways. To clarify how mediation shapes human interaction, it is helpful to contrast it to a rights-based, adversarial process.

When vindicating a claim in a rule-governed system, a party asserts that someone else has acted in a way that undermines or frustrates its realizing a particular state of affairs to which it believes it is entitled. Rights have multiple sources, including but not limited to legal, moral, religious, institutional, or conventional bases. Whatever the source, the structure for claiming vindication is identical.

For example, assume that the New York Yankees and the New York Mets are playing a baseball game in the World Series. The

⁴³ Same-sex couples trying to make plans analogous to those of heterosexual married couples confront this challenge in states where the legal status of same sex couples is ambiguous. See, e.g., *Gay Couples Told to Expect Legal Battles*, COLUMBUS DISPATCH, Feb. 14, 2005, at B1-2.

Mets are at bat. The pitcher throws a pitch to the batter. The batter swings and misses, and that missed swing constitutes the batter's third strike. Further, that strikeout would constitute the third out of the inning. According to the rules of American baseball, the New York Mets have been retired and the Yankees should come to bat.⁴⁴

Suppose, though, that the umpire does not call the batter out. Rather, she reasons that the game will be much more exciting if the inning continues, because the bases are loaded, and the Mets might be able to tie the score if the batter hits safely. Or, the umpire knows that if the batter gets one more hit, that would trigger the application of an incentive clause provision in the player's contract that would result in his earning a substantial bonus while the pitcher's statistical record would not suffer significantly by having to pitch to one more batter. Under either scenario, she orders the players to continue playing, with the Mets batter receiving an "extra" strike, in order to promote a greater good.

The pitcher can justifiably complain that his "right" to have the batter called out has been violated, even if the game would be more interesting or rewarding were the batter to have another chance. True, the fans might find the game more exciting if the Mets had the batter continue in an attempt to hit to tie the score. But the pitcher can justifiably argue that the Mets had their opportunity within the defined rules, and the fact (or prediction) that most persons would find an extended inning more exciting is irrelevant to enforcing a rule that helps to define "baseball." Baseball, in Rawlsian philosophical terms, is a practice concept;⁴⁵ its rules are constitutive of the activity. And, even if the pitcher agreed that fans would be entertained and he and his teammates were willing to continue to play in the proposed manner, we would criticize the umpire for her failing to apply the rule – "to do justice" – were she to enforce the agreed-upon settlement.

Additionally, the pitcher's actual attitude towards the opposing batter could appropriately fall within a wide range. It could be compassionate ("I'm sorry that you didn't qualify for the bonus"), neutral ("I really don't care if you earn more money or not"), or nasty ("you are a selfish, overpaid athlete already, I'm delighted that you won't get your damn bonus"). In a procedure to vindicate

⁴⁴ Readers will immediately note that this example is simply an updated version of H.L.A. Hart's example of scorer's discretion. See H.L.A. HART, *THE CONCEPT OF LAW*, *supra* note 15, at 129-42.

⁴⁵ See John Rawls, *Two Concepts of Rules*, 64 *PHIL. REV.* 177 (1955).

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one's claim, though, the pitcher's attitude towards the batter is irrelevant to whether he is entitled to have the batter called out.

A more serious matter, of course, can be readily drawn from real-life scenarios. Consider the employee who is lured to leave her place of employment by a tantalizing employment offer from a competitor. The new employer, geographically located a substantial distance from her current home, offers her a dramatic salary increase, added office and travel perks, and the prospect of a high visibility career at the new company. The employee, a single parent, accepts the offer and announces to her current employer that she is leaving. She sells her current home, buys a new residence in her new city and makes appropriate arrangements for her school-age child to enter a school system. She moves. At the end of her first week of work at her new job, she is terminated. When she asks for a reason, she is told that the company is engaging in a downsizing initiative that has resulted in several individuals, herself included, being released from the company. The employee sues the employer, claiming that the representations made to her result in her being "entitled" to employment.

The employer claims that the law governing the jurisdiction incorporates an "employment-at-will" principle that permits the employer to terminate employees for good reasons, bad reasons, or no reasons at all. In most jurisdictions in the United States, the employer in the above scenario prevails.⁴⁶ Again, in vindicating the claim, the employer might act with compassion and sensitivity, genuinely making such statements as "I feel very bad that things worked out this way for you and your child." But the employer might also adopt a contrary perspective and say: "I really don't give a damn what happens to you and your kid; I've got a business to run." We might find these latter statements offensive and morally blind, but we would quickly conclude that the defendant seeking to vindicate her right need not like or, more objectionably, care about what happens to the affected individual.

Does the same mode of interaction occur when disputants negotiate with one another in a mediation conference? The presumptive motivation for engaging in negotiation is the belief by one or more parties that they need the cooperation of someone else in order to achieve their objective. While there are multiple strate-

⁴⁶ The employment-at-will doctrine is a creation of state, not federal, law. While most states incorporate some public policy exceptions to the general rule, such as prohibiting the termination of an employee for performing jury duty service rather than attending work, the scenario above does not trigger their application.

gies and suggestions offered for how one party gains another's cooperation,⁴⁷ that party cannot obtain it by disregarding or ignoring the interests, goals or aspirations of its bargaining counterpart. And that can only be done by being attuned to how a party's own bargaining proposals or postures impact the standing and capacity of the bargaining counterpart to advance or protect their respective interests and goals. A bargaining party need not agree with or endorse the desirability of its counterpart's aspirations, but if cooperation is required, then a party must at least acknowledge that its counterpart wants to secure some interest or goal, if only to assess more accurately whether it believes continued bargaining would be useful.

It is elementary to note that simply by engaging in a negotiation, a party is not required to reach an agreement with its counterpart. What is required, though, is that each person be ready to account or explain to her bargaining counterpart what reasons she finds persuasive for acting in a particular way; in that sense, personal accountability is an indispensable feature of negotiation. If a negotiator is ruthless, selfish, or not open to considering new information, the necessity of holding a conviction publicly (i.e. to her counterpart) will make those traits transparent in the bargaining process. In a significant sense, negotiating allows bargaining counterparts to see one another "for who they really are." It may be of small practical consolation to the less powerful negotiator to be able to report to her friends, with solid evidence, that her bargaining counterpart is a mean or self-centered individual. But that, at least, is a sharply different and far stronger judgment than the one she might otherwise have to report if her counterpart shielded himself by asserting that he was only doing what the law (or some other rule) entitled him to do. The rule-governed system, in the latter instance, serves to protect the individual from a deservedly harsher moral judgment.

The above comments focus on process. Does the demand to treat others with a threshold level of dignity and respect affect the substantive outcomes that the parties strike? A crucial element in a well-conducted mediation conference is that persons identify concerns they want to address and over which the other party has

⁴⁷ The negotiation literature is replete with varying, and conflicting, suggestions. Compare, for instance, the well-known approach of principled bargaining outlined in ROGER FISHER, ET AL., *GETTING TO YES* (1991), with the competitive approach described in WALTON & MCKERSIE, *A BEHAVIORAL THEORY OF LABOR NEGOTIATIONS: AN ANALYSIS OF A SOCIAL INTERACTION SYSTEM* (2d ed. 1991).

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some control. That is, the bargaining agenda can reflect those elements of the individuals' interactions that at least one person found offensive, degrading, harmful, or otherwise impeding her ability to promote or satisfy some interest. People can choose to ignore the matter ("I refuse to discuss whether I should have consulted with you before making the decision to fire you"), but that choice itself exposes the values of the various individuals and becomes the basis for others to make moral evaluations of those decision-makers. What is not tolerable from a justice-perspective, though, is for contesting parties to resolve a concern that, from one party's perspective, constitutes only a "small aspect" of the controversy. The challenge is not a pragmatic consideration that failure to address some matters might jeopardize the parties' ability to implement agreed-upon settlement terms. Instead, the concern is that a party might escape accounting for its conduct to the injured party – "get away with it" – in a manner that renders the remaining remedy not simply a poor resolution but perhaps, in significant terms, no resolution at all. In that way, a party fails to accord dignity and respect to their counterpart.

5. *Informed decision-making.*

Persons will participate in a consensual dispute resolution process if, and only if, the participants have access to a reasonably rich life experience to suggest that a person capably envisions and appreciates the value of alternative courses of action for living a life of normal duration.

Mediation loses attractiveness if it becomes a vehicle through which persons make binding decisions that are ill considered. But the justice-based concern is whether the negotiated outcomes reflect a distribution of benefits and burdens that would have been notably different if one of the parties had more information at the time it made its decision or had the capacity to envision possibilities that the other side in fact would have been in a position to help her realize.

Perfect information is not required to meet justice concerns. The fact that neither party knew about a particular condition that, if known, would have influenced their bargaining proposal is not, in and of itself, sufficient to raise justice concerns about negotiated outcomes. We might view their agreement, in the absence of such information, as unfortunate or short-sighted, but not unfair. We are more troubled when mutually agreed upon settlement terms appear to reflect an information asymmetry that presumptively operates to one party's benefit and the other's detriment.

Persons are not comfortable with the idea of parties resolving a dispute in the absence of relevant information.⁴⁸ In many settings, though, we consider it fair to hold the parties to their settlement terms even though they might have decided differently had they been better informed, more rigorous in preparation or more disciplined in their analysis.⁴⁹ In a legal system (or in a “justice-from-above” setting), though, we become uneasy about persons agreeing to outcomes in ignorance of their legal rights and duties, because we believe that the integrity and acceptability of a legal system *tout court* is predicated in significant measure on each citizen having information about her legal rights and duties,⁵⁰ or at least the capacity to obtain assistance in learning about those matters. Therefore, being uninformed about legal rights and duties appears to differ importantly from a bargaining party’s lack of information about economic strategies, psychological truths, or religious beliefs and agreement terms based upon ignorance of those legal rights and duties raise concerns.

While the concern about sustaining support for a legal system is certainly warranted and profound, I am not persuaded that the compelling rationale for insuring that party decision-making be based on minimum information regarding legal rights and duties is based on justice considerations rather than on such alternative values as social cohesion. Knowledge of legal rights and duties becomes a justice-based concern when legal information relevant to the discussion and resolution of particular controversies assumes a dominant or exclusive role (that is, in the vernacular, the only thing people want to talk about in considering settlement of the controversy are law-based claims), for in such a situation, the distributive outcomes may vary considerably according to the information possessed by the respective parties.

The matter of informed decision-making becomes more complex when one considers that some persons, by virtue of their life experiences, cannot envision what is even possible in a given set-

⁴⁸ See Nolan-Haley, *supra* note 31.

⁴⁹ The principle of “let the buyer beware” governs much policy for consumer transactions in a capitalistic economy. But also, in very personal matters, such as agreeing to marry someone without knowing more about his personality or values, we endorse the notion that even though one might have decided differently had she taken the time to gather more information that was available at the time, the agreement, though not “fully informed,” was fair.

⁵⁰ See LON FULLER, *THE MORALITY OF LAW* 33-38 (1964). Fuller makes this point poignantly in discussing how difficult it is to decide whether or not there is an existing legal system within a culture, if the rules of the system are not widely known or are being changed retroactively.

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ting; that lack of information undermines a person's ability to fashion a robust proposal or envision the range of possible outcomes. It becomes a justice concern because the person's inability to envision the possibilities may be the result of that person's having been raised in an environment over which she had little control, such as adverse economic circumstances, limited family experiences, or the absence of educational opportunities.⁵¹

The requirements of informed decision-making to meet justice concerns may be less stringent than advocates propose. Each of us strives to make wise decisions in our lives, but seeking wisdom is not the same as ensuring fair treatment. Similarly, while we may be appalled that one party takes advantage of another individual's ignorance to secure a more favorable outcome for herself than would otherwise be likely, our critique of that person is that she is selfish or self-serving, not necessarily that the outcome is unfair. Those are important moral judgments to make, but they are quite different from justice-claims.

6. *Toleration of conflicting fundamental values.*

Persons will participate in a consensual dispute resolution process if, and only if, they possess a reasonably intelligent capacity to envision and shape a life's plan according to a considered vision of a life over a reasonable life span.

Some mediation scholars and practitioners claim that persons cannot mediate conflicts involving clashes of fundamental values.⁵² If they are correct, mediation's usefulness is severely limited, or the values that it promotes are less robust than otherwise believed. But those claims are not persuasive, conceptually or empirically.⁵³

What does it mean for someone to engage in a discussion with someone committed to fundamentally different values? First, it must be possible for each individual to be able to envision how his or her life might develop by adhering to a set of fundamental convictions throughout the course of a normal life. Second, it must be possible for all individuals to be able to discuss those convictions in a way that enhances each person's ability to understand the other's perspective. While these elements are necessary and sufficient

⁵¹ Compare, for instance, the image of the world and its possibilities of those persons who have access to learning about and using personal computers with those who have not been similarly exposed. The entire phenomenon of downloading — “pirating” — songs and “burning” them onto a CD makes sense to some people and is a foreign concept to others.

⁵² See CARPENTER & KENNEDY, *MANAGING PUBLIC DISPUTES* 197-202 (1988).

⁵³ See R. GOLDMANN, *ROUNDTABLE JUSTICE: CASE STUDIES IN CONFLICT RESOLUTION* (1980) (accounting conflicts resolved through mediation that involved parties in controversies in which some of their fundamental values clashed).

conditions for ensuring fairness, their presence does not insure that parties shall reach an acceptable outcome.⁵⁴

The clash of values described in Part II⁵⁵ supports this analysis. First, what is crucial in that challenging situation is for all affected stakeholders – the hospital representative, doctors, parents, and daughter – to be able to envision and understand in a reasonably robust manner what is actually involved in the lifestyle of the conflicting practices.⁵⁶ This is not an “information” need, but rather a requirement, that each person appreciates and understands how each person’s human existence would play out by being lived in one mode with its distinctive values, opportunities, and aesthetics rather than in another fashion. Achieving such understanding requires considerable reciprocal efforts at learning about different cultural values and practices. Second, it is imperative that the parties be able to learn from one another in a manner that is reasonably accessible to human beings with reasonable intellectual and emotional capacities. That is, if the conversation is predicated on the claims of special insights or talents (e.g. “You won’t understand why freedom is so important to a young girl unless you grew up in an affluent suburb of Los Angeles, California in the late twentieth century”), then the outcomes are tainted by other considerations, such as overwhelming power or fatigue that may lead to one party unilaterally imposing its will on another, trampling justice considerations in the process. That, arguably, was the outcome of the scenario in Part II when the hospital decided not to endorse the compromise.

V. SECURING JUSTICE AT A PRACTICAL LEVEL

The analysis of the preceding parts, particularly Part III, is abstract. Does it have any cash value? My thesis is that the principle of party acceptability of outcomes (“justice from below”) can be confidently embraced if we can credibly view the mediation process as an example of a system of pure procedural justice. We can plausibly view it that way if we can persuasively incorporate the conceptual elements identified in Part III into an account of mediation and then develop or cite practical guidelines, via principles of

⁵⁴ This is one of the critical insights of scholars analyzing the concept of deliberative democracy. See, e.g., A. GUTMANN & D. THOMPSON, *DEMOCRACY AND DISAGREEMENT* (1996).

⁵⁵ See *supra* at Part II, at 18-19.

⁵⁶ See GUTMANN, *supra* note 35, at 69-73 (offering an insightful discussion of this challenge).

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process design or mediator ethics, that insures substantial process integrity. I comment briefly on how we try at a practical level – I believe with considerable success – to insure that integrity.

1. *Voluntariness.* We address this value directly in two ways and indirectly in another. First, some jurisdictions declare that certain cases, such as those involving charges of domestic abuse, are ineligible for mediation. These jurisdictions establish screening procedures to prohibit the referral of such cases to a mediator. Second, if for some reason, the referral process fails and the prohibited case comes to a mediator, laws and programs develop policy support for the mediator to address the situation, including withdrawing from the mediation.⁵⁷ A supplementary approach is to insure the party has a right to counsel or an advocate; then, if the advocate believes her client is being coerced into agreeing to an outcome, presumptively there are measures she might take to deter the individual from making any commitments under those conditions. Finally, if a party believes that she was coerced by the mediator into accepting an agreement, there are typically procedures available to the parties to escape liability.

2. *Inalienable interests.* Contract law typically addresses such situations by rendering unenforceable those contractual obligations that are deemed to be unconscionable. The ambiguity of this concept of unconscionability raises practical concerns akin to identifying acceptable definitions of obscenity. But perhaps we need not be overly concerned about whether most cases bring this unconscionability concern into play; if it is accurate, empirically, that such situations arise only infrequently, then we can be reasonably comfortable that parties in mediation would not, for the most part, generate unconscionable outcomes. And, if they do arise, we presumptively would be able to articulate the general features of the situation that draw us to conclude that the arrangement, even though agreed to by the parties, should be unenforceable; *viz.* a situation in which parties are in a significantly disproportionate power relationship that results in one party proposing and the other accepting an arrangement that systematically undermines the less powerful party's capacity to continue to lead a life with basic liberties and opportunities. In such a situation, our mediator code of ethics directs the mediator to invite parties to consult with

⁵⁷ See R.L. Rimelspach, *Mediating Family Disputes in a World with Domestic Violence: How To Devise a Safe and Effective Court-Connected Mediation Program*, 17 OHIO. ST. J. ON DISP. RESOL. 95 (2001) (presenting a thoughtful discussion of these practices and challenges, as well as a critique of their scope).

outside resources before committing themselves to an outcome or to terminate her services.⁵⁸

This is obviously not a fail-safe approach. But it importantly highlights that a mediator, or system of mediation, must be sensitive to the social and economic realities within which the parties are operating.

3. *Publicity of Outcome.* In practice, we address this in several ways. First, a mediator during the mediation itself might press one party to consider the likelihood of gaining compliance with the outcome if the other party later decides to renege on her promise. Additionally, administrators in some programs instruct their mediators to inform the parties in such a situation that the terms being contemplated are violations of the law and that as a matter of public policy, program mediators cannot incorporate into a written agreement terms known to be illegal. Advocates representing parties would not commit terms to a written agreement that they know to be prohibited by law, and mediator ethical codes prevent the mediator from drafting an agreement (particularly if parties are *pro se*) that contains unlawful terms.⁵⁹

4. *Dignity and Respect.* In practice, this challenge is approached through mediator training programs and program ideology rather than institutional guidelines. Mediation programs and agencies that want their mediators to encourage parties to go beyond a discussion of legal issues to examine “underlying issues” or “related issues” systematically invite this wider discussion; their training program reflects this commitment.⁶⁰ By contrast, an individual who mediates according to Riskin’s narrow orientation (whether facilitative or evaluative) reinforces the limited approach, thereby raising the probability of violating this justice-concern by routinely favoring the more powerful; to the extent that lawyers choose mediators with such an orientation, concern about this fairness dimensions needs increased attention.⁶¹

5. *Informed decision making.* To insure informed decision-making, understood in terms of insuring that parties are knowledgeable about their legal rights and obligations, statutes, court

⁵⁸ See *Model Standards of Conduct for Mediators*, Standard I (A)(2), (Dec. 2004).

⁵⁹ *Id.* at Standard VI (A-C).

⁶⁰ See, e.g., STULBERG & LOVE, INSTRUCTOR’S MANUAL: CONDUCTING THE MEDIATOR SKILL-BUILDING TRAINING PROGRAM FOR PERSONS SERVING IN MICHIGAN’S COMMUNITY DISPUTE RESOLUTION PROGRAM 79-95 (rev. ed. 1996).

⁶¹ See McAdoo & Welsh, *Does ADR Really Have a Place on the Lawyer’s Philosophical Map*, 18 *HAMLIN J. OF PUB. L. & POL’Y*, 376 (1997) (describing Rule 114 attorney selection of mediators).

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programs, and rules support the proposition that each party attending a mediation be accompanied by a representative who can provide such information to the individual.⁶² Some court programs require judicial approval of certain mediated agreements, and mediator ethical codes, in situations of *pro se* parties, provide that a mediator should encourage a party to consult with an appropriate professional before agreeing to the proposal.⁶³

Although none of these approaches directly address the challenge raised by the “sour-grapes” phenomenon, one can plausibly argue that a person’s representative in a mediation conference, whether a lawyer or support person, might blend her expertise and experiences into various pre-mediation consulting sessions so as to provide the client with a different, perhaps more expansive, view of the possibilities for discussion and resolution than the client herself is capable of envisioning. There is no guarantee, of course, that such counseling is effective. Of more concern, there may be little sensitivity by the advocate to the overall plight of her client, leading that advocate to focus exclusively on examining legal or rule-related remedies for the legally identified harm.

6. *Toleration of conflicting fundamental values.* Mediation practice can address this challenge in two structural ways. First, it can ensure that persons affected by the outcome have the right to be present and participate in the discussion process. Second, it can ensure that the mediator serving in the case has appropriate expertise and sensitivity to address these issues.

While many court programs require the presence at mediation of an individual with authority to settle the case, I think it is less clear how rigorously we canvass and require the participation of persons who will be affected by the outcome but may not be named parties to a lawsuit. The more formal the initial framing of the controversy in rule-governed terms (“Plaintiff” and “Defendant” tied to “legal causes of action”), the easier it is for all participants, including the mediator, to restrict the participant numbers.

The second requirement speaks to mediator qualifications. The disturbing phenomenon hinted at in the Hermann study⁶⁴ is that a mediator’s ethnicity might have a far more significant impact, adversely in terms of justice, than many of us would like to

⁶² See Uniform Mediation Act as an example of a non-waivable right to an attorney representative in mediation.

⁶³ See *supra* note 58, at Standard I (A)(2).

⁶⁴ See MICHELE HERMANN ET AL., AN EMPIRICAL STUDY OF THE EFFECTS OF RACE AND GENDER ON SMALL CLAIMS ADJUDICATION AND MEDIATION (1993).

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believe. The lack of diversity of individuals in a mediator pool along grounds of race or national origin might make it far more difficult to conduct meaningful conversations – i.e. to enable parties to understand one another – in precisely those controversies for which such nuanced understanding is critical. How well the mediation profession is doing on this score is a critical topic worthy of serious empirical analysis.

VI. CONCLUSION

I believe there are strong reasons to envision the conception and practice of mediation as an important social practice that powerfully exemplifies those features of a procedure suitably viewed as one of pure procedural justice. That leads to the conclusion that party-acceptability of outcomes is, and should be, the defining feature of justice in mediation. Standards independent of the process are not needed.

