IF PORTIA WERE A MEDIATOR: AN INQUIRY INTO JUSTICE IN MEDIATION

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Summum ius summa iniura. [The strictest following of law can lead to the greatest injustice.]
MARCUS TULLIUS CICERO, DE OFFICIIS (ABOUT DUTIES) I. 10, 33

No one can say
That the trial was not fair. The trial was fair,
Painfully fair by every rule of law,
And that it was [fair] made not the slightest difference.
The Law's our yardstick, and it measures well
Or well enough when there are yards to measure.
Measure a wave with it, Measure a fire,
Cut sorrow up in inches, weigh content.
You can weigh John Brown's body well enough,
But how and in what balance weigh John Brown?
STEPHEN VINCENT BENET, JOHN BROWN'S BODY

Creon: And am I wrong, if I maintain my rights?
Haemon: Talk not of rights; thou spurn'st the due of Heaven.
SOPHOCLES, ANTIGONE lines 744-745

Whoever undertakes to set himself up as a judge in the field of truth and knowledge is shipwrecked by the laughter of the gods.
ALBERT EINSTEIN

The receiver in the cause has acquired a goodly sum of money by it, but has acquired too a distrust of his own mother, and a contempt for his own kind.
CHARLES DICKENS, BLEAK HOUSE 4 (Houghton Mifflin Ed.)

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The practice of mediation is deeply attuned to issues of justice. To one unfamiliar with mediation, it might seem that mediation marks a flight from justice, a move to crude compromise or the abandonment of rights for the sake of making peace or saving time or money. On the contrary, mediation brings to the fore the perennial questions of justice: Has there been a wrong (or several wrongs) and what is the fair correction that provides a just measure for the kind and degree of harm done? What is a fair and just distribution of the resources available? How can stability and community be restored in light of the wrong? What should a mediator do to try to assure that the process itself remains just? Mediators, like judges and arbitrators, must attend to these issues.

However, justice in mediation is different from justice in adjudication. Unlike a judge, jury or arbitrator, a mediator does not have the responsibility to determine an appropriate remedy or a just distribution. That is for the parties themselves to do. The mediator must attend to the process, help the parties recognize the legitimacy of different perspectives on justice, and work towards a resolution that comports with the parties' considered views of a fair and acceptable outcome.

The dispute between Shylock and Antonio in Shakespeare's The Merchant of Venice *provides a vehicle to compare justice in adjudication with justice in a hypothetical mediation of the same conflict. In the play's famous trial scene, Portia, the heroine, disguised as a male lawyer, uses clever legal tactics to protect Antonio from Shylock's claim for "a pound of [Antonio's] flesh". While execution on Antonio's bond may be unjust (Antonio's life for a mere debt does not seem fair), and that potential injustice is prevented, other injustices go unanswered. Multiple incidents of injuries and wrongs running through the history between Shylock and Antonio call out for redress. The anti-Semitism depicted in the play, the wrongs and disrespect suffered by Shylock, like the oppression of marginal, powerless individuals and groups, remain unchecked–if not exacerbated–by litigation. How might mediation deal with those larger issues of social justice?*

After exploring justice issues in a work of fiction, the resolutions in four different mediations are described. An analysis follows each case, noting how justice was served, despite the outcomes being entirely different than the likely adjudicated resolution of a similar case. A neighborhood dispute over noise, a commercial dispute over damaged property, an employment discrimination case, and a matter concerning a claim that a town ordinance is unconstitutional—all result in outcomes that are in keeping with notions of justice, yet would not be possible in adjudication.

Finally, the importance and relevance of this analysis for law school education is explored. Justice is a central and critical inquiry for any student or practitioner in the legal arena. Service as a media-

tor, in the context of law school mediation clinics, provides a unique opportunity to reflect on justice issues, unencumbered by the responsibility to advocate for one side.

INTRODUCTION

Using mediation rather than adjudication to resolve disputes carries important implications for justice.[1] How can an agreed-upon solution, crafted by disputing parties rather than by duly appointed arbiters, judges or juries, comport with ideals of justice? Critics claim that mediation and settlement sacrifice a just result, a result in keeping with articulated and accepted societal norms, for mere efficiency or expedience.[2] Such critiques neglect the multi-faceted nature of justice. This article examines how a justice rationale undergirds the consensual resolution of disputes, while another justice rationale undergirds adjudication. Justice-seeking is a central component of all dispute resolution processes, and one that mediators, like judges and arbitrators, must attend to. Rather than abandoning justice, the unique attributes of mediation enable mediators to help those who ultimately have the most intimate understanding of the complexities of their situation achieve a resolution they find "just".

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[1] It is with considerable humility that we embark on any analysis which bears on a concept so elusive of definition as "justice." For a thoughtful article on fairness and mediation more explicitly grounded in the work of philosophers such as Jeremy Bentham, John Stuart Mills, John Rawls, and Ronald Dworkin see Joseph B. Stulberg, *Fairness and Mediation*, 13 OHIO S. J. OF DIS. RES. 909 (1998).

[2] *See, e.g.*, Owen Fiss, *Against Settlement*, 93 YALE L. J. 1073 (1984).

Efficiency has many aspects. Courts value mediation for its potential in helping judges clear their dockets, even though there is no consensus among scholars and administrators that mediation actually relieves court dockets. *E.g.*, JAMES S. KAKALIK, TERENCE DUNWORTH, LAUREL HILL, DANIEL MCCAFFREY, MARIAN OSHIRO, NICHOLAS M. PACE & MARY E. VAIANA, AN EVALUATION OF MEDIATION AND EARLY NEUTRAL EVALUATION UNDER THE CIVIL JUSTICE REFORM ACT (Rand Institute for Civil Justice 1996) [hereinafter "RAND REPORT"] (finding ADR methods in the federal courts were neither a panacea nor detrimental and did not show any significant changes in time, cost, or lawyer views of satisfaction or fairness). *But see, New Research Proves that Mediation Saves Time and Money*, 2 MACROSCOPE (NEWSLETTER OF THE MARYLAND MEDIATION AND CONFLICT RESOLUTION OFFICE) 11 (September, 2002) (recent study of the Maryland Mediation and Conflict Resolution Office finding that mediation of workers' compensation cases in Maryland saves time and money for litigants and for the courts). For parties, savings in time and process costs are frequently cited benefits of mediation. Savings in the psychological wear and tear that adjudication entails is another possible benefit, though mediation itself can be challenging psychologically for participants. Finally, the savings entailed in getting a "Pareto-efficient" result is another potential benefit of mediation. *See* David Metcalfe, *Rethinking Pareto-Efficiency and Joint Feasibility*, 16 NEGOTIATION J. 29 (2000). A "Pareto-efficient" outcome is one that cannot be improved for one party without making another party worse off, and one which maximizes joint gains to the fullest extent possible, ensuring that all value possible in the situation is distributed to the parties.

Justice in adjudicative systems comes from above,[3] from the application by a judge, jury or arbitrator of properly created standards or rules to "facts" as determined by the adjudicator. Justice inheres in two aspects of that system – in the standards or rules that are applied, and in the process that is used to apply them. Mediation has parallel, but very different, aspects. The rules, standards, principles and beliefs that guide the resolution of the dispute in mediation are those held by the parties. The guiding norms in mediation may be legal, moral, religious or practical. In mediation, 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.[4] Consequently, justice

[3] Professor Jacqueline Nolan-Haley thoughtfully commented that justice "from above" sounds superior than justice "from below" and, consequently, the dichotomy might be framed as vertical (applied from a hierarchy) justice versus horizontal (derived from parties on the same plane) justice. Telephone conversation of Lela Love with Jacqueline Nolan-Haley (Sept. 19, 2002). We have retained the terms "from above/below," but attach no judgment to them. Like the earth (from below) and the sky (from above) they are equally significant and potent forces with which to reckon.

[4] This is arguably an over-simplification, as the term "mediation" has come to mean many things. *See*, Jeffrey W. Stemple, *The Inevitability of the Eclectic: Liberating ADR from Ideology,* 2000 J. OF DISP. RES. 247, 248 (arguing in favor of an "eclectic" and flexible approach to mediation that would allow mediators to both assist parties in finding resolution and provide guidance as to the likely court outcome); *but see*, Lela P. Love and Kimberlee K. Kovach, *ADR: An Eclectic Array of Processes Rather Than One Eclectic Process*, 2000 J. OF DISP. RES. 295 (arguing that mediation plus evaluation should be considered a mixed process). Pinning down a justice rationale for mediation becomes impossible absent a clear target (*i.e.*, a defined rather than eclectic process).

Professor Ellen Waldman points out that mediation can be "norm-generating" (as we describe here), "norm-educating" or "norm-advocating." Ellen A.Waldman, *Identifying the Role of Social Norms in Mediation: A Multiple Model Approach*, 48 HASTINGS L. J. 703 (1997). Professor Clark Freshman notes that the private-ordering vision of mediation (more in keeping with this perspective) competes with the communitarian vision of ADR in which community values can provide the framework for the mediation, either explicitly, as in Jewish or Islamic mediation programs, or in practice, due to mediator values and biases connected to a given community which get imposed on the parties. Clark Freshman, *Privatizing Same-Sex "Marriage" Through Alternative Dispute Resolution: Community-Enhancing Versus Community-Enabling Mediation*, 44 UCLA L. Rev. 1687, 1692-1694 (1997).

In the context of court-annexed mediation of civil cases, commentators have noted that the trend is towards a mutation of the mediation process in which: attorneys dominate sessions with clients playing little or no role; mediators are selected for their ability to evaluate cases and regularly provide their assessments of the strengths and weaknesses of the legal case; the joint session is marginalized with the process moving quickly to caucus; and there are few non-monetary or "creative" settlements. *See,* Deborah R. Hensler, *A Research Agenda: What We Need to Know About Court-Connected ADR*, DISP. RESOL. MAG., Fall 1999, at 15 and Nancy A. Welsh, *Making Deals in Court-Connected Mediation: What's Justice Got to Do With It?,* 79 WASH. U. L. QUARTERLY 787 (2001) [hereinafter "*Making Deals*"].

An inquiry into the justice rationale of a "norm-advocating" procedure based on explicit or implicit legal norms or communitarian values, in which the mediator's interventions are based on explicating and advocating for those norms or values (which may not be entirely the same as those of the parties), or court-annexed evaluative "mediation," which more closely resembles judicial settlement conferences, would arrive at different conclu-

in mediation comes from below, from the parties.[5] Similarly, the process of mediation has different guiding principles than adjudication. Parties may address any issue they wish, not limited to legal causes of action; they may bring in any information they wish, not limited by rules of evidence and procedure to probative evidence, relevant to legal causes of action and meeting evidentiary requirements for authenticity and accuracy. On the other hand, norms of "fair process" guide mediators and adjudicators alike. Both must act in an unbiased and impartial manner and be perceived as neutral. Both must give all participants a level playing field with an equal opportunity to be heard and equal attention and amenities in proceeding through the process.[6]

Judges and arbitrators must understand that both the formal procedures that guide their conduct and the publicly articulated norms that intersect with the facts are the critical pillars of justice in adjudication. It is equally important for mediators to understand the sources of justice in mediation, so that they can develop strategies and techniques to enhance the opportunities to make mediation a richer field in which to do justice, and to avoid injustice, while honoring the primacy of the parties' decision-making and values.

This article approaches the question of justice in mediation in four Parts. In Part I, we review various approaches to justice, discuss key justice concepts and delineate important questions that this analysis will not address. Part II uses Shakespeare's *The Merchant of Venice* to explore some of the limits of justice in adjudication and some of the ways mediation can provide a rich alternative in light of those limits. Part III examines the interplay of justice in the context of the resolution of specific issues in several actual mediations. Part IV ex-

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sions about justice and is beyond the scope of this analysis.

[5] In Card v. Card, 706 So.2d 409 (Fla. Dist. Ct. App. 1998), in upholding a custody order entered by the trial court when the parties had failed to settle the matter, the appellate court highlighted the role parties are called on to play in mediation in terms of fashioning their own norms:

> When divorcing parents cede to the judicial branch of government the duty to decide the most intimate family issues, it is not unlikely that one or both parents will be less than satisfied with the decision. The bench and bar have for years now encouraged divorcing parents to resolve their differences through mediation. In effect, *parents have been urged to make their own law* [emphasis added], in the hope that they can better live with a decision that is their own, rather than a decision that is externally imposed.

[6] Professor Joseph Stulberg, in reflecting on fairness principles as they are articulated in statutory schemes concerning mediation, urges that in order to ensure procedural fairness statutes should: define mediation so as to "establish a conversational procedure in which fundamental elements of conversational dignity and respect are secured"; not characterize mediation as informal or non-adversarial to ensure that "inequalities in advocacy skills, verbal and non-verbal party behaviors, and mediator biases have no room to flourish"; and "minimally provide parties with a non-waivable right to counsel" to ensure minimum levels of informed decisionmaking. Stulberg, *supra* note 1, at 945.

plores the implications of this discussion for clinical legal education.

I. WHAT WE MEAN WHEN WE TALK ABOUT JUSTICE

Because explicit concepts of justice are not a prominent part of the literature or practice of mediation, we would like to sketch out, as a preliminary matter, the kinds of concepts of justice we will bring to our analysis of *The Merchant of Venice* and other mediation situations. We start by distinguishing the adjudicative approach to justice and highlighting certain issues that are beyond the scope of this analysis.

Lawyers tend to view justice as the application of law through the legal system. Substantive rules of law, judicial discretion, and the procedures for adjudicating disputes all strive to comport with ideals of fairness and justice. How well they succeed is the subject of constant debate and legislative and judicial reform, but justice and fairness provide one standard by which rules, practice and procedure are measured.

The application of a rule of law and the form of justice adjudication provides is not irrelevant to the justice-from-below of mediation. To a significant degree, the public law provides the norms that guide private dispute resolution.[7] Parties often settle disputes by keeping in mind and balancing the entitlements the litigation system promises. Furthermore, some scholars suggest that mediation becomes unjust if the issues it considers and the results it achieves stray too far from the issues and results that would obtain in the adjudicatory system, particularly where parties get diverted to mediation after coming to the courts for a judgment.[8] If mediation too cavalierly ignores the public

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[7] *See*, Robert H. Mnookin & Lewis Kornhauser, *Bargaining in the Shadow of the Law: The Case for Divorce*, 88 YALE L.J. 950 (1979)(indicating that legal rules, entitlements and procedures are among the factors that affect bargaining and negotiation outcomes).

[8] *See, e.g.*, Richard Delgado, Chris Dunn, Pamela Brown, Helena Lee & David Hubbert, *Fairness and Formality: Minimizing the Risk of Prejudice in Alternative Dispute Resolution*, 1985 WIS. L. REV. 1359 (1985)(referring to social science data to conclude that people are more likely to act from prejudice and thus wrongly use their power in informal settings, such as mediation) and Trina Grillo, *The Mediation Alternative: Process Dangers for Women*, 100 YALE L. J. 1545 (1991)(discussing and providing examples of mediators who make judgments about both outcome and party conduct and hence chill self-determination and undermine party autonomy by taking sides); *Compare*, Gary LaFree & Christine Rack, *The Effects of Participants' Ethnicity and Gender on Monetary Outcomes in Mediated and Adjudicated Civil Cases,* 30 LAW & SOC'Y REV. 767 (1996) (empirical study of ethnic and gender differences in outcomes in adjudication and mediation in small claims matters in New Mexico, finding mixed results, including "no evidence that Anglo women were disadvantaged as claimants or respondents in mediated cases," *id.* at 791, but also that minority male and female claimants did less well in mediation, but only in cases mediated by at least one Anglo mediator, *id.* at 789); *See also* Jacqueline M. Nolan-Haley, *Court Mediation and the Search for Justice Through Law*, 74 WASH. U. L. Q. 47 (1996)[hereinafter *"Justice Through Law"*](arguing that in a court-annexed context, if the results stray too far from the results that would obtain in litigation, mediation without informed consent—

norms and results that we would expect from the adjudicatory system questions of injustice may arise: Were the parties ignorant of their rights?[9] Did the courts (to which the case was brought) fail to protect important entitlements?[10] Was one of the parties bullied by the other? Did mediator bias and dominant culture norms unfairly disadvantage a party?[11]

Additionally, an analysis of justice as it inheres in particular mediations does not answer the different set of justice issues posed by whether public institutions should require or mandate mediation as part of the public justice system.[12] Should courts require litigants first to use mediation to try to resolve their disputes?[13] If they do, are they robbing the judicial system of its charge to produce just results in a

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meaning knowledge of legal rights and entitlements—may be unjust); Jacqueline M. Nolan-Haley, *Informed Consent in Mediation: A Guiding Principle for Truly Educated Decisionmaking*, 74 NOTRE DAME L. REV. 775 (1999))[hereinafter *"Informed Consent"*].

[9] Self-determination implies a meaningful level of informed consent to outcomes, and it follows that if a party is ignorant of a right their agreement to forego the right is not "informed." *See*, Jacqueline M. Nolan-Haley, *Justice Through Law, supra* note 8. On the other hand, no one bargains–or acts generally–with perfect knowledge. Several scholars suggest that legal values and norms should not receive special treatment over community, religious, individual or other values. *See*, Freshman, *supra* note 4, at 1734-1742, 1762-1766 (1997)(questioning why legal values should receive special treatment over community or other values and arguing for the mediator to introduce and encourage parties to consider a wide range of values) and Stulberg, *supra* note 1.

[10] *See*, Nolan-Haley, *Justice Through Law, supra* note 8.

[11] *See,* Freshman, *supra* note 4 at 1716-1742 (discussing and illustrating how mediator biases, norms and values can impact the course of a dispute resolution procedure and hence interfere with party self-determination); Grillo, *supra* note 8 (describing examples of mediator bias that systematically disadvantaged one party); Isabelle R. Gunning, *Diversity Issues in Mediation: Controlling Negative Cultural Myths*, 1995 J. DISP. RESOL. 55, 79 (arguing that standard mediation techniques might place parties in frameworks or boxes which would make it hard for them to achieve genuine self-determination).

[12] In reviewing how mediation or other alternative dispute resolution processes might promote or hinder justice, Professor Robert A. Baruch Bush has listed seven goals for civil justice by which one could measure the success of a system of dispute resolution: 1) resource allocation: the allocation of society's scarce resources among various resource-consuming activities to maximize the benefit or value of those resources; 2) social or distributional justice: the attainment of equity (as between the haves and the have-nots) in the distribution of society's resources, including wealth and power; 3) fundamental rights protection: the articulation and protection of fundamental individual rights; 4) public or social order: the prevention or cessation of hostilities; 5) human relations: promotion of mutual tolerance, respect and appreciation and the development of a sense of shared humanity and social solidarity; 6) legitimacy: the appearance and perception of legitimacy to society's members; and 7) administration: the minimization of the cost of administering social enterprises. Robert A. Baruch Bush, *Dispute Resolution Alternatives and The Goals of Civil Justice: Jurisdictional Principles for Process Choice*, 1984 WIS. L. REV. 189.

[13] Court-annexed programs diverting litigants into mediation have become very wide spread in the American justice system. In Florida where all civil cases may be diverted to mediation 92,047 cases were referred to mediation by the courts in 2000. FLORIDA DISPUTE RESOLUTION CENTER, FLORIDA MEDIATION AND ARBITRATION PROGRAMS: A COMPENDIUM (15th ed. 2002).

public forum where the outcome can be scrutinized and where the decision will ultimately become a public precedent?[14] Do mediation programs reduce the overall time and resources spent by litigating parties,[15] and if they do, are these efficiencies worth whatever other costs they impose, such as a reduced opportunity for a full discovery and airing of legally relevant facts? Is the societal benefit provided by mediation sufficient to support the complex rules of confidentiality and privilege in mediation that have been developing?[16] Where mediation is incorporated into a larger system of justice, these questions must be answered. However, they can only be answered if it is clear that mediation, like adjudication, rests on a compelling justice rationale. Acknowledging that those important questions must ultimately be answered, this article focuses instead on exploring the justice rationale in mediation itself–a necessary first step in answering questions about designing a coherent justice system.

The justice that pertains in mediation is the justice the parties themselves experience, articulate and embody in their resolution of the dispute. For individuals, public legal norms are but one factor in a constellation of norms and expectations creating a sense of correct conduct, fair procedure and a just outcome. For our discussion, the parties' own views of justice, not the views of judges and lawyers, become the key measure of justice in mediation.[17]

Among the dilemmas of a discussion of justice in mediation is the assumption, not always warranted, that parties settle matters when the proposed settlement comports with their notions of justice. In reality, a party's sense of justice can be but one of several reasons for which she decides to accept or not accept a proposed resolution. The decision-making process entails weighing various reasons and factors against each other to reach a decision to settle. For example, a party may settle a matter because the costs of litigating have become too high, or she feels it is time to move on with her life, or she simply no longer cares about the outcome, or she wants the dispute to end. Justice, in certain instances, may have little to do with the decision to settle a dispute! Notwithstanding this insight, most people do not vol-

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[14] *See, e.g.*, Fiss, *supra* note 2.

[15] *See* RAND REPORT., *supra* note 2.

[16] The National Conference of Commissioners on Uniform State Laws and the American Bar Association have developed a model Uniform Mediation Act for adoption by the states. UNIF. MEDIATION ACT (2001). The hotly debated provisions regarding privilege and confidentiality have numerous and complicated exceptions. For discussions of the complex drafting history of the Act and debate about its provisions *see* 85 MARQUETTE LAW REVIEW 1 (entire volume)(2001).

[17] Nolan-Haley, *Justice Through Law*, *supra* note 8, at 49 (noting that justice is derived in mediation "not through the operation of law, but through autonomy and self-determination").

untarily sign agreements which they experience as "unjust." The phenomena of parties persistently and vigorously fighting when relatively little is at stake from a financial perspective and the costs of disputing are disproportionately high argues that justice-seeking is a central preoccupation for many, perhaps most, parties in the disputing universe.

While justice in mediation relies on each party's own private sense of justice, conversations about justice differ from a discussion of competing private tastes or personal preferences. There is a difference, for instance, between wanting money from another party because it is justly deserved, and wanting money because it is pleasurable or satisfying to have more money. A sense of justice is in part a social phenomenon built on family and community beliefs and norms. A discussion in a mediation of what is fair or just, or what is deserved, articulates these norms more explicitly and fully than simply making competing claims for resources or demands for desired actions. When parties bring justice norms to a mediation and make them part of the discussion, they are educating each other, building justice norms in their family, workplace, business or community–in a manner parallel to (however different from) the public declaration of precedents and norms that litigation achieves.

The differing sources of justice in mediation and adjudication have important consequences for assessing the role of justice in a mediation. Mediators, as human beings, are part of the same social and moral world as the parties. When parties seek to satisfy their sense of fairness and justice, as well as their psychological and material needs, the mediator can understand the claim to justice with the same kind of empathetic response that she brings to each party's feelings and interests. As with other forms of empathetic response, a mediator need not agree with a party's views about what is more fair or more just, but should be able to articulate the meaning of justice as the party sees it, and help the party think through his ideas in ways that might lead to a resolution.[18] This means that explicit talk about fairness and justice can, and often does, form an appropriate part of a mediation session.

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[18] Consider the charitable contribution, for example. Sometimes parties are able to resolve their dispute when the alleged wrongdoer makes a contribution to a charity rather than a payment to the alleged victim. Or the payment to charity might be part of a larger package of payments and acts. The victim may think that such a solution is fair and just (or more fair and just than continuing the dispute) because the wrongdoer has given up some ill-gotten gains, and has provided help to balance out the prior harm. If the victim came into the mediation thinking that a payment to him was required for a fair and just result, the mediator, empathizing with the victim's sense of justice, might explore the victim's understanding of a fair and just result, and together they might discover that the victim's sense could be satisfied by such a third party payment.

But of what would such talk consist? When parties talk about fairness and justice, without the overlay of the elaborate system of adjudicatory justice, they will most likely find themselves talking about the well-known Aristotelean categories of reparative justice, distributive justice, and procedural justice.[19] They may also find themselves talking about restoration, retribution, revenge and relationships. Each is discussed below: reparative justice, including a discussion of restorative justice; retribution and revenge (which can be forms of reparative justice); distributive justice; relationships; and procedural justice.

A. Reparative Justice

Parties in mediation may use claims of justice to seek repair of what they see as a wrongful deprivation or harm imposed on them by the other. They need not limit their claims of injustice to acts that may have violated the law. A party who has taken more than is "fair" from the complaining party might have arguably committed an injustice that needs to be corrected, even if the law does not prohibit the taking. Treating someone disrespectfully, taking or diminishing their dignity, for example, might become part of a claim that an injustice was done even though there may be no cognizable "cause of action" for such a wrong. Of course, there can be – and usually is – sharp disagreement between parties over whether a particular action should be characterized as an injustice. Such disagreements are similar to the often-contested question of how much responsibility each party bears for the harm that occurred. A discussion about such disagreements is a form of articulating justice in mediation.

Just as mediation permits the parties to air a wide range of grievances, and permits them to characterize the grievances as injustices if they see them that way, it also permits a wide range of possible repairs for the claimed injustice. Remedies developed in mediation are not limited to adjudicative remedies, such as the payment of money, criminal punishment, or injunctive orders. They can be constructed to deal directly with what the parties see as the injustices that gave rise to the dispute. Examples might include elimination of disparaging comments in a personnel file, correction of the physical condition that caused harm, or a change in certain practices. Sincere apologies, for instance, can serve as a valid remedy to achieve justice in mediation–an outcome not available when a third party adjudicator is imposing a resolution.[20] The recognition and remorse that underlie

[19] Morton Deutsch, *Justice and Conflict*, in THE HANDBOOK OF CONFLICT RESOLUTION 41 (Morton Deutsch & Peter S. Coleman eds.2000).

[20] *See* Stephen B. Goldberg, Eric D. Green & Frank E.A. Sander, *Saying You're Sorry,*

apology can arise through the dialogue made possible by mediation and the richer understanding of the situation such dialogue can generate.

The practice of "restorative justice" in the criminal law arena is one example of how the justice concept of repairing a wrong can extend beyond punishment or payment of money. Restorative justice brings together criminal offenders (often juveniles) and their victims in an effort to mediate between them. It provides an opportunity for a victim to tell the offender how he or she has been hurt and harmed, for the offender to understand the impact of his or her action, and for both victim and offender to construct an acceptable plan to redress the wrong. Mediation in this context often results in some plan of action for the offender to take, to try to ameliorate the harm and restore the offender to the community.[21] This kind of action is in addition to, or sometimes in lieu of, the formal imposition of sanctions by the adjudicatory system.[22]

B. Retribution and Revenge

What if a party to a mediation seeks revenge for the wrong claimed to have been done? The notion of "an eye for an eye" is an ancient form of balancing that some experience as both just and "reparative." Frequently, mediated discussions result in the parties' recognition that the wrong they experienced may be counter-balanced by a wrong they sponsored. Or, the proverbial "eye" they wish to extract can be given in a more meaningful (and less costly) way than blinding the other side. In other words, mediated discussions of justice can be responsive to desires for revenge even though revenge, as it is nor-

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NEGOTIATION J. 221 (1987) (examining the importance, function and timing of apologies in disputing contexts); Deborah Levi, *Why Not Just Apologize? How to Say You're Sorry in ADR*, 18 ALTERNATIVES 162 (2000)(examining various aspects of meaningful apologies); Deborah L. Levi, *The Role of Apology in Mediation*, 72 NYU L. REV. 1165 (1997); Hiroshi Wagatsuma & Arthur Rosett, *The Implications of Apology: Law and Culture in Japan and the United States*, 20 LAW & SOC'Y REV. 461 (1986); *see also*, Jonathan R. Cohen, *Advising Clients to Apologize*, 72 S. CAL. L. REV. 1009 (1999).

21 Ways for the offender to take responsibility include actions such as expressing full responsibility, verbal or written apology, or acknowledging his or her deficits, such as drug dependency. Ways to correct the harm include monetary payments, victim directed community service, or even service to the victim. CTR. FOR RESTORATIVE JUSTICE & PEACEMAKING, RESTORATIVE JUSTICE FOR VICTIMS, COMMUNITIES AND OFFENDERS 17 (1996), available at http://ssw.che.umn.edu/rjp/resources/documents/cctr96a.pdf (last visited September 25, 2002).

22 *See, generally*, MARK S. UMBREIT & JEAN GREENWOOD, CTR. FOR RESTORATIVE JUSTICE & PEACEMAKING, GUIDELINES FOR VICTIM- SENSITIVE VICTIM-OFFENDER MEDIATION: RESTORATIVE JUSTICE THROUGH DIALOGUE (2000). See also, Alyssa H. Shenk, *Note, Victim-Offender Mediation:The Road to Repairing Hate Crime Injustice*, 17 OHIO ST. J. ON DISP. RESOL. 185 (2001).

mally conceived, is not usually the product of mediation.[23] Rather, the desire for revenge is transformed either by recognition of the larger context of the dispute and the "opponent," by remorse and apology, or by meaningful reparations. In contrast, lawsuits are often brought to teach the other side a lesson (*i.e.*, get revenge). Occasionally, they do that. More often, both sides are taught lessons about the uncertainty of any given outcome, the enormous costs of litigation and the indignities of being at the mercy of strangers in a public forum.[24]

C. Distributive Justice

We tend to think of distributive justice in terms of legislative debates or negotiations for structuring transactions: What is a just way to distribute society's resources among different groups or classes of people? How should employers and employees, owners and players, divorcing spouses, or business partners, equitably divide resources?[25] Distributive justice plays an important role in mediations.

It is common to analyze a proposed settlement by predicting the

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[23] A lively literature has developed attacking the dichotomy between justice and revenge. It points out how a desire for revenge can be part of seeking justice. *E.g.*, Jeffrey G. Murphy, *Moral Epistemology, the Retributive Emotions, and the 'Clumsy Moral Philosophy' of Jesus Christ*, in THE PASSIONS OF LAW 123 (Susan A. Bandes, ed. 1999) (noting that we should not be too quick to exclude retribution from our legitimate reasons for imposing punishment); *and* Robert C. Solomon, *Justice v. Vengeance: On Law and the Satisfaction of Emotion*, in THE PASSIONS OF LAW (discussing the ways in which vengeance and justice overlap). In an interesting recent book, Laura Blumenfeld, a journalist, recounts a personal study of vengeance as she set out to get revenge on a Palestinian terrorist who shot and wounded her father, not knowing what revenge would be appropriate or how to bring it about. In the course of her journey, she spoke with Jewish, Muslim and Christian religious authorities, and explored a variety of cultures that have exquisitely calculated measures for determining appropriate revenge. But, unlike her prosecutor husband, she did not separate justice and revenge. "For Baruch [her husband], for most people, justice and revenge are mutually exclusive. But I considered the division false. Revenge has no clear borders. Justice shades into punishment, into retribution, into reprisal, into retaliation, into counterstrikes, into getting even, into vendetta, into vengeance, into revenge." LAURA BLUMENFELD, REVENGE: A STORY OF HOPE 109 (2002). In her quest for justice, she corresponded with the assailant (who was in jail) and came to know the assailant's family, although none of them knew who she was. She ended her idiosyncratic journey with an unexpected and surprising act, revealing who she was for the first time at a court hearing on the assailant's continued incarceration, and supporting his application to be released early because of his poor health. She found an act of "revenge" – revealing her identity – that did not harm the object of her quest.

In some sense, remorse and apology–available outcomes in mediation – are the converse of revenge. Like revenge, remorse has both cognitive and strongly emotive components. Remorse can sometimes be the justice called for by revenge.

[24] The adage *He who seeks revenge must dig two graves* is an apt warning for those bringing a lawsuit to extract vengeance.

[25] John Rawls uses the term allocative justice to distinguish the more general problem of ordering social institutions "so that a fair, efficient, and productive system of social cooperation can be maintained over time, from one generation to the next[.]" JOHN RAWLS, JUSTICE AS FAIRNESS: A RESTATEMENT 50 (2001)

value of the alternative to agreement. Where litigation is the alternative to settlement, this means assessing the likelihood of prevailing at trial *times* the expected trial outcome *minus* the costs of pursuing litigation. By considering the nature and likelihood of particular trial outcomes, parties can vicariously incorporate in their settlement analysis justice concepts that are embodied in adjudicatory law, although such reasoning measures only anticipated justice, not imposed justice – that is, the shadow of the law, rather than the law itself. When the settlement distribution is looked on as a problem of distribution, however, rather than as a compromise of adjudicatory claims, additional justice concepts come into play. The well-known concepts by which we can measure the justice of distributions are equality, equity, and need.[26]

"Splitting the difference" between settlement demands, a common last step in a negotiated distribution, is a claim to equality, and has a powerful attraction to people's sense of fairness and common sense justice.[27] Similarly, siblings, employees, or victims who must share resources in a common fund may be guided by understandable principles of equal treatment.

Equity, as distinct from equality, can support distributions other than an even split.[28] A victim's feelings or a perpetrator's ability to pay can be more important for determining a just distribution than simply splitting the difference or precisely measuring actual losses.[29] The concept of *Pareto efficiency*[30] also carries implications for justice. That concept asks us to consider, for any given or proposed distribution of resources, whether there is another possible distribution that would make at least one party better off without making any other party worse off. A *Pareto* improved distribution would, at a minimum, be more efficient, and–since each party gets more (or closer to their notion of their "just deserts") in a *Pareto* superior outcome–it will probably be experienced as more just. Even without the logical

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[26] Deutsch, *supra* note 19.

[27] The equality inherent in splitting the difference is highly dependent on the context. The difference is most often split between demands, proposals and counter-proposals that have been presented in negotiation, and the fairness of splitting the remaining difference between them is in part – but not entirely – dependent on the fairness of the original and intermediate offers that brought the parties to this final step. Fairness is also partly dependent on other characteristics of the parties, such as their relative wealth, their relative time-related costs, and other needs. *See*, HOWARD RAIFFA, THE ART AND SCIENCE OF NEGOTIATION 51 - 54 (1982).

[28] Equity may invoke some of the concepts involved in reparative justice, such as a claim that a party whose "rights" were violated has legitimate claim to more than an even split.

[29] The Honorable Robert Yazzie, *"Life Comes From It": Navajo Justice Concepts*, 24 N.M. L. REV. 175, 185 (1994).

[30] *See* definition *supra* note 3.

rigor of the economic concept of *Pareto* efficiency, such distributions will likely comport with notions of fairness that one "should" relinquish things of low personal value if those things reap enormous benefit for others.

The relative needs of the parties also play into questions of distributive justice.[31] Such considerations make it acceptable for disparate treatment such as the rich being taxed at a higher rate than the poor. The precept *from each according to his ability, to each according to his need* can fuel claims of justice and lead to responsive settlement terms and sometimes acts of generosity which restore families and communities.[32]

When discussions about fault and blame are not fruitful, mediators may wish to direct the mediation session away from reparative claims and focus on distributional issues instead. Shifting the focus from what happened and who is to blame to the future can ultimately address justice issues. This is true because the ultimate distribution plan needs to balance out how a proposed agreement might divide the available current and foreseeable resources, or might equitably meet the needs of each party, or how the parties might increase the efficiency of their exchange by each trading away things that cost them less in exchange for things they value more. The agreed upon distribution should not violate the parties' senses of equity, equality

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[31] A cynic about human nature might feel that an adjudicative process is always necessary to achieve distributional justice, particularly when the ends of justice require that a "have" relinquish his goods to a "have-not." When gross power disparities are present, the fairness of a process based on autonomous bargaining becomes questionable. *See* Stulberg *supra* note 1, at 924-25 (discussing the impact of power relationships on fairness in bargaining). However, mediation has the potential to enable parties to appreciate each other's reality and consequently to make accommodations they would not be legally required to make. For example, landlords who enter mediation asking for rent arrears and an immediate departure of the tenant often shift to a willingness not only to forgive the back rent but also to help the tenant find new living quarters and move. Sometimes this is done out of self-interest; other times distributional justice has come into play. Professor Carrie Menkel-Meadow writes: "[M]ediation. . .[is] most appropriate for honestly addressing inequalities and meeting the needs of unequal parties. In mediation, people can recognize and face up to their human responsibilities, not because someone has ordered them to, but because they have come fully to understand and comprehend someone else's reality and limitations." Carrie Menkle-Meadow, *A Humanist Perspective on ADR*, XXVIII FORDHAM URBAN L. J. 1073, 1082-83 (2001) [hereintafter *"Humanist Perspective"*].

[32] In a mediation between siblings conducted by Lela Love, the parties disputed whether a payment made by a deceased parent was a gift or a loan. A wealthy sibling, asserting that the payment was a loan, held to the principle of equal treatment for all children. The poorer sibling, claiming the payment was a gift, asserted that the family took care of its members according to their needs. A resolution of that matter involved the parent's payment being treated as a loan (in deference to the distributional principle of equality) *and* a gift being made by the wealthy sibling to support his nephew's college expenses (in deference to the principle of need), which equaled the amount of money in dispute. The parties' sense of justice was satisfied, and the family was restored.

and need if it is to be acceptable to them.[33] One used to thinking of justice in terms of adjudication might object to such a redirection as turning away from justice concerns and towards satisfying only personal needs and preferences. On the contrary, in determining an equitable distribution, parties are frequently balancing up–or repairing–past harms in a way that will be most productive for them. To some extent, questions of distributional justice are most important in an interest-based, needs-oriented approach to mediation, and questions of reparative justice play a more prominent role in a mediation context where parties (or their "mediator") focus on evaluating the merits of law-based claims.[34] In a larger sense, however, in the work of crafting acceptable outcomes, the two concepts become inextricably intertwined.

D. Relationships

Mediation can involve efforts to restore or improve a damaged or hurtful relationship between the disputing parties, to re-establish a sense of harmony, or to effect a return to the status quo in a family, business, or community. This can have an instrumental value. If the parties have an on-going relationship, doing business with each other, living near each other, co-parenting, or being members of common economic or social groups, improving their relationship can reduce disputes in the future and make their interaction more economically

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[33] In an elaborate expansion of the "I cut, you choose" method of fairly dividing goods, Steven Brams and Alan Taylor have designed a method they call "adjusted winner" to keep the fairness of the simple division while dealing with much more complex distribution problems. The method has each party assign points, totaling 100, to all the goods that must be divided between the parties. The goods are distributed to the parties based on an analysis of the points. STEVEN J. BRAMS & ALAN D. TAYLOR, THE WIN-WIN SOLUTION (1999). Other methods of fair division are described in RAIFFA, *supra* note 27, at 288-99.

[34] A mediator who explores and captures the parties' norms about distributional fairness probably creates less of a risk of doing an injustice himself by imposing his values on the parties than one who actively participates in a substantive discussion of fair reparations. When legal claims, with their embedded concepts of justice, lurk in the background as the basis for reparation claims, a mediator's opinion about fair reparation might begin to sound like an adjudicative judgment; the mediator is telling the parties what the law requires, at least as the mediator sees it. That would be an imperfect kind of quasi-adjudicative judgment, or suggested judgment, since the mediator reaches the opinion without the procedural forms, factual development, and adjudicative thought processes that we most trust in an adjudicative setting. *See* Lon Fuller, *Mediation: Its Forms and Functions*, 44 S. CAL. L. REV. 305, 326, 337 (1971) (describing ways in which mediators should avoid the imposition of law-like rules and avoid "legalizing" various situations in which people are highly interdependent) and Lon Fuller, *The Forms and Limits of Adjudication,* 92 HARV. L. REV. 353, 382 - 391, 394 - 405 (1978) (describing the key attributes of adjudication and distinguishing them from solving "polycentric" problems, which are more amenable to a mediated or negotiated resolution). Distributional issues have less definitive law behind them, and, as matters of common sense and individual preference and need, are less likely to place the mediator in an evaluative posture.

or personally rewarding. Improved relationships can be valuable in themselves, can ripple out and effect a community, and can represent a public good that is a component of a justice system.[35]

How are improved relationships an aspect of justice? Would a mediation produce more justice if it strengthened the relationship between the parties? In traditional Navajo systems, for example, concepts of justice are related to healing and to restoring a person to good relations with both her surroundings and herself.[36] Navajo justice concepts focus on helping parties re-integrate with the group with the goal of nourishing ongoing relationships with family, neighbors and community.[37] Similarly, in China, history and tradition place a high value on social order and harmony and the stability of the group as a whole.[38]

Additionally, good relationships are sometimes a precondition for negotiating reparative or distributive justice; that is, the correction of wrongs and a more just allocation of goods can be accomplished more smoothly and thoughtfully if done in the context of good relationships. Mediation is the only third party dispute resolution process that is or can be targeted to improving relationships.

E. Procedural justice

While mediation lacks the formality and elaborate procedural rules of litigation, it nonetheless provides a rich opportunity to implement procedural justice. From a disputant's perspective, the perception of fairness is linked to having a meaningful opportunity to tell one's story, to feeling that the mediator considers the story, and to being treated with dignity and in an even-handed manner.[39] Adher-

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[35] The transformative school of mediation emphasizes that the goal of mediation should be to empower parties to understand their own situation and increase their capacity for self-determination and also to enable parties to recognize the concerns and the personhood of the other party. Empowerment and recognition–good relationship with self and others–are viewed as public values that mediation promotes and a proper goal for a justice system. ROBERT BARUCH BUSH & JOSEPH FOLGER, THE PROMISE OF MEDIATION (1994). Following this approach, reaching agreement is not a measure of success in mediation. Rather party empowerment and recognition between parties are hallmarks of successful mediation. *See also*, Jonathan R. Cohen, *When People are the Means: Negotiating with Respect*, 14 GEO. J. OF LEGAL ETHICS 739 (2001) (arguing that respect for the other party is a value in negotiation – and therefore in mediation – separate and apart from the value of gaining material advantage from the negotiation).

[36] Yazzie, *supra* note 29, at 181.

[37] *Id.* at 182.

[38] *See* Jerome A. Cohen, *Chinese Mediation on the Eve of Modernization*, 54 CAL. L. REV. 1201 (1966); Stanley Lubman, *Mao and Mediation: Politics and Dispute Resolution in Communist China*, 55 CAL. L. REV 1284 (1967).

[39] Welsh, *Making Deals, supra* note 4, at 793, 820-21; Nancy A. Welsh, *Disputants' Decision Control in Court-Connected Mediation: A Hollow Promise Without Procedural Justice*, 2002 JOURNAL OF DISPUTE RESOLUTION 179, 180 [hereinafter "*Disputants' Deci-*

ence to principles of procedural justice influence the parties' perceptions about the fairness of the process, as well as their perceptions of substantive justice[40] and their willingness to comply with the outcome of the dispute resolution process.[41] The philosopher David Miller argues that a system of justice should be characterized by four critical attributes:

- •Equality (treating the participants equally);
- •Accuracy (in consideration of whatever information is deemed relevant);
- •Publicity (making the rules and procedures apparent to the participants); and
- •Dignity (treating the participants in a dignified way, and not requiring undignified actions from them.)[42]

To some extent, ethical standards and practice norms for mediators embody these aspects of procedural justice in mediation. First, mediators should remain impartial and without bias between the parties. Second, resolution through mediation should only occur as a result of the knowing, voluntary decisions of the parties.[43] In fact, many accounts of injustice in mediation include stories about mediators who violate such ethical and practice norms in situations where mediation has been mandated.[44]

Mediation (at least the facilitative variety) is most emphatically a forum in which the parties can be heard.[45] Parties' statements and interactions in mediation are not constrained in the way they are in more formal adjudicative forums.

Some evidence suggests that parties tend to regard a more coop-

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sion Control"].

[40] Welsh, *Making Deals, supra* note 4, at 818-19; Welsh, *Disputants' Decision Control, supra* note 39, at 184; *see also* E. Allan Lind & Tom R. Tyler, THE SOCIAL PSYCHOLOGY OF PROCEDURAL JUSTICE, 66-70, 205 (1988).

[41] *See* Welsh, *Making Deals, supra* note 4, at 819; Craig A. McEwen & Richard J. Maiman, *Mediation in Small Claims Court: Achieving Compliance Through Consent*, 18 L. & SOC'Y REV. 11, at 44-45 (1984).

[42] DAVID MILLER, PRINCIPLES OF SOCIAL JUSTICE 99 – 101 (1999).

[43] *See* MODEL STANDARDS OF CONDUCT FOR MEDIATORS (approved by the American Arbitration Association, the Litigation and Dispute Resolution Sections of the American Bar Association and the Society of Professionals in Dispute Resolution)(1994)[hereinafter cited as MODEL STANDARDS] (Standard 1 states that "mediation is based on the principle of self-determination by the parties"; Standard 2 requires that the "mediator shall conduct the mediation in an impartial manner"; and Standard 6, focusing on quality of the process, states that a mediator shall work "to encourage mutual respect among the parties" and be committed "to diligence and procedural fairness").

[44] *See, e.g.,* Grillo, *supra* note 8.

[45] *But see*, Nancy A.Welsh, *The Thinning Vision of Self-Determination in Court-Connected Mediation: The Inevitable Price of Institutionalization*, 6 HARV. NEGOTIATION L. REV. 1, 25 (2001) (noting a trend towards parties being marginalized and frequently not present in court-annexed mediation of civil cases).

erative, problem-solving approach to negotiating conflicts as more just, and as leading to substantive resolutions that are more just, than a negotiating process that is more adversarial and contentious.[46] Good mediation often builds just such a problem solving framework for the parties. It can thus provide justice of a form and degree not available in adjudication.

II. THE MERCHANT OF VENICE

A. A Synopsis

For the reader who is not familiar with *The Merchant of Venice* a brief summary follows, highlighting some of the ways in which the conflicts depicted in the play bring issues of justice to the fore:

> Bassanio, a nobleman of Venice, has fallen in love with Portia, and needs funds to woo her. He approaches his friend Antonio (the merchant of the title) asking for a loan. Antonio has no ready funds – all his assets are tied up in merchant ships at sea. To help Bassanio, for whom he cares deeply, Antonio seeks a loan from Shylock, a Jewish businessman and money lender.
>
> Antonio's request for a loan is somewhat surprising, because he and Shylock dislike each other. This enmity stems in part from Shylock's subordinated position as a Jew in Venetian society. Shylock voices his bitterness about the way Antonio and others have excluded Shylock (and the Jews) from their business, and the way they have also unfairly competed with him by lending money without the interest that Shylock charges.[47] In raising ill-treatment as an issue between them, Shylock implies that he would like to improve the relationship. Antonio rebuffs that overture and refuses to change the way he treats Shylock.[48] Shylock nevertheless agrees to make the loan to Bassanio, but with the condition that if Bassanio does not repay the loan on time, Shylock may collect a pound of Antonio's flesh. Despite Bassanio's protestations that Antonio should not put himself at such risk simply to help his friend, Antonio unwisely agrees to the loan.[49]

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[46] Guoquan Chen, et al., Contributions of Conflict for Justice in Student Groups in China, Unpublished manuscript presented at the 2001 International Association for Conflict Management meeting, Paris (on file with the authors.)

[47] "I hate him for he is a Christian;/ But more, for that in low simplicity/ He lends out money gratis, . . . He hates our sacred nation, and he rails/ . . . On me, my bargains, and my well-won thrift,/ Which he calls interest." WILLIAM SHAKESPEARE, THE MERCHANT OF VENICE, Act I, Scene iii, lines 39 - 48. (Kenneth Myrick, ed., Signet Classic (1965)) [hereinafter cited by act, scene and line numbers only.]

[48] I, iii, 127 - 33.

[49] The play depicts a very strong bond of affection between Antonio and Bassanio, which goes far to explain Antonio's bad judgment in agreeing to the terms of the loan. Antonio is also extremely confident that he has ample assets to cover his exposure on the loan.

Antonio's ships are lost at sea, and he is unable to repay the loan. Shylock sues to collect his pound of flesh on the bond. He appears to have a strong case. Despite the apparent injustice of enforcing such a severe penalty for failure to keep a contractual obligation, Venetian law has no available doctrine for mitigating contractual bonds that are too extreme.[50] Any exceptions to the law would jeopardize the legal stability that is required if Venice is to keep its reputation as a secure place to do business.

Antonio is saved by Portia, who appears at the trial disguised as a young male legal scholar named Balthasar. She wants to help her fiancé, Bassanio, who succeeded in his wooing in part due to Antonio's generosity. After refusing to permit an equitable exception to the harsh enforcement of the bond, and reiterating the importance to Venice's economic stability of the strict enforcement of its contract laws, Portia nevertheless urges Shylock to forgive the bond as a act of mercy, trying to persuade him with her famous speech[51] that mercy must temper justice else "none of us should see

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[50] The modern version of such a doctrine is the limitation on the terms of liquidated damages. Although the courts will sometimes enforce damage terms to which the parties have agreed in advance, they will not do so if the terms are too onerous, or, in the language of the Restatement (2d) of Contracts, if the terms are not reasonable in light of the anticipated or actual damages, taking into consideration the difficulty of proving damages. RESTATEMENT (SECOND) OF CONTRACTS §356 (1) (1978). And §356(2) permits the enforcement of bonds only to the extent of the loss the bond was meant to protect against.

[51]

PORTIA. Do you confess the bond?
ANTONIO. I do.
PORTIA. Then must the Jew be merciful.
SHYLOCK. On what compulsion must I? Tell me that.
PORTIA. The quality of mercy is not strained;
It droppeth as the gentle rain from heaven
Upon the place beneath. It is twice blest:
It blesseth him that gives and him that takes.
'Tis mightiest in the mightiest; it becomes
The throned monarch better than his crown;
His sceptre shows the force of temporal power,
The attribute to awe and majesty,
Wherein doth sit the dread and fear of kings;
But mercy is above this scept'red sway;
It is enthroned in the hearts of kings,
It is an attribute to God himself;
And earthly power doth then show likest God's
When mercy seasons justice. Therefore, Jew,
Though justice be thy plea, consider this:
That, in the course of justice none of us
Should see salvation. We do pray for mercy,
And that same prayer doth teach us all to render
The deeds of mercy. I have spoke thus much
To mitigate the justice of thy plea;
Which if thou follow, this strict court of Venice
Must needs give sentence 'gainst the merchant there. IV, i, 180 - 204.

salvation."[52]

Shylock is unmoved. He "crave[s] the law, The penalty and forfeit of [his] bond,"[53] despite the fact that Bassanio and others have by now offered Shylock twice or three times the amount of the loan in settlement. Shylock's angry and adamant stance is fueled, in part, by the loss of his only daughter, Jessica, who has eloped with Lorenzo, one of Bassanio's cronies, and in the process has both forsaken her Jewish faith and taken Shylock's money.[54]

When it appears that Shylock has won his suit and he prepares to remove a pound of Antonio's flesh, Portia intervenes again. By a close reading of the text of the bond, she asserts that the bond does not authorize Shylock to spill any of Antonio's blood. He can take flesh only if he can do so bloodlessly. That, of course, is impossible. Shylock has lost his suit.

Shylock's woes continue. Portia then notes that by his bond and his suit to enforce it he has violated a Venetian law that prohibits aliens from trying to kill Venetians. His punishment is to forfeit half of his wealth to the person he tried to kill, and the other half to the state, with the state also having the power to execute him. Antonio decides to hold his share of Shylock's wealth in trust for Jessica and Lorenzo, and requires Shylock to convert to Christianity and leave his estate at his death to Jessica and Lorenzo.

This story has intrigued legions of lawyers and law professors, and has generated numerous discussions on the nature of justice.[55] It

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[52] IV, i, 198 - 99.

[53] IV, i, 205 - 06.

[54] Additionally, Shylock reiterates that his anger and desire for revenge is based on Antonio's public humiliation of Shylock and prejudice against Jews: "He hath disgraced me and /hindired me half a million, laughed at my losses,/ mocked at my gains, scorned my nation, thwarted/ my bargains, cooled my friends, heated mine enemies - and what's his reason? I am a Jew." III, i, 51 - 55.

[55] Recent scholarship includes Symposium, The Merchant of Venice, 5 CARDOZO STUD.L. & LIT.1 (1993); Daniel H. Lowenstein, *The Failure of the Act: Conceptions of Law in* The Merchant of Venice, Bleak House, Les Miserables, *and Richard Weisberg's* Poethics, 15 CARDOZO L. REV. 1139, 1157-1174 (1994); RICHARD A. POSNER, LAW AND LITERATURE 90-99 (1988); RICHARD WEISBERG, POETHICS AND OTHER STRATEGIES IN LAW AND LITERATURE 94-104 (1992); Kenji Yoshino, *The Lawyer of Belmont*, 9 YALE J. OF LAW AND THE HUMANITIES 183 (1997); THEODORE ZIOLKOWSKI, THE MIRROR OF JUSTICE 163-186 (1997); and the University of Texas conference From Text to Performance: Law & Other Performing Arts, available in audio and video on the internet: http://www.utexas.edu/law/news/colloquium/lawandarts/index.html (last visited August 1, 2002). The contracts casebook edited by the Wisconsin Law School faculty uses the trial scene from THE MERCHANT OF VENICE to highlight two problems of contract law: the enforceability of liquidated damages provisions in contracts, and the technique of using hyperliteralism to interpret language so as to create a more just result than a common sense reading of the contract might entail. 1 STEWART MACAULAY, JOHN KIDWELL, WILLIAM WHITFORD & MARC GALANTER, CONTRACTS: LAW IN ACTION 104-107, 696-698 (1995). *See also,* Allan Axelrod, *Was Shylock v. Antonio Properly Decided?,* 39 RUT. L. REV. 143 (1986) (ironically using law and economics analysis to consider whether it is economically appropriate to bar debtors from pledging their bodies after death, or promising to go to

compactly displays the tension between equity (not enforcing the bond) and law (enforcing the bond to protect commerce and a reliable rule of law), and it confronts us with the distasteful irony of using unjust methods of reasoning (excessive literalism) to seek just ends (barring enforcement of the bond). Furthermore, it places the legal issues in a larger context of social injustice (discrimination against and exclusion of Jews). To imagine a mediation of the dispute, instead of a trial, gives us the opportunity to examine these justice issues in a different frame. The play's depiction of adjudication leaves us unsatisfied that justice has been done, and makes the possibility of seeking justice through mediation more inviting.

The play is particularly apt for exploring justice in mediation because it also provides well developed personalities and a rich story. Mediation often entails moving beyond the legal aspects of the parties' dispute and uncovering the real world needs and perceptions that fueled the conflict. *The Merchant of Venice* gives us the prior relationship of the disputing parties, the economic and social circumstances in which the conflict arose, and the individual values and personal issues that intensified the conflict. The detailed background of the dispute allows us to consider the justice issues of the story in a larger context, the type of context that parties in a real mediation have. We are not limited solely to justice as framed by the concept of legal rights, which in many ways is inadequate to deal with the situation in the play.[56]

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debtor's prison, as security to their creditors.)

[56] Using the story of Shylock for any purpose can be disturbing to some. His character can be depicted as the epitome of an anti-Semitic stereotype of a Jew, and can lend itself to the perpetuation of the very kind of oppression that is part of the injustice described in the play. But Shylock need not be played that way. The history of performance of THE MERCHANT OF VENICE has demonstrated a broad variety of approaches. Until the early Nineteenth Century, Shylock was usually depicted as a kind of comic and disreputable character, becoming less comic and more offensive over time, in line with much of the anti-Semitic attitudes of the time. Sylvan Barnet, *The Merchant of Venice on Stage and Screen*, SIGNET CLASSIC SHAKESPEARE: THE MERCHANT OF VENICE, *supra* note 48, at 160-65. In the Nineteenth Century, however, several leading actors completely reversed the depiction, playing Shylock as a noble and deeply wronged tragic hero. Heinrich Heine described the reaction of an English woman to a performance of the play at Drury Lane in London in 1839.

> When I saw a performance of [The Merchant of Venice] at Drury Lane, a beautiful pale-faced English woman stood behind me in the box and wept profusely at the end of the fourth act [the trial scene], and called out repeatedly, "The poor man is wronged."

Quoted in *id.* at 166. Edwin Booth, who successfully mounted the play, even dropped the entire fifth act, to keep the focus on Shylock as the wronged hero. *Id.* at 167. By the Twentieth Century the fifth act had been restored. *Id.* (Directors could now focus on Portia, and the things she had to do both to get Bassanio as a husband and then to teach him the virtues of domestic love and loyalty). The anti-Semitic dimensions of the play continue to engage directors, however. George Tabori's production in the 1970's staged the play as if it were being performed in a concentration camp under the compulsion of the Nazi

B. *If Portia Were a Mediator*

In her article about women as lawyers, Professor Carrie Menkel Meadow notes that Portia acts as an advocate, not a mediator.[57] While Portia does make an effort to get the parties to settle their legal dispute, she does not succeed in resolving the matter nor does she employ the strategies or display the mind set of a mediator. Shylock does not waiver from his insistence on securing justice in the form of the payment of the bond owed to him by Antonio, and Antonio offers no settlement terms that are of any interest to Shylock. So the trial proceeds, bringing ruin on Shylock. As an advocate, Portia is admirably successful: she finds a clever argument that demolishes Shylock's claim.[58] But what if she were to mediate, rather than to advocate? What opportunities lie in that path to do "justice" in a more satisfactory way than Shakespeare depicted it?

A good mediation effort by Portia would look quite different from the trial scene in the play. Among other things, Portia's goals and methods as a mediator would include:

- •Obtaining the agreement of Shylock and Antonio that they will spend some time articulating their perspectives, listening to each other, and trying to develop options to address the concerns raised.
- •Getting them to understand that Portia, as a mediator, will not decide who is right and who is wrong.
- •Conducting the mediation in privacy with assurances of confidentiality on the part of the mediator.
- •Spending substantial time listening to the parties, starting with a period of time in which each party has ample opportunity to describe how the dispute between them came about.
- •Trying to learn Shylock's and Antonio's underlying needs, interests, concerns, principles, values and feelings that lead them to dispute over the bond.
- •Trying to find, or help the parties invent, some agreement terms with respect to all issues raised that will best satisfy those needs and

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guards, a kind of play within a play, using a grotesquely stereotyped anti-Semitic depiction of Shylock. The Shylock character continually broke his part to try to avoid the stereotype, tearing off his false nose and ending with a violent attack on the guards. JAMES C. BULMAN, THE MERCHANT OF VENICE (SHAKESPEARE IN PERFORMANCE) 151 (1991).

The play has such hurtful possibilities because it deals with such an important and charged issue of social injustice. It is for precisely this reason that it is a fruitful subject for examining mediation. In considering the nature and limits of justice in mediation, it is important not to shy away from large and difficult issues of injustice. Strains of similar kinds of prejudice and group oppression appear more often than one would like in conflicts that can become the subjects of mediation. The limits of mediation as a method for dealing with such issues should be explored.

57 Carrie Menkel-Meadow, *Portia Redux*, 2 VA. J. SOC. POL'Y & L. 75 (1994).

58 Her advocacy skill, however, leaves us questioning whether she has done justice or used just means.

interests.

•Getting the parties to think realistically about the adjudication–and other alternatives they might have – and the serious risks entailed in the event they do not reach agreement.

In the course of doing these tasks the mediator will: spend more time listening to Shylock and Antonio than talking to them; make an effort to encourage Shylock and Antonio to understand the needs, interests, and concerns of the other; explore Shylock's and Antonio's feelings about the events that gave rise to the dispute and about the dispute itself so that the parties operate from an enriched understanding of each other's perceptions and emotions; and urge the parties to examine their respective futures, looking for ways to make the future more desirable.[59]

Portia's actions in the play, of course, demonstrate none of these characteristics. She does most of the talking. She pays no attention to the reasons Shylock and Antonio are embroiled in their dispute. For Shylock, his relationship with Antonio involved financial loss, indignities, and bitter enmity.[60] Antonio demonizes Shylock and his heri-

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[59] Our description of mediation embodies what has been labeled a *broad, facilitative* approach to mediation, rather than a narrow or evaluative one. *See* Leonard L. Riskin, *Understanding Mediators' Orientations, Strategies, and Techniques: A Grid for the Perplexed*, 1 HARV. NEG. L. REV. 7 (1996)(describing four distinct orientations to mediation: *broad, facilitative*: the mediator addresses all issues of concern to the parties, not just the legal ones, and facilitates the parties' evaluation of their various options without evaluating for them the strengths and weaknesses of each; *narrow, facilitative*: the mediator defines the problem narrowly (*e.g.*, sticking with the legal cause of action) and facilitates the parties' own evaluation of their various options; *narrow, evaluative*: the mediator defines the problem narrowly, usually only in terms of legal claims and defenses, and predicts the court outcome and proposes terms of agreement; and *broad, evaluative*: the mediator addresses all issues raised by the parties, predicts the court (or other) outcome and proposes terms of agreement). By contrast to what is described above as Portia's goals and methods, if Portia were to use a *narrow, evaluative* approach, she would focus on Shylock's legal claim and Antonio's legal defenses, and perhaps give an opinion on the likely court outcome. Such an approach would be more aligned with justice as it inheres in adjudicative systems, rather than the standards of justice outlined in this article.

Nor does the description of Portia the mediator capture the transformative approach to mediation. A transformative mediator would keep the focus on individual party empowerment and inter-party recognition in contrast to encouraging problem-solving and agreement once a richer understanding among parties were developed. *See*, BUSH & FOLGER, *supra* note 35; Joseph P. Folger and Robert A. Baruch Bush, *Transformative Mediation and Third-Party Intervention: Ten Hallmarks of a Transformative Approach to Practice*, 13 MED. Q. 263 (Summer 1996) (describing particular strategies of a transformative mediator).

For other accounts of mediation, *see* Freshman, *supra* note 4 (describing community enforcing and community enabling mediation); Welsh, *Making Deals*, *supra* note 4 (describing court-annexed evaluative mediation of non-family civil cases); Waldman *supra* note 4 (describing norm-educating and norm-enforcing mediation).

[60] When Antonio asks Shylock to lend Bassanio money, Shylock points out:

Signor Antonio, many a time and oft
In the Rialto you have rated me

tage. Their mutual animosity has a history.

Shylock's response to Portia's plea for mercy is to insist that he craves the law. Ignoring all aspects of the conflict between Shylock and Antonio that cannot be contained in Shylock's legal claim, Portia immediately moves on to interpret the meaning of the bond. In her frame of reference, she has little choice. She has described justice or mercy as the only available choices, and justice is understood to lie in the act of judging by a judge (understood to be the Duke). Portia does not consider that there might be a third option, to search for justice through another process.

In ignoring the broader nature of the conflict, as well as its history, Portia loses a powerful opportunity to investigate what was really at stake for the parties. If Portia were a mediator, she might shift the focus from Shylock's demand for legal satisfaction by using his outburst as an opportunity to expose and explore the parties' history, their views, their values, and their needs. She could ask him to talk more about why he craves the law, to explain to her and to Antonio what it is about the situation and Antonio's past behavior that makes enforcement of the law so important to him. She might then learn more about the indignities Shylock has suffered from Antonio, his enormous loss and pain from the defection of his daughter, his initial intentions with respect to the bond, and so on. Indeed, if Shylock talked about these things, Antonio would learn and might shift his own perspective, and *vice versa*. Encouraging parties to listen to each other, without the defensive deafness that usually accompanies heated

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About my money and my usances.
Still have I born it with a patient shrug,
For suff'rance is the badge of all our tribe.
You call me misbeliever, cutthroat dog,
And spet upon my Jewish gaberdine,
And all for use of that which is mine own.
Well then, it now appears you need my help.
Go to, then. You come to me and you say
'Shylock, we would have moneys'–you say so,
You that did void your rheum upon my beard,
And foot me as you spurn a stranger cur
Over your threshold! Moneys is your suit.
What should I say to you? Should I not say
"Hath a dog money? Is it possible
A cur can lend three thousand ducats?" Or
Shall I bend low, and in a bondman's key
With bated breath and whisp'ring humbleness,
Say this:
"Fair sir, you spet on me on Wednesday last,
You spurned me such a day, another time
You called me dog; and for these courtesies
I'll lend you thus much moneys"? I, iii, 103 - 126.

conflicts, frequently changes the dynamic. Both Shylock and Antonio might gain a clearer insight into the variety of concerns that are motivating each of them and that call for resolution. In the play, Shylock has already refused to discuss his reasons for insisting on the performance of the bond, angrily attributing it to his mere personal preference when challenged by Antonio's friends.[61] But his refusal to disclose his reasons in the adjudicatory setting of the court, publicly facing his enemies and tormentors, is a face-saving measure that keeps his dignity and pride intact. The privacy of mediation, where a non-judgmental, neutral mediator elicits stories from the parties, invites a candor that allows for beneficial exchange. Portia as mediator would give equal attention to Antonio's concerns. Indeed, getting Antonio to articulate his views and his needs may be the more difficult task. Throughout the play, Antonio exhibits a withdrawn, rather uncommunicative and even depressive demeanor.[62] His haughty withdrawal from Shylock is part of the problem, signifying the more concrete financial and personal harms that he and Venetian society have imposed on Shylock, and frustrating any effort Shylock might make to deal with the problem. In the trial, all Antonio had to do was confess the bond, and then prepare himself for its (and his) execution. Mediation would require more participation from him.

Who knows what Shylock and Antonio would say in mediation if Shakespeare re-wrote the play. Probably Shylock would express a need for revenge, but the discussion need not stop there. Shylock would be encouraged to articulate the various injustices that Antonio and his cohorts have heaped upon him, including disrespectful treatment, exclusion from social and financial transactions, and involvement in the elopement of his daughter and the alienation of her affections. None of these are legally cognizable injustices. But if Shylock articulates them as injustices, and if Antonio responds by, for example, denying they are injustices, or by admitting that he can see why Shylock would perceive them as injustices, even though Antonio disagrees that they are, or by admitting that there was some wrongful behavior on his part, though not enough to justify the taking of a pound of flesh, the mediation will have become a forum for the discussion of reparative justice. The efforts of the parties and the mediator to clarify and then resolve these views would be an instance of trying

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[61] IV, i, 34 - 62.

[62] In the first line of the play Antonio says: "In sooth I know not why I am so sad." I.i.1. And he sharply rebuffs Shylock's effort to develop a fuller relationship with him. "I am as like to call thee [a cur] again,/ To spet on thee again, to spurn thee too." I, iii, 127-128. In the trial scene, he puts up no defense, and seems quite willing to let Shylock take his pound of flesh when it appears that the law provides no escape from the terms of the bond.

to reach agreement on what is reparatively just for these people in this situation. Similarly, it is possible that Antonio could begin to appreciate the harm his conduct caused for Shylock, and he might even begin to feel some remorse. As noted above, remorse is a kind of repair for the harms that give rise to a need for revenge, and can be the basis for an honest apology.

Where might this lead? We can't say. It is a characteristic of good mediation that the outcome can never be seen in advance of the process. The participants have to build a solution from their own understandings and their own needs. What works for two parties in one dispute will not work for other parties in a similar dispute, or even for the same parties in another dispute. We can guess, however, that a good solution might include a recognition by Antonio that he had treated Shylock in a demeaning way. Similarly, Shylock's attempt to take Antonio's life through enforcement of the bond is a wrong that must be addressed. Some form of mutual recognition, perhaps apologies, might be part of the resolution. An agreement might also include restructured payment terms that are more fair and reasonable, in light of the circumstances under which the bond was given. One of Shylock's gravest losses is that of his daughter and only heir; Antonio conceivably has some power to help repair that situation as well. Finally, an agreement might include provisions under which Shylock and Antonio could work together in the future. This might include sending business to each other or recommending each other to other business associates. The issue of some social relations, to prevent the demeaning aspects of the relationship from resurfacing, might also figure in a resolution, particularly since Shylock's daughter, during the course of the play, marries Antonio's friend. While resolutions that involve future business dealings among parties in conflict and shifts in attitude impacting larger issues of social injustice may seem far fetched, future oriented resolutions occur regularly in mediation and social justice can advance person by person.[63]

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[63] Peter Alscher has spelled out an alternate staging of THE MERCHANT OF VENICE that shows how both Shylock and Antonio bear some responsibility for the wrongs that occurred, and how both have an opportunity to correct them. In this version, Portia addresses her quality of mercy speech (*see supra* note 51) in alternate parts to both Shylock and Antonio, not just to Shylock, as is usually done, telling Antonio that he, too, must be merciful. And when it is revealed that Venetian law calls for the death of Shylock, as an alien, for attempting the life of Antonio, a Venetian, Alscher's version gives Antonio the choice to destroy that law, a law that is one of the fundamental wrongs from which Shylock suffers. Antonio does not rise to that challenge. Peter J. Alscher, *"I would be friends with you . . " Staging Directions for a Balanced Resolution to "The Merchant of Venice" Trial Scene*, 5 CARDOZO STUDIES IN LAW AND LIT. 1 (1993). This focus on both parties and their responsibility for what happened and how to correct it is similar to what Portia would do as a mediator, but the lecturing, commanding quality of Portia's words in the play, even as

As parties exchange proposals, issues of distributive or allocative justice become prominent. The process presents opportunities to "create value" and optimize both parties' individual and joint gains.[64] Finding ways to restructure a deal to bring more value to one party, without diminishing its value to the other, making the outcome more *Pareto* efficient[65] would enact a form of distributive justice, even if the parties do not explicitly consider the efficiency issue in justice terms. If all or part of a settlement proposal consists of terms for repaying the loan, we can imagine a series of offers, demands, and concessions that would raise the issues of equality, equity and need. If Shylock demands a specified amount immediately, and Antonio offers a lesser amount paid over time, they might decide that it is fair to split the difference (equality). Antonio might argue that repayment should be delayed because he has other payments he must make immediately, while Shylock will not suffer financially from later payments (need). Shylock might argue the converse (also need). If they are discussing future business relations, Shylock might argue that it is fair for Antonio to provide more because of the harmful exclusion of Jews from Venetian commerce in the past (equity). None of these arguments about distributive justice can be dispositive, in the same sense that a judge's or jury's decision can finally determine (in theory) what is just, but if these or similar points are part of the parties' discussion, and if they reach an agreement, then the agreement will incorporate, to a greater or lesser degree, their views of justice.

The conflict between Shylock and Antonio also involves broader issues of social injustice. Can mediation address such issues? Assuming that Antonio and Shylock reach some workable agreement, they can provide a model or social precedent as to how gentile and Jew can constructively interact. Like a pebble sending out ripples in a pond, changes by individuals can change the whole—anti-Semitism can be addressed case by case. Should Antonio's attitude truly shift, he will affect those around him, who in turn will change others. In other words, change, in this case to Venetian society, can come from below (person to person, group to group), as is the case with mediation, or from above, as is the case with litigation or legislation. Both methods are powerful. Obviously, if Antonio cannot make it attractive to Shylock to settle, then the matter would be adjudicated. But we should not underestimate the ability of individuals to ameliorate the effects

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restaged by Alscher, would not be appropriate for mediation.

[64] ROBERT H. MNOOKIN, SCOTT R. PEPPET & ANDREW S. TULUMELLO, BEYOND WINNING 2 - 17 (2000); DAVID LAX & JAMES SEBENIUS, THE MANAGER AS NEGOTIATOR 88 - 116 (1986).

[65] *See* Metcalfe, *supra* note 2.

of social injustice in meaningful ways by their individual actions, even if they cannot by themselves legislate societal reform.[66]

To incorporate procedural justice, Portia's mediation of the dispute between Shylock and Antonio would have to look quite different from the trial in the play. While Portia might take care to treat the parties equally by giving them equivalent attention and opportunity to talk, her disguise and her hidden interest in the outcome should disqualify her as a mediator. She has come to help Bassanio (the person for whose benefit Antonio gave his bond), which makes her biased towards Antonio, his close friend. She keeps that interest secret. If she were to disclose her true identity and her interest, she would raise a difficult ethical question. Since mediation is a voluntary process, Shylock would have the option to reject her services as a mediator on finding out who she really is. But what if he agreed to keep her as a mediator, anyway? He might wish to do so with the thought that Antonio would be more likely to speak candidly at her urging, or offer serious and reasonable settlement proposals in her presence, than he would with a stranger, thus increasing Shylock's chances of getting a good resolution. Portia would then be faced with the question of whether her continued mediation would create such an appearance of bias that she should refuse to continue, even if the appearance causes no harm to Shylock and is acceptable to him. Additionally, she would have to feel she could be neutral according to her own standards, which would be unlikely, if not impossible, under these circumstances. These are important questions of procedural justice.[67]

Portia could also satisfy Miller's[68] procedural justice conditions of publicity and dignity by the way she conducts the mediation. It is common for mediators to use the beginning of the mediation session to describe what will happen, emphasizing the voluntariness of the process, the opportunities each party will have to discuss his or her views and proposals, the procedures that might be used (such as separate meetings or caucuses between the mediator and each party alone) and the guidelines for the discussion, the confidentiality of the sessions, and the mediator's neutrality (or interest, if it exists). According each of the parties dignity is something Portia can do by how she speaks to them and what she asks of them.

Accuracy is a value of procedural justice that could be more difficult for Portia to achieve, unless she treats the mediation substantially

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[66] Consider the impact of the personal examples of Martin Luther King, Mother Teresa, Mahatma Gandhi, or Nelson Mandela on the social injustices surrounding them.

[67] MODEL STANDARDS, *supra* note 43 (Standard 2 requires mediator impartiality, and Standard 3 requires disclosure of conflicts of interest).

[68] *See supra* note 42 and accompanying text.

differently from the way she treats the trial. In the trial, two key facts remain hidden from Shylock until he has foreclosed settlement. The first is the possibility that the bond might be interpreted to bar him from taking any blood. Shylock rejects the offers of settlement and demands an adjudication in supreme ignorance of this risk. The second is the Venetian law that would punish Shylock as an alien attempting to take the life of a Venetian if he seeks to enforce a deadly bond. Shylock also proceeds in apparent ignorance of that law, a law which ultimately destroys him.[69] In the context of a mediation, we would be troubled by the prospect of Shylock making critical decisions while remaining ignorant of these two possibilities, particularly where Shylock has not availed himself of legal advice. In mediation, the prospect of what would happen if no agreement is reached is highly relevant information. Procedural justice requires reasonable accuracy about such relevant information–or at least access to such information, even though such options can never be known with certainty, but must remain matters of prediction and probability. Here, too, Portia would face a mediator's dilemma if she realizes that Shylock is proceeding in complete ignorance of these risks, risks of which she is well aware. We can't say how Portia would resolve the dilemma. If she were to give Shylock her opinion of the likelihood of the legal result being what Portia (as advocate) advances, she could be jeopardizing the appearance of her neutrality, and she might be giving inaccurate advice as well, since it is often difficult to foresee exactly how the facts that come out at a trial will affect the applicability of the law. But if she were to remain silent, she might be undermining the voluntariness of Shylock's decision. If Antonio knows of these options (which in the play he does not), then Portia's silence could perpetuate a serious imbalance in negotiating power, further undermining the justice of the process. Mediators have no standard way to resolve this dilemma,[70] though in a case like this one, given the

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[69] Perhaps he isn't destroyed. After the trial has concluded, the final act takes place again in Belmont, Portia's estate. Portia is described as traveling to Belmont in the company of a holy hermit, who is not otherwise described. V.1.34. Susan Oldrieve wonders whether the holy hermit could be Shylock himself, after his conversion, emphasizing the similarity of Shylock and Portia as people who must live in the shadows of Venetian (or English) society dominated by Christian men. Susan Oldrieve, *Marginalized Voices in "The Merchant of Venice,"* 5 CARDOZO STUDIES OF LAW & LIT. 87 (1993). Using that suggestion, Marci Hamilton sees the ways in which the play depicts Shylock as undergoing a true religious conversion, making him religiously and morally more authentic than the manipulative and mercenary Christians with whom he has struggled. Marci A. Hamilton, *The End of Law*, 5 CARDOZO STUDIES OF LAW & LIT. 125 (1993).

[70] *See* Nolan-Haley, *Search for Justice, supra* note 8 (asking whether it is "just" for parties to bargain in court-annexed mediation without relevant legal information and concluding it is not). *See also*, John Feerick, Carol Izumi, Kimberlee Kovach, Lela Love, Robert Moberly, Leonard Riskin & Edward Sherman, *Standards of Professional Conduct in*

jeopardy that both parties are in, she should certainly urge them to seek counsel.

Dynamics similar to those in *The Merchant of Venice* regularly present themselves in mediated disputes. People insist on their legal rights in the context of a relationship in which they have suffered hurts and failures of communication. Insistence on rights often keeps the parties from thinking clearly about either their real needs or the risk that the trial judge or arbitrator will use unexpected techniques or call on unforeseen laws to dash their hopes and cause them harm. The origins of their conflict, the forces that perpetuate it, and the best chances to resolve it, are often as hidden as the dynamics of Shylock's dispute with Antonio are at their trial.

III. Mediated Outcomes and Their Implications for Justice

Moving from hypothetical mediation between Shylock and Antonio to actually mediated disputes provides a range of examples of justice delivery in mediation. The following descriptions of mediated outcomes[71] illustrate resolutions that (i) were viewed as fair – or at least acceptable – by all participants (who agreed to the outcome); (ii) restored some balance and harmony among them; (iii) may have increased the likelihood of understanding and better relationship between the parties (understanding that arguably had value even when the parties were strangers); (iv) achieved more *Pareto* efficient resolutions (placing the outcome closer to, at, or beyond what each party felt was adequate reparation for the harm); (v) saved time, money, and perhaps aggravation and stress (on both individual and institutional levels);[72] (vi) seemed to enhance communication and harmony in communities (in neighborhoods, among businesses, in workplaces, and in larger communities); and (vii) set social precedents for better ordering of relationships. Each of these features is an aspect of civil justice. Moreover, the process of mediation – regardless of outcomes – allowed each party to tell their "story". The ability to speak, to give voice to a perceived wrong, is something a justice system protects in a democratic regime and a process feature which enhances parties' per-

Alternative Dispute Resolution,1995 J. Disp. Res. 95, 105-110 (examining whether a mediator should give legal information that would change the power dynamic between parties when one (or both) party(ies) may be ignorant about the law).

[71] Examples A (the door), C (the abusive supervisor) and D (the ordinance) were from mediations conducted by Lela Love and/or the Mediation Clinic at the Benjamin N. Cardozo School of Law. Example B (the shrimp boat) is taken from a scenario described by Michael C. Lang, who mediates in New York.

[72] The waste in time, money, aggravation and stress in conflict scenarios are insults added to injuries, and, as they multiply, the perception of injustice increases.

ception of justice done.[73]

Imagine the following issues and judge the "justice" in the mediated resolutions.

> A. *The door.* An upstairs and downstairs neighbor have had a fierce dispute about sounds disturbing to the downstairs neighbor. In the course of the dispute on one occasion, the downstairs neighbor came upstairs and banged on the upstairs neighbor's door, causing a panel in the door to crack. Among the claims of the upstairs neighbor was a demand for $2,000 to replace the broken door. The downstairs neighbor was willing to repair his upstairs neighbor's door himself so that it would "look like new," so he refused to pay the $2,000 his neighbor demanded and indeed felt that he need not pay anything at all. The upstairs neighbor's response was that he wanted an intact door, one as good as the door he had had before the panel was broken, not merely a repaired door; consequently, he would go to court for his $2,000. Ultimately, the parties agreed that they would switch doors, since the downstairs neighbor had an identical door to the upstairs neighbor. Here, the downstairs neighbor paid nothing and gained a door satisfactory to him; the upstairs neighbor got 100% of what he wanted–an intact door. In the course of the mediation, a variety of solutions were explored with respect to the concerns about the sounds upsetting the downstairs neighbor. The agreements reached included the upstairs neighbor wearing slippers inside his apartment, installing wall-to-wall carpeting in the room under which the downstairs neighbor sleeps, and so on. None of these outcomes would have been possible in litigation.

"The Door" illustrates an "integrative" solution, in which each side gets precisely what he wants without cost to the other side. The parties' agreement re-established a modicum of neighborly relations as well, since the parties had to collaborate to effectuate their own resolution. Other issues in the case–sounds heard by the downstairs neighbor and the reactions of the downstairs neighbor to those sounds–were also addressed by mediation. Such issues represent a class of issues that adjudicative processes are ill-suited to address. This resolution illustrates: satisfactory reparation, appropriately measured to harm; the operation of a *Pareto efficient* result, capitalizing on the parties' differing views of the importance of an "original" and "intact" door, achieving distributional justice as each party receives what he feels is fair; personal action taken (wearing slippers, working on the door, installing carpet) as a kind of payment and establishment of a relationship likely to restore a modicum of neighborly relations and

[73] We do not give accounts of what happened during the mediations themselves, so we cannot use these examples to explore issues of procedural justice. But the issues and the outcomes provide opportunities to consider substantive justice.

building harmony, as well as mindfulness of others in a relatively small community.

> B. *The shrimp boat.* A New York City based television network was in a dispute with a Florida shrimp boat captain, whose boat they had leased for the filming of a show. During the lease the boat was destroyed in a hurricane. The parties sought a mediated resolution prior to taking the dispute to litigation. The gap between their monetary positions was bridged by an offer of the television network to host the captain in N.Y.C. and introduce him to all his favorite television stars. This offer, which cost the television studio virtually nothing, fulfilled a lifelong dream of the captain and sufficiently sweetened the deal to make the monetary offer of the network acceptable.

"The Shrimp Boat" represents a *Pareto* efficient solution where one party adds something of relatively low cost to the offering party but of high value to the recipient. This additional item sufficiently "sweetens the pot" to make the overall deal attractive to both sides. We can speculate that this sort of resolution will foster good relations, which in turn might result in possible business opportunities in the future for the parties. To the extent that conflicts represent situations full of danger and loss, the transformation of this situation into an opportunity to fulfill a lifelong dream of the captain provides meaningful and restorative reparations for the harm suffered.

> C. *The abusive supervisor.* A group of Latin-American men alleged discrimination by a corporation consisting of treatment over the course of a decade that included a hostile work environment, failure to promote qualified individuals because of their ethnicity and inequalities in pay related to ethnic background. A variety of offers were on the table with respect to promotions and damages for inequalities in pay. The workers, however, wanted an opportunity to explain directly to the supervisor the impact on their marriages and their children and their psychological well-being of his verbal derogatory remarks. In the course of the mediation, each of seven men in turn explained to the supervisor the personal impact his conduct had on their lives. For one of the workers, the abusive situation at work was directly connected to his divorce, which in turn (in his view) caused his fourteen year old child to run away. Each of the men wanted assurance that this situation would not happen to others in the future. The supervisor apologized to each person. In addition to agreements with respect to promotions and back pay, the company agreed to a variety of provisions–training programs, new policies–assuring that the events would not recur.

"The Abusive Supervisor" illustrates the importance in justice-seeking of being able to tell one's story to a particular audience and of being able to ensure that similar injustices are prevented. Media-

tion–insofar as it gives "voice and choice"—offers unique opportunities for empowerment and altruism, which are not facets of adjudication. The apologies and the new policies are reparative and make the resolution more just than promotions and back pay alone. The employer will have a more humane company, the supervisor presumably has learned a lesson, and the men feel heard and respected. Justice plays a part in this return to a more correct ordering, a moral universe–created by the men speaking their mind and receiving recognition through apology, as well as through other forms of compensation.

> D. *The ordinance.* A Long Island town adopted an ordinance prohibiting standing on a street or highway and soliciting employment from anyone in a motor vehicle and also prohibited anyone in a motor vehicle from hiring or attempting to hire workers.[74] The ordinance was a response to the gathering of Central American refugees seeking day labor at a "shaping point"[75] in the town. Advocacy groups representing the workers challenged the ordinance as an unconstitutional violation of the First Amendment. Advocates for the town claimed the ordinance was necessary for public safety, particularly traffic safety. While many issues were involved in the mediation of this case–for example, use of the city soccer field and other city services by non-English speaking residents, police interaction with non-English speaking people, interactions between Salvadorans and other residents in the town (littering, "cat-calling" to women, public urination)–for the purposes of this example we will examine the resolution of the issue of the ordinance only. With respect to the ordinance, both sides agreed that a new ordinance would be drafted which satisfied the public safety concerns of the town and simultaneously did not offend Salvadoran workers or abridge any constitutional rights. Since a law school clinic was involved in the representation of the Salvadoran workers, the drafting of the new ordinance was taken on by law students, subject to the advice and consent of lawyers involved on both sides.

"The Ordinance" poses a constitutional issue. Should such questions, which might create a meaningful legal precedent, be resolved by mediation? The mediated resolution resulted in the two sides collaborating together to create a satisfactory ordinance, as well as resolving the other issues. The collaboration had two benefits. First, it was a

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[74] For a fuller description of this mediation, *see* Lela P. Love, *Glen Cove: Mediation Achieves What Litigation Cannot*, CONSENSUS (a quarterly newsletter of the MIT-Harvard Public Dispute Program), no. 20, p. 1 (Oct. 1993) and Lela P. Love & Cheryl B. McDonald, *A Tale of Two Cities: Effective Conflict Resolution for Communities in Crisis*, DISPUTE RESOLUTION MAGAZINE (published by the ABA Section of Dispute Resolution)(Fall 1997).

[75] A shaping point is a locale where day laborers congregate, and employers go to find workers.

precedent for collaborating on other issues that the groups faced in the future. And, second, the new ordinance was a type of precedent in itself, an example to which others in similar circumstances could look. Critics of settlement might argue that mediating such cases is an abdication by the courts that are charged with articulating public norms.[76] This critique ignores the fact that in a democracy "a patient confidence in the ultimate justice of the people"[77] to do justice among themselves, sometimes more responsively and creatively than is possible in the courts, is a pillar of our social order.

As important as the substantive outcome was, in the mediation each side listened to the other, treated those on the other side with dignity, and paid attention to issues such as the right to seek a living, public order, and the right to be treated without bias or vindictive stereotypes. The mediation provided an opportunity for the parties to articulate these values and incorporate them into the resolution. These are the kinds of fundamental justice issues that the constitutional claims protect, and for which the legal claims act as a proxy. By using the mediation process, rather than adjudication, the parties had the opportunity to address these issues directly, and find a way to best implement them, rather than try to satisfy them only through legal doctrine and legal logic. Indeed, the interaction and collaboration in the mediation might be seen as an implementation, in a specific and limited setting, of some of the dignitary interests that underlie constitutional rights. The mediation may have served as a model of future respect between these parties, that is, a model for how to build some just constitutional values into their ongoing relationship.

IV. Implications for Clinical Legal Education

The ways in which justice plays a role in mediation carry important implications for legal education in general, and clinical legal education in particular. When law students are mediators, they have the opportunity – and perhaps the responsibility – to grapple with the justice issues in the parties' disputes in ways not available to them in the classroom or a litigation clinic. In pursuing the educational goal of training students to appreciate the multifaceted nature of justice, law schools would do well to foster mediation clinics.

Studying legal doctrines in the classroom, students use "justice" as a touchstone for examining whether doctrines are good or bad. But they do not make decisions or take action, so the application of their concepts is not tested in the real world. Their opportunities to serve

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[76] *See* Fiss, *supra* note 2.

[77] Abraham Lincoln, *First Inaugural Address*, in <http://showcase.netins.net/web/creative/lincoln/speeches/1inaug.htm> (last visited October 1, 2002).

as adjudicators and legislators, making real decisions, are generally limited to simulated classroom roleplays and problems.[78] But simulations do not present the critical dimension of real effects on the lives of real people. When students represent clients in a clinical setting, they do have to make decisions and take action. They invoke concepts of justice in constructing a theory of the case, in arguing to the court, and perhaps in negotiation with the other side. As counsel for their clients, however, their ability to invoke or implement concepts of justice is narrowly channeled by their role as zealous advocates for their clients.

Mediation provides students an opportunity to view a dispute from the vantage point of a neutral and to have a real effect on the lives of real people. Mediation clinics typically assign students to mediate actual disputes, frequently in venues such as small claims courts or community dispute resolution centers.[79] Since mediation does not require a license, students can become legally competent to mediate after meeting the training and practice requirements of their particular venue. Initial training is usually done through simulations, but the classroom component is followed by an apprenticeship where students work with experienced mediators on real disputes. In some programs, after the requisite training and apprenticeship, students proceed to mediate "solo" or with another student serving as a co-mediator.[80] While the monetary stakes are often small, the human drama is vivid, and issues of fairness and justice abound.

Some students (and indeed many lawyers) view negotiation and mediation as a process of compromise,[81] in which notions of a just

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[78] For example, simulated arbitrations have been used in a contracts class at Rutgers to help students understand how their lay ideas of justice may differ from legal doctrine, and to understand how legal doctrine might influence their sense of a right result. *See* Jonathan M. Hyman, *Discovery and Invention: The NITA Method in the Contracts Classroom*, 66 NOTRE DAME L. REV. 759 - 84 (1991).

[79] Nolan-Haley, *Search for Justice, supra* note 8 (describing and analyzing cases mediated by Fordham Law School students in a Mediation Clinic based in Small Claims Court); James H. Stark, *Preliminary Reflections on the Establishment of a Mediation Clinic,* 2 CLIN. L. REV. 457 (1996) (describing how students can use their mediation placement experiences to analyze the process).

[80] The Mediation Clinic at Benjamin N. Cardozo School of Law requires that students mediate in an apprentice program, supervised by a professor, in the fall semester, and then in the spring semester mediate solo or in co-mediation teams once they have been certified by their community dispute resolution center, except when they mediate more complex (typically EEOC) cases when they are again joined by a professor/co-mediator.

[81] For many mediators and mediation scholars, "compromise"–where each party must sacrifice or relinquish some element of his claim or position to reach a mutually tolerable middle ground–is not as promising as a search for resolution that meet each party's interests. Professor Carrie Menkel-Meadow notes: "Compromise may produce the same sense of arbitrary peace and injustice [as adjudication], if, for example, we simply 'split the difference' to achieve peace and closure. Instead, . . .rather than compromise, where each party

outcome are put aside in the interests of avoiding risk and saving time and money. For those students, it is difficult to go beyond concepts of "justice" that are limited to legal rights and entitlements, particularly when students have not yet come to appreciate the value of social harmony, the importance of human relations, and the fact that a party may view a fair outcome in ways dramatically different from an adjudicated resolution. Even when mediating in a law school clinic, students often operate from a rights and entitlements framework and find themselves making judgments about who is telling the truth, who is improperly denying responsibility for what happened, and who should pay what to resolve the matter. That is, they find themselves quickly drawn to an adjudicatory sense of a just outcome. They want to do justice by being judges, not mediators. As teachers, we urge them to put aside these reactions and follow the parties to find what outcome fits the parties' notion of justice. The nonjudgmental stance of the mediator assists the parties to engage in a critical judging process themselves, whereby they can understand and articulate their own principles and values. Ultimately, the mediator acts as a catalyst to help the parties find an outcome which (at least) they can live with and (at best) comports with their highest notions of fairness and justice. In asking students to put aside justice as that term is used in adjudicatory processes, they need greater clarity as to what justice entails in mediation.

CONCLUSION

Justice is too multi-faceted to be reduced to a definition or a single concept. In its procedural aspect, justice involves notions of equal access, equal treatment, impartiality of the neutral, giving "voice" to each side, disputing costs that are appropriate to the amount in dispute, timeliness of the process, and access to necessary resources by both sides. Any process, be it adjudicative or collaborative, that ignores these procedural dimensions will be perceived as unjust by participants.

In its substantive (or outcome) aspect, justice also has many

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is likely to feel as if they have still 'given up something,' we should seek to meet each other's needs and interests and not cut the orange or chocolate cake in half. Menkel-Meadow, *Humanist Perspective, supra* note 31, at 1084. As mediation practitioners, we note that the word "compromise" (as in "Are you willing to compromise?") tends to stall, rather than start, movement towards settlement. On the other hand, in fact, sequential changes in settlement proposals often do form the basis of negotiated or mediated settlements and cannot be ignored (even though a mediator might not label them as "compromises"). *See*, ROBERT B. CIALDINI, INFLUENCE: THE PSYCHOLOGY OF PERSUASION 17 - 56 (rev. ed. 1993) (describing the psychological power of reciprocation in inducing people to act and accept an agreement).

faces. A just outcome may be one that seems just to the parties – that "satisfies the heart."[82] An outcome that re-establishes harmony and allows individuals or a community to heal and move forward may be just. An outcome that is durable and stable, prevents future disputes and, insofar as parties are not disappointed, prevents the perception of added injustices may also be considered just. An outcome that is efficient or *Pareto* optimal increases possibilities for reparative and distributional justice. These aspects of the experience of justice need to be understood as clearly as the achievement of outcomes that comport with societal rules and norms, as determined by arbitrators, judges and juries.

In the adjudication of Shylock vs. Antonio one aspect of justice was realized, but many others were neglected. Mediation has the potential to allow Shylock and Antonio to move beyond their rigid demonization of each other, to create mutually beneficial solutions to issues posed by their situation and even to address the anti-Semitism in Venetian society by building a better understanding between themselves. Fostering human understanding and creative problem-solving, bridging divides between ethnicities, and creating resolutions that parties feel are fair are critically important aspects of justice that should not be neglected in the law school curriculum.

[82] This is a native American concept linked to a just outcome.