THE CONCEPT OF JUSTICE IN MEDIATION: 
A PSYCHOBIOGRAPHY

Ellen Waldman*

I. Introduction

Discussions of what justice means in mediation have a dialectical quality to them. At various points in the field’s history, the notion that justice in mediation consists of fully maximized disputant self-determination holds sway. At other historical moments, a tentative consensus appears to recognize that justice in mediation requires normative content independent of the disputants’ beliefs and values.

There are two ways to explain this dialectic. One might analyze the history of the field, looking for exogenous forces that shaped initial visions of justice, prompted intellectual re-assessments, and forced new understandings that directly challenged the field’s original ideological foundations. The story could be compellingly told of a counter-cultural movement forced to don a suit and cut its hair as it sought acceptance by the status quo it initially sought to replace. Parts of the story would even be true.

Another way to explain the ongoing shifts in thinking about justice would focus less on external changes in the field and more on its intellectual infrastructure. This account would view the fluid conceptions of justice that dominate mediation discourse as reflecting the divergent theoretical predispositions of those partisans who have sought to shape mediation to fit a preferred image. This story minimizes mediation’s excellent adventure as it moves from an

---

1 Psychobiography traditionally entails an examination of a person’s life, emphasizing insights gained from the application of psychological theory to the raw tensions, conflicts, choices and achievements of that life. Here, I seek a richer understanding of the justice debates in mediation by bringing a psychologically-minded lens to the topic. See THE HANDBOOK OF PSYCHOBIOGRAPHY (William Todd Schultz ed., 2004).

2 Ellen Waldman is a Professor of Law at Thomas Jefferson School of Law.

3 Of course, there are more than two ways. As with almost any topic in mediation, there are multiple explanations for the same phenomena. Still, for the sake of simplicity, I will offer two explanations, conscious of the old adage that for every complex question, there is always a simple answer . . . and it is always wrong.
over-crowded community center to a municipal court building to a lavish law firm conference room. It looks instead at the relatively stable assumptions about private ordering and collective norms that animate leading mediation theorists’ musings on mediation justice.

In the essay that follows, I argue that while external developments have had an impact on our discussions of justice in mediation, the impact is not as dramatic as one might think. More central, in my view, are the beliefs about human nature and legal regulation that anchor the thinking of some of the field’s most influential scholars. Each one of these thinkers is drawn to mediation in the belief that litigation and adversarial warring are not the only, or the best, ways to approach conflict. But as a group, they hold vastly different assumptions about private bargainers’ capacity for empathy and legal norms’ capacity to “do justice” in the individual case. Just as uncertainty shrouds the role nature and nurture play in shaping human behavior, we cannot be sure which forces, external events or internal psychological affinities, shape the dialectic of justice in mediation. This article, in highlighting the differing presuppositions of our field’s most influential thinkers, pushes for a more psychologically–minded approach. It urges we see our justice debates propelled, at least in part, by how optimistically or skeptically mediation theorists assess the capabilities of individual parties and institutional actors in constructing fair outcomes from the raw material of human conflict.

II. JUSTICE DISCOURSE AS A CLASH OF ORTHODOXIES: THE DUELING CATECHISMS OF SELF DETERMINATION THEORISTS AND SOCIAL NORM THEORISTS

Our field is awash in cognitive-psychology speak. In an effort to understand the barriers that prevent otherwise rational actors from achieving Pareto-optimal settlements, students of conflict point to a variety of cognitive errors that likely distort disputant thinking. Framing and anchoring effects, reactive devaluation, availability and representative heuristics, and egocentric or self-serving biases help disputants assimilate complex information, and make decisions under conditions of incomplete information.\(^4\) At the same time, these mental shortcuts sometimes lead disputants to

\(^4\) See generally JUDGMENT UNDER UNCERTAINTY: H EURISTICS AND B IASES (Daniel Kahneman et al. eds., 1982).
misinterpret information and misperceive the true nature of risks and probabilities.\textsuperscript{5} Mediation and negotiation scholars have demonstrated how these cognitive habits lead negotiators astray. But are disputants the only ones so afflicted? Is it possible that mediation enthusiasts and critics might themselves come to the table with stubbornly fixed notions about how justice is best delivered that lead them to selectively perceive, recall and interpret the available information on justice in the mediation process? By examining the “priors”\textsuperscript{6} that inform decision-making, we can gain a deeper understanding of how the objective data of conflict translates into divergent theories of fairness, justice and equity.

Ten years ago, constitutional scholar Kathleen Sullivan\textsuperscript{7} rejected the common wisdom that Supreme Court decisions were largely driven by political ideology.\textsuperscript{8} Instead, Sullivan argued that the Justices were splitting, not along political fault lines, but rather according to their jurisprudential affinity for rules versus standards.\textsuperscript{9} These affinities, she explained, are further driven by differing conceptions of history, knowledge and power.\textsuperscript{10} The Justices of Rules, she argued, hold that common law judges have a limited role to play in interpreting authoritative texts, that the process of discovering the Framers’ intent is an essentially mechanical one, and that rules should be used to limit the opportunity for judges to import value choices into what is essentially a factual inquiry.\textsuperscript{11}


\textsuperscript{6} According to Bayesian methods for determining probabilities, prior information or subjective judgment may be used to construct a distribution model that assesses the likely values of unknown parameters. Viewed more abstractly, Bayesian priors introduce a subjective element into mathematical formulas that seek to objectively assess probabilities under uncertainty. Efforts to locate justice in mediation are unavoidably influenced by one’s initial assumptions and “Bayesian priors” are “entangled with ideology.” See Wayne Eastman, \textit{Telling Alternative Stories: Heterodox Versions of the Prisoners’ Dilemma, The Coase Theorem, and Supply-Demand Equilibrium: Ideology and Formality: The Eternal Golden Snarl}, 29 Conn. L. Rev. 849, 865 (1997).

\textsuperscript{7} Kathleen M. Sullivan is the Stanley Morrison Professor of Law and former Dean at the Stanford Law School.


\textsuperscript{9} See id. at 117.

\textsuperscript{10} See id. at 123.

\textsuperscript{11} See id. at 115.
The Justices of Standards view constitutional interpretation as a more organic affair and believe that true explication comes from considering social practices and changing understandings over time. These Justices expect judges to engage in interpretive work and view standards as felicitously porous to allow for the appropriate weighing and balancing of competing interests. To grossly oversimplify, the Justices of Rules trust text and distrust people, while the Justices of Standards distrust text and trust people.

To some degree, we can say the same about the theorists who advance conflicting views about justice in mediation. Those theorists whose definition of justice draws primarily from the exercise of party self-determination (Self-Determination Theorists) are hopeful about the magic that can occur when people open up honestly and empathetically about their needs and fears in uninhibited private discussion. As thinkers, these theorists are optimistic that the magnanimity of the human spirit can conquer structural imbalances and resource constraints. Moreover, they doubt that social institutions can forge norms that have a universally salutary effect and can “do justice” in the individual case. Conversely, theorists whose definition of justice draws heavily on social norms (Social Norm Theorists) are less sanguine about what occurs when people are invited to structure resolutions according to their own personal notions of fairness and equity. These theorists worry more about structural inequities, power imbalances, and the shriveled capacity for entitlement of traditionally marginalized groups. While pragmatic about the limits of human empathy in individual conflict, they are more optimistic about the power of social institutions to translate moral sentiments into collective norms capable of enhancing equity and equality in particularistic settings.

12 See id. at 116.

13 See id.


15 See infra pp. 704-707, 713-717.

16 See id.

17 See id.
Although it is tempting to ascribe the shifting winds in justice discussions to evolutions in the field, developments in the mediation world alone cannot fully account for these changing fashions. Rather, the justice dialectic that exists in mediation is equally a function of the hopes, fears, and trust that mediation’s intellectual architects hold for human interaction at both the individual and collective level. A closer look at the commitments and beliefs that animate the competing Self-Determination and Social Norm narratives helps to make sense of the different conclusions these theorists reach regarding justice in mediation.

A. The Catechism of Self-Determination Theorists: Justice is What the Parties Decide

Both the grand vision of what individuals can accomplish in private conversation and skepticism regarding the morality of legal norms are captured in the writings of prominent Self-Determination theorists. Take for example, the writings of theorists, mediators, and trainers par excellence, Professors Joseph Stulberg and Lela Love.

Professor Stulberg, in his masterful comment on the drafting of the Uniform Model Mediation Act, *Fairness and Mediation*, begins with the understated predicate that “the meaning of fairness is not exhausted by the concept of legal justice.” In truth, the more pointed argument advanced in the article is that legal norms often diverge quite dramatically from our, and many disputants’, notions of fairness. He argues against a concept of mediation that requires disputant agreements accord with substantive legal outcomes because it erroneously “posits the concept of fairness as being legal fairness.” To demonstrate the divergence of these two concepts, Professor Stulberg provides a hypothetical in which one disputant has terminated another in violation of state and federal norms.
anti-discrimination laws.24 The specter of liability prompts a productive mediation discussion leading the errant employer to consider re-hiring the employee at a higher pay rate and compensating the employee for lost wages and benefits — clearly the beginnings of a “fair resolution.”25 Unfortunately, the statute of limitations has run on the discrimination claims.26 Stulberg poses this question: what would happen if a mediator was required to ensure that disputants were informed of their legal rights?27 The miscreant employer would learn that, in this case, his discriminatory actions are beyond the law’s reach. The threat of a poor WATNA28 eliminated, the employer would likely stop making concessions, and the mediation would end badly for the employee.29 Tracking legal entitlements, Stulberg suggests, does not necessarily lead to fair outcomes.30 In the case presented, knowledge of legal rights “does not equalize a power relationship” but “solidifies the inequities.” 31

Legal rules, in Stulberg’s vision, are ill-equipped to do justice because of their rigidity and inflexibility.32 The time-limited nature of the law’s power to punish wrong-doers and compensate victims is presented as a classic example of justice undone by a “legal technicality.” Procedural booby-traps aside, Stulberg is equally doubtful of the substantive norms incorporated into legislative directives and the common law. For example, he questions a divorce mediation process that is informed by the statutorily defined goal of promoting the “child’s close and continuing contact with both parents.”33 Professor Stulberg maintains that divorce mediation’s goals should be limited to determining what is best for the dissolving family, and that close and continuing contact with both parents may not be optimal for every family unit.34 In other words, the legislatively-generated norm may have pernicious effects when imposed on a particular family.

24 See id. at 940.
25 See id.
26 See id. at 941.
27 See id.
28 A negotiator’s WATNA is the “worst alternative to a negotiated agreement.” Classic negotiation theory suggests that negotiators should always measure settlement opportunities against both the best and the worst alternatives facing them if the dispute does not settle.
29 See Stulberg, supra note 20, at 941.
30 See id.
31 Id.
32 See id. at 922, 926.
33 Id. at 916.
34 See id. at 919-20.
Conversely, Professor Stulberg advances an optimistic vision of the alchemy of private bargaining. This vision, elaborated in a discussion of the National Labor Relations Act, is one in which groups best serve each other’s and the community’s interests by advancing preferences in respectful and honest dialogue. Stulberg’s description of the conceptual model underlying the NLRA also captures his own utopian model of what bargaining entails. In this model:

There is an operative presumption of an employer’s or union’s right to be treated with dignity and respect by their respective counterparts, a respect for the capacity of each party to identify its respective concerns and priorities and a confidence that the dialogue process will enable the parties to secure their substantive interests in a manner compatible with the community’s interest.

It is a vision, as Stulberg notes, “breathtaking in its confidence in the democratic process and spirit.”

Professor Stulberg does acknowledge that power imbalances can introduce a discordant note into the harmonious picture he paints. He notes that “disadvantages of wealth, linguistic skill, information or visions of the possibilities” can skew the bargaining process and reduce the likelihood that such disadvantaged individuals will be able to secure what society would intuit is their due. But this does not lead Stulberg to pull back from his vision of unconstrained bargaining as a positive good. Rather, he dismisses excessive concerns with unequal negotiating power as contrary to our political economy and, in some sense, fundamental principles of law. He asserts that both the structure of constitutional democracies, and contract law’s power to bind, assume that a process “respect[ing] the capacity of individuals . . . to identify concerns of significance . . . and . . . persuade others to respond or honor their need” will, in fact, deliver individuals who possess those capabilities. Stulberg acknowledges that maintaining trust in the justice-creating properties of private negotiations despite the threats posed by power asymmetries requires adoption of a particular
world-view. This world-view is lit from within by a profound trust in individuals’ capacity to negotiate empathetically and magnanimously. This incandescent vision is not, and indeed cannot, be advanced on empirical or data-driven grounds. Rather the choice is an aesthetic and ideological one, and Stulberg urges it almost as a matter of faith.43

Similarly hopeful visions of private bargaining emerge in the writings of Professor Lela Love, alongside strikingly dismal portraits of judicially and legislatively crafted norms. In a recent article, coauthored with mediation enthusiast Professor Jonathan M. Hyman,44 the authors imaginatively reconstruct Shakespeare’s *Merchant of Venice*45 (hereinafter “Merchant”), casting Portia in a mediative, rather than in an advocacy role.46 This construct has one immediate advantage; it sets up a straw man for critique and provides mediation a useful foil. Venetian law, as presented in Merchant, is grotesque.47 It is unreasoning, formalistic, and cruel. First, it permits construction of a contract that would authorize murder in satisfaction of a debt.48 Second, it interprets the contract’s liquidated damage clause to exact terrible punishment on the party who would seek enforcement.49 In this particular Shakespearean rendering, the rule of law is a destructive force — a contributor to implacable hostility, never a means to its sensible end.

In contrast, the authors envision all that could be accomplished were Shylock and Antonio to sit down and try to reach an agreement that comports with their own sense of fairness.50 They speculate that mediation would afford Shylock the opportunity to disclose the pain occasioned by Antonio’s demeaning treatment.51 They imagine that these disclosures might elicit understanding and empathy from the steely and withdrawn Antonio.52 Beyond the possibilities for interpersonal repair and reconciliation, the authors

---

44 Jonathan M. Hyman is a Professor of Law at the Rutgers School of Law at Newark and also serves as the Associate Director of the Rutgers Certificate Program in Conflict Management.
45 WILLIAM SHAKESPEARE, THE MERCHANT OF VENICE.
47 See id. at 175.
48 See id.
49 See id.
50 See id. at 178.
51 See id. at 180-81.
52 See id. at 157.
suggest that the social divide existing between Jews and Gentiles in Venetian society might be rendered less impassable through the individual agreement that mediation might elicit. The authors hypothesize that if Shylock and Antonio were able to reach resolution on past hurts and decide to collaborate on business and financial opportunities in the future, this “social precedent” might have a ripple effect on other groups and individuals. Seeing a Jew and Gentile work together in partnership might lead the “Venetian on the street” to question the negative attributes automatically assigned to those whose habits and rituals are unfamiliar.

This is, needless to say, a rather Panglossian vision. It imagines that a single or multiple sets of conversations might erase a lifetime of ill-treatment and degradation and suggests that an individual reconciliation could prompt larger changes in a social fabric marked by segregation and ethnic division. Even assuming mediation is an effective corrective for individuals and groups whose anger and fears are so deeply entrenched, Love and Hyman’s argument begs the question of whether mediation practices are the best and most efficient mechanism for defeating prejudice, bias and social injustice. Might not laws that forbid discrimination based on religion, that encourage the mixing of Jews and Gentiles in public schools and that reward interdenominational business ventures be equally or more effective? The ambitious endpoint

53 See id. at 183.
54 See id.
56 Although individual intergroup contact has the potential to reduce group prejudice, the phenomenon of subcategorization can nullify the positive effects of such contact. Some studies suggest that when individuals have positive experiences with an out-group member, rather than dismissing the negative images of the out-group as a whole, they view the particular out-group member as an anomaly, placing him or her in a subcategory and “treating him or her as an exception that does not change the rule.” See C. Daniel Batson et al., Empathy and Attitudes: Can Feeling for a Member of a Stigmatized Group Improve Feelings Toward the Group?, 72 J. PERSONALITY & SOC. PSYCHOL. 105 (1997). The receipt of stereotype-inconsistent information about numerous group members, not simply one or two individuals, is more likely to have enduring effects on group stereotypes. See Renee Weber & Jennifer Crocker, Cognitive Processes in the Revision of Stereotypic Beliefs, 45 J. PERSONALITY & SOC. PSYCHOL. 961 (1983).
57 Intergroup contact is widely believed to reduce intergroup prejudice when the contact is structured to satisfy the following four conditions: 1) equal status within the contact situation; 2) intergroup cooperation; 3) common goals; and 4) support of authorities, law, or custom. See John Dovidio, Samuel Gaertner, & Kerry Kawakami, Intergroup Contact: The Past, Present, and the Future, 6 GROUP PROCESSES & INTERGROUP RELATIONS 5 (2003). Absent these conditions, intergroup contact may yield either negative emotions, thus exacerbating intergroup prejudice, or positive individualized perceptions that do not affect stereotypes about the larger out-group.
the authors envision for mediation reflects their faith in the power of face-to-face conversation. At the same time, they devalue the important role that existing norms or legal precedents play in curbing Machiavellian power-grabs endemic to informal negotiations between unequally situated parties.

This tendency to diminish the fairness-enhancing role of norms in private negotiation is clear in Love and Hyman’s discussion of a zoning dispute that mediation brought to fair and just conclusion. The zoning ordinance at issue prohibited street loitering and the street-side solicitation of employment. It was designed to shut down the informal recruiting meeting that occurred each morning on city streets as day laborers and employers congregated in an exchange of work for pay. The City claimed that the ordinance was necessary to protect public safety, while the refugee workers claimed it abridged their First Amendment rights to speak and associate in a public place. After the City announced its position, residents and day-laborers came together to mediate their respective claims. An agreement was reached to draft a new ordinance, one that “satisfied the public safety concerns of the town and simultaneously did not offend Salvadoran workers or abridge any constitutional rights.” Love and Hyman argue that the mediation was successful both because it provided a model for future collaboration and because the new ordinance “was a type of precedent in itself, an example to which others in similar circumstances could look.”

The authors draw from this mediation the lesson that people, put together in the same room and made to understand each other’s goals, will together reach a fair resolution. They cite Abraham Lincoln’s inaugural address which proposed that in a democracy, “‘a patient confidence in the ultimate justice of the people’ to do justice among themselves . . . is a pillar of our social

To the degree that mediation may entail competitive bargaining between individuals with vastly disparate power reserves with little active support from legal norms or custom, it is unclear that mediation presents the most promising venue for intergroup interaction. Rather, a court-mandated co-operative business venture that vests in and out-groups alike with equal status within the venture would appear to offer a greater likelihood of success.

58 See Hyman & Love, supra note 46, at 179.
59 See id. at 189.
60 See id.
61 See id.
62 See id.
63 Id.
64 Id. at 190.
65 See id.
order.” But what made this mediation successful? Why was the second ordinance, drafted with law student assistance, a useful precedent for other communities with similar problems? The ordinance is worthy of replication precisely because it meets the requisites of the Constitution; that is, it does not unduly interfere with the refugees’ legitimate rights to speak and gather for the purpose of seeking work. The mediation process, attendant as it is to disputants’ idiosyncratic needs, feelings and desires, does not alone guarantee that those rights of speech and association would be assured. In fact, one can imagine an agreement whereby the refugees agree to avoid gathering and soliciting work street-side in exchange for a one-time payout from the community power-brokers. This might solve the financial woes of those refugees at the table, but disadvantage future employment-seekers by depriving them of their constitutional rights and the practical means to gain employment. Or, a second ordinance could be drafted that exempts the Central American day-laborers from the loitering restriction, but burdens other constitutional rights of which the refugees are not aware. What prevents the townspeople from unduly infringing upon the refugees’ rights and interests? It is the Constitution, which imposes certain restraints on the concessions that the town can demand. And, it was the decision to treat those constitutional norms as binding within the mediation that ensured the emergence of a settlement that can serve as a model for other communities. While Hyman and Love argue for a justice definition that looks to parties’ preferences rather than legal rights for content, their exemplar of successful mediation looks ultimately to constitutional principles for its normative framework. This point, however, lurks behind the textual foreground because it is more consonant with Self-Determination Theorists’ presuppositions to see justice occurring through the empathy-inspiring alchemy of a dialogic process rather than through the slightly coercive nudging that external norms supply.

The notion that mediation presents golden opportunities for a higher justice because personal and community norms can take preference over legal rules is implicit in the work of Professor Clark Freshman. In a 1997 work, Professor Freshman urges a

66 Id.
67 See id. at 189.
68 See id. at 189-90.
69 Clark Freshman is a Visiting Professor at the Santa Clara University School of Law for the 2004-05 school year and has been a Professor of the Miami School of Law since 1995.
“community-enabling” approach in which “actively neutral” mediators expose disputants to a variety of different community norms to encourage the broadest and most educated choice of relationship arrangements possible.70 Because Freshman limits his discussion to domestic mediation between gay and lesbian partners, he is skeptical of the relevance of legal norms crafted with heterosexual unions (and their dissolution) in mind.71 But, his skepticism about the value of legal norms in structuring human interaction transcends the context of same-sex relationships. Indeed, he explicitly expands his exhortation that community norms (as opposed to legal norms) be referenced with greater frequency to include business disputes, intra-organizational tensions, as well as a “wide range of activities when individuals and groups order, reorder, and sometimes dissolve relationships with other individuals and groups.”72

Professor Freshman bemoans the special attention legal norms receive in current mediation practice because it advantages disputants whose claims receive support from existing case law and discourages individuals from considering “alternate ways they might structure their lives and alternative values they might try to apply.”73 He questions why mediation practitioners and scholars “give special treatment to legal principles” and wonders why they do not give equal attention to the norms of the various constituencies to which disputants belong.74 Professor Freshman notes that some people endow legal norms with preeminent authority because they emerge through democratic procedures, but he argues that the law’s institutional pedigree is insufficient to give it trump status over the disputants’ values and preferences.75 From Freshman’s perspective, legal norms constitute merely one set of rules

71 See id. (“[G]ay and lesbian mediation may overemphasize legal values and neglect values of various communities. This overemphasis of legal values may characterize much mediation, but it is particularly troublesome when, as with lesbians and gays, the relevant legal values may not have reflected lesbian and gay needs.”).
72 Id. at 1699.
73 Id. at 1734 (worrying that an emphasis on legal norms improperly privileges those who “can best articulate legal arguments” as well as those whom the law favors).
74 See id.
75 See id. at 1740. The author argues that mediators who limit their intervention to discussion of legal rules, may fall short in leaving room for individuals to consider possible values they would like to apply apart from legal values . . . [.] [This practice] may very well give couples informed consent about the alternative they would face if they could afford to have a
amidst a larger array of normative options presented by the overlapping communities within which disputants live. Decisions regarding how child custody should be arranged in the wake of relationship dissolution can be decided with reference to legislative enactments, Jewish law, Black, Asian, Hispanic, or Islamic practices, gay and lesbian traditions, as well as the customs of any other community with whom the disputants identify. Although Freshman worries that certain community values may be given priority over other community norms and practices, he is untroubled by the prospect that a mélange of community commitments might crowd out norms that legal doctrines articulate and enforce. And, though Professor Freshman is aware of the potential for oppression and exploitation in mediation, the threats he recognizes come from an over-reliance on a singular community’s moral code, as opposed to the individual power imbalances that might result in over-reaching.

In making the case that settlement has a political and ethical economy of its own, Professor Carrie Menkel-Meadow presents a related point of view. Although supportive of mediators who in-court decide their dispute. But, it gives little glimpse of the various other visions of how they might lead and reorder their lives.

---

76 See id.
77 See id. at 1758-59.
78 See id. at 1761 (“[W]hen community-enhancing mediation involves experts on ‘the community,’ parties may miss an opportunity to consider different communities [and] different interpretations.”).
79 See id. at 1762-63 (describing community-enabling mediation in which the mediator “introduces a wide range of values and encourages parties to consider how such values, or some combination of them, might fit their needs . . . . This would include active consideration of the ways that others, including communities that the parties find valuable, have resolved similar disputes or reached similar agreements.”).
80 Carrie Menkel-Meadow is a Professor of Law at the Georgetown University Law Center.

Justice, it is often claimed, emerges only when lawyers and their clients argue over its meaning, and, in turn, some authoritative figure or body pronounces on its meaning, such as in the canonical cases of the late-twentieth century, Brown v. Board of Education and Roe v. Wade. For many years now, I have suggested that there are other components to the achievement of justice. Most notably, I refer to the process by which we seek justice (party participation and empowerment, consensus rather than compromise or command) and the particular types of outcomes that might help to achieve it (not binary win-lose solutions, but creative, pie-expanding or even shared solutions).

Id. at 1763.

In an e-mail colloquy on this point, Professor Menkel-Meadow pointed out that she frequently brings legal norms into play in her own mediation practice and in the practice of students under her supervision. Additionally, her position that mediators should be held to high ethical stan-
form parties about relevant law in rights-based disputes, she also has suggested that settlements that spurn precise application of the law may yield outcomes that are more just than those produced through greater fidelity to legal norms.82 When disputants prune, tailor, or disregard legal norms in their settlements, Professor Menkel-Meadow’s imagination is not darkened by the specter of one powerful disputant arm-twisting a less powerful adversary to ignore public principles that would help advance the disempowered party’s cause. Rather, she prefers to conjure a harmonious scene of parties working jointly to reach collectively superior outcomes — a value-creating, rather than value-claiming exercise that produces mutual gains without accompanying distributive inequities. She suggests that “[s]ettlement (and its sometime rejection of law) could just as easily be seen as a democratic expression of individual justice where rules made for the aggregate would either be unjust, or simply irrelevant to the achievement of justice in individual cases.”83

Professor Menkel-Meadow’s assumption that fair negotiated outcomes need not follow established legal precedent pervades her definition of a “principled” settlement.84 As she explains, private negotiation, as opposed to public adjudication, allows for the ex-

83 Id. at 2676.
pression of a wide variety of disputant interests.\textsuperscript{85} Thus, parties may decide that

in any given case, social, psychological, economic, political, moral, or religious principles should govern the resolution of their dispute . . . . These variations on legal principles do not mean that settlements are not principled — only that they may be based on ‘nonlegal’ principles that may be just as fair or just (if not more so) in particular cases.\textsuperscript{86}

But the advancement of positions grounded in psychological, economic, moral or religious principles does not assure the construction of “principled” agreements, if by principled we mean fair, just and balanced. Indeed, whether disputants ground their claims on legal entitlements or deeply-felt religious or psychological commitments, the injustices created when the more powerful party foists its preferences on the less powerful party remain. Darwinian encounters at the negotiating table pose perils for the less-advantaged party, and this is true regardless of whether the terms of debate are primarily legal or non-legal in nature.

Imagine a negotiation between a Catholic physician and a woman serving as a health-care surrogate for her comatose and terminally ill mother. The daughter argues that treatment should be withdrawn based on the wishes that her mother expressed and codified in a living will before slipping into a coma. The physician, persuasive and powerful, argues that withdrawal of treatment is morally illegitimate. His views stem from deep-seated religious conviction that only God can take life. The law supports both the surrogate’s decisional authority and the ethical legitimacy of treatment withdrawal that reflects the wishes of the patient when competent.\textsuperscript{87} The physician’s non-legal, religious and moral interests, though deeply felt, should not trump, or even moderate, the “legal interests” advanced by the daughter and the patient in her living will. And, if the physician successfully deploys his professional authority to make changes in the mother’s treatment plan, it is not at

\textsuperscript{85} See id. at 100 (arguing that private settlement, such as those achieved in “[m]ediation offers the opportunity for participating parties to . . . make decisions about what is fair and just to them than when an outsider applies rules that have been enacted by a legislature for some generalized mean, rather than for particularized human individuals.”); see generally Menkel-Meadow, supra note 82.

\textsuperscript{86} Menkel-Meadow, supra note 82, at 2677.

\textsuperscript{87} State law is virtually unanimous on this point. See, e.g., Uniform Health Care Decisions Act, CAL. PROB. CODE §§ 4600-4786 (2000) (allowing an individual to authorize another individual (an “attorney in fact”) to make health care decisions in the event of incapacity, including the withdrawal of life-sustaining treatment).
all clear that the resulting decision is “principled” in the sense that it represents the most morally defensible outcome. Rather, as so often happens, the more powerful, more strategic, and more authoritative negotiator’s “principles” hold sway, despite legal authority to the contrary. Professor Menkel-Meadow’s “democratically-generated” agreements may reflect the law of the jungle, where the strong prevail and the weak retreat with their needs unmet. This possibility, however, lurks only at the periphery of Professor Menkel-Meadow’s musings, because her general approach to private bargaining is irressibly optimistic.

Professor Menkel-Meadow’s confidence that negotiators’ needs can be well-matched with privately generated remedies informs both her skeptical view of “judge-decreed” justice and her sanguine view of private bargaining. According to Professor Menkel-Meadow, a primary flaw of the adversary system is its tendency to monetize disputes, to reduce the complexity of human needs and aspirations to one metric: money. Settlement negotiations, by contrast, allow Jack Sprat to eat his lean, his wife to eat her fat, and both orange-coveting sisters to use their respectively desired portions of the orange. In this universe, disputants’ divergent needs match up neatly with available goods.

The tidiness of this vision is aptly demonstrated in a footnote to a larger work in which Professor Menkel-Meadow describes how consumption of snacks at a faculty cocktail party mirrored her description of the synergies possible in private negotiation. “Slowly the bowl of cocktail snacks was worn down as we picked our way through nuts, pretzels, wheatchex, popcorn, puffed rice, raisins, and goldfish, each of us choosing our favorite — there was no competition at all!” The conclusion that no competition truly existed ignores a number of possibilities: that one woman, seeing her male colleague’s preference for Wheatchex, settled for pretzels in order to avoid a direct clash; another new hire chose the tasteless rice puffs in order to avoid trenching on another more senior colleague’s sweet-tooth for raisins; and all of the discussants stayed away from the macadamia nuts because they were being eaten by a gruff fixture at the law school known to be caustic and cutting in

88 Webster’s defines “principled” as “[m]otivated by or based on moral or ethical principles.” See The American Heritage Dictionary of the English Language (New College ed. 1976).
89 See Menkel-Meadow, supra note 82, at 2672-74.
90 See id. at 2673 n.48.
91 Id.
92 See id.
the face of a challenge to his authority. Although each would have loved to partake of the buttery morsels, each feared an unkind comment about the calorie content and their cyclical dieting efforts. Self-Determination Theorists like Professor Menkel-Meadow tend to believe that disputants’ choices in negotiation represent their true preferences, and tend to worry more about the oppression imposed by one-size fits all abstract norms than the oppression occasioned by an adversary’s use of unconstrained power to pursue exploitative gains.

B. Social Norm Theorists

Social Norm Theorists share different assumptions. These theorists have greater confidence that the inclusion of legal norms in private ordering will bring notions of justice into play. Thus, these theorists have greater concerns about what may transpire in negotiation sessions unanchored by public norms, and have some (though, oft-times limited) faith that the norms brought to bear on a private dispute will push discussion toward more equitable solutions.

These assumptions can be seen in the work of several mediation theorists, including Isabelle Gunning, Trina Grillo and Jeffery Stempel. Professor Gunning, who has described herself as a “concerned supporter,” reveals both a tentative belief in the potential of legal norms to shift negotiating power from “in” to “out” groups, as well as reservations about how deeply-embedded stereotypes affect mediation participants’ ability to achieve fair outcomes in informal negotiations.

While conceding that the formal adversarial system does not perfectly screen for bias or prejudice, Gunning has, in recent work, asserted that the norms forged in legislative halls and courtrooms do, in certain areas, address the power asymmetries suffered by

---

93 Professor Isabelle R. Gunning is a Professor of Law at the Southwestern University School of Law.
95 Jeffrey S. Stempel is a Professor of Law at the William S. Boyd School of Law.
97 See id.
racial minorities and other disadvantaged groups. She argues that the mandate of mediator neutrality should not preclude mediators from “having an interest in the outcome of the conflict” and supports those mediators who seek an outcome that is fair and just for both parties.

Professor Gunning’s faith that legal norms will help “out groups” attain the resources and opportunities that are their due is shaky at best. Her tone becomes more certain when discussing the dangers that lurk for out-groups in the private, informal setting of mediation. Mediation, in Gunning’s view, does not dispense entirely with the competitive battling that characterizes the adversary system; it simply shifts the battle to different terrain. Argument may not fix around the applicability of legal norms, but party narratives still vie for dominance and credibility. Gunning contends that this battle for narrative primacy is skewed because the narratives of disadvantaged parties are undercut by negative cultural myths.

---


99 See id. at 93 (explaining that “[i]t seems that a mediator’s concern for a just outcome, as well as process, does not make a mediator impartial in the sense of being biased towards one party or another.”). Gunning continues to say that, [m]any . . . often provide certain minimal rules or instructions to mediation parties such as, “not interrupting.” Some go slightly beyond this to include “employing good faith” and “no name calling.” . . . We are talking substantive values when we do this. If we can talk about these values why not discuss the values of “equality” and “justice” and “fairness?”

100 See id. at 94.

101 See Gunning, supra note 96, at 64 (setting out the argument that legal rights benefit disadvantaged groups but concluding, “the psychological theories of prejudice that reveal the depth and intractability of prejudice, especially unconscious racism, suggest that formal procedures cannot eradicate prejudice in the courtroom. Indeed, empirical evidence suggests continuing discrimination against marginalized groups within the formal legal system at all levels.”).

102 See id.
groups,” leading to worse outcomes for these groups in mediation.\footnote{Id. See id. at 76 (explaining that “even if the outcomes remained the same . . . it is hard to imagine that in the narrative struggle of competing social definitions and frameworks the existence of negative, foundationless cultural myths about ‘out’ groups would have no impact in the process.”}).

Gunning admits to having no “magical solutions.” Instead she urges an ongoing course of bias awareness for mediators, and acceptance of “intervention techniques to allow the parties to create more equitable interpretive frameworks within which to resolve their conflicts.”\footnote{Id. at 93.} Her last word on the subject suggests, though, that private ordering, mediated by a third party, will, by definition, pose dangers for marginalized peoples unless justice norms, borrowed from our more formal legal system, are brought into play.\footnote{See Gunning, supra note 98, at 95 (“‘Equality’ and ‘justice’ continue to be contested concepts in their particularity. Mediation then becomes another forum in American political, legal and social life within which these important principles are redefined.”).}

The late professor Trina Grillo’s ground-breaking jeremiad on mediation also reflects some of the assumptions of the Social Norm Theorists.\footnote{See generally Grillo, supra note 94. Although I have characterized Professors Stulberg, Love, Hyman, Freshman and Menkel-Meadow as Self–Determination Theorists and Professors Gunning, Grillo and Stempel as Social Norm Theorists, these categorizations, adopted in the service of intellectual clarity, fail to fully capture the subtlety of each thinker’s body of work. The crossovers and complexities that characterize these theorists’ insights are apparent in Professor Menkel-Meadow’s appreciation of Professor Grillo’s analysis. See Carrie Menkel-Meadow, What Trina Taught Me: Reflections on Mediation Inequality, Teaching and Life, 81 Miss. L. Rev. 1413 (1997).} Grimly dour about the patriarchal assumptions and methods that lace traditional legal thinking,\footnote{See generally id.} Grillo is nonetheless drawn to the formal legal system’s capacity for moral line-drawing.\footnote{See id. at 1547.} Although unhappy that fault plays a smaller role in divorce law than it once did, Grillo applauds the role legal norms can play in censuring misdeeds, rewarding past valor, and setting out a roadmap for future conduct.\footnote{See generally id.}

\begin{itemize}
  \item Sometimes, however, all agreements are not equal. It may be important, from both a societal and an individual standpoint, to have an agreement that reflects cultural notions of justice and not merely one to which there has been mutual assent. Many see the courts as a place where they can obtain vindication and a ruling by a higher authority. It is also important in some situations for society to send a clear message
\end{itemize}
Perhaps more importantly, Grillo recognizes the importance of the psychological process that precedes the initiation of formal legal proceedings in which people recognize that they have been wronged, assign blame, and claim redress.\textsuperscript{110} Grillo points out that this process can be empowering for those who have been systematically disadvantaged. Consequently, suing, as opposed to negotiating and settling, may be valuable simply for the enlarging effect that claiming rights has on a disadvantaged individual’s sense of dignity and self-worth.\textsuperscript{111}

Suing may also be preferable to settling where the negotiation forum is as vulnerable to bias and manipulation as Professor Grillo suggests is often the case.\textsuperscript{112} The picture Grillo presents of private ordering is a Boschian portrait, populated by disputants of vastly unequal power, whose disparate status is exacerbated by a mediator whose opinions are tainted by reliance on invidious stereotypes.\textsuperscript{113} The women presented in Grillo’s vignettes come to mediation without the financial and emotional resources necessary to cut a fair deal. They are rightfully angry about injustices that have been dealt to them in the past, but are not allowed to discuss past wrongs or express anger.\textsuperscript{114} They have been socialized to operate from an ethic of care and thus are prone to sacrifice their own interests in order to accommodate the needs of their ex-spouse or

\textit{as to how children are to be treated, what the obligations of ex-spouses are to each other and to their children, and what sort of behavior will not be tolerated.}\textsuperscript{Id.}

\textsuperscript{110} See id. at 1565.

One cannot arrive at “claiming,” that is, the assertion of rights, without passing through “blaming.” By making blaming off-limits, the process by which a dispute is fully developed — and rights are asserted — cannot be complete. Short-circuiting the blaming process may fall most heavily on those who are already at a disadvantage in society. Whether people “perceive an experience as an injury, blame someone else, claim redress, or get their claims accepted . . . is a function of their social position as well as their individual characteristics.”

\textit{Id.} (quoting Felstiner, Abel & Sarat, \textit{The Emergence and Transformation of Disputes: Naming, Blaming, Claiming . . .}, 15 Law. & Soc’y Rev. 631, 637 (1981)).

\textsuperscript{111} See Grillo, \textit{supra} note 94, at 1558 (arguing that “although the language of legal rights may divert public consciousness away from the real roots of anger, the assertion of rights may also clarify and elucidate those roots. The process of claiming rights, by itself, can be empowering for people who have not shared societal power.”).

\textsuperscript{112} See id.

\textsuperscript{113} The women in Grillo’s article, Linda, Joan, Emma, are all at risk of serious exploitation. Linda is economically dependent on her ex-husband, Emma has difficulty recognizing herself as a separate person from her husband, and Joan is a victim of domestic violence. \textit{See id.} at 1660. The mediators described in the article have biases against blacks, and especially, black women. \textit{See id.} at 1581-86.

\textsuperscript{114} See id. at 1573-81; \textit{see also} id. at 1562-64 (the hypothetical involving Linda). \textit{Id.} at 1562-64.
2005] THE CONCEPT OF JUSTICE IN MEDIATION 267

children. They are shamed and coerced by mediator comments reflecting racial bias and unjustified hostility. The negative impacts of these effects are magnified — as if in an echo chamber — by the informality and intimacy of the process.

Grillo’s concerns for women’s welfare in divorce mediation lead her to urge purely voluntary entry into the process and the presence of lawyers, if requested. She also seeks change in mediation norms favoring repression of anger, disregard for the past, adoption of joint custody, and cooperation in all things. When ex-spouses come together to structure their post-divorce parenting, in the absence of these reforms, Grillo sees mediation as the great bait-and-switch: a process in which “people are told they are being empowered, but in fact are being forced to acquiesce in their own oppression.”

Professor Jeffrey Stempel appreciates the idealism of those who allow private bargaining to proceed without the intrusion of “rights-talk,” but shares many of the assumptions of Social-Norm theorists, who believe that justice occasionally requires highly evaluative forms of practice. Advancing a capacious and eclectic vision of what mediation involves, Stempel presents his worst fear of what could happen in mediation if social or legal norms are not brought to bear on the parties’ discussions. The images conjured are those already at the forefront of a Social Norm theorist’s consciousness: one party, weak, compliant, ill-informed; the other, slick, confident, well-resourced and out to “win” the negotiation. Stempel’s variant on this theme involves a relatively unsophisticated wife who has sacrificed her professional aspirations for the sake of the marriage. She has not completed her education and has no marketable skills, and yet the husband has made a “laughably low” financial offer. Because she is ignorant of her legal rights and is exhausted by “the rigors of child rearing, she stands, in me-

115 See id. at 1601-05.
116 See generally id.
117 See generally id.
118 Id. at 1610.
121 See id.
122 See id.
diation on the precipice of decisional disaster.”

Stempel drives home his point more aggressively with an “illustrative, if absurd,” thought experiment in which Pol Pot mediates with Mother Theresa. His concern is clear: evil exists, sometimes embodied in the person of the negotiator who comes to the table in bad faith and is incapable of, or unwilling to, take others’ needs into account. Even when negotiators operate in good faith, Stempel assumes that the laws of the jungle will prevail and the more powerful will seek to extort benefits from the less powerful. Stempel also sees the importation of legal norms as one way to prevent exploitation and to even a playing field that can be disastrously tilted in one side’s favor.

Like Trina Grillo and Isabelle Gunning, Stempel recognizes that legal norms do not occupy the entire field of what justice might require. Nevertheless, he sees these norms as offering a needed corrective to the natural impulses of negotiators whose goals are to maximize their gain and others’ losses.

123 Id.
124 See id. at 958. Although jarring, the thought experiment is effective. Stempel very humorously conveys the terrible results that might flow from a sweet trusting Mother Theresa falling for the empty promises of a Pol Pot.

You know, Mother Theresa, there may be some legal issues in this case and you might want to consult a lawyer, but otherwise if you and Mr. Pot want to agree that all relief aid stops at the border and is delivered to Khmer Rouge soldiers, then we have a settlement.

Id. at 958-59.

Professor Stempel, though, may be underestimating Mother Theresa’s negotiating prowess. There are accounts that portray the legendary figure as a much tougher cookie than Professor Stempel allows. See also Christopher Hitchens, The Missionary Position: Mother Theresa in Theory and Practice (Verso 1995).

125 See Stempel, supra note 120, at 983.

To the extent mediation veers too far from the voluntary, cooperative, facilitative assumptions that spurred its growth, it loses some of this creative and transformative potential. Some of this is inevitable, however, when the mediation is court-ordered or when one or more of the parties is not approaching mediation in the cooperative spirit.

Id.

126 See id. at 976-77 (“The cold, hard reality is that some disputants are better situated to extract favorable settlements from their opponents . . . . When mismatched parties, whether represented or pro se, are thrown together, any resulting settlement is more likely to favor the party with superior resources.”).

127 See id.

128 See id. at 977 (noting that merit does not always ensure a successful outcome in court because attorneys differ in skill and experience and “sophisticated disputants generally retain more effective lawyers.”).

129 That Stempel views many disputes as zero-sum games in which prisoner/negotiators will always “screw” the other negotiator in an effort to obtain the best deal is clear from his discussion of game theory. See id. at 978-79.
the structure of a hypothetical used in a law student negotiations competition, Stempel complains that one party to the hypothetical engaged in “blatant, ugly, opportunistic and mean discrimination,” yet students representing perpetrator and victim are led to believe that able negotiators should be able to paper over this rights violation with a relatively small monetary settlement. Stempel looks to adjudicatory standards for a better measure of fairness. He argues that advocates for the retaliated-against employee should be thinking about punitive damages and injunctive relief. The perniciousness of discrimination requires vindication and this is recognized in punitive damage awards that seek, not to compensate the victim, but to reaffirm the moral lines that discriminatory actions blur. Stempel sees the negotiation hypothetical as evidence of “how quickly a peace-promoting ADR culture can drive quite rapidly away from the law and legal rights” and unlike many in the ADR community, Stempel sees this as a bad thing.

Professor Stempel believes that in most disputes, despite efforts at pie-expanding maneuvers, there comes a time when “one plus” for one party equals “one minus” for the other. Although it doesn’t always work perfectly, Stempel believes litigation aims at corrective justice — restoring the parties to the position they occupied before the dispute arose. While litigation may not cure existing inequalities of wealth or power, it does not, in Stempel’s view, exacerbate them. Applying legal norms in any particular factual setting, he suggests, is likely to result in a fair outcome. Indeed, he forthrightly claimed the mantle of litigation romanticist when he wrote in an article several years ago,

I have implicitly suggested that the default legal regime that obtains in the absence of settlement is by and large a good one . . . . [A]djudication results . . . are by and large sound and just results . . . . For the most part, the American legal system — both its substantive body of law (the default rules that create much of the shadow of the law in which to bargain) and its adjudicative machinery — have worked well . . . . Certainly, ADR advocates

131 Id. at 352.
132 See Jeffrey W. Stempel, The Inevitability of the Eclectic: Liberating ADR from Ideology, 2000 J. Disp. Resol. 247, 264-66 (2000) (“[P]roperly performed adjudication gives the parties what they would have had or should have had in the absence of the dispute. Whatever inequalities preceded the litigation remain after the litigation — but the litigation at least usually does not enhance inequality.”).
have not put forth a better yardstick . . . . Until there is an alternative organizing construct, the body of legal principles and adjudicative outcomes should remain the standard by which we measure justice in ADR.\textsuperscript{133}

Social Norm Theorists, then, hold a more skeptical view of private bargainers’ capacity for empathy, magnanimity and self-sacrifice. They see negotiators arrayed along a power hierarchy, and worry that those on the lower ends of the ladder are destined to get “lower-rung” deals. The intimacy and informality of the process, presents, for these theorists, the potential for disinhibition — the abandonment of strictures that keep bias, stereotyping, and rank exploitation in check. For these thinkers, legal norms offer a constraint. They set parameters grounded in corrective justice principles that moderate and control negotiators’ Hobbesian tendencies.

III. Conclusion

Social psychologists have taught us that our assessments of probabilities hinge strongly on our ability to recall or retrieve relevant information.\textsuperscript{134} The information available to us when we try to imagine an event shapes our evaluation of its probability.\textsuperscript{135} Thus, we are more likely to assess an event as probable if we can conjure information about the event.\textsuperscript{136} Of course, the fact that we can imagine an event occurring does not make it more or less probable.\textsuperscript{137} But, this mental shortcut allows us to evaluate frequencies and probabilities in the absence of conclusive information.

The availability heuristic plays a role in the justice dialectic. A mediation theorist who has presided over a number of dramatic, transformative mediations in which parties successfully achieve empathy, empowerment and recognition will likely have a store of optimistic images about the power of mediation at hand. When thinking about how justice is best accomplished, the salient information available to these theorists will lead them to look hopefully toward a private negotiation where disputant grace and magnanim-

\begin{footnotesize}
\begin{enumerate}
\item Stempel, supra note 119, at 382-83.
\item See id.
\item See id. at 1297, 1304-05.
\end{enumerate}
\end{footnotesize}
2005] THE CONCEPT OF JUSTICE IN MEDIATION  271

...