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## Making Deals in Court-Connected Mediation: What's Justice Got to Do With It?

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# MAKING DEALS IN COURT-CONNECTED MEDIATION: WHAT'S JUSTICE GOT TO DO WITH IT?

NANCY A. WELSH\*

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## INTRODUCTION

When mediation was first introduced to the courts, the process was hailed as “alternative.”<sup>1</sup> Mediation gave disputants the opportunity to discuss and resolve their dispute themselves, without lawyers or judges imposing legal norms or a legal process. The role of the third party was to facilitate the disputants’ negotiations, not to dictate the outcome. Because the disputants were able to focus on their underlying interests in mediation, the process could result in creative, customized solutions.<sup>2</sup>

The picture of mediation is changing, however, as the process settles into its role as a tool for the resolution of personal injury, contract, and other nonfamily cases on the courts’ civil dockets. Recent research suggests that this dispute resolution procedure increasingly resembles a traditional bilateral negotiation session between attorneys (albeit with a third party in attendance)<sup>3</sup> or a “glorified”<sup>4</sup> judicial settlement conference.<sup>5</sup> Attorneys

1. More recently, commentators have urged that the word “appropriate” should replace “alternative” in describing mediation and other nontrial dispute resolution processes. See, e.g., Carrie Menkel-Meadow, *Whose Dispute Is It Anyway?: A Philosophical and Democratic Defense of Settlement (In Some Cases)*, 83 GEO. L.J. 2663, 2689 (1995) [hereinafter Menkel-Meadow, *Whose Dispute Is It Anyway?*]. Perhaps this semantic change reflects a larger search for legitimacy. See Robert Dingwall, *Divorce Mediation as a Social Movement*, in RECHTSSOCIOLOGIE, SOCIALE PROBLEMEN EN JUSTITIEEL BELEID [SOCIOLOGY OF LAW, SOCIAL PROBLEMS AND LEGAL POLICY] 371, 372 (F. Van Leon & V. Van Acken eds., 1999) (observing that many mediators spent many years eagerly “seek[ing] a niche in the shadow of the dominant profession [e.g., the legal profession], asking only to be recognized as offering a useful and legitimate supplement to its services”).

2. See *infra* Part I.

3. See *infra* Part I.

4. John Bickerman, *Great Potential: The New Federal Law Provides Vehicle, If Local Courts Want to Move on ADR*, DISP. RESOL. MAG., Fall 1999, at 3, 5.

5. See Deborah R. Hensler, *A Research Agenda: What We Need to Know About Court-Connected ADR*, DISP. RESOL. MAG., Fall 1999, at 15, 17 [hereinafter Hensler, *A Research Agenda*] (observing that anecdotal data and empirical studies “suggest that mediation of civil lawsuits in practice is evaluative rather than facilitative, and yields distributive outcomes. In other words, court

dominate the mediation sessions, while their clients play no or minimal roles.<sup>6</sup> Mediators are selected for their ability to value cases and to assess each side's strengths and weaknesses.<sup>7</sup> Mediators also increasingly bypass or marginalize the joint session in order to move quickly to caucuses.<sup>8</sup> Moreover, a surprisingly small percentage of the settlements produced by these mediation sessions are creative or even nonmonetary.<sup>9</sup>

Mediation's shift strongly suggests that the bargaining paradigm that dominates and delivers settlements in most civil cases is capturing the mediation process. This Article will begin by demonstrating that significant theory and research in negotiation and decision making support the move toward attorney dominance, evaluative intervention, the marginalization or abandonment of joint sessions and traditional monetary settlements.<sup>10</sup> If mediation is viewed simply as a means to enhance the deal-making that occurs in the negotiated settlement of most civil cases, the process' evolution appears to represent a successful adaptation to the realities of our civil system of "litigotiation."<sup>11</sup>

Many commentators and mediators, however, argue that mediation is a process that goes beyond assisting current approaches to bargaining and decision making.<sup>12</sup> These commentators urge that the disputants want and

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mediation is a lot like a settlement conference."); Deborah R. Hensler, *ADR Research at the Crossroads*, 2000 J. DISP. RESOL. 71, 76 n.23 (2000) (observing that "[i]n a . . . review of empirical literature examining court-ordered mediation practices, [she] found few examples of facilitative mediation of civil damage suits" and was "unable to identify any significant differences in case outcomes between . . . courts that adopted more facilitative mediation approaches and courts that adopted more evaluative approaches").

6. See *infra* Part I.A.

7. See *infra* Part I.B.

8. See *infra* Part I.C.

9. See *infra* Part I.D.

10. See *infra* Part I.

11. Marc Galanter, *Worlds of Deals: Using Negotiation to Teach About Legal Process*, 34 J. LEGAL EDUC. 268, 268-69 (1984) ("On the contemporary American legal scene the negotiation of disputes is not an alternative to litigation. . . . There are not two distinct processes, negotiation and litigation; there is a single process of disputing . . . that we might call *litigotiation* . . . . [N]egotiation and litigation are not separate processes, but are inseparably entwined. Negotiation, then, is not the law's soft penumbra, but the hard heart of the process.") (footnote omitted). See also Robert A. Baruch Bush, "What Do We Need A Mediator For?": *Mediation's "Value-Added" for Negotiators*, 12 OHIO ST. J. ON DISP. RESOL. 1, 5 (1996) (observing that the standard method of case disposition is through settlement as result of negotiation); Marc Galanter & Mia Cahill, "Most Cases Settle": *Judicial Promotion and Regulation of Settlements*, 46 STAN. L. REV. 1339, 1390 (1994) (observing that settlements are not "a stray byproduct of the judicial process, but . . . part of the essential core").

12. See Baruch Bush, *supra* note 11, at 32 ("[E]mpowerment and recognition logically belong at the center of the practice of mediation as assisted negotiation. When they are placed there, then the process will be as useful and attractive to its potential users as the theory suggests it should be."); Bickerman, *supra* note 4, at 3, 5 ("[I]f magistrates treat mediation as glorified settlement conferences, then the value of the process may be lost."); Linda R. Singer, *Future Looks Bright, But Challenges*

deserve something more. There is disagreement, however, regarding the identity of the additional benefit that mediation can offer to disputants. Some commentators urge that this additional benefit is an affirmation of democratic values<sup>13</sup> and citizens' rights to self-determination,<sup>14</sup> made possible through disputants' control over both the mediation process and the final outcome. Others point to mediation's capacity to provide "empowerment and recognition"<sup>15</sup> to disputants and even to engender self-transformation or "moral growth."<sup>16</sup> Still others assert that the added benefit of mediation is its potential for identifying disputants' unique underlying interests and creating

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*Include Retaining Our Core Values*, DISP. RESOL. MAG., Spring 2000, at 26, 29 ("While efficiency may be the value that accounts for much of the interest of the legal establishment and the general public in our processes, the values of access, the potential for creative solutions and the ability of the parties to participate in shaping outcomes are what makes us unique.").

13. See JAY P. FOLBERG & ALISON TAYLOR, *MEDIATION: A COMPREHENSIVE GUIDE TO RESOLVING DISPUTES WITHOUT LITIGATION* 35 (1984) ("Using mediation to facilitate conflict resolution and encourage self-determination thus strengthens democratic values and enhances the dignity of those in conflict."); Carrie Menkel-Meadow, *Ethics in Alternative Dispute Resolution: New Issues, No Answers from the Adversary Conception of Lawyers' Responsibilities*, 38 S. TEX. L. REV. 407, 452 (1997) [hereinafter Menkel-Meadow, *Ethics in Alternative Dispute Resolution*] ("As I have argued for the substantive justification of ADR (and settlement) on the basis of democratic, party-empowering participation, consent and quality of solutions, and outcomes, then so must the ethics (and justice) of ADR be judged by these goals and purposes . . . ."); Joseph B. Stulberg, *Facilitative v. Evaluative Mediator Orientations: Piercing the "Grid" Lock*, 24 FLA. ST. U. L. REV. 985, 1001-02 (1997) [hereinafter Stulberg, *Facilitative v. Evaluative Mediator Orientations*] ("Concepts of participation and empowerment are not idle pleasantries . . . but are central principles of a democratic society and critical features of consensual decisionmaking processes, of which mediation is traditionally thought to be a prime example."). See also Alex Wellington, *Taking Codes of Ethics Seriously: Alternative Dispute Resolution and Reconstitutive Liberalism*, 12 CAN. J. L. & JURISPRUDENCE 297, 299 (1999) (arguing that liberal, pluralistic, democratic theory provides coherent context for understanding and defending the value of alternative dispute resolution).

14. See Nancy Welsh, *The Thinning Vision of Self-Determination in Court-Connected Mediation: The Inevitable Price of Institutionalization?*, 6 HARV. NEGOT. L. REV. 1, 15-18 (2001) (describing the vision of self-determination that dominated the rhetoric of early mediation as assuming that disputants would do the following: actively and directly participate in the mediation process, choose and control the substantive norms to guide their decision making, create the options for settlement, and control the final decision regarding whether or not to settle).

15. See ROBERT A. BARUCH BUSH & JOSEPH P. FOLGER, *THE PROMISE OF MEDIATION* 2 (1994) (urging that mediation should promote empowerment and recognition of disputants). Empowerment is the renewal of disputants' values, strengths, and capacity to handle life's complexities. *Id.* Recognition is "acknowledgment and empathy for the situation and problems of others." *Id.* Baruch Bush, *supra* note 11, at 29-30 (describing empowerment as "supporting—and not supplanting—the parties' own deliberation and decisionmaking processes" and describing recognition as "inviting, encouraging and supporting the parties' presentation . . . and reception . . . of each other's perspectives and new and altered views [to] one another").

16. BARUCH BUSH & FOLGER, *supra* note 15, at 2-3 (asserting that "dispute resolution scholars see that mediation's transformative dimensions are connected to an emerging, higher vision of self and society, one based on moral development and interpersonal relations rather than on satisfaction and individual autonomy"). More recently, Professor Bush has described the effect of empowerment and recognition in more limited terms, noting that it can result in "enhancement of interpersonal expression and communication, and de-demonization . . ." Baruch Bush, *supra* note 11, at 30-31.

solutions that respond to those interests.<sup>17</sup>

Of course, “context matters”<sup>18</sup> when defining the mission and the quality of any particular model of mediation. Therefore, what is the “something more” that mediation should be expected to deliver when the process is occurring within the specific context of civil litigation? When disputants have brought their civil nonfamily conflicts to the courts for resolution, what are they entitled to expect? Are they entitled to anything more than getting deals and settling their legal disputes? What institutional values should guide and be visible in court-connected mediation, particularly when the courts are ordering disputants into this third-party process?

This Article argues that particularly within the context of the courts, mediation should be expected to deliver to disputants an experience of justice, more commonly referred to as *procedural* justice. Although some commentators have suggested that our courts are moving toward a transactional model, in which “[t]he courthouse [is] the site for large financial transactions . . . [involving] the buying and selling of . . . legal rights, [rather than] their possible adjudication,”<sup>19</sup> it is not the metaphor of the marketplace that provides the courts with their social and political legitimacy. Research in the field of procedural justice clearly reveals that citizens want the courts to resolve their disputes in a manner that *feels like justice is being done*.<sup>20</sup> This yearning for the experience of justice is so profound that disputants’ perceptions regarding procedural justice affect their perceptions of the distributive justice that is delivered by a dispute resolution

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17. See Menkel-Meadow, *Ethics in Alternative Dispute Resolution*, *supra* note 13, at 416 (“[A]s formalism spawned realism, the rigidity of rules and the ‘limited remedial imagination of courts,’ gave (re)birth to the more flexible and hybrid forms of mediation, mini-trials and settlement conferences which were intended to provide not only more flexible processes but more party-sensitive and complex solutions than the traditional litigated outcome.”). Professor Menkel-Meadow also argues that negotiated settlements can be more “democratic” than adjudicated results because settlements potentially allow for fuller expression of the parties’ interdependent needs and interests. Menkel-Meadow, *Whose Dispute Is It Anyway?*, *supra* note 1, at 2673. In addition, negotiated settlements facilitate outcomes that maximize party goals and produce more “just” results than adjudication because they can incorporate a variety of remedies. *Id.* at 2673-74. Moreover, negotiated settlements serve an “important critical and democratic function” by offering a means to “criticize, avoid, or correct laws that some find unjust, inefficient, or just plain inapplicable.” *Id.* at 2676.

18. Craig A. McEwen, *Managing Corporate Disputing: Overcoming Barriers to the Effective Use of Mediation for Reducing The Cost and Time of Litigation*, 14 OHIO ST. J. ON DISP. RESOL. 1, 16 (1998).

19. William B. Rubenstein, *A Transactional Model of Adjudication*, 89 GEO. L.J. 371, 372 (2001). Professor Rubenstein argues that a “transactional” model helps in understanding the logic of recent developments in complex private litigation. *Id.* at 418-31. He notes that these developments, such as the management of mass tort and securities class actions, are not adequately explained by either the “adversarial” model described by Lon Fuller or the “managerial” model described and critiqued by Judith Resnik. *Id.* at 410-18. See also Galander, *supra* note 11 and accompanying text.

20. See *infra* Part II.A.

process, their compliance with the outcome of the dispute resolution process, and their perception of the legitimacy of the institution providing or sponsoring the process.<sup>21</sup> Ultimately, insuring that mediation comes within a procedural justice paradigm serves some of the courts' most important goals—delivering justice, delivering resolution, and fostering respect for the important public institution of the judiciary.<sup>22</sup>

What must be done to enable an experience of justice to co-exist with the deal-making that characterizes court-connected mediation?<sup>23</sup> Procedural justice research indicates clearly that disputants want and need the opportunity to tell their story and control the telling of that story;<sup>24</sup> disputants want and need to feel that the mediator has considered their story<sup>25</sup> and is trying to be fair;<sup>26</sup> and disputants want and need to feel that they have been treated with dignity and respect.<sup>27</sup> Procedural justice theories explain that these procedural attributes are important for two primary reasons. First, disputants value the opportunity to express their views because this provides them with the opportunity to influence the final outcome of the dispute resolution process.<sup>28</sup> This influence is important even in mediation because the disputants will not reach an agreement unless they sufficiently influence each other, either directly or through the mediator. Second, disputants care about their interaction with the mediator because a third party—particularly if court-appointed or court-approved—represents legal authority. When mediators manage the process so that the disputants feel heard and respected, this sends a signal to the disputants that the institution of the courts views them as valued and respected members of society. In contrast, when mediators do not ensure that the procedure includes the attributes described above, they send the message to disputants that society has judged them to be

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21. See *infra* Part II.A.

22. See Wayne D. Brazil & Jennifer Smith, *Choice of Structures: Critical Values and Concerns Should Guide Format of Court ADR Programs*, *DISP. RESOL. MAG.*, Fall 1999, at 8, 8 (“The business of the courts is not business, it is justice, and particularly protection of respect-worthy procedural guarantees. In other words, a court-connected ADR program must be designed to achieve justice and to foster public respect for the judicial system as a whole.”).

23. Several years ago, Professor Marc Galanter expressed his comfort “with a ‘mixed’ view that justice does not reside entirely in the realm of formal legal processes nor is it entirely absent from the world of bargaining.” Galanter, *supra* note 11, at 275. But, he added, “[t]he question—both for research and practice—is how to locate it and augment it.” *Id.* In some sense, this Article is meant to meet Professor Galanter’s challenge.

24. See *infra* Part II.B. See also *infra* text accompanying note 162.

25. See *infra* Part II.B. See also *infra* text accompanying note 162.

26. See *infra* Part II.B.

27. See *infra* Part II.B. See also *infra* text accompanying note 163.

28. See *infra* Part II.B.

undeserving or inferior.<sup>29</sup> Not surprisingly, many disputants care about such messages regarding their social standing. These messages affect disputants' feelings about whether they have received justice and their feelings regarding the legitimacy of the social institution that provided the dispute resolution process.<sup>30</sup>

This Article applies the research findings and theories from the procedural justice literature to the current evolution of court-connected mediation. The analysis reveals that some of the changes that streamline bargaining—the dominant participation of disputants' attorneys and the reduced role of the disputants, the eventual use of evaluative interventions, and the prevalence of monetary (noncreative) outcomes—are not necessarily inconsistent with procedural justice considerations.<sup>31</sup> Indeed, if used appropriately, some of these changes may even have the potential to enhance disputants' perceptions of procedural justice. This Article argues that deal-making and procedural justice can co-exist and even complement each other. The analysis in this Article also shows, however, that other changes designed to ease legal negotiation—the de facto exclusion of disputants from mediation sessions, the abandonment or marginalization of initial joint sessions, and the early and aggressive use of legally evaluative interventions—are inconsistent with procedural justice.<sup>32</sup> These particular adaptations raise serious concerns regarding the ability of court-connected mediation to deliver an experience of justice along with a settlement.

Ultimately, this Article argues that choices need to be made to keep court-connected mediation from continuing its headlong evolution (or devolution) into becoming just another bargaining session. Mediators, courts, and policy-makers need to acknowledge and ensure that for disputants—the ultimate beneficiaries of and necessary supporters of court-connected services—mediation exists at the intersection of a bargaining paradigm and a procedural justice paradigm.<sup>33</sup> Just as the owners of a house must care for the structure's foundation in order to ensure that the walls of their handsome home do not crumble, the courts must ensure that the very effective bargaining overseen by the courts' representatives is well-grounded in the courts' promise of justice. Mediation's ability to deliver results that last and

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29. See *infra* Part II.B.

30. See *infra* Part II.B.

31. See *infra* Part IV.E.

32. See *infra* Part IV.E.

33. Professor Joseph Stulberg has previously observed that “[a] suitably framed conception of fairness” in mediation requires consideration of the substantive and procedural dimensions of fairness, as well as consideration of theories of bargaining. Joseph B. Stulberg, *Fairness and Mediation*, 13 OHIO ST. J. ON DISP. RESOL. 909, 910-11 (1998).

reflect well on the institution of the courts will be enhanced by attention to procedural justice considerations. Conversely, a single-minded rush toward bargaining and settlement will erode mediation's ability to deliver procedural justice.

This Article begins, in Part I, with a description of the adaptations that have occurred in the model of mediation that is aiding the resolution of civil nonfamily cases in the courts. This part then uses bargaining and decision making theory and research to explain why these changes have occurred. Interestingly, the evolution of the court-connected mediation process appears quite rational when evaluated in this way. In Part II, the Article introduces and examines the procedural justice literature. The Article explores the procedural attributes that trigger enhanced perceptions of procedural justice and the impact of these perceptions on compliance with less-than-fully-satisfactory outcomes, perceptions of substantive justice, and respect for the judiciary. This part also discusses the theories explaining why perceptions of procedural justice have significant effects. Part III considers why procedural justice has not been expected of unassisted negotiation in the civil litigation context, but should be expected of court-connected mediation. Part IV then applies procedural justice theories and research to court-connected mediation in order to predict the impact of recent adaptations upon disputants' perceptions regarding the fairness of the mediation process.

#### I. THE BARGAINING PARADIGM AS EXPLANATION FOR THE ADAPTATIONS IN COURT-CONNECTED MEDIATION

When the "contemporary mediation movement"<sup>34</sup> arose and grew in the 1970s and 1980s, mediation was used primarily to resolve neighborhood, small claims, and family disputes. Many of the defining characteristics of the process reflected these roots. First and most strikingly, mediation required that the disputants meet face-to-face and become "an active part of the communication."<sup>35</sup> Consistent with a participatory conception of self-determination, the disputants did the talking and negotiating. They were responsible for nearly every part of the process: identifying the issues to be resolved,<sup>36</sup> identifying their concerns,<sup>37</sup> generating options for the resolution

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34. BARUCH BUSH & FOLGER, *supra* note 15, at 1 (emphasis omitted). Mediation certainly existed before the 1970s and 1980s. For example, the process had been used for many years to resolve labor disputes. However, many of the principles and practices that had developed in the labor mediation context varied considerably from those that arose in the context of the 1970s and 1980s.

35. FOLBERG & TAYLOR, *supra* note 13, at 41.

36. *See* CMTY. DISP. RESOL. CTR. (Ithaca, N.Y.), *MEDIATION TRAINING MANUAL—SIX STAGES OF MEDIATION* (1989).

of their dispute,<sup>38</sup> evaluating the resolution options,<sup>39</sup> and choosing whether or not to reach resolution. Mediation promised a cooperative environment<sup>40</sup> that would enhance the disputants' ability to understand each other and reach resolution.<sup>41</sup> The mediator's job was to ensure that each disputant had a chance to speak, that no one dominated the session, that the disputants heard each other's perceptions, and that positions were translated into interests and "positive need statements."<sup>42</sup> The mediator "validate[d] and encourage[d] parties throughout the process"<sup>43</sup> and used both the mediation structure and a variety of techniques to enable the parties to exercise their self-determination.<sup>44</sup> The general presumption was that the mediators were

37. *See id.* at stage II.

38. *See id.* at stage IV. *See also* BEER ET AL., *infra* note 40, at 38 (providing several techniques to permit parties to arrive at a resolution for each main issue and if the parties "are unable to continue progressing on their own"); THE NEIGHBORHOOD JUST. CTR. OF ATLANTA, INC., TRAINING MANUAL FOR MEDIATORS 17 (1987) ("The two or more sides involved in a dispute are given an opportunity through the mediator to fashion between and among themselves a solution satisfactory to all sides.") (emphasis omitted).

39. *See* CMTY. DISP. RESOL. CTR., *supra* note 36.

40. *See id.* Some commentators have described the necessity of the cooperative element of mediation as follows:

Beyond techniques, beyond useful phrases, beyond process, the core of the mediator's work is learning to see a situation as each disputant perceives it. Compassion and respect are the intangible attitudes which let disputants safely express feelings and break away from locked-in positions . . . . An agreement is signed when each disputant is willing to accept each point of the contract. A person pressured into concession is less likely to follow the terms of the agreement. If someone is uncomfortable with a suggestion, no matter how rational the solution appears, the group continues to look for other possibilities.

JENNIFER BEER ET AL., PEACEMAKING IN YOUR NEIGHBORHOOD: MODERATOR'S HANDBOOK 18, 34-35 (1982). *See also* THE NEIGHBORHOOD JUST. CTR. OF ATLANTA, *supra* note 38, at 14 ("Mediation is . . . non-adversarial in nature. It seeks not to declare winners or losers, but to find reconciliation between disputing parties.").

41. This cooperative environment contrasts with a competitive approach, which many have argued favors men and those with power. *See, e.g.,* Stulberg, *Facilitative v. Evaluative Mediator Orientations*, *supra* note 13, at 993-94. *See also* Linda Stamato, *Voice, Place, and Process: Research on Gender, Negotiation, and Conflict Resolution*, *MEDIATION Q.*, Summer 1992, at 378 (reporting research on the effect of gender differences and situational power on negotiating behavior).

42. *See* CMTY. DISP. RESOL. CTR., *supra* note 36. *See also* BEER ET AL., *supra* note 40, at 12, 23, 35 (noting that mediators should give disputants a meaningful opportunity to express themselves during mediation sessions); THE NEIGHBORHOOD JUST. CTR. OF ATLANTA, *supra* note 38, at 49 ("Vital that both sides air their grievance in presence of opposing party. Get as many issues out on the table as possible in joint session.") (emphasis omitted).

43. *See* CMTY. DISP. RESOL. CTR., *supra* note 36.

44. Recommended techniques included the following: active listening, clarification, reflecting and acknowledging feelings, probing for parties' underlying issues and concerns, translating positions into interests and positive-need statements, helping parties to state what was important to them and what they would like to have happen, enabling the parties to generate a list of possible options, checking the "workability" of each alternative with the parties, and encouraging the parties to select alternatives which appeared acceptable to them. *See id.* *See also, e.g.,* BEER ET AL., *supra* note 40, at 28-30 (describing various facilitation skills used in mediation).

facilitators and were not to give their views on any issue.<sup>45</sup> In order to ensure that disputants heard each other's perceptions and to enhance their communication, many mediation programs preferred keeping the disputants together in joint session and counseled against the use of caucuses or separate meetings.<sup>46</sup> Lawyers were not welcome and sometimes were explicitly excluded from these mediation sessions.<sup>47</sup> Finally, the disputants' participation in the mediation process was voluntary. Mediation advocates argued that disputants should participate in mediation only if they chose to do so.<sup>48</sup>

There is ample evidence that as mediation has entered the courthouse and begun resolving bigger, nonfamily civil cases, the process has diverged from this earlier model. Court-connected mediation now often bears "an uncanny resemblance to the judicially-hosted settlement conference."<sup>49</sup> In many

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45. See CMTY. DISP. RESOL. CTR., *supra* note 36. See also, e.g., BEER ET AL., *supra* note 40, at 34, 37 (noting that mediators should avoid judgmental statements and attempt to summarize issues without judgment or bias); THE NEIGHBORHOOD JUST. CTR. OF ATLANTA, *supra* note 38, at 22 ("[Mediators] are there as an impartial third party to facilitate communication and to help people reach a mutually satisfactory agreement.").

46. See, e.g., THE NEIGHBORHOOD JUST. CTR. OF ATLANTA, *supra* note 38, at 49 ("Only after both sides have been aired and an attempt to have a joint discussion has been made should caucusing occur.") (emphasis omitted).

47. See, e.g., BEER ET AL., *supra* note 40, at 12 (noting that, in a community mediation program, lawyers and witnesses were not allowed to participate in mediation sessions unless the parties approved). See also, e.g., THE NEIGHBORHOOD JUST. CTR. OF ATLANTA, *supra* note 38, at 111 ("[Attorneys] have a right to attend sessions with [their] client[s] . . . . [T]hey do not have a right to control [the] session[s] . . . . [i]f [an] attorney disrupts, speak with him/her separately. If disruptions continue, adjourn [the] session and let [the] parties decide if they wish to reset [sic] without [the] attorney or go on to court.").

48. See, e.g., BEER ET AL., *supra* note 40, at 19 ("Community Dispute Settlement Program's goal of empowerment includes the power of choice—the disputant chooses to participate."); Trina Grillo, *The Mediation Alternative: Process Dangers for Women*, 100 YALE L.J. 1545, 1581 (1991) ("When mandatory mediation is part of the court system, the notion that parties are actually making their own decisions is purely illusory."); Raymond Shonholtz, *Neighborhood Justice Systems: Work, Structure, and Guiding Principles*, MEDIATION Q., Sept. 1984, at 22-23 (contrasting effects of "coerced participation" in the civil justice system with benefits of voluntary participation in community boards' model of mediation). See also SOCIETY OF PROFESSIONALS IN DISPUTE RESOLUTION, MANDATED PARTICIPATION AND SETTLEMENT COERCION: DISPUTE RESOLUTION AS IT RELATES TO THE COURTS 12 (1991) (observing that mandated participation in mediation can lead to "narrowly focused procedures and briefer, more formulaic sessions" and that "short, rigid sessions may result in lower party involvement, poor resolution, and thus lower voluntary compliance with the resolution"); Lucy V. Katz, *Compulsory Alternative Dispute Resolution and Voluntarism: Two-Headed Monster or Two Sides of the Coin?*, 1993 J. DISP. RESOL. 1, 5 (1993) (noting that "the growth in compulsory ADR may have destroyed part of its original value as an informal, consensual alternative").

49. Welsh, *supra* note 14, at 25. See also Hensler, *A Research Agenda*, *supra* note 5, at 15 ("On the surface, we see widespread adoption of mediation . . . . But as I travel about the country talking with judges, court administrators, ADR practitioners and lawyers, I mostly hear about good old-fashioned settlement programs and evaluative mediation that looks a lot like the latter.").

courts, participation in mediation sessions is court-ordered or mandatory.<sup>50</sup> In addition, the process diverges from the earlier model of mediation in four important ways. First, attorneys attend and dominate these mediation sessions while the disputants play no or a much-reduced role. Second, mediators are selected for their ability to value cases and to share their assessments with the parties; the mediators in court-connected mediation regularly opine regarding the strengths and weaknesses of each side's case. Third, the disputants and their attorneys generally are not kept together in joint session; caucus is preferred. Fourth, the mediators do not actively encourage the development of creative settlement options that respond to the unique needs of the parties.

Some commentators have explained these developments by speculating that the "movement [has] been hijacked by the lawyers,"<sup>51</sup> who now attend mediation sessions as advocates for their clients or as mediators. According to this argument, as the courts have ordered attorneys to participate with (or without) their clients in mediation, the attorneys consciously or unconsciously<sup>52</sup> have co-opted<sup>53</sup> the process. Through their presence, their role vis-a-vis their clients,<sup>54</sup> and their power over the selection of the

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50. See FLA. STAT. ch. 44.102 (1998 & West Supp. 2001); MINN. STAT. § 17.697 (1999 & West Supp. 2001); N.C. GEN. STAT. § 7A-38.1 (2000); TEX. BUS. & COM. CODE ANN. § 17.5051 (2000). See generally NANCY H. ROGERS & CRAIG A. MCEWEN, *MEDIATION: LAW, POLICY & PRACTICE* §§ 5.1-5.6 (1989) (discussing issues surrounding court-ordered and statutorily-mandated participation in mediation).

51. Hensler, *A Research Agenda*, supra note 5, at 15.

52. See Leonard L. Riskin, *Mediation and Lawyers*, 43 OHIO ST. L.J. 29, 43-45 (1982) (describing the lawyers' "standard philosophical map"). Professor Riskin has similarly suggested that lawyers' and judges' professional concerns have, perhaps unconsciously, shaped judicial settlement conferences.

A lawyer who embraces a Model I [traditional authoritarian] vision of professional-client relations may be unsettled by the participation or mere presence of a client in a settlement conference. The lawyer who wants to maintain the mystique of expertise could feel severely threatened by the presence of a client. The client might interpret his uncertainty as incompetence, or, worse, notice that he is unprepared, that the other lawyer is more clever, or that the judge seems not to respect his opinion. Similarly, some judges might feel discomfort about interfering with lawyer-client relations or the possibility of being challenged, questioned, or evaluated by a client who, not being legally trained, might behave less predictably than the lawyer. In short, the presence of clients may breed anxiety and interfere with the lawyers' and judge's feelings of competence and control. This anxiety may cause an unspoken and, perhaps, unconscious conspiracy between lawyers and judges to exclude clients from all or important parts of settlement conferences.

Leonard L. Riskin, *The Represented Client in a Settlement Conference: The Lessons of G. Heileman Brewing Co. v. Joseph Oat Corp.*, 69 WASH. U. L.Q. 1059, 1105 (1991) [hereinafter Riskin, *The Represented Client in a Settlement Conference*].

53. Alison E. Gerencser, *Alternative Dispute Resolution Has Morphed into Mediation: Standards of Conduct Must Be Changed*, 50 FLA. L. REV. 843, 849 (1998).

54. See ROBERT F. COCHRAN ET AL., *THE COUNSELOR-AT-LAW: A COLLABORATIVE APPROACH TO CLIENT INTERVIEWING AND COUNSELING* §§ 1-2 to 1-4 (1999) (describing authoritarian, client-

mediator, lawyers have made mediation look like the processes in which they are dominant—i.e., bilateral negotiation sessions and judicial settlement conferences.<sup>55</sup> Further, as more and more attorneys and retired judges have become attracted to mediation as a professional activity, they have co-opted the role of mediator to make it fit certain assumptions about “the role of the [quasi-]judicial host”<sup>56</sup> and to permit them to use the skills and knowledge that have served them well in their careers.<sup>57</sup>

Others have suggested that the reason that mediation is changing can be found not by dwelling upon the preferences and behavior of the attorneys who are now involved, but by examining the disputes that are generally the subject of court-connected mediation sessions. These commentators suggest that “the power of a problem-solving, interest-identifying, differences-conciliating approach [is] a myth, or appropriate in some circumstances but not appropriate for the sort of disputes that make their way to court.”<sup>58</sup> In particular, lawyers and judges have pointed out that the personal injury and contract cases that dominate the nonfamily civil docket<sup>59</sup> rarely involve litigants who have relationships with each other.<sup>60</sup> As a result, these

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centered, and collaborative legal counseling approaches); Ronald J. Gilson & Robert H. Mnookin, *Disputing Through Agents: Cooperation and Conflict Between Lawyers in Litigation*, 94 COLUM. L. REV. 509, 509 (1994) (noting that “[a] distinctive characteristic of our formal mechanisms of conflict resolution is that clients carry on their disputes through lawyers”); Riskin, *The Represented Client in a Settlement Conference*, *supra* note 52, at 1076-77 (contrasting traditional and participatory lawyer-client relationships).

55. See Kimberlee K. Kovach & Lela P. Love, *Mapping Mediation: The Risk of Riskin’s Grid*, 3 HARV. NEGOT. L. REV. 71, 96 (1998) [hereinafter Kovach & Love, *Mapping Mediation*] (“Lawyers like most people feel more comfortable with what they know best. Lawyers customarily speak for their clients and present adversarial arguments about the merits of the case. Accordingly, they attempt to draw mediation back into their adversarial paradigm.”).

56. Riskin, *The Represented Client in a Settlement Conference*, *supra* note 52, at 1081. See generally *id.* at 1081-89 (describing courts’ and attorneys’ expectations of the judicial host role in settlement conferences).

57. See Kovach & Love, *Mapping Mediation*, *supra* note 55, at 94. See also Menkel-Meadow, *Ethics in Alternative Dispute Resolution*, *supra* note 13, at 408 (“To the extent that ADR has become institutionalized and more routine, it is now practiced by many different people, pursuing many different goals.”).

58. Hensler, *A Research Agenda*, *supra* note 5, at 15.

59. See WAYNE KOBBERVIG, *MEDIATION OF CIVIL CASES IN HENNEPIN COUNTY: AN EVALUATION* 13 (1991) (observing that, of the cases involved in a civil mediation pilot project, more than two-thirds were personal injury cases and another twenty-two percent were contract cases); Elizabeth Ellen Gordon, *Attorneys’ Negotiation Strategies in Mediation: Business as Usual?*, *MEDIATION Q.*, Summer 2000, at 384 [hereinafter Gordon, *Attorneys’ Negotiation Strategies*] (observing that the typical case in North Carolina’s Mediated Settlement Conference Program “involve[s] two strangers who are involved in an automobile accident”).

60. See Gordon, *Attorneys’ Negotiation Strategies*, *supra* note 59, at 384 (observing that disputants in North Carolina’s Mediated Settlement Conference Program “frequently have no preexisting relationship, and if they do, they usually say they place little or no priority on continuing that relationship”); Jeffrey W. Stempel, *The Inevitability of the Eclectic: Liberating ADR from*

commentators argue, the disputants (and, for that matter, their attorneys and the mediator) have little motivation to discuss shared interests or develop creative, nonmonetary solutions.<sup>61</sup>

A third, related explanation requires focusing on the primary paradigm explaining the place or purpose of mediation within the civil litigation system. Much of the literature hailing mediation describes the process as essentially “facilitated” or “assisted” negotiation.<sup>62</sup> For many involved in the contemporary mediation movement, the mediation process represented a rejection of the formality and elitism of adjudication by the courts.<sup>63</sup> Perhaps to the surprise of some mediation advocates, attorneys and judges have easily adopted the description of mediation as “assisted negotiation.”<sup>64</sup> Indeed, the conception of mediation as just another form of negotiation fits very well into a system in which settlement plays the central role in the resolution of cases.<sup>65</sup>

It is important to remember, however, that much of the negotiation occurring in civil litigation has a decidedly distributive cast. While attorneys increasingly acknowledge that mediation may reduce the adversarial tenor of

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*Ideology*, 2000 J. OF DISP. RESOL. 247, 289 (2000) (noting that “tort claimants and defendants are often strangers . . .”).

61. See, e.g., Gordon, *Attorneys’ Negotiation Strategies*, *supra* note 59, at 384 (noting that a “lack of a shared past or anticipated future relationship presents barriers to crafting a creative win-win solution and relatively little incentive to do so, therefore making a problem-solving strategy less likely”).

62. See, e.g., CHRISTOPHER MOORE, *THE MEDIATION PROCESS: PRACTICAL STRATEGIES FOR RESOLVING CONFLICT* 16 (2d ed. 1996) (“[Mediation is] essentially dialogue or negotiation with the involvement of a third party,” without which, “there can be no mediation.”) (emphasis omitted); Ronald Lee Gilman, *Resolving Commercial Cases Through Alternative Dispute Resolution*, 26 U. MEM. L. REV. 1121, 1124 (1996) (“Mediation is essentially ‘assisted negotiation’ using a third-party neutral.”); Kimberlee K. Kovach, *Neonatology Life and Death Decisions: Can Mediation Help?*, 28 CAP. U. L. REV. 251, 289 (2000) (same); James K. L. Lawrence, *Mediation Advocacy: Partnering with the Mediator*, 15 OHIO ST. J. ON DISP. RESOL. 425, 425 (2000) (“Mediation is, after all, assisted negotiation.”); Jacqueline M. Nolan-Haley, *Informed Consent in Mediation: A Guiding Principle for Truly Educated Decision-Making*, 74 NOTRE DAME L. REV. 775, 777 (1999) (“Mediation is a process of assisted negotiation in which a neutral third party assists individuals in resolving a dispute.”); Riskin, *The Represented Client in a Settlement Conference*, *supra* note 52, at 1081 (“Mediation is facilitated negotiation . . . .”); Gerald R. Williams, *Negotiation as a Healing Process*, 1996 J. DISP. RESOL. 1, 10 (1996) (“Mediation is best understood as ‘assisted negotiation.’”). See also Baruch Bush, *supra* note 11, at 3 (recounting an imaginary expert’s description of mediation for clients considering use of the process to resolve a dispute over land-use issues); Craig A. McEwen et al., *Bring in the Lawyers: Challenging the Dominant Approaches to Ensuring Fairness in Divorce Mediation*, 79 MINN. L. REV. 1317, 1373 (1995) [hereinafter McEwen et al., *Bring in the Lawyers*] (reporting that attorneys in Maine describe mediation as “formalizing and improving negotiation”).

63. See Welsh, *supra* note 14, at 16 (noting that mediation allows citizens a means to “wrest control over both the . . . process and . . . outcome from judges and lawyers”).

64. See Moore, *supra* note 62, at 16.

65. See *supra* note 11 and accompanying text.

negotiations in the nonfamily, civil context,<sup>66</sup> the underlying theory of negotiation as distributive remains largely unchanged.<sup>67</sup> Thus, mediation is conceived as enhanced bargaining—enhanced *distributive* bargaining—that is not different from, just more effective<sup>68</sup> than, the typical negotiation between lawyers.

In addition, because negotiation is understood as just a “stray byproduct of the judicial process,”<sup>69</sup> there is no expectation that a process described as “assisted negotiation” should do anything more than deliver settlements. Attorneys report that they choose mediation in order to reduce the likelihood of trial and improve the likelihood of settlement.<sup>70</sup> Attorneys are *not*

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66. See, e.g., BOBBI MCADOO, A REPORT TO THE MINNESOTA SUPREME COURT: THE IMPACT OF RULE 114 ON CIVIL LITIGATION PRACTICE IN MINNESOTA 33 (1997) [hereinafter MCADOO, A REPORT TO THE MINNESOTA SUPREME COURT] (discussing results of a survey in which 62.1% of attorneys indicated that, based on their experiences and compared to the normal civil litigation process, mediation had the effect of being less adversarial); Gordon, *Attorneys' Negotiation Strategies*, *supra* note 59, at 385-86 (reporting a modest difference among attorneys' responses regarding the appropriateness of competitive negotiation strategies in mediation).

67. See Gordon, *Attorneys' Negotiation Strategies*, *supra* note 59, at 382 (discussing negotiation settlements as bargaining sessions instead of information exchange sessions).

68. Although attorneys clearly perceive that mediation increases the likelihood of settlement and reduces clients' expenses, other research does not unequivocally support these perceptions. See, e.g., STEVENS H. CLARKE ET AL., COURT-ORDERED CIVIL CASE MEDIATION IN NORTH CAROLINA: AN EVALUATION OF ITS EFFECTS 55-56 (1996) (reporting that a program of court-ordered mediated settlement conferences reduced the median filing-to-disposition time in contested cases by about seven weeks, suggesting that the program produced savings for litigants); JAMES S. KAKALIK ET AL., RAND INSTITUTE FOR CIVIL JUSTICE, AN EVALUATION OF MEDIATION AND EARLY NEUTRAL EVALUATION UNDER THE CIVIL JUSTICE REFORM ACT 48-49 (1996) (finding that federal courts' use of mediation and early neutral evaluation, as mandated by the Civil Justice Reform Act of 1990, has not resulted in quicker settlements or reduced expenses for litigants); KOBBERVIG, *supra* note 59, at 19 (reporting that median disposition times in cases referred to mediation and cases disposed of in the judicial process were identical); DONNA STIENSTRA ET AL., REPORT TO THE JUDICIAL CONFERENCE COMMITTEE ON COURT ADMINISTRATION AND CASE MANAGEMENT: A STUDY OF THE FIVE DEMONSTRATION PROGRAMS ESTABLISHED UNDER THE CIVIL JUSTICE REFORM ACT OF 1990 16 (1997) (reporting that the median age at termination for cases assigned to Missouri Western's Early Assessment Program was reduced by more than two months). In addition, attorneys generally indicate that the use of mediation has neither changed the timing nor the volume of discovery in most civil cases. See, e.g., MCADOO, A REPORT TO THE MINNESOTA SUPREME COURT, *supra* note 66, at 35 (reporting that almost two-thirds of lawyers reported no change in timing of discovery while over two-thirds reported no change in volume of discovery and pre-trial preparation).

69. Galanter & Cahill, *supra* note 11, at 1390 (arguing that settlements are an essential part of the judicial process).

70. See, e.g., MCADOO, A REPORT TO THE MINNESOTA SUPREME COURT, *supra* note 66, at 30-31. In response to questions about the reasons attorneys choose mediation, 67.9% of attorneys surveyed indicated the desire to reduce litigation expenses while 57.4% thought that mediation would make settlement more likely. *Id.* at 33. In addition, 59.8% of attorneys indicated that based on their experience and compared to the normal civil litigation process, mediation had the effect of causing earlier settlements. *Id.* See also Bobbi McAdoo & Art Hinshaw, *Attorney Perspectives on the Effect of Rule 17 on Civil Litigation in Missouri: Supreme Court ADR Committee Report* 67 J. DISP. RESOL. (forthcoming Summer 2002) (reporting that lawyers' selection of mediation is motivated by saving litigation expense (85%), speeding settlement (76%) and making settlement more likely (69%));

motivated to choose mediation because their clients *like* the process<sup>71</sup> or because they perceive that the mediation process provides their clients with any more satisfaction or control than is provided by the normal civil litigation process.<sup>72</sup> Mediation is just another means to reach a settlement.

Although this Article focuses on the procedural justice implications of the current evolution of court-connected mediation, it is important to begin by acknowledging that the most significant changes in the process represent adaptations that make mediation a more effective tool for bargaining toward settlement. As the remainder of this part will show, substantial negotiation research and theory support these structural changes in the mediation process. The fact that these adaptations have occurred also reveals the capture of the mediation process by the bargaining paradigm.

#### A. *The Reduced Role for Disputants in Court-Connected Mediation*

Disputants themselves played the central roles in the model of mediation that arose during the contemporary mediation movement. In the civil, nonfamily court-connected context, however, the disputants' role (and even the need for their presence) has diminished substantially. Quite commonly, for example, insured defendants in personal injury or malpractice claims fail even to attend mediation sessions.<sup>73</sup> The need for defendants' presence has diminished because in the context of many civil, nonfamily cases, defendants

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Gordon, *Attorneys' Negotiation Strategies*, *supra* note 59, at 387 (observing that attorneys who are not also mediators "think the mediator's primary duty is to act as referee between opposing sides or to convey offers and counteroffers"); Elizabeth Ellen Gordon, *Why Attorneys Support Mandatory Mediation*, 82 JUDICATURE 224, 227 tbl.2 (1999) [hereinafter Gordon, *Why Attorneys Support Mandatory Mediation*] (noting that approximately ninety-three percent of North Carolina attorneys who are not also mediators perceive that "mediation reduces the likelihood that a case will be tried," and approximately sixty-nine percent perceive that "knowledge that mediation is pending encourages settlement sooner than would otherwise happen").

71. See, e.g., MCADOO, A REPORT TO THE MINNESOTA SUPREME COURT, *supra* note 66, at 31 (demonstrating that lawyers' selection of mediation is rarely motivated by the increased potential for creative solutions, preservation of parties' relationships, or evidence that clients like mediation); McAdoo & Hinshaw, *supra* note 70 (reporting that lawyers' selection of mediation is infrequently motivated by evidence that clients like mediation, the increased potential for creative solutions, or preservation of the parties' relationships).

72. See, e.g., MCADOO, A REPORT TO THE MINNESOTA SUPREME COURT, *supra* note 66, at 33 (reporting that few attorneys perceived that mediation has the effect of providing greater client satisfaction (26.1%) or providing greater client control (28.3%)); McAdoo & Hinshaw, *supra* note 70 (reporting that a minority of attorneys perceived that mediation has the effect of providing greater client satisfaction (30%) or providing client with a greater sense of control (31.2%)).

73. See Thomas B. Metzloff et al., *Empirical Perspectives on Mediation and Malpractice*, 60 LAW & CONTEMP. PROBS. 107, 124-25 (1997). See also Kovach & Love, *Mapping Mediation*, *supra* note 55, at 99 (reporting that the Civil Appeals Management Plan of the United States Court of Appeals for the Second Circuit "neither expects nor requires party participation, though mediators may invite the parties to attend the conference").

do not control the funds that will be necessary to settle the case.<sup>74</sup> In most cases, insurance companies control these funds and, therefore, essentially wield full settlement authority. Indeed, in some courts' programs, attendance by either the plaintiff(s) or the defendant(s) is the exception rather than the norm.<sup>75</sup> The disputants' attorneys attend the mediation sessions and negotiate on their clients' behalf. Courts' rules for court-connected mediation generally require attendance only by the attorneys who will try the case<sup>76</sup> and those with the authority to settle the case.<sup>77</sup> In this model of mediation, if the disputants do not possess authority or if they have given full authority to their attorneys, the disputants are not needed and are generally absent.<sup>78</sup> Further, even when the disputants do attend the mediation sessions, their involvement is likely to be limited. Disputants may be excluded from caucuses with the mediator.<sup>79</sup> When the disputants are permitted to attend both the joint session and the caucuses, their attorneys are likely to do much if not all of the

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74. See JOHN W. COOLEY, *THE MEDIATOR'S HANDBOOK: ADVANCED PRACTICE GUIDE FOR CIVIL LITIGATION* 127 (2000) (defining the "real client" as the person who has a large role in deciding how much the insurance company will pay in the case of a personal injury claim).

75. This is the case, for example, in the mediation program established by the Pennsylvania Commonwealth Court. The order establishing the program provides that "[a]ll mediation sessions must be attended by counsel for each party with authority to settle the matter, and, if required, such other person with actual authority to negotiate a settlement." While the order also provides that "[t]he mediation judge may at his or her discretion require the parties (or real parties in interest) to attend mediation," it has not been the practice of the mediation judge to require the clients to attend. It is usually the case that clients do not attend the mediation session. The clients that do arrive at the mediation session with their attorneys generally are not included in most of the negotiation that occurs in the session. Telephone Interview with John Gordon, Program Director, Pennsylvania Commonwealth Court Mediation Program (Feb. 28, 2001).

76. See, e.g., MINN. R. 114.07(b) (2001) ("The attorneys who will try the case may be required to attend ADR proceedings."). But see JULIE MACFARLENE, *CULTURE CHANGE? COMMERCIAL LITIGATORS AND THE ONTARIO MANDATORY MEDIATION PROGRAM* 2, 33-40 (2001) (noting that Rule 24.1 Ontario Rules of Civil Procedure, RRO 1990, requires clients' attendance at mandatory mediation sessions and describing attorneys' reactions to changes in their clients' role and involvement).

77. See, e.g., *id.* § 114.07(c) ("Facilitative processes aimed at settlement of the case, such as mediation . . . shall be attended by individuals with the authority to settle the case, unless otherwise directed by the court.").

78. See Riskin, *The Represented Client in a Settlement Conference*, *supra* note 52, at 1109-12 (exploring the meaning of "full authority to settle the case"). The extent of an individual's authority to settle a case should be determined by considering whether the individual has: "authority to commit the client to a particular course of conduct . . . [s]ufficient knowledge . . . of the client's needs, interests, and operations . . . [s]ufficient influence . . . that his recommendations likely would affect the principal's decisions [and] [d]iscretion . . . to negotiate a different kind of arrangement . . ." *Id.* at 1110.

79. Gordon, *Attorneys' Negotiation Strategies*, *supra* note 59, at 383 ("In observed mediation sessions, it was not uncommon for a mediator to caucus with all the attorneys without their clients being present, but the observers never witnessed or even heard about the reverse situation's occurring: a mediator's meeting with parties without their attorneys present."). See Hensler, *A Research Agenda*, *supra* note 5, at 17 ("[M]ediator and lawyer may caucus without the lawyer's client present.").

talking.<sup>80</sup>

Negotiation theory and research often support this reduced role for the disputants. First, both negotiation theory and research confirm that negotiation will more likely produce prompt resolution if the process is structured to enhance decision making. Thus, negotiations should include only those with authority and those who will aid the bargaining and decision making.<sup>81</sup> If a disputant does not control the funds necessary for such settlement and will neither influence nor provide strategic benefit to the individual who does control such funds, the disputant's presence is unnecessary. Indeed, the disputant may even be a distraction.

Even when the disputants do possess settlement authority, bargaining and decision-making research indicates that there are many advantages to relying primarily upon the disputants' agents in the mediation process.<sup>82</sup> In the court-connected context, the disputants' agents generally are professionals who

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80. See, e.g., Gordon, *Attorneys' Negotiation Strategies*, *supra* note 59, at 383 (“[A]ttorneys rather than disputants are unquestionably the main negotiators in mediated settlement conferences.”); Gordon, *Why Attorneys Support Mandatory Mediation*, *supra* note 70, at 227 (reporting that in observed mediations, lawyers dominated negotiation, the minority of clients who did “play active roles” were “supporting rather than starring players,” and that three-quarters of responding attorneys disagreed with the statement, “Litigants should be the most active participants in mediation, with attorneys standing by to offer legal advice.”); McAdoo & Hinshaw, *supra* note 70, at 51 tbl.32 (reporting that fifty-one percent of lawyers perceive that mediators speak primarily with or to the lawyers, but forty-two percent of lawyers perceive that mediators encourage the clients to speak for themselves); Metzloff et al., *supra* note 73, at 123-25 (discussing the limited involvement of plaintiffs and defendants during medical malpractice mediation sessions). *But see* MCADOO, A REPORT TO THE MINNESOTA SUPREME COURT, *supra* note 66, at 39 (reporting that nearly eighty-percent of attorneys perceive that mediators always or frequently encourage clients to participate in the mediation process); McEwen et al., *Bring in the Lawyers*, *supra* note 62, at 1382-84 (describing lawyer appreciation of client involvement in divorce mediation).

81. See DAVID A. LAX & JAMES K. SEBENIUS, *THE MANAGER AS NEGOTIATOR: BARGAINING FOR COOPERATION AND COMPETITIVE GAIN* 228, 311 (1986). “The more . . . parties (and issues), the higher the costs, the longer the time, and the greater the informational requirements tend to be for settlement.” *Id.* However, an unaccompanied agent who is uncertain of his principal's bottom line may behave inflexibly and risk impasse. *Id.* The people who participate in negotiations should “have the power or authority to make a decision” and “have the capacity, if they are not involved, to reverse or damage a negotiated settlement.” Moore, *supra* note 62, at 144. See also CHARLES B. CRAVER, *EFFECTIVE LEGAL NEGOTIATION AND SETTLEMENT* 195-96 (3d ed. 1997) (“Only when the representatives of both parties possess the authority to articulate meaningful offers can real bargaining occur.”); Major Sherry R. Wetsch, *Alternative Dispute Resolution—An Introduction for Legal Assistance Attorneys*, 2000 *ARMY LAW.* 8, 12 (2000) (recommending that an individual with “authority to settle” must participate in the mediation process because “one of the key goals of mediation is a signed agreement before the parties leave the mediation . . .”).

82. ROBERT H. MNOOKIN ET AL., *BEYOND WINNING: NEGOTIATING TO CREATE VALUE IN DEALS AND DISPUTES* 93-96 (2000) [hereinafter MNOOKIN ET AL., *BEYOND WINNING*] (describing the benefits of using attorneys as agents); See also Riskin, *The Represented Client in a Settlement Conference*, *supra* note 52, at 1099-103 (describing the benefits and risks of including clients in judicial settlement conferences and noting that the salience of both the benefits and risks increases as the clients' participation increases).

bring expertise, detachment, and tactical flexibility to the process.<sup>83</sup> In addition, some research suggests that members of a common professional subculture are more likely to communicate sufficiently to permit mutually-beneficial settlements.<sup>84</sup> Research has also demonstrated that lawyers (and perhaps claims adjusters) tend to share and apply a rational, economically-grounded analysis to determine whether to settle and upon what terms.<sup>85</sup> This analytical orientation facilitates distributive negotiation, rational decision making, and a higher rate of settlement.<sup>86</sup> In contrast, disputants are more likely to be influenced by cognitive and social-psychological phenomena that can distract them from rational, expected financial value analysis.<sup>87</sup> Finally, although there are exceptions, many clients are heavily influenced by their attorneys and thus surrender their primacy in decision making.<sup>88</sup>

If mediation is viewed exclusively within a bargaining paradigm, it

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83. See Jeffrey Z. Rubin & Frank E. A. Sander, *When Should We Use Agents? Direct vs. Representative Negotiation*, in NEGOTIATION THEORY AND PRACTICE 81, 81-87 (J. William Breslin & Jeffrey Rubin eds., 1991) (describing the potential advantages and disadvantages of using agents in negotiation).

84. See Max H. Bazerman & Margaret A. Neale, *The Role of Fairness Considerations and Relationships in a Judgmental Perspective of Negotiation*, in BARRIERS TO CONFLICT RESOLUTION 87, 103-04 (Kenneth Arrow et al. eds., 1995) (reporting research from several studies involving MBA students). *But see* Gilson & Mnookin, *supra* note 54, at 546-49 (suggesting several institutional features that influence the likelihood of cooperative strategies among lawyers and arguing that “[w]hen opposing attorneys know and trust each other,” both parties may benefit “by reducing transaction costs”).

85. One study described experiments that suggest that lawyers are less likely to be influenced by the framing of a settlement offer, opening offer anchor, or equity-seeking. See Russell Korobkin & Chris Guthrie, *Psychology, Economics and Settlement: A New Look at the Role of the Lawyer*, 76 TEX. L. REV. 77, 95-112, 122 (1997). Instead, lawyers tend to focus on whether a settlement or a trial is likely to yield a better financial result. *Id.* *But see* Richard Birke & Craig R. Fox, *Psychological Principles in Negotiating Civil Settlements*, 4 HARV. NEGOT. L. REV. 1, 2 (1999) (suggesting that, based on a review of research regarding psychological biases in judgment and decision making, lawyers’ faith in their own rationality is “misplaced”).

86. Korobkin & Guthrie, *supra* note 85, at 82-83. See also, MNOOKIN ET AL., BEYOND WINNING, *supra* note 82, at 101-07 (describing financial factors that influence the decision to settle); Deborah R. Hensler, *The Real World of Tort Litigation*, in EVERYDAY PRACTICES AND TROUBLE CASES 155, 162-63 (Austin Sarat et al. eds., 1998) [hereinafter Hensler, *The Real World of Tort Litigation*] (contrasting tort plaintiffs’ desire to vindicate rights and the tort plaintiffs’ sense of entitlement regarding the use of a legal system with attorneys’ overwhelming focus on money in discussions with clients and in negotiations with opponents).

87. Korobkin & Guthrie, *supra* note 85, at 88-121 (describing experiments that showed that litigants were more affected than their lawyers by framing, anchoring, and equity-seeking variables when deciding whether or not to settle).

88. William L.F. Felstiner & Austin Sarat, *Enactments of Power: Negotiating Reality and Responsibility in Lawyer-Client Interactions*, 77 CORNELL L. REV. 1447, 1451-54 (1992) [hereinafter Felstiner & Sarat, *Enactments of Power*] (describing conventional views and studies regarding power in attorney-client relationships, with variations caused by differences in status, economic power, the area of law, or individual client characteristics).

becomes quite rational for mediators<sup>89</sup> to permit and even encourage the disputants' attorneys and other agents (such as the claims adjusters) to play the central roles and to reduce or even eliminate the participation of the disputants. Far from celebrating the participation of the disputants, this approach to mediation focuses on the need to control and limit the disputants' contribution to that which is absolutely necessary.<sup>90</sup>

It is worth remembering, of course, that the goal of mediation within the bargaining paradigm is settlement, not the achievement of a sense of just treatment for the disputants.

### *B. The Preference for Evaluative Interventions in Court-Connected Mediation*

Recent data also strongly indicates that court-connected mediation has developed an evaluative cast. Attorneys, who generally choose the mediation process and the mediator, value evaluative interventions. Many attorneys choose mediation because they perceive that the process will provide a needed "reality check" for both opposing counsel and their own clients.<sup>91</sup> Attorneys report that they want mediators to provide opinions on the merits of cases<sup>92</sup> and even want mediators to give their view of settlement ranges.<sup>93</sup>

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89. This refers to mediators handling civil, nonfamily cases.

90. Of course, not all commentators celebrate the lawyers' rational approach because it is not always responsive to clients' needs and interests. For example, Professor Jean Sternlight has written:

Mediation allows participating clients to see with their own eyes, speak with their own voices, and use their own creative talents. By participating directly in the mediation, the client has the opportunity to view the opponent, the opponent's attorney, and any witnesses directly rather than through the filter of her attorney. A good mediator can facilitate these opportunities. For example, whereas the attorney may have responded cynically to the opponent's apology, it may be meaningful for the client. Where the attorney may have regarded the opponent's story as hogwash, the client may see it as compelling. That is, the client's view is not restricted by the lawyer's cold, rational, and perhaps even cynical lens.

Jean R. Sternlight, *Lawyers' Representation of Clients in Mediation: Using Economics and Psychology to Structure Advocacy in a Nonadversarial Setting*, 14 OHIO ST. J. ON DISP. RESOL. 269, 343-44 (1999).

91. See MCADOO, A REPORT TO THE MINNESOTA SUPREME COURT, *supra* note 66 and accompanying text; McAdoo & Hinshaw, *supra* note 70 and accompanying text.

92. See ROSELLE L. WISSLER, AN EVALUATION OF THE COMMON PLEAS COURT CIVIL PILOT MEDIATION PROJECT ix (Feb. 2000) [hereinafter WISSLER, AN EVALUATION OF THE COMMON PLEAS COURT] (reporting that "[a]ttorneys had more favorable assessments of the [mediation] process and mediator and reported mediation was more helpful in achieving case objectives if the mediator evaluated the merits of the case and suggested settlement options"); Metzloff et al., *supra* note 73, at 144-45 (reporting that almost seventy percent of attorneys want mediators to provide opinions on the merits of medical malpractice cases and that attorneys highly value mediators who possess substantive expertise in medical malpractice).

93. See WISSLER, AN EVALUATION OF THE COMMON PLEAS COURT, *supra* note 92 and accompanying text. See also Barbara McAdoo & Nancy Welsh, *Does ADR Really Have a Place on the*

Attorneys choose mediators who, like judges, have the knowledge and experience that will permit them to understand and comment on the parties' legal arguments.<sup>94</sup> Indeed, many court-connected mediators now focus upon the legal issues and opine regarding the strengths and weaknesses of each party's case and the appropriate settlement ranges.<sup>95</sup>

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*Lawyer's Philosophical Map?*, 18 HAMLINE J. PUB. L. & POL'Y 376, 390 (1997) (reporting that the majority of Hennepin County lawyers that were interviewed want mediators to give their view of settlement ranges).

94. See, e.g., MCADOO, A REPORT TO THE MINNESOTA SUPREME COURT, *supra* note 66, at 38 (reporting that 84.2% of lawyers surveyed perceive that the most important qualification for mediators is "substantive experience in the field of law related to case"); James J. Alfini, *Trashing, Bashing, and Hashing It Out: Is This the End of "Good Mediation"?*, 19 FLA. ST. U. L. REV. 47, 66-71 (1991) (describing new techniques brought into mediation because of the use of legal professionals as mediators); Gordon, *Why Attorneys Support Mandatory Mediation*, *supra* note 70, at 228 (noting that attorneys prefer mediators who are experienced trial lawyers); McAdoo & Hinshaw, *supra* note 70, at 50 tbl.34 (reporting that eighty-seven percent of lawyers indicated that a mediator should know how to value a case and eighty-three percent indicated that a mediator should be a litigator); McAdoo & Welsh, *Does ADR Really Have a Place*, *supra* note 93 (reporting that the majority of Hennepin County lawyers interviewed wanted mediators to give their view of settlement ranges); Metzloff et al., *supra* note 73, at 144-45 (reporting that almost seventy percent of attorneys want mediators to provide opinions on the merits of medical malpractice cases and that attorneys highly valued mediators who possessed substantive expertise in medical malpractice). For the top factors motivating lawyers to choose mediation, see *supra* note 70 and accompanying text. Some additional factors include: providing needed reality check for opposing counsel, opposing party, and an attorney's own client, and valuating cases. McAdoo & Hinshaw, *supra* note 70, at 41 tbl.25. Lawyers' selection of mediation is rarely motivated by evidence that clients like mediation, the increased potential for creative solutions, or preservation of relationships. *Id.* Attorneys may use these criteria to select mediators due to "concern[s] about the basic qualifications and neutrality of arbitrators and mediators," which were expressed in a recent American Bar Association poll. Richard C. Reuben, *Public Justice: Toward a State Action Theory of Alternative Dispute Resolution*, 85 CAL. L. REV. 577, 637 (1997) (citing an American Bar Association poll of a sampling of ABA members that found that approximately seventy percent respondents expressed these concerns).

95. See, e.g., MCADOO, A REPORT TO THE MINNESOTA SUPREME COURT, *supra* note 66, at 39 (reporting that approximately thirty percent of lawyers perceive that mediators frequently or always predict court outcomes while approximately sixty-eight percent perceive that mediators frequently or always propose realistic settlement ranges); WISSLER, AN EVALUATION OF THE COMMON PLEAS COURT, *supra* note 92, at v ("[M]ediators said they assisted the parties in evaluating the case in 91% of the cases, suggested possible settlement options in 77%, kept their views of the case silent in 36%, evaluated the merits of the case for the parties in 23%, and recommended a particular settlement in 9% of the cases."); Kovach & Love, *Mapping Mediation*, *supra* note 55, at 99 (reporting that mediators employed by the Civil Appeals Management Plan of the United States Court of Appeals for the Second Circuit evaluate strengths and weaknesses of cases); McAdoo & Welsh, *supra* note 93, at 390 n.71 (reporting that the majority of Hennepin County lawyers interviewed perceive mediators to frequently or always predict court outcomes about one-third of the time and propose realistic settlement ranges about two-thirds of the time); Metzloff et al., *supra* note 73, at 121 (reporting that half of the mediators who were observed expressed opinions about parties' offers and twelve percent opined the merits of the case). In general, the mediators engaged in more directive actions in less contentious and less complex cases, but they engaged in less directive actions in more contentious and more complex cases."). See also STIENSTRA ET AL., *supra* note 68, at 228-29 (describing observed EAP sessions). *But see* Gordon, *Why Attorneys Support Mandatory Mediation*, *supra* note 70, at 228 (reporting that observed mediators were reticent in offering opinions or suggesting specific offers or demands).

Bargaining theory and research help explain why such evaluative interventions can be very effective in generating movement and ultimately producing a settlement. As noted earlier, attorneys generally apply a rational, expected financial value analysis to determine whether and when to settle and tend not to be diverted by other psychological or cognitive factors.<sup>96</sup> Using this approach, attorneys can evaluate their clients' "Best Alternative to a Negotiated Settlement" (BATNA)<sup>97</sup> (i.e., the likely value of the case if it proceeds to trial) and use this valuation to formulate their offer or demand, or to assess the adequacy of the offer or demand being made by the other side. In other words, the attorney can calculate whether a deadlock is acceptable.<sup>98</sup>

When attorneys take an active role in their clients' litigation decision-making processes, they often can persuade their clients to adopt this rational approach and abandon other, less pragmatic anchors or considerations such as the desire to be treated fairly or to have the validity of a position acknowledged.<sup>99</sup> The attorneys' success in aiding their clients to adopt or at least accept this different orientation allows the decision-making process to become more rational and predictable and makes settlement more likely.<sup>100</sup> The attorneys' use of the expected financial value analysis approach eases the convergence of the clients' aspiration levels<sup>101</sup> and perceptions of

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96. Korobkin & Guthrie, *supra* note 85, at 122. *But see generally* Birke & Fox, *supra* note 85 (discussing the considerations that influence attorneys' settlement decisions); Jeffrey M. Senger & Christopher Honeyman, *Cracking the Hard-Boiled Student: Some Ways to Turn Research Findings into Effective Training Exercises*, in CONFLICT RESOLUTION PRACTITIONER: A MONOGRAM BRIDGING THEORY AND PRACTICE (Shinji Morokuma ed., 2001).

97. ROGER FISHER ET AL., GETTING TO YES: NEGOTIATING AGREEMENT WITHOUT GIVING IN 100 (2d ed. 1991).

98. HOWARD RAIFFA, THE ART AND SCIENCE OF NEGOTIATION 126 (1982) ("First, *know yourself* . . . . Consider what will happen to you if no deal is struck."); FISHER ET AL., *supra* note 97, at 97-106 (describing the use and development of BATNA).

99. Korobkin & Guthrie, *supra* note 85, at 82, 120-21. *See* MNOOKIN ET AL., BEYOND WINNING, *supra* note 82, at 102 (noting that "[l]awyers spend much of their time and energy helping their clients to make . . . comparisons [between the value of a proposed settlement and the expected value of adjudication in court]; it is a primary reason why disputants hire lawyers"); Felstner & Sarat, *Enactments of Power*, *supra* note 88, at 1459 (describing a lawyer's and client's struggle in the divorce context to "[d]efine and identify[] 'realistic' goals, and orient[] and reconcil[e] clients to the world of the legally possible").

100. Korobkin & Guthrie, *supra* note 85, at 82, 119-20 (observing that lawyers' interventions drastically reduced litigants' strong opposition to settlement). *See also* E. ALLAN LIND ET AL., THE PERCEPTION OF JUSTICE: TORT LITIGANTS' VIEWS OF TRIALS, COURT-ANNEXED ARBITRATION, AND JUDICIAL SETTLEMENT CONFERENCES 59 (1989) [hereinafter LIND ET AL., THE PERCEPTION OF JUSTICE] (noting that litigants perceived procedures to be more fair and were more satisfied with their outcomes and with the courts when their outcomes exceeded their subjective expectations).

101. Clients' aspirational levels are also described as their bargaining targets. *See* Bazerman & Neale, *supra* note 84, at 87. If a client's aspiration level—or target—is "optimistic," it will greatly exceed the client's walk-away position in the negotiation. If the aspiration level or target is "pessimistic," it will only slightly exceed the client's walk-away position. *See id.*

substantive fairness.

Negotiation research findings explain why attorneys prefer mediators who will use and apply the norms and language of the legal marketplace. There is some suggestion that court-connected mediation now contains “an undercurrent of sensitivity to evidential precepts”<sup>102</sup> that places limits on disputants’ digression into emotional or other matters that are not sufficiently relevant to the legal issues<sup>103</sup> or to the needs and interests to be met through settlement. Mediators can help the attorneys’ clients become more “realistic” (i.e., help them understand what will happen if their cases go to trial and what represents a fair settlement when compared to other similar cases). If mediators are trustworthy and impartial, and willing to share and reinforce the lawyers’ rational financial value analysis, it is more likely that the disputants will be persuaded to adopt or at least accept this rational approach.

In addition, mediators’ evaluations serve as a reassurance and a double check for the attorneys who have developed their own estimates and counseled their clients regarding the odds of prevailing, the odds of particular outcomes, and the resulting valuation of their cases. Research has repeatedly demonstrated that valuation of cases is an imprecise science.<sup>104</sup> In particular, attorneys’ valuations can be affected by their idiosyncratic histories with similar and memorable cases<sup>105</sup> and their representation of and advocacy for one of the parties.<sup>106</sup> Mediators are just as likely to be limited by their own idiosyncratic histories, yet their histories will expand the attorneys’ comparative experiences, resulting in somewhat more reliable valuations. Further, due to mediators’ perspectives as impartial third parties, they are less likely to make biased assessments of the value of a case.<sup>107</sup> Ultimately, if a

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102. Jack M. Sabatino, *ADR as “Litigation Lite”: Procedural and Evidentiary Norms Embedded Within Alternative Dispute Resolution*, 47 EMORY L.J. 1289, 1327 (1998).

103. See MCADOO & HINSHAW, *supra* note 70, at 49 tbl.33 (reporting that about twenty-three percent of lawyers believe mediators encourage the parties to address issues beyond the legal causes of action).

104. See John Lande, *Getting the Faith: Why Business Lawyers and Executives Believe in Mediation*, 5 HARV. NEGOT. L. REV. 137, 153 (2000) (noting that research shows that claims adjusters and personal injury lawyers “rely on folk conceptions” to determine liability and damage estimates). Of course, inconsistent judgments and recommendations are prevalent in other professions as well. See, e.g., STEPHEN L. FIELDING, *THE PRACTICE OF UNCERTAINTY* 52 (1999) (noting that physicians consistently disagree on diagnosis and treatment, notwithstanding technical knowledge, due to heavy dependence upon personal judgment, an “intuitive feel,” and other subjective factors).

105. This psychological principle is termed the “availability heuristic.” See Birke & Fox, *supra* note 85, at 7-12 (describing the availability heuristic and its application to lawyers).

106. This psychological principle is known as the “perspective bias.” Birke & Fox, *supra* note 85, at 14. See generally *id.* at 14-15, 20 (describing the perspective bias and its application to lawyers).

107. See Birke & Fox, *supra* note 85, at 14 (observing that participants in a study who were asked to predict jurors’ likely verdicts were more balanced when they were put in a neutral condition than when they were put in a partisan condition); Leigh Thompson & Janice Nadler, *Judgmental Biases in*

mediator agrees with an attorney's valuation of the case, this is likely to bolster the attorney's confidence in the estimates and reduce the disputant's doubts about the reliability of the attorney's predictions.<sup>108</sup> The addition of the mediator's evaluation makes the process of developing a rational, expected financial value analysis a bit more scientific and reliable, which further supports its use and its potency in easing settlement.<sup>109</sup>

If we can assume that judges, attorneys, and disputants agree that the exclusive goal of the mediation process is the delivery of settlements and that there is no need for the process to offer an experience of justice, this second structural change also appears to represent a successful and laudable adaptation to the environment of the courthouse.

### *C. The Abandonment or Marginalization of the Joint Session in Court-Connected Mediation*

As noted earlier, in the model of mediation developed to resolve neighborhood, small claims, and family disputes, the disputants themselves were expected to meet in joint session and communicate face-to-face regarding their dispute.<sup>110</sup> Caucus was used very little, if at all, because it was not perceived as consistent with a commitment to party control or party self-determination.<sup>111</sup>

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*Conflict Resolution and How to Overcome Them*, in THE HANDBOOK OF CONFLICT RESOLUTION 224-25 (Morton Deutsch & Peter T. Coleman eds., 2000) [hereinafter Thompson & Nadler, *Judgmental Biases*] (describing research that has found that people who are immediately put into the position of one of the parties in a dispute make more self-serving judgments of fairness and encounter a higher rate of impasse than people who first learn the facts and determine a fair settlement from the standpoint of a neutral observer). See generally Robert H. Mnookin & Lee Ross, *Introduction to BARRIERS TO CONFLICT RESOLUTION*, *supra* note 84, at 3, 13-15 [hereinafter Mnookin & Ross, *Introduction*] (discussing the influence of biases on the views of disputants).

108. In a sense, the mediator is providing the client with a second opinion, which is particularly useful when the client doubts her attorney's advice. See Michael Klausner et al., *Second Opinions in Litigation*, 84 VA. L. REV. 1411, 1416-25 (1998) (identifying the circumstances when a second opinion serves a valuable function). It has also been suggested that the mediator's evaluation can assist the lawyer whose over-optimistic assessment of the case impedes settlement. See Hensler, *A Research Agenda*, *supra* note 5, at 17 ("The lawyer who over-promises faces the unpleasant task of informing the client that her options are not as attractive as she thought. Mediation offers an opportunity for the lawyer to enlist a third party in this task.")

109. See Jeffrey Rubin, *Experimental Research on Third-Party Intervention in Conflict: Toward Some Generalizations*, 87 PSYCHOL. BULL. 379, 388 (1980) (describing research that found that in high-accountability conditions, a third party's "content" intervention—a recommendation of a specific settlement—aided parties' negotiations more effectively than a "process" intervention—a recommendation regarding exercises to improve communication skills—or a "passive" intervention—a recommendation that parties take a break).

110. See BEER ET AL., *supra* note 40, at 21. See also THE NEIGHBORHOOD JUST. CTR. OF ATLANTA, *supra* note 38, at 49.

111. See THE NEIGHBORHOOD JUST. CTR. OF ATLANTA, *supra* note 46 and accompanying text.

In the context of personal injury, contract, and other nonfamily civil actions, however, an increasing number of mediators are abandoning or greatly minimizing the joint session, preferring instead to move quickly to caucus and keep the parties separate for the remainder of the mediation.<sup>112</sup> Anecdotal evidence also suggests that even those mediators who do allow the disputants and their attorneys to present their views in joint session “view this process as ‘venting,’ rather than as an opportunity for parties to present facts that will shape an outcome.”<sup>113</sup>

Mediators indicate that they fear that emotional, hostile, or inflammatory remarks will be made during joint session and that these remarks will make constructive conversation and settlement much more difficult to achieve.<sup>114</sup>

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112. See, e.g., MCADOO, A REPORT TO THE MINNESOTA SUPREME COURT, *supra* note 66, at 39 (reporting that approximately seventy-two percent of attorneys perceive that mediators always or frequently use caucuses effectively and approximately forty-nine percent of attorneys perceive that mediators always or frequently ask each side to present an opening statement); Alfini, *supra* note 94, at 66 (reporting that “trashier[s]” discourage direct party communication and quickly move to caucuses); Gordon, *Attorneys’ Negotiation Strategies*, *supra* note 59, at 382 (“Observations suggest that mediation conferences typically involve extensive caucusing, a structure that supports bargaining rather than open information exchange or direct communication between the parties.”); Hensler, *A Research Agenda*, *supra* note 5, at 17 (“After initial presentation of the dispute, evaluative mediators appear to move quickly to ‘shuttle diplomacy.’ Parties may not meet together again until an agreement has been struck . . . .”); McAdoo & Hinshaw, *supra* note 70 (reporting that approximately sixty-two percent of lawyers perceive that mediators use caucuses almost exclusively but approximately three percent of lawyers perceive that mediators use joint session almost exclusively; also reporting that about eighty-five percent of lawyers indicated that mediators ask each side to present an opening statement in joint session); McAdoo & Welsh, *Does ADR Really Have a Place*, *supra* note 93, at 391 (reporting that in “lawyer interviews, several lawyers observed that opening statements could promote unproductive adversarial posturing and thus should not be part of the typical mediation”); Metzloff et al., *supra* note 73, at 119 (describing the structure of mediation sessions, which typically involve a series of private caucuses). See also Reuben, *Public Justice*, *supra* note 94, at 638 & n.313 (raising concerns about the absence of the right to present evidence in ADR proceedings and that a disputant may be “essentially silenced by a biased or rushed mediator”).

113. Hensler, *A Research Agenda*, *supra* note 5, at 17.

114. Mediators have made these sorts of remarks at continuing legal education programs. See, e.g., E-mail from James Coben, Director, Dispute Resolution Institute, to Nancy Welsh, Assistant Professor of Law, Dickinson School of Law of the Pennsylvania State University (Mar. 6, 2001, 09:09:42 EST) (on file with author) (describing panel discussion entitled “The Great Mediator Debate: Rhetoric or Reality” at the Annual ADR Institute sponsored by the Minnesota State Bar Association in 2000 and post-panel discussions with lawyer participants). Commentators have made similar remarks in various articles and books. See, e.g., COOLEY, *THE MEDIATOR’S HANDBOOK*, *supra* note 74, at 154 (describing situations in which the mediator should caucus “before even attempting to conduct a joint session” and should consider “conduct[ing] the entire mediation using separate caucuses”); William D. Coleman, *The Mediation Alternative: Participating in a Problem-Solving Process*, ALA. LAW., Mar. 1995, at 100, 102 (1995) (explaining that “[t]he mediator can hold the emotions in check by using private caucuses and shuttle diplomacy. The mediator is able to discuss the interests of the parties without the emotional baggage that often attends direct negotiations between them.”); Rita Lowery Gitchell & Andrew Plattner, *Mediation: A Viable Alternative to Litigation for Medical Malpractice Cases*, 2 DEPAUL J. HEALTH CARE L. 421, 440 (1999) (observing that in caucus, “the mediator allows each person to vent any emotions without disrupting the communicative process between the parties”)

In addition, many mediators believe that disputants and their attorneys are more likely to be candid and to provide more reliable information in a private session with the mediator than they are in the presence of the opposition.<sup>115</sup> Finally, mediators indicate that they prefer the control that the use of caucus provides over the transmission and framing of information.<sup>116</sup>

Recent research in bargaining supports court-connected mediators' preferences. First, a recent study strongly suggests that communication in caucus can be superior to direct communication between the disputants in joint session, because the mediator's "translation" of the information is generally stripped of the implicit threats or insults that impede efforts to build understanding and reach agreements.<sup>117</sup> Further, negotiation studies have

(footnote omitted); Charles R. Pyle, *Mediation and Judicial Settlement Conferences: Different Rides on the Road to Resolution*, ARIZ. ATT'Y, Nov. 1996, at 20, 23 (observing that "[a] cardinal rule of mediation is that no personal attacks are made on the other party. Such attacks invariably move parties' positions further apart."); Richard G. Spier, *Legal Practice Tips: Mediation Miscues: The 10 Biggest Mistakes Lawyers Make in Mediation*, OR. ST. B. BULL., June 1999, at 35, 35 (observing that the trend is to avoid using opening comments "to present aggressive or inflammatory statements of the case" and recommending that "it is often best to say nothing or perhaps to state that while one's client feels strongly about the correctness of his or her position, the client is here to bargain in good faith"); Nicholas J. Taldone, *Winning Mediation Strategies*, TRIAL LAW., May-June 1999, at 190, 194 (cautioning that counsel should not "oversell his or her case in the opening statement [because] [n]othing destroys the conciliatory atmosphere of a mediation faster than arrogance, hostility, or puffery as to the merits of a case").

115. See Baruch Bush, *supra* note 11, at 9 (observing that negotiators are unlikely to trust the information provided by each other); John G. Melbane, III, *An End to Settlement on the Courthouse Steps? Mediated Settlement Conferences in North Carolina Superior Courts*, 71 N.C. L. REV. 1857, 1886-87 (1993) ("[S]ome mediators prefer to use caucuses in their settlement efforts . . . . A mediator might find that caucuses provide an opportunity for candor or, perhaps, a chance for the party to feel more at ease.").

116. John Cooley characterizes mediators as "conductors," observing that [M]ediators are more likely to use deceptive behaviors because they are the conductors . . . of an information system specially designed for each dispute, a system with ambiguously defined . . . disclosure rules in which mediators are the chief information officers with near-absolute control. Mediators' control extends to what nonconfidential information, critical or otherwise, is developed, to what is withheld, to what is disclosed, and to when disclosure occurs.

John W. Cooley, *Mediation Magic: Its Use and Abuse*, 29 LOY. U. CHI. L.J. 1, 6 (1997) (emphasis omitted).

117. See Ian Ayres & Barry J. Nalebuff, *Common Knowledge as a Barrier to Negotiation*, 44 UCLA L. REV. 1631, 1634 (1997) ("Caucus mediation can communicate . . . (first order knowledge) without creating common, higher-order knowledge among the parties."). See also Dean G. Pruitt et al., *Long-Term Success in Mediation*, 17 LAW & HUM. BEHAV. 313, 314 (1993) (reporting research findings that disputants' hostile or contentious behavior in mediation can decrease the likelihood for reaching an agreement that satisfies the disputants, but that such behavior is unrelated to measures of long-term outcome); Rubin, *supra* note 109, at 382-83 (describing research demonstrating that compulsory communication between parties engaged in intense conflict had the effect of exacerbating the conflict). See also William Laurens Walker & John W. Thibaut, *An Experimental Examination of Pretrial Conference Techniques*, 55 MINN. L. REV. 1113, 1132-33 (1971) (reporting that settlement is impeded when a judge begins a pretrial conference in a high conflict case by having the parties identify the issues in dispute).

shown that, when an opponent makes a proposal—which may actually represent a compromise, concession, or responsive solution—the recipient of the proposal is nonetheless likely to devalue the proposal simply because it came from a perceived opponent.<sup>118</sup> Finally, other negotiation research indicates that if the disputants have a negative relationship—which can be created or exacerbated by an outburst or a subtle jab in a joint session—the disputants are more willing to take risks just so that they can do better than their negotiating opponents. This dynamic occurs even when disputants can objectively achieve better settlements if they permit their opponents to recover equally.<sup>119</sup>

All of these studies<sup>120</sup> suggest that it makes great sense for the mediator to separate the parties in mediation as quickly as possible and, throughout the mediation session, to control the communication of offers and counter-offers by shuttling back and forth. In this way, the mediator effectively buffers the disputants from each other's intentional or unintentional barbs and threats.<sup>121</sup> Further, knowing that the dispute has already reached the point at which one of the disputants turned to the courts for assistance, the mediator can keep the disputants from worsening what is likely to be an already negative relationship. Finally, keeping the disputants apart gives mediators the option of presenting potential solutions as their own, rather than tainting such proposals by associating them with an opponent.<sup>122</sup>

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118. See generally Lee Ross, *Reactive Devaluation in Negotiation and Conflict Resolution*, in BARRIERS TO CONFLICT RESOLUTION, *supra* note 84, at 27, 29-31 (summarizing research results that demonstrate that an offer made by an adversary may appear less attractive in the eyes of the recipient). See also Baruch Bush, *supra* note 11, at 11 (describing various cognitive biases that distort information).

119. Bazerman & Neale, *supra* note 84, at 98-99.

120. Other studies also support this development. See, e.g., Max H. Bazerman, *Negotiator Judgment: A Critical Look at the Rationality Assumption*, in NEGOTIATION THEORY AND PRACTICE, *supra* note 83, at 197, 198-200 (finding that people are more likely to gamble on the possibility of a loss than on the possibility of a gain and suggesting that one negotiator may be able to influence the other negotiator's perceptions through careful framing of proposals). See also Jennifer Gerarda Brown, *The Role of Hope in Negotiation*, 44 UCLA L. REV. 1661, 1682 (1997) (suggesting that third parties such as mediators may "present more credible proof that [negotiators'] estimates are unrealistically optimistic"); Sternlight, *supra* note 90, at 332-45, 348 (demonstrating how a mediator can overcome various psychological barriers to settlement, but also asserting that many barriers can be overcome by direct communication between the disputants and their attorneys in joint session).

121. It should be noted, however, that other research suggests that mediators can choose interventions (e.g., coaching the parties in communication skills or urging the parties to put themselves in each other's shoes, be fair, and make reasonable and mutually acceptable proposals) that enhance direct, constructive negotiation between the parties in joint session. See Rubin, *supra* note 109, at 382-83 (describing a series of experiments to test the circumstances that facilitate productive communication channels).

122. See Mnookin & Ross, *Introduction*, *supra* note 107, at 23; Birke & Fox, *supra* note 85, at 48-50 (describing the psychological principle of "reactive devaluation" and applying it to negotiation between lawyers). For a definition of reactive devaluation, see *supra* text accompanying note 118.

Indeed, the research results summarized above suggest that a mediator invites failure by keeping the disputants together. "Failure," of course, means failure to assist the disputants in negotiating a settlement.<sup>123</sup> After all, settlement is the sole criterion for judging the success or failure of a mediation session if the mediation process is defined as "nothing more than a formalized settlement procedure"<sup>124</sup> structured to remove cases (perhaps more quickly and less expensively) from the courts' civil dockets.

#### *D. The Lack of Creativity in the Settlements Produced by Court-Connected Mediation*

Mediation continues to be hailed as a process that permits the disputants to arrive at creative, nonmonetary settlements that meet their unique needs.<sup>125</sup> Empirical data, however, indicates that mediators infrequently act to encourage the search for creative, nonmonetary settlements,<sup>126</sup> and that relatively few attorneys choose mediation for its creative potential.<sup>127</sup> Instead, mediation generally results in traditional, distributive outcomes.<sup>128</sup> This has led commentators, such as Professor Barbara McAdoo to lament: "In litigation, money is the substitute (i.e., remedy) for every 'wrong.' Is [money] the only language trial lawyers have?"<sup>129</sup>

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123. See Baruch Bush, *supra* note 11, at 8 (describing failure as impasse or as unnecessarily expensive or sub-optimal).

124. Steven Weiss, *ADR: A Litigator's Perspective: Viewing the Pluses and Minuses*, BUS. L. TODAY, Mar./Apr. 1999, at 30, 32.

125. See *supra* notes 12, 17 and accompanying text.

126. See, e.g., MCADOO, A REPORT TO THE MINNESOTA SUPREME COURT, *supra* note 66, at 39 (reporting that approximately twenty-six percent of attorneys perceive that mediators frequently or always "provide input for non-monetary aspects of settlement"); McAdoo & Hinshaw, *supra* note 70, at 51 tbl. 32 (reporting that about eight percent of lawyers perceive that mediators "suggest creative outcomes that would not be a likely court outcome"). See also Metzloff et al., *supra* note 73, at 151 (noting that during the course of a study involving court-ordered mediation in the malpractice context, parties rarely considered "creative solutions").

127. See MCADOO, A REPORT TO THE MINNESOTA SUPREME COURT, *supra* note 66, at 31 (reporting that about thirty-one percent of attorneys voluntarily choose mediation to "[i]ncrease potential for creative solutions").

128. See Gordon, *Attorneys' Negotiation Strategies*, *supra* note 59, at 384. One survey showed that less than twelve percent of "plaintiffs settling at a mediated settlement conference received nonmonetary relief." *Id.* In contrast, nearly thirty percent of plaintiffs who opted for adjudication "received some type of nonmonetary relief."; Hensler, *A Research Agenda*, *supra* note 5, at 15.

129. Barbara McAdoo, *The Future of ADR: Have They Come for the Right Reason?*, 3 J. ALT. DISP. RESOL. EMP. 8, 10 (Summer 2001). See also Riskin, *Mediation and Lawyers*, *supra* note 52, at 44-45 (observing that "on the lawyer's philosophical map, quantities are bright and large while qualities appear dimly or not at all . . . . [The] 'reduction' of nonmaterial values . . . to amounts of money, can have one of two effects . . . . [T]hese values are excluded . . . as irrelevant [or] . . . they are present but transmuted into . . . a justification for money damages.").

Bargaining theory and research help to explain this phenomenon. On one hand, effective bargaining requires the communication of goals that are “concrete,” “specific, and preferably measurable.”<sup>130</sup> Negotiators can more easily compare such goals by placing them in a “common dimension,”<sup>131</sup> thus enhancing the rationality of the sequential offers and counter-offers that characterize distributive negotiation.<sup>132</sup> As one commentator has observed: “[A]ny guide is better than none . . . [and] [t]ranslating every issue into dollars is one way to facilitate these comparisons.”<sup>133</sup> This helps to explain why, “[i]n evaluating the interests at stake, a typical negotiator might focus on commodities that can be bought and sold or on concrete terms that can be written into a contract or treaty.”<sup>134</sup> Further, reliance on monetary, noncreative solutions facilitates settlement. “[C]ut-and-dried cases” can be resolved with “cut-and-dried solution[s,]” which generally “involve[] the simple exchange of money.”<sup>135</sup>

Integrative negotiation theory, however, celebrates the search for nonmonetary, creative solutions that meet the underlying needs and interests of disputants.<sup>136</sup> Some commentators have suggested that settlement options naturally become nonmonetary and creative in more complex disputes.<sup>137</sup> Indeed, if disputants expand rather than restrict the issues under discussion in negotiation,<sup>138</sup> it seems nearly inevitable that such expansion will lead to a

130. ROY J. LEWICKI ET AL., *NEGOTIATION* 42 (3d ed. 1999) (emphasis omitted).

131. *Id.* at 61.

132. RAIFFA, *supra* note 98, at 128 (describing the pattern of concessions in the “negotiation dance”); Donald G. Gifford, *A Context-Based Theory of Strategy Selection in Legal Negotiation*, 46 OHIO ST. L. REV. 41, 48-52 (1985) (describing the competitive negotiation strategy).

133. LEWICKI ET AL., *supra* note 130, at 62.

134. LAX & SEBENIUS, *supra* note 81, at 64.

135. HERBERT M. KRITZER, *LET’S MAKE A DEAL: UNDERSTANDING THE NEGOTIATION PROCESS IN ORDINARY LITIGATION* 44 (1991).

136. *See, e.g.*, FISHER ET AL., *supra* note 97, at 49-50 (noting that the most powerful interests are basic human needs, which also underlie a monetary figure in negotiation); LAX & SEBENIUS, *supra* note 81, at 68 (“Many negotiators retard creativity by failing to distinguish the issues under discussion from their underlying interests.”); Carrie Menkel-Meadow, *Toward Another View of Legal Negotiation: The Structure of Problem Solving*, 31 UCLA L. REV. 754, 794-813 (1984) (describing the underlying principles and structure of problem solving).

137. *See, e.g.*, KRITZER, *supra* note 135, at 44 (“[T]here is a clear, steady shift toward nonmonetary offers . . . as the complexity of the cases increases . . . [T]his is not particularly surprising, because in more complex cases there may be greater possibilities for ‘creative’ solutions.”).

138. *See, e.g.*, Birke & Fox, *supra* note 85, at 32-33 (“[F]ully exploiting issues on which the principals have a shared interest” improves agreements and makes them more “Pareto efficient,” that is, “no party can be made better off without at least one party made worse off.”); Carrie Menkel-Meadow, *The Many Ways of Mediation: The Transformation of Traditions, Ideologies, Paradigms, and Practices*, 11 NEGOT. J. 217, 226 (1995) (reviewing ROBERT A. BARUCH BUSH & JOSEPH FOLGER, *THE PROMISE OF MEDIATION: RESPONDING TO CONFLICT THROUGH EMPOWERMENT & RECOGNITION* (1994); DEBORAH M. KOLB & ASSOCIATES, *WHEN TALK WORKS: PROFILES OF MEDIATORS* (1994); *THE POSSIBILITY OF POPULAR JUSTICE: A CASE STUDY OF AMERICAN*

creative broadening of the resources available for exchange and settlement.

However, integrative negotiation is likely to be used and creative solutions are likely to arise only if the disputants have sufficiently explored each other's preferences and priorities.<sup>139</sup> This assumes that the disputants recognize each other as unique individuals with unique needs and interests.<sup>140</sup> In other words, integrative negotiation assumes that the disputants realize that they do not necessarily share identical (and mutually exclusive) objectives and goals in the mediation and are willing to learn about each other's preferences and priorities. Furthermore, for the disputants to sufficiently explore each other's preferences and priorities, the mediator and the mediation process must offer the disputants an opportunity to communicate regarding these matters.

All of the changes in the mediation process that make distributive bargaining and decision making more effective—the reduced role of the disputants; the preference for use of a rational financial value analysis approach to decision making; the marginalization of joint session and increased reliance on caucus—unfortunately make it less likely that disputants will perceive each other as unique, that the disputants will become willing to learn about each other, and that they will have an opportunity to communicate regarding their preferences and priorities.

Ultimately, then, negotiation theory and research do not provide a clear-cut justification for mediation's failure to produce creative, nonmonetary settlements. Instead, some of court-connected mediation's adaptations—which, as this Article has demonstrated, are supported by research and theory

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COMMUNITY JUSTICE (Sally Engle Merry & Neal Milner eds., 1993)) ("It is often more productive to expand, rather than narrow issues in order to create more issues for trade . . . . Much legal dispute settlement activity is focused on narrowing disputes, which often makes resolution more difficult, rather than easier.").

139. LEWICKI ET AL., *supra* note 130, at 136 (citing K. E. Kemp & W. P. Smith, *Information Exchange, Toughness, and Integrative Bargaining: The Roles of Explicit Cues and Perspective-Taking*, INT'L J. CONFLICT MGMT. 5, 5-21 (1994)); MNOOKIN ET AL., *BEYOND WINNING*, *supra* note 82, at 108 (observing that "[a]lthough the litigation game includes the evaluation of the legal opportunities and risks, it does not usually incorporate a broad consideration of the parties' interests, resources, and capabilities" and thus "the parties may never discover possible trades that could have left both sides better off").

140. This also assumes that attorneys recognize their clients as unique individuals, with unique needs and interests. However, various studies suggest that attorneys fail to perceive their clients' nonmonetary interests and goals. *See, e.g.*, Hensler, *The Real World of Tort Litigation*, in EVERYDAY PRACTICES AND TROUBLE CASES, *supra* note 86, at 156-66 (contrasting tort plaintiffs' desire to vindicate their rights and to use the legal system with lawyers' focus on monetary concerns); Gordon, *Attorneys' Negotiation Strategies*, *supra* note 59, at 384 ("[M]ost attorneys (56.1 percent) feel that litigants are not necessarily involved in these suits to satisfy some sense of justice; instead, they think litigants are concerned about money.").

as effective means to streamline bargaining and decision making—may have the undesirable effect of reducing mediation’s effectiveness if the disputants cannot reach common ground regarding a particular monetary settlement.

*E. Summarizing the Application of Bargaining Theory and Research to Court-Connected Mediation*

The application of bargaining theory and research to the current evolution of court-connected mediation shows that mediation’s new “look” makes great sense. For the most part, these innovations have enhanced mediation’s effectiveness as a tool for distributive negotiation, decision making, and settlement. If court-connected mediation is defined as just assisted negotiation, these innovations represent successful and necessary adaptations to the environment of the courthouse, at least that part of the courthouse that handles nonfamily, relatively large civil disputes.

However, other research reveals that when disputants bring their disputes to the courthouse, they expect something more than bargaining assistance. They expect and value procedures that feel fair. Indeed, research suggests that the failure to consider issues of procedural justice in court-connected mediation has the potential to threaten the legitimacy and the authority of the judiciary and to reduce disputants’ compliance with the agreements they have reached. In order to understand why this is so, it is necessary to understand the concept of procedural justice.<sup>141</sup>

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141. This Article will confine its discussion to “procedural justice” or “procedural fairness” as it has been defined through social science research and theory. However, it is worth noting here that commentators have used the terms “procedural justice” or “procedural fairness” to describe various characteristics of activities in mediation. For example, one commentator has defined a procedurally fair mediation process as one that provides “equal opportunity to engage in a meaningful dialogue.” Michael Coyle, *Defending the Weak and Fighting Unfairness: Can Mediators Respond to The Challenge?*, 36 OSGOODE HALL L.J. 625, 637 (1998). Another commentator has indicated that procedural fairness principles require consideration of parties’ “self-esteem.” Stulberg, *Fairness and Mediation*, *supra* note 33, at 912. Furthermore, “fair procedures [in mediation] assume (1) starting points in which parties possess the autonomy to explore settlement arrangements, (2) the liberty to strike deals which maximize their freedom of operation consistent with a like liberty for all and (3) outcomes that do not put one party in a notably worse-off situation than his original starting position.” *Id.* at 936. A third commentator has discussed the importance of “procedural justice” within the context of court-connected mediation involving unrepresented parties. See generally Russel Engler, *And Justice for All—Including the Unrepresented Poor: Revisiting the Roles of the Judges, Mediators, and Clerks*, 67 FORDHAM L. REV. 1987, 2007-11 (1999).

## II. UNDERSTANDING PROCEDURAL JUSTICE

What does “justice” mean? What types of justice<sup>142</sup> must or should the courts provide? This Article focuses primarily upon one type of justice—procedural justice. Procedural justice is concerned with the fairness of the procedures or processes that are used to arrive at outcomes.<sup>143</sup> Distributive justice, in contrast, focuses on perceptions of and criteria to determine the substantive fairness of the outcomes themselves.<sup>144</sup>

As previously noted, researchers have found that procedural justice matters profoundly. Disputants’ perceptions of the justice provided by a procedure affect their judgments of the distributive justice provided by the outcome, their compliance with that outcome, and their faith in the legitimacy of the institution that offered the procedure. Disputants use the following indicia to assess procedural justice: whether the procedure provided them with the opportunity to tell their stories,<sup>145</sup> whether the third party considered their stories,<sup>146</sup> and whether the third party treated them in an even-handed and dignified manner.<sup>147</sup> The procedures used in socially-sanctioned dispute resolution processes assume such significance because disputants seek personal and pragmatic reassurance. Disputants need to believe that they are valued members of society and that the final outcome of a dispute resolution process will be based on full information.

In order to advance beyond this very general understanding of the effects, indicia, and underpinnings of procedural justice and in order to discern this concept’s application to mediation, it is necessary to examine the research findings and the underlying theories in some detail.

### A. *The Effects of Procedural Justice*

Although issues of procedural justice often do not attract as much public attention as concerns about distributive justice, research has shown that when people experience dispute resolution and decision-making procedures, they “pay a great deal of attention to the way things are done [i.e., how decisions

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142. See Morton Deutsch, *Justice and Conflict*, in THE HANDBOOK OF CONFLICT RESOLUTION, *supra* note 107, at 41-42 (discussing distributive justice, procedural justice, a “sense of justice,” retributive or reparative justice, and the scope of justice).

143. See *id.* at 41.

144. See *id.* Professor Deutsch also describes other types of justice, including “retributive or reparative justice,” which he defines as “concerned with how to respond to the violation of moral norms and how to repair the moral community that has been violated.” *Id.* at 42.

145. See *infra* note 161 and accompanying text.

146. See *infra* note 162 and accompanying text.

147. See *infra* note 163 and accompanying text.

are made] and the nuances of their treatment by others.”<sup>148</sup> As a result, perceptions of procedural justice profoundly affect people’s perceptions of distributive justice, their compliance with the outcomes of decision-making procedures and processes, and their perceptions of the legitimacy of the authorities that determine such outcomes. Perhaps surprisingly, perceptions of distributive justice generally have a much more modest impact<sup>149</sup> than perceptions of procedural justice.

Research has repeatedly confirmed that people’s perceptions of procedural justice mediate or influence their perceptions of distributive justice. Disputants who believe that they have been treated in a procedurally fair manner are more likely to conclude that the resulting outcome is substantively fair.<sup>150</sup> In effect, a disputant’s perception of procedural justice

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148. See E. ALLAN LIND & TOM R. TYLER, THE SOCIAL PSYCHOLOGY OF PROCEDURAL JUSTICE 242 (1988); E. Allan Lind et al., *Individual and Corporate Dispute Resolution: Using Procedural Fairness as a Decision Heuristic*, ADMIN. SCI. Q., 1993, at 247 [herein after Lind et al., *Individual and Corporate Dispute Resolution*]. In a field study, researchers found that procedural justice judgments strongly influenced litigants’ decisions whether or not to accept non-binding arbitration awards, regardless of whether litigants were individuals, small business owners, or corporate officers; only corporate employees failed to demonstrate a link between their procedural justice judgments and their decisions to accept awards. *Id.* at 247. *But see* JANE W. ADLER ET AL., SIMPLE JUSTICE: HOW LITIGANTS FARE IN THE PITTSBURGH COURT ARBITRATION PROGRAM 76, 83 (1983) (Unlike “unsophisticated individual litigants,” institutional litigants who made extensive use of the arbitration program “appear[ed] to care little about qualitative aspects of the hearing process . . . . They judge arbitration primarily on the basis of the outcomes it delivers.”).

149. LIND & TYLER, *supra* note 148, at 242. There may be a need to distinguish unsophisticated individual disputants from sophisticated institutional litigants. See, e.g., ADLER ET AL., *supra* note 148 and accompanying text. *But see* Lind et al., *Individual and Corporate Dispute Resolution*, *supra* note 148 and accompanying text.

150. See, e.g., LIND & TYLER, *supra* note 148, at 66-70, 205. Lind and Tyler describe laboratory and field studies that show that greater perceptions of procedural justice generally produce greater perceptions of distributive justice, regardless of whether the outcome is positive or negative. *Id.* Occasional studies show that this effect may be reduced when the outcome is positive, but also that this effect continues to be strong when the outcome is negative. *Id.* See also Craig A. McEwen & Richard J. Maiman, *Mediation in Small Claims Court: Achieving Compliance Through Consent*, 18 LAW AND SOC’Y REV. 11, 37 (1984) [hereinafter McEwen & Maiman, *Mediation in Small Claims Court*] (reporting a study that found that fairness perceptions depend in part upon whether the dispute resolution forum operates under a consent or command model and that “defendants were about twice as likely to perceive the settlement as fair after consensual settlements”—reached in face-to-face mediation sessions generally without lawyers—“as after adjudication”); Craig A. McEwen & Richard J. Maiman, *Small Claims Mediation in Maine: An Empirical Assessment*, 33 ME. L. REV. 237, 258 (1981) [hereinafter McEwen & Maiman, *Small Claims Mediation in Maine*] (reporting that the perceived fairness of adjudicated outcomes “closely paralleled the degree of one’s victory or loss,” while perceived fairness of outcomes reached in face-to-face mediation sessions was much more weakly correlated with the favorability of the outcome); Tom R. Tyler, *Psychological Models of the Justice Motive: Antecedents of Distributive and Procedural Justice*, 67 J. PERSONALITY & SOC. PSYCHOL. 850, 859 (1994) [hereinafter Tyler, *Psychological Models of the Justice Motive*] (reporting that studies in legal and managerial settings found that the “primary relational issue influencing judgments of distributive justice was trustworthiness”); Tom R. Tyler, *The Psychology of Procedural Justice: A Test of the Group-Value Model*, 57 J. PERSONALITY & SOC. PSYCHOL. 830, 834 (1989)

anchors general fairness impressions or serves as a fairness heuristic.<sup>151</sup> Further, research has indicated that disputants who have participated in a procedure that they evaluated as fair do not change their evaluation even if the procedure produces a poor or unfair outcome.<sup>152</sup>

The perception of procedural justice also serves as a shortcut means of determining<sup>153</sup> whether to accept or reject a legal decision or procedure.<sup>154</sup> Disputants who believe that they were treated fairly in a dispute resolution procedure are more likely to comply with the outcome of that procedure.<sup>155</sup> This effect will occur even if outcomes do not favor the disputants<sup>156</sup> or they

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[hereinafter Tyler, *The Psychology of Procedural Justice*] (observing that people are most influenced by the relational concern of neutrality “when the issue of concern is outcome fairness”).

151. E. Allan Lind, *Procedural Justice, Disputing, and Reactions to Legal Authorities, in EVERYDAY PRACTICES AND TROUBLE CASES*, *supra* note 86, at 177, 185 [hereinafter Lind, *Procedural Justice, Disputing, and Reactions to Legal Authorities*] (“[P]eople form their original justice judgment on the basis of procedures and social process and then later incorporate outcome information into their overall impressions of the fairness or unfairness of the encounter. In the terms of art used in modern social cognition theory, process information anchors the fairness judgment to such an extent that outcome information can only make relatively minor adjustments.”).

152. ADLER ET AL., *supra* note 148, at 65 (reporting that “perceptions of fairness [of arbitration hearings differed] by outcome of the case, [and] although in the expected direction, [these differences] were not statistically significant”); LIND & TYLER, *supra* note 148, at 235. *See also* Tyler, *Psychological Models of the Justice Motive*, *supra* note 150, at 855 (discussing a study finding that procedural justice judgments are influenced only by relational concerns, while distributive justice judgments are influenced by both resource or outcome concerns and relational concerns).

153. This psychological shortcut “replaces a full exploration of the implications and possible motives of each directive from an authority.” Lind et al., *Individual and Corporate Dispute Resolution*, *supra* note 148, at 225.

154. *See* Lind, *Procedural Justice, Disputing, and Reactions to Legal Authorities*, *supra* note 151, at 185; Lind et al., *Individual and Corporate Dispute Resolution*, *supra* note 148, at 224 (citing research that found the decision to accept or reject an arbitrator’s award is “strongly correlated with judgments of procedural justice . . . , which had a stronger effect than either subjective or objective measures of the arbitration award”).

155. *See* Lind, *Procedural Justice, Disputing, and Reactions to Legal Authorities*, *supra* note 151, at 192 (describing research regarding court-annexed arbitration that found that “[a]cceptance of the arbitration awards as resolution of the case was much more strongly linked to the fairness judgments than to the outcome”). Moreover, one study of the resolution of cases in small claims court found greater compliance with results reached in consensual processes than in adjudicative processes, suggesting that “the personal and immediate commitments generated by consensual processes bind people more strongly to compliance than the relatively distant, impersonal obligations imposed by authorities.” McEwen & Maiman, *Mediation in Small Claims Court*, *supra* note 150, at 44-45. Compliance with mediated results (reached in face-to-face meetings without lawyers) was higher than compliance with negotiated results. *See id.* at 21. *See also* Tyler, *Psychological Models of the Justice Motive*, *supra* note 150, at 857 (discussing field studies that found that “procedural justice is the primary justice judgment influencing affect and the willingness to accept third-party decisions, although distributive influences also occur”). Arguably, courts that ensure the provision of procedurally just processes can improve their efficiency by reducing the likelihood that litigants will return to court. Research, however, has not found a relationship between goals of efficiency or productivity and issues of procedural justice. *See* LIND & TYLER, *supra* note 148, at 225.

156. *See* Tyler, *Psychological Models of the Justice Motive*, *supra* note 150, at 857. *See also supra* note 155 and accompanying text.

are actually unhappy with the outcomes.<sup>157</sup>

Disputants' perceptions of the procedural justice provided by a decision-making authority also affect the respect and loyalty accorded to the authority.<sup>158</sup> This effect is particularly strong for the courts.<sup>159</sup> Thus, litigants' reactions to the institution of the judiciary and their compliance with decisions arising out of court-mandated procedures do not depend simply (or even primarily) upon whether they feel that they won or lost their cases. Rather, litigants' reactions depend largely upon their "experience of legal procedures."<sup>160</sup>

### *B. Process Characteristics That Enhance Perceptions of Procedural Justice*

Several rather specific process characteristics enhance perceptions of procedural justice. First, perceptions of procedural justice are enhanced to the extent that disputants perceive that they had the opportunity to present their views, concerns, and evidence to a third party and had control over this presentation ("opportunity for voice").<sup>161</sup> Second, disputants are more likely to perceive procedural justice if they perceive that the third party considered their views, concerns, and evidence.<sup>162</sup> Third, disputants' judgments about procedural justice are affected by the perception that the third party treated them in a dignified, respectful manner and that the procedure itself was dignified.<sup>163</sup> Although it seems that a disputants' perceptions regarding a

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157. See Pruitt et al., *supra* note 117, at 324, 327 (reporting research showing that respondents who perceived that the mediation process was fair were more likely to comply with the agreement, even though they were not necessarily happier with the agreement).

158. See LIND & TYLER, *supra* note 148, at 209 (summarizing studies that have "found that procedural justice judgments affect the evaluation of authorities and institutions"); TOM R. TYLER, WHY PEOPLE OBEY THE LAW 94-108 (1990) (finding that procedural fairness judgments influence perceptions of the legitimacy of legal authority and that this effect is particularly strong for the courts); Lind, *Procedural Justice, Disputing, and Reactions to Legal Authorities*, *supra* note 151, at 188 (summarizing studies showing that perceptions of authorities' legitimacy and compliance "with authoritative directives correlate highly with procedural justice judgments").

159. TYLER, WHY PEOPLE OBEY THE LAW, *supra* note 158, at 94-108.

160. LIND & TYLER, *supra* note 148, at 218.

161. See *id.* at 101-04.

162. *Id.* at 236 (proposing a model to explain "finding[s] that the voice effect does not require that voice be effective in producing favorable outcomes but does require that the decisionmaker appear to be giving due consideration to the expressed values and arguments"); Tom R. Tyler, *Conditions Leading to Value-Expressive Effects in Judgments of Procedural Justice: A Test of Four Models*, 52 J. PERSONALITY & SOC. PSYCHOL. 333, 339 (1987) [hereinafter Tyler, *Conditions Leading to Value-Expressive Effects*] (reporting that results of a study regarding citizens' interactions with police "suggest that the key precondition for the occurrence of voice effects is the belief among citizens that their views are being considered by the authorities with whom they deal").

163. See LIND & TYLER, *supra* note 148, at 214 (describing studies showing that "politeness of

fourth factor—the impartiality of the third party decision maker—also ought to affect procedural justice judgments, it appears that disputants are influenced more strongly by their observations regarding the third party’s even-handedness and attempts at fairness.<sup>164</sup>

Through a long series of experiments involving many different settings and situations, disputants’ opportunity for voice has been found to “reliably affect”<sup>165</sup> perceptions of procedural justice. “[W]hen disputants [feel] that they [have] been allowed a full opportunity to voice their views, concerns, and evidence, the disputing process [is] seen as fairer and the outcome [is] more likely to be accepted.”<sup>166</sup> Concerns regarding the opportunity for voice apply in a variety of settings, including the courtroom, arbitration proceedings, contacts with the police, political decision making, and decision making in work organizations.<sup>167</sup> Even in countries where the judicial systems typically use nonadversarial procedures, citizens often prefer procedures that allow a full opportunity for voice.<sup>168</sup> Perhaps most

treatment” affects judgments about procedural justice); Lind, *Procedural Justice, Disputing, and Reactions to Legal Authorities*, *supra* note 151, at 181 (summarizing the findings from studies that show the influence of dignified and polite treatment).

164. See ADLER ET AL., *supra* note 148, at 65 (reporting that litigants simply “want[] an opportunity to have their case heard and decided by an impartial third party”); Tyler, *Psychological Models of the Justice Motive*, *supra* note 150, at 853 (reporting that “neutrality” is one of three relational concerns that exert independent influence on procedural justice judgments). Although “[n]eutrality involves honesty and lack of bias,” people focus “on whether the third party creates a ‘level playing field’ by evenhanded treatment [and] uses facts, not opinions,” as bases for decision making. *Id.* at 854. Consequently, litigants value trust in the motives of the third-party authority as the primary relational influence on procedural justice; “issues of standing and neutrality [are] of lesser importance.” *Id.* See also Tyler, *Conditions Leading to Value-Expressive Effects*, *supra* note 162, at 337 (reporting that in field experiment a significant “voice effect” occurred regardless of whether citizens viewed decision makers as impartial or nonbiased; however, judgments of process control were affected by citizens’ perceptions that decision makers considered their views and tried to be fair). See generally *infra* notes 204-08 and accompanying text.

165. Lind, *Procedural Justice, Disputing, and Reactions to Legal Authorities*, *supra* note 151, at 180.

166. *Id.*

167. LIND & TYLER, *supra* note 148, at 211-12.

168. See, e.g., Stephen LaTour et al., *Procedure: Transnational Perspectives and Preferences*, 86 YALE L.J. 258, 281 (1976) (finding that subjects in Chapel Hill and Hamburg both preferred procedures allowing “full opportunity for evidence presentation,” but diverged with respect to third-party decision control; Chapel Hill subjects preferred that the third party control the outcome while Hamburg subjects did not); E. Allan Lind et al., *Reactions to Procedural Models for Adjudicative Conflict Resolution: A Cross-National Study*, 22 J. CONFLICT RESOL. 318, 335 (1978) [hereinafter Lind et al., *Reactions to Procedural Models*] (reporting that in a laboratory study involving students in the United States, England, France, and West Germany, researchers found that the subjects consistently preferred the adversary model over the investigator and inquisitorial models, suggesting that “even among subjects whose own legal systems are based on inquisitorial models,” procedures that provide high process control are preferred and perceived as fairer). See also E. Allan Lind et al., *Procedural Context and Culture: Variation in the Antecedents of Procedural Justice Judgments*, 73 J. PERSONALITY & SOC. PSYCHOL. 767, 777 (1997) [hereinafter Lind et al., *Procedural Context and*

surprisingly, both field and laboratory studies<sup>169</sup> have demonstrated that the opportunity for voice heightens disputants' judgments of procedural justice even when they know that their voice will not and cannot influence the final outcome.<sup>170</sup>

These research results are helpful as we consider the application of procedural justice to court-connected mediation, but they raise several important questions: What counts as a full opportunity for voice? How much freedom and time must disputants be given? What represents sufficient control by disputants over the presentation of their views, concerns, and evidence? Can an agent's presentation fulfill the disputants' opportunity for voice? Many of the procedural justice studies deal with these questions, directly or indirectly. The results of these studies and their significance for the court-connected mediation process will be considered below, particularly with respect to the reduced role of the disputants in court-connected mediation and mediators' increased use of legal norms to evaluate disputants' cases.

The other three process characteristics that influence procedural justice judgments center upon the behavior of the third party.<sup>171</sup> In particular,

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*Culture*] (discussing two laboratory studies involving four cultures, which indicate that procedural fairness is defined consistently across cultures and primarily in terms of relational variables).

169. The early studies in procedural justice, which "used laboratory methods and undergraduate students," were quickly subjected to criticism of their methodology. LIND & TYLER, *supra* note 148, at 203. However, subsequent studies "have not only confirmed the findings of laboratory and scenario studies on procedural justice, but in fact have usually shown stronger procedural justice effects." *Id.* at 206.

170. See, e.g., E. Allan Lind et al., *Voice, Control, and Procedural Justice: Instrumental and Noninstrumental Concerns in Fairness Judgments*, 59 J. PERSONALITY & SOC. PSYCHOL. 952, 957 (1990) (finding that people's fairness judgments are enhanced by the opportunity to voice their opinions even when this opportunity does not occur until after a decision has been made; having a "voice with the possibility of influence . . . leads to even greater perceived fairness"); Tom R. Tyler et al., *Influence of Voice on Satisfaction with Leaders: Exploring the Meaning of Process Control*, 48 J. PERSONALITY & SOC. PSYCHOL. 72, 80 (1985) [hereinafter Tyler et al., *Influence of Voice on Satisfaction with Leaders*] (based on one field study and two laboratory studies, researchers concluded that voice heightens procedural justice judgments and leadership endorsement even when disputants perceive that they have little control over the decision). See also LIND & TYLER, *supra* note 148, at 215. Some studies reveal that variations in decision control either have no influence on satisfaction or judgment of procedural justice or have a smaller influence than process control effects. *Id.* Growing evidence suggests that control over the process or having a voice "enhances perceived fairness for reasons quite apart from any value it might have in affecting outcomes." *Id.* It is important to point out, however, that disputants' perceptions of procedural justice are affected by whether or not they perceive that the decision maker has *considered* what they said. See *supra* note 162 and accompanying text. In addition, studies have found that under certain conditions, voice without decision control heightens feelings of procedural injustice and dissatisfaction with leaders, a result described as the "frustration effect." See Tom R. Tyler et al., *Influence of Voice on Satisfaction with Leaders*, *supra*, at 74.

171. This focus on the behavior of the third party is also known as "enactment" or "interactional justice." See Donald E. Conlon et al., *Nonlinear and Nonmonotonic Effects of Outcome on Procedural and Distributive Fairness Judgments*, 19 J. APPLIED SOC. PSYCHOL. 1085, 1087 (1989).

disputants assess the extent to which the third party hears and considers their presentations, treats them with dignity and respect, and tries to be fair and even-handed. Disputants seek assurance that the decision maker has given adequate consideration to their presentations.<sup>172</sup> Apparently, while disputants care very much about having the opportunity for voice, they also wish to know that they have been heard.<sup>173</sup> In one study examining citizens' interactions with police and judges, researchers found that the effect of providing an opportunity for voice was significantly enhanced if citizens also believed that the police and judges considered their views before they made decisions.<sup>174</sup> Indeed, a third party's behavior, including the third party's consideration of the disputants' views, independently affects perceptions of procedural justice and "acts as a filter for . . . and an amplifier of"<sup>175</sup> the disputants' subjective assessments of their control over both the outcome and the process within a particular procedure.

Disputants' perceptions of procedural justice also are influenced by how the third party interacts with them on an interpersonal level. In particular, disputants assess the degree to which the third party treats them in a polite and dignified fashion<sup>176</sup> and tries to be fair and even-handed.<sup>177</sup> Research has

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172. Lind, *Procedural Justice, Disputing, and Reactions to Legal Authorities*, *supra* note 151, at 183.

173. See Conlon et al., *supra* note 171, at 1095 ("suggest[ing] that it is not only important for disputants to express their opinions, but [that] they must [also] feel that the third party is giving due consideration to the views expressed by the disputants").

174. See Tyler, *Conditions Leading to Value-Expressive Effects*, *supra* note 162, at 338-39. In a field study of mediation and arbitration, grievants' "judgments of procedural justice were greatest when third parties were judged to be fair and process control was high." Debra L. Shapiro & Jeanne M. Brett, *Comparing Three Processes Underlying Judgments of Procedural Justice: A Field Study of Mediation and Arbitration*, 65 J. PERSONALITY & SOC. PSYCHOL. 1167, 1173 (1993). The study measured third party fairness by asking grievants whether the third party understood the grievance, whether the third party was fair, whether the third party was impartial, whether the grievants were willing to take a future grievance to the same third party, and whether the third party seriously considered their feelings and opinions. *Id.* at 1171.

175. Shapiro & Brett, *supra* note 174, at 1175 (studying the extent to which instrument, noninstrumental, and enactment processes influenced claimants' procedural justice perceptions in the mediation and arbitration of coal miners' grievances).

176. See LIND ET AL., THE PERCEPTION OF JUSTICE, *supra* note 100, at 22-23; E. Allan Lind et al., *In the Eye of the Beholder: Tort Litigants' Evaluations of Their Experiences in the Civil Justice System*, 24 LAW & SOC'Y REV. 953, 958 (1990) [hereinafter Lind et al., *In the Eye of the Beholder*]; Tyler, *The Psychology of Procedural Justice*, *supra* note 150, at 831. Mediation commentators most frequently identify this process element as the key to providing procedural fairness to disputants. See, e.g., John W. Cooley, *A Classical Approach to Mediation—Part I: Classical Rhetoric and the Art of Persuasion in Mediation*, 19 U. DAYTON L. REV. 83, 130 (1993) (noting that mediators must provide procedural fairness, which involves treating the disputants with respect and insuring that neither party intimidates or abuses the other).

177. See Tyler, *Conditions Leading to Value-Expressive Effects*, *supra* note 162, at 337 (reporting that significant "voice effect" occurred regardless of whether citizens viewed decision makers as impartial or nonbiased; however, citizens' perceptions that decision makers considered their views and

shown that disputants' procedural justice judgments are strongly influenced by the dignity or lack of dignity in decision-making proceedings.<sup>178</sup> For example, in one study comparing litigants' reactions to the third-party processes of trial, arbitration, and judicial settlement conferences, the litigants gave much higher procedural justice rankings to trial and arbitration, even though these proceedings required the litigants to surrender decision-making control.<sup>179</sup> Most litigants perceived trial and arbitration as dignified and careful.<sup>180</sup> In contrast, settlement conferences were more likely to strike litigants as undignified<sup>181</sup> and contrary to the litigants' sense of procedural fairness.<sup>182</sup> Dignified and respectful treatment demonstrates to citizens that authorities recognize their own role as that of "public servants and [recognize] . . . the role of citizens as clients who have a legitimate right to certain services."<sup>183</sup> Interestingly, while authorities' politeness and respect for citizens' rights have been found to influence all citizens' perceptions of procedural justice, some research suggests that minority group members

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tried to be fair affected their judgments about process control); Tyler, *Psychological Models of the Justice Motive*, *supra* note 150, at 853 and text accompanying note 164. Overall, citizens just want their case to be heard and decided by an impartial third party. ADLER ET AL., *supra* note 148, at 65. *See generally infra* notes 204-08 and accompanying text.

178. One commentator suggests that the importance of dignified treatment parallels a finding in the negotiation literature that "issues of 'face saving' often overwhelm bargainers, leading them to make choices not in their economic self-interest." Tom R. Tyler, *The Psychology of Disputant Concerns in Mediation*, 3 NEGOT. J. 367, 371 (1987) [hereinafter Tyler, *The Psychology of Disputant Concerns*].

179. *See* LIND ET AL., THE PERCEPTION OF JUSTICE, *supra* note 100, at 44-45 (reporting that tort litigants "who had experienced arbitrations or trials thought that arbitration hearings and trials were fairer than did those litigants who had had settlement conferences").

180. *See id.* at 45 (reporting that litigants perceived arbitration and trial procedures as "more dignified and . . . employ[ing] a more careful and thorough process" than settlement conferences). *See also* Lind et al., *In the Eye of the Beholder*, *supra* note 176, at 967 (observing that litigants viewed trials as "more dignified and more careful than bilateral settlements").

181. *See* LIND ET AL., THE PERCEPTION OF JUSTICE, *supra* note 100, at 62 n.55 (reporting that litigants believed settlement conferences were "undignified," even when they had no personal knowledge of what occurred); Lind et al., *In the Eye of the Beholder*, *supra* note 176, at 968 tbl.2 (demonstrating that in one court approximately eighty-nine percent of litigants surveyed considered trial to be dignified while approximately fifty-six percent considered settlement conferences to be dignified; in another court, approximately eighty-four percent judged arbitration to be dignified, compared to approximately sixty-seven percent for settlement).

182. *See* Lind, *Procedural Justice, Disputing, and Reactions to Legal Authorities*, *supra* note 151, at 188 ("Our analyses suggested that litigants feel that settlement conferences are unfair because the conferences seem to them to be undignified, and undignified treatment violates the relational concerns that underlie the fairness heuristic."); LIND ET AL., THE PERCEPTION OF JUSTICE, *supra* note 100, at 62, 76 ("[I]f a procedure appears to treat cases in a less than serious fashion . . . litigants will be quick to see the procedure as unfair, and they will be dissatisfied with the court."); Lind et al., *In the Eye of the Beholder*, *supra* note 176, at 972 ("Perceptions of the dignity of the procedure showed a consistent and strong relationship with procedural justice judgments").

183. Tom R. Tyler & Robert Folger, *Distributional and Procedural Aspects of Satisfaction with Citizen-Police Encounters*, 1 BASIC & APPLIED SOC. PSYCHOL. 281, 292 (1980).

particularly value the existence of these qualities in their interactions with authorities.<sup>184</sup>

Significantly, several studies have shown that disputants value these process characteristics as much as, or even more than, control over the final decision (also termed “decision control”<sup>185</sup>). Disputants particularly have identified the opportunity for voice as just as valuable as decision control.<sup>186</sup> Other studies have demonstrated that disputants actually prefer processes in which they surrender decision control (e.g., trial and arbitration) if they perceive that these processes provide more opportunity for voice<sup>187</sup> and more dignified treatment than the available consensual processes.<sup>188</sup> This finding is consistent with other studies that have found that disputants’ procedural

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184. Tyler, *The Psychology of Procedural Justice*, *supra* note 150, at 835 n.4 (noting that minorities “place[d] significantly greater weight on evidence about their social standing than did White group members”). See also MICHELE HERMAN ET AL., METROCOURT PROJECT FINAL REPORT: A STUDY OF THE EFFECTS OF ETHNICITY AND GENDER IN MEDIATED AND ADJUDICATED CASES AT THE METROPOLITAN COURT MEDIATION CENTER viii-xii (1993) (finding that minority litigants were more satisfied with mediation processes and outcomes even though mediated outcomes were not as favorable as those received in adjudication).

185. “Decision control” is defined as “the extent to which disputants are free to accept or reject the result of a third-party intervention.” E. Allan Lind et al., *Decision Control and Process Control Effects on Procedural Fairness Judgments*, 13 J. APPLIED SOC. PSYCHOL. 338, 339 (1983) [hereinafter Lind et al., *Decision Control and Process Control*].

186. See P. Christopher Earley & E. Allan Lind, *Procedural Justice and Participation in Task Selection: The Role of Control in Mediating Justice Judgments*, 52 J. PERSONALITY & SOC. PSYCHOL. 1148, 1154 (1987) (reporting the results of a laboratory experiment and a field experiment, which found no evidence that perceptions of decision control produce or influence perceptions of procedural justice); Tyler, *Psychological Models of the Justice Motive*, *supra* note 150, at 859 (finding that “both decision and process control mattered” in the legal arena while control did not matter in the managerial setting).

187. See LaTour et al., *Procedure: Transnational Perspectives and Preferences*, *supra* note 168, at 283 (finding that United States “participants prefer to control the process of evidence presentation themselves while a third party controls the result”).

188. See Lind et al., *In the Eye of the Beholder*, *supra* note 176, at 965 (reporting that “litigants viewed trial and arbitration as fairer than bilateral settlements” and viewed judicial settlement conferences as somewhat less fair than bilateral settlements, though the difference was not statistically significant). See also LaTour et al., *Procedure: Transnational Perspectives and Preferences*, *supra* note 168, at 274 (speculating that United States participants least prefer bargaining because “if litigants simply present their cases to each other (as in bargaining), they may choose to ignore each other or may prevent each other from making a complete presentation of the evidence”). But see TOM R. TYLER ET AL., PREFERRED, CHOOSING, AND EVALUATING DISPUTE RESOLUTION PROCEDURES: THE PSYCHOLOGICAL ANTECEDENTS OF FEELINGS AND CHOICES 28 (Am. Bar Found., Working Paper No. 9304, 1993) (reporting that while people’s post-procedure evaluations and preferences are most strongly influenced by issues of “treatment,” their actual selection among procedures is based on issues of “control”); Baruch Bush, *supra* note 11, at 18, 23, 26 (arguing that the procedural justice studies show that people prefer *consensual* processes because these provide the opportunity for participation in the decision-making process as well as an opportunity for voice); Shapiro & Brett, *supra* note 174, at 1175 (reporting that grievants “perceived greater procedural justice in mediation than in arbitration and ... perceived greater outcome and process control in mediation than in arbitration”).

justice judgments are affected much more strongly by variations in process control<sup>189</sup> than by variations in decision control.<sup>190</sup>

Ultimately, the procedural justice literature highlights the need to focus not solely on the fairness of outcomes, but also on the fairness of procedures.<sup>191</sup> Further, the literature suggests that disputants are less concerned about receiving formal due process during their experiences with the courts than they are about being treated in a manner that is consistent with their everyday expectations regarding social relations and norms.<sup>192</sup> The research studies themselves, however, do not explain why the opportunity for voice, consideration, and even-handed, dignified treatment are so important to disputants. Social science scholars have developed theories to explain the potency of procedural justice. These theories also assist the application of procedural justice principles to mediation.

### *C. Theories Explaining Procedural Justice*

Two theories—the “social exchange” theory and the “group value” theory—together explain the importance of procedural justice.<sup>193</sup> According to the social exchange theory, disputants value the opportunity for voice

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189. One commentator has defined process control as “the extent and nature of participant’s control over the presentation of evidence.” Tyler, *Psychological Models of the Justice Motive*, *supra* note 150, at 853. Other commentators have defined process control as “the extent to which disputants are given control over the content of the dispute resolution hearing.” Lind et al., *Decision Control and Process Control*, *supra* note 185, at 339.

190. Decision control is defined as “the extent and nature of people’s control over the actual decisions made.” Tyler, *Psychological Models of the Justice Motive*, *supra* note 150, at 853. Some studies have found that variations in decision control have no or much smaller effects on procedural justice judgments than variations in process control. LIND & TYLER, *supra* note 148, at 215. Furthermore, process control may be “more important to people’s feelings of being fairly treated than . . . decision control.” Tyler, *The Psychology of Procedural Justice*, *supra* note 150, at 837. But see Baruch Bush, *supra* note 11, at 23 (asserting that disputants prefer mediation and negotiation—at least in the small claims and divorce contexts—because they “offer greater opportunities for participation and communication”).

191. LIND & TYLER, *supra* note 148, at 217 (“The most important implication of the procedural justice literature is that . . . outcome-based conceptions of the person are incomplete—they ignore important concerns that people have. In particular, work in procedural justice shows a great concern with the processes of social life.”).

192. Lind, *Procedural Justice, Disputing, and Reactions to Legal Authorities*, *supra* note 151, at 187.

193. See Lind et al., *Reactions to Procedural Models*, *supra* note 168, at 179. Theorists also have raised a “cultural conditioning” theory, which posits that disputants prefer procedures that promote their cultures’ most important social bonds and that disputants are socialized to perceive such procedures as fair. *Id.* This suggests that American disputants prefer procedures in which they have an opportunity for voice because the American culture values the opportunity for expression and free speech. Specifically, some studies have revealed that people in other countries, with very different conflict resolution cultures, also prefer procedures that offer the opportunity for voice. *Id.* at 180.

because this provides them with the opportunity to influence the decision maker and indirectly influence the final outcome. Disputants “evaluate procedures in terms of the immediate financial and social benefits they receive from the procedure.”<sup>194</sup> Thus, procedure is important because it serves the disputants’ goals of achieving favorable outcomes. As previously noted, however, research has shown that disputants value voice even when they know they cannot influence outcomes.<sup>195</sup> This suggests that voice has a significance that is independent of its effect upon the outcome.

A second theory, the “group value” theory, supplements the social exchange theory and helps to explain the inherent value of voice.<sup>196</sup> The group value theory views procedures as something more than a means to achieve outcomes. The theory “emphasize[s] the symbolic and psychological implications of procedures for feelings of inclusion in society and for the belief that the institution using the procedure holds the person in high regard.”<sup>197</sup> By focusing on the symbolism and psychological implications of procedures, the group value theory explains the overwhelming importance of voice in affecting perceptions of procedural justice, even when such voice will not affect the outcome of a decision-making forum. The theory also provides a means for understanding the importance of dignified treatment and consideration of the views expressed by the disputants. All of these cues send powerful messages to disputants regarding their status in society, which then “validates their self-identity, self-esteem, and self-respect.”<sup>198</sup>

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194. Lind, *Procedural Justice, Disputing, and Reactions to Legal Authorities*, *supra* note 151, at 179.

195. Such research also challenged the theory proposed by Thibaut and Walker that the opportunity for voice is seen as fair because it permits the disputants to provide the decision maker with all information needed to permit the most equitable resolution. *Id.* at 180-81.

196. See Tyler, *Psychological Models of the Justice Motive*, *supra* note 150, at 858. Tyler observes that:

[D]istributive justice judgments do have a basis in the resources individuals receive in interactions with others [i.e. outcomes]. This supports traditional conceptions of the psychology of distributive justice. It suggests that social exchange concerns are important to any complete understanding of the psychology of justice. The data also suggest that the traditional conception of the psychology of distributive justice is too limited. Relational concerns also influence judgments of distributive justice. Hence, people’s feelings about the fairness of outcomes also reflect judgments about procedural justice.

*Id.* More recently, Lind and Tyler have hypothesized that people use their perceptions of procedural justice as a heuristic for determining whether they have received distributive justice. See *supra* note 151. See also Tyler, *The Psychology of Procedural Justice*, *supra* note 150, at 836 (suggesting that the influence of social exchange concerns on procedural justice judgments may be greater in dispute settings and when outcomes are unfavorable).

197. Lind, *Procedural Justice, Disputing, and Reactions to Legal Authorities*, *supra* note 151, at 182.

198. Tyler, *Psychological Models of the Justice Motive*, *supra* note 150, at 852.

Based on the group value theory and the findings of procedural justice research, Tom Tyler developed three categories of “relational concerns,”<sup>199</sup> or “indicators,”<sup>200</sup> that independently and “directly shape[] procedural justice judgments.”<sup>201</sup> Subsequent research has begun to indicate that disputants’ perceptions regarding these relational concerns also influence the effect of providing the disputants with an opportunity for voice in a dispute resolution process.<sup>202</sup> First, disputants are concerned about their “standing” as full members of society (also termed “status recognition”). The disputants’ assessments of their standing is dependent upon the way in which group authorities treat them.<sup>203</sup> Second, disputants assess the treatment they receive in order to determine whether the authorities involved in the decision-making procedure “are trustworthy and benevolently disposed toward”<sup>204</sup> them. “If people are able to infer a benevolent disposition, they can trust that in the long run the authority with whom they are dealing will work to serve their interests.”<sup>205</sup> Finally, disputants are concerned about “neutrality” and assess the “evenhanded[ness]”<sup>206</sup> of the treatment they receive and the extent to which decisions will be based on facts, not opinions.<sup>207</sup> Based on their evaluations of these relational concerns, disputants determine the security of their place in society. To the extent that decision-making procedures are structured to reassure disputants that they are valued members of society—and thus included in “the group”—such procedures are more likely to be perceived as procedurally just.<sup>208</sup>

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199. *Id.* at 853 (describing relational concerns and reporting field research results that support the influence of these concerns on procedural justice judgments). See Lind et al., *Procedural Context and Culture*, *supra* note 168, at 778-79 (finding that in a study of four different cultures, evidence of the “voice effect” is mediated by perceptions regarding relational concerns).

200. Tyler, *Psychological Models of the Justice Motive*, *supra* note 150, at 858.

201. *Id.*

202. Lind et al., *Procedural Context and Culture*, *supra* note 168, at 778 (finding “little support for the idea that voice has a substantial effect independent of the three relational variables”).

203. See Tyler, *Psychological Models of the Justice Motive*, *supra* note 150, at 851. See also Lind et al., *Procedural Context and Culture*, *supra* note 168, at 768 (describing “status recognition” as “feelings that the authority has treated the person with the dignity and respect appropriate for a full-fledged member of the group”).

204. Lind, *Procedural Justice, Disputing, and Reactions to Legal Authorities*, *supra* note 151, at 182. See also Lind et al., *Procedural Context and Culture*, *supra* note 168, at 768 (reframing “trust” as “trust in benevolence” and defining this relational term as “inferences about the authority’s motivations, especially the authority’s willingness to consider one’s needs and to try to make fair decisions”).

205. Tyler, *Psychological Models of the Justice Motive*, *supra* note 150, at 854.

206. *Id.* See also Lind et al., *Procedural Context and Culture*, *supra* note 168, at 768 (defining “neutrality” as “the belief that decisions are based on a full and open accurate assessment of the facts”).

207. Tyler, *Psychological Models of the Justice Motive*, *supra* note 150, at 854.

208. Research supports the importance of these indicators. See, e.g., Tyler, *The Psychology of*

It should be noted here that the group value theory does not assume that the disputants participating in a decision-making procedure are most concerned about gaining recognition or acknowledgment from each other. The group value theory does not focus on the relationship (or lack of a relationship) between the disputants. Rather, this theory and the research supporting the theory highlight the relationship between the disputants and the third party in decision-making procedures. The group value theory “assumes that people are concerned about their long-term social relationship with the authorities or institutions acting as third parties and do not view their relationship . . . as a one-shot deal.”<sup>209</sup> Research has demonstrated that “[p]eople care about their relationship with the third party. They react to evidence about how that person makes decisions, to information about their intentions, and to the interpersonal context of their interaction with each other.”<sup>210</sup>

The group value theory also does not assume that disputants seek a personal or spiritual recognition of each other’s “common humanity.”<sup>211</sup> Rather, this theory assumes that disputants search for something more limited—reassurance regarding their identities as valued members of society. Is the disputant respected enough by this society’s authorities that they grant him the opportunity to be heard and structure their decision-making process to ensure that he is treated with dignity? Do the authorities pay attention to what he has to say? Ultimately, what does their treatment suggest about the disputant’s placement in the social hierarchy?<sup>212</sup>

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*Procedural Justice*, *supra* note 150, at 836 (examining citizen experience with police and courts and finding that “issues of neutrality, trust, and standing . . . explain more about people’s reactions to their experiences than do variations in perceived control or outcome favorability”).

209. Tyler, *The Psychology of Procedural Justice*, *supra* note 150, at 831.

210. *Id.* at 836-37.

211. BARUCH BUSH & FOLGER, *supra* note 15, at 92. Bush and Folger explain that

[i]n the transformative orientation, the ideal response to a conflict . . . is to *help transform* the individuals involved . . . Responding to conflicts productively means utilizing the opportunities they present to change and transform the parties as human beings. It means encouraging and helping the parties to use the conflict to realize and actualize their inherent capacities both for strength of self and for relating to others. It means bringing out the intrinsic goodness that lies within the parties as human beings.

*Id.* at 82. See also Jerry L. Mashaw, *Administrative Due Process: The Quest for a Dignitary Theory*, 61 B.U. L. REV. 885, 930 (1981) (describing the “procedural barrenness of liberal theory,” which does not respond to man’s fundamental sociability and his interest in “a relationship in which he both knew and was known. For it may be that we cannot, after all, ever know ourselves except as mediated and reinforced by association with others.”) (citing ROBERTO MANGABEIRA UNGER, *KNOWLEDGE AND POLITICS* 191-235 (1975)).

212. See Tyler, *The Psychology of Procedural Justice*, *supra* note 150, at 837 (discussing standing within a group).

In some sense, it is easier to intuit why disputants care so much about procedural justice when they will be subject to a third party's decision regarding their dispute. If disputants perceive that the third party is treating them and their dispute in a procedurally just manner, then it becomes somewhat easier to trust that the third party's decision will be based on all relevant information and that the third party will attempt to make a substantively just decision. Mediation, however, assumes that the *disputants* will maintain control over the resolution of their disputes. There will be no outcome unless they agree to it. They are not vulnerable to the whims of a third-party decision maker. Under these circumstances, why should mediation participants care about procedural justice?<sup>213</sup> Further, why should the courts care about the existence of procedural justice in the mediation process? The next part of this Article will explain why the procedural justice paradigm does and should apply to mediation, despite the consensual nature of the process.

### III. EXAMINING WHETHER THE PROCEDURAL JUSTICE PARADIGM SHOULD APPLY TO MEDIATION

If mediation is viewed as fitting exclusively within the bargaining paradigm, there is little reason to propose that disputants participating in mediation are entitled to experience procedural justice. Courts certainly do not expect procedural justice in the negotiation process. Judicial review of the negotiation underlying a settlement agreement generally is limited to determining whether the negotiation was marred by fraud,<sup>214</sup> misrepresentation,<sup>215</sup> mutual mistake,<sup>216</sup> coercion or duress,<sup>217</sup> or undue influence.<sup>218</sup> Under extremely limited circumstances, judicial review will include consideration of the "candor, openness and bargaining balance"<sup>219</sup> of

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213. This question is grounded in the assumption that disputants' voice matters only because it serves as a means to "secure fair outcomes." Lind, *Procedural Justice, Disputing, and Reactions to Legal Authorities*, *supra* note 151, at 181. E. Allan Lind, Tom Tyler, and others were troubled by this assertion and "questioned how [it] . . . could be reconciled with laboratory research . . . showing that voice effects occur even when disputants have more direct means to assure the fairness of outcomes (as is the case in mediation procedures, where the disputants can reject outcomes that they feel are unfair)." *Id.*

214. *See* RESTATEMENT (SECOND) OF CONTRACTS §§ 162, 164 (1982).

215. *See id.* at §§ 162-64.

216. *See id.* at § 152.

217. *See id.* at § 175. *See also* *Machinery Hauling, Inc. v. Steel of W. Va.*, 384 S.E.2d 139, 141-44 (W. Va. 1989) (discussing duress defenses in contract enforcement actions).

218. *See* RESTATEMENT (SECOND) OF CONTRACTS § 177 (1982).

219. *United States v. Cannons Eng'g Corp.*, 899 F.2d 79, 86 (1st Cir. 1990). In cases involving claimed violations of the Comprehensive Environmental Response, Compensation and Liability Act of

the settlement negotiations or whether the settlement agreement represents the exercise of parties' free and informed will.<sup>220</sup> However, courts rarely concern themselves with the extent to which the underlying negotiation affirmatively provided the parties with the opportunity to be heard, to have their perceptions considered by the other side, or to be treated with dignity and respect.<sup>221</sup>

Empirical studies of litigants' experiences in the negotiated resolution of their cases further suggest that the courts would not find much procedural justice in court-connected negotiation if they chose to look for it. Several years ago, a study involving personal injury litigants in three different state courts compared the litigants' perceptions of the procedural justice provided by trial, court-connected arbitration, judicial settlement conferences, and

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1980 (CERCLA), the government frequently negotiates proposed consent decrees with companies and individuals identified as potentially responsible parties (PRPs). Before such a consent decree may be entered, the court must determine whether the decree is reasonable, fair, and consistent with CERCLA's goals. *Id.* at 84. In assessing the decree's fairness, the court must consider the procedural fairness of the proposed settlement which requires a review of the "candor, openness, and bargaining balance of the settlement process." *Id.* at 86. Specifically, courts have focused on whether the complaining PRPs were or should have been given the opportunity to participate in the negotiation process. *United States v. Am. Cyanamid Co., Inc.*, No. 2:93-0654, 1997 U.S. Dist. LEXIS 4692, at \*23, \*31 (S.D.W. Va. 1997). *See also* *United States v. Davis*, 11 F. Supp. 2d 183, 189 (D.R.I. 1998) ("Generally, the requirement of procedural fairness is satisfied if . . . all parties . . . are afforded an opportunity to participate . . ."); *Arizona v. Nucor Corp.*, 825 F. Supp. 1452, 1458 (D. Ariz. 1992) (examining whether the government misled the complaining PRPs regarding the negotiation process). The courts have also looked at whether the government bargained in good faith. *United States v. Bay Area Battery*, 895 F. Supp. 1524, 1529 (N.D. Fla. 1995) (examining whether the government made reasonable efforts to collect and analyze financial data before agreeing to specific payment terms); *Nucor*, 825 F. Supp. at 1458 (requiring government to operate in good faith). In assessing the procedural fairness of the bargaining process, courts specifically have found that the government is not required to invite all PRPs to participate in negotiations and that the government is not required to "telegraph its settlement offers, divulge its negotiating strategy in advance, or surrender the normal prerogatives of strategic flexibility." *Cannons Eng'g*, 899 F.2d at 93. Although the courts use the term "procedural fairness" in their review of the negotiations that led to the proposed decrees, they do not examine the underlying negotiations to determine the opportunity for voice, consideration by the other negotiators, and respectful and dignified treatment. *But see* *United States v. Kramer*, 19 F. Supp. 2d 273, 284-85 (D.N.J. 1998) (reviewing a proposed decree developed through a nonbinding mediation/arbitration procedure involving a third party, court evaluated the procedure to determine the extent of participants' involvement in developing the procedure, the participants' opportunity to be heard regarding allocation factors and proposed allocations, and the third party's consideration of the participants' views).

220. For example, in a settlement agreement with a seaman, the shipowner bears the burden of establishing the validity of the seaman's release of claims and must show that the release "was executed freely, without deception or coercion, and that it was made by the seaman with full understanding of his rights." *Castillo v. Spiliada Mar. Corp.*, 937 F.2d 240, 244 (5th Cir. 1991) (quoting *Garrett v. Moore-McCormack Co.*, 317 U.S. 239, 248 (1942)). The shipowner bears the burden because "seamen have enjoyed a special status in our judicial system . . . because they occupy a unique position. A seaman isolated on a ship on the high seas is often vulnerable to the exploitation of his employer." *Castillo*, 937 F.2d at 243.

221. *See supra* note 219.

traditional bilateral negotiations (i.e., negotiations between the litigants' attorneys).<sup>222</sup> Although litigants clearly retained control over the final outcome<sup>223</sup> of bilateral negotiations between their attorneys, litigants ranked this process as significantly less procedurally fair than either trial or court-connected arbitration.<sup>224</sup> The procedural fairness ratings for judicial settlement conferences were even slightly lower than the ratings for bilateral negotiations, although the difference was not statistically significant.<sup>225</sup> The reasons for these perceptions will be examined in greater detail below, but the research results affirm a real-life disconnect between the delivery of procedural justice and court-connected negotiation processes. These results raise concerns about the procedural justice-related consequences of modeling court-connected mediation after either attorneys' bilateral negotiations or judicial settlement conferences.

The theories underlying the importance of procedural justice help to explain why procedural justice is not expected of the negotiations underlying settlement. The group value theory suggests that procedural justice is important because people are concerned about how they are perceived by the authority presiding over a decision-making process. The negotiation process, however, does not involve a decision-making authority. Instead, it involves just another self-interested negotiator. Arguably, litigants who opt out of the state-sponsored processes that involve third-party decision makers (i.e., the courts) also effectively waive any expectation of procedural justice. Taking the courts' perspective, once litigants withdraw from participation in the trial process, the courts (and society) are under no obligation to ensure that their cases are resolved in procedurally just processes. The litigants are on their own.<sup>226</sup>

The other major theory explaining the importance of procedural justice, the social exchange theory, argues that procedural justice is important to disputants because it is only through the opportunity for voice that the disputants retain some level of indirect control over the outcome. However,

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222. Lind et al., *In the Eye of the Beholder*, *supra* note 176, at 961-63.

223. It is worth noting, however, that there was no significant difference between litigants' perceptions of their control (either over outcome or process) in bilateral negotiations compared to their control in the trial or arbitration processes. *Id.* at 967. In addition, the means for litigant control ratings were relatively low across all processes. *Id.* at 993-94.

224. *Id.* at 965.

225. *Id.* at 965-66.

226. This perspective is consistent with the conception that settlement is a "product of a consensual private departure from the public forum [and that] [t]he results [are] an accidental byproduct for which the court [is] not accountable." Galanter & Cahill, *supra* note 11, at 1390-91 (arguing that courts can no longer define themselves or be defined as responsible only for adjudication; they must ensure the quality of dispute resolution processes and settlements).

in negotiation, there is no need for disputants to exercise indirect control. They retain full and direct control over their own decision whether or not to settle and upon what terms. Thus, they retain direct control over the outcome.

Because negotiation does not involve an authority and does not remove disputants' control over outcomes, it is understandable that expectations of procedural justice generally are not applied to the bargaining process.<sup>227</sup> If mediation is viewed as merely assisted negotiation, it is equally easy to understand why one might conclude that procedural justice also need not be expected of this process.<sup>228</sup>

However, mediation is different from negotiation simply because it involves the presence of a neutral third party.<sup>229</sup> Particularly in court-connected mediation, this third party is likely to be perceived as a representative of the courts and as an authority figure.<sup>230</sup> This perception of the mediator as an authority, and of mediation as a socially-sanctioned decision-making process, is likely to be even stronger when the use of mediation is court-mandated or court-encouraged.<sup>231</sup> Under these

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227. Although procedural justice is not expected of the negotiation process, some researchers have begun to identify the dynamics within negotiation that produce enhanced perceptions of procedural fairness. *See, e.g.,* Lind et al., *Procedural Context and Culture*, *supra* note 168, at 778 (discussing two laboratory studies involving four cultures that indicate that when people are engaged in "dyadic conflict resolution," procedural justice judgments are based primarily upon perceptions of status recognition and neutrality, but when people are engaged in third-party dispute resolution processes, procedural justice judgments are influenced more strongly by perceptions of trust).

228. Frankly, if mediation is viewed as a substitute for judicial settlement conferences (another process involving a third party authority) it is less easy to justify the inapplicability of procedural justice principles. Professor Carrie Menkel-Meadow, for example, has observed that judges may conceive of their overriding goal in settlement conferences as "facilitation of . . . procedural justice," but this goal competes with others, such as "efficient case management," "facilitation of substantive justice," or "simple brokering of what would occur anyway in bilateral negotiations." *See* Carrie Menkel-Meadow, *For and Against Settlement: Uses and Abuses of the Mandatory Settlement Conference*, 33 UCLA L. REV. 485, 506 (1985).

229. In making this point, Craig McEwen and Richard Maiman have further assumed that the mediator must be educated in the mediation session:

Mediation and negotiation differ in that the former involves a third party whereas the latter does not. The presence of the third party makes it likely that the consensual process in mediation will differ in some respects from that in negotiation. A mediator, in order to understand the dispute, needs to have the disputants review and clarify their perceptions of facts, events, commitments, obligations, demands and disagreements. In bilateral negotiations such a detailed review is neither as necessary, nor as likely.

McEwen & Maiman, *Mediation in Small Claims Court*, *supra* note 150, at 14-15.

230. *See* Wayne D. Brazil, *Continuing the Conversation About the Current Status and the Future of ADR: A View from the Courts*, 2000 J. DISP. RESOL. 11, 24 (2000) (noting that litigants, lawyers and the general public perceive neutrals in court-sponsored ADR programs as representatives of the court). *See also* McEwen & Maiman, *Mediation in Small Claims Court*, *supra* note 150, at 15 (observing that "the presence of a mediator makes a consensual commitment semi-public in character").

231. Indeed, Professor Richard Reuben has even suggested that some due process guarantees

circumstances, the group value theory suggests that disputants will care very much about the mediator's behavior and will interpret it as a sign of the judiciary's attitude toward them and their disputes.<sup>232</sup>

The social exchange theory is also relevant to mediation because there will only be an outcome if all of the disputants agree to one.<sup>233</sup> Simply, in order to reach a mutually acceptable agreement, the disputants generally must persuade each other to move from mutually exclusive positions. Such persuasion requires that the disputants hear and understand each other's voice. Often, this also requires the mediator to hear and understand the disputants' voices, so that the mediator can then use the information he has learned to encourage each of the disputants to make responsive (and perhaps even creative) new offers and demands.

Ultimately, it is not surprising that research has demonstrated that procedural justice concerns apply just as much to mediation as to the third-party processes that produce binding outcomes.<sup>234</sup> Indeed, some commentators have warned of a "potentially serious problem—the diminution of perceived fairness—if the flight from adversariness is carried too far"<sup>235</sup> and have recommended that "care must be taken to provide the disputant with clear procedural mechanisms for the exercise of process control in the mediation hearing."<sup>236</sup>

The rhetoric and data used to introduce mediation to the courts and to persuade litigants to submit their cases to this dispute resolution process (or to acquiesce in court-ordered submission of their cases to the process) also support the application of procedural justice considerations to mediation. Professor Deborah Hensler recently noted that in urging courts to institutionalize mediation, advocates "tended to sell ADR . . . to litigants as

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apply to court-connected ADR processes once they are mandated, encouraged, or enforced by the courts. See Richard C. Reuben, *Constitutional Gravity: A Unitary Theory of Alternative Dispute Resolution and Public Civil Justice*, 47 UCLA L. REV. 949, 1046-1101 (2000).

232. See Shapiro & Brett, *supra* note 174, at 1174 (reporting that the noninstrumental importance of voice was "relatively" as important in mediation as in arbitration in accounting for judgments of procedural justice).

233. Recent research supports the relevance of both the group value theory and the social exchange theory in mediation. See, e.g., *id.* at 1174-75 (reporting that field study results demonstrate that "instrumental, non-instrumental, and enactment processes account for judgments of procedural justice both in mediation, where disputants have control over the outcome, and in arbitration, where a third party has control over the outcome").

234. See, e.g., *id.* at 1174 (comparing procedural justice judgments in mediation and arbitration of miners' grievances). See also Lind et al., *Decision Control and Process Control*, *supra* note 185, at 345-48 (reporting results of a laboratory study demonstrating that perceptions of process control are not enhanced by the existence of decision control and that process control enhances fairness judgments of individuals experiencing a nonbinding dispute resolution procedure).

235. Lind et al., *Decision Control and Process Control*, *supra* note 185, at 347.

236. *Id.*

something that [would] improve the quality of the dispute resolution *process* and outcomes.”<sup>237</sup> As I have suggested elsewhere, proponents of mediation argued that one of the most important procedural attributes of the mediation process—and one of its most significant improvements upon both trial and attorney-controlled negotiation—was the disputants’ active and direct participation in the communication and negotiation occurring within the mediation session.<sup>238</sup> Mediation, unlike trial or traditional bilateral negotiations, gave the disputants the opportunity to tell their stories themselves—to have voice—and to be heard by each other and by the neutral third party.

Procedural justice considerations also were recognized as relevant to mediation in the development of standards of conduct for mediators and in the many studies evaluating mediator performance and litigant satisfaction. In the *Model Standards of Conduct for Mediators*, mediation proponents explicitly invoked the significance of procedural fairness as a measure of the quality of the mediation process. Standard VI, entitled, “Quality of the Process,” provides that “[a] mediator shall work to ensure a quality process[.]” which is defined as one that “requires a commitment by the mediator to diligence and procedural fairness.”<sup>239</sup> In satisfaction studies of mediation—used both to promote the introduction of mediation to the courts and to evaluate court-connected mediation programs<sup>240</sup>—researchers consistently invoked procedural justice by querying whether litigants were “given an adequate opportunity to express [their] view[s],”<sup>241</sup> whether the

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237. Deborah R. Hensler, ADR 2000: Court-Sponsored ADR Programs, Address at the Association of American Law Schools Centennial Annual Meeting (Jan. 7, 2000) [hereinafter Heisler, ADR 2000: Court-Sponsored ADR Programs] (emphasis added).

238. See Welsh, *supra* note 14. See, e.g., FOLBERG & TAYLOR, *supra* note 13, at xiii (“Those involved in mediation are not simply recipients of a service; they are actively involved in the process as participants.”); Janet M. Rifkin & JoAnne Sawyer, *Alternative Dispute Resolution—From A Legal Services Perspective*, NLADA BRIEFCASE, Fall 1982, at 20, 22 (“Participation in the resolution of their own disputes can give clients a sense of control over their own lives in contrast to the feeling of being victims of [a] legal process they do not understand.”).

239. See AM. ARB. ASS’N ET AL., *MODEL STANDARDS OF CONDUCT FOR MEDIATORS*, IV (1994). Standard IV fails to define procedural fairness or to reference the indicia of procedural justice uncovered by research, but it provides that “[t]here should be adequate opportunity for each party in the mediation to participate in the discussions.” *Id.* Thus, mediation is distinguished by the extent to which it permits disputants to participate and have a voice.

240. See, e.g., McEwen & Maiman, *Mediation in Small Claims Court*, *supra* note 150, at 31 (measuring participants’ perception of fair treatment in mediation of cases involving small claims).

241. KOBBERVIG, *supra* note 59, at 38. See also THE CJRA DEMONSTRATION PROJECT, *ALTERNATIVE DISPUTE RESOLUTION IN THE NORTHERN DISTRICT OF CALIFORNIA: A SURVEY OF ATTORNEYS 2* (1993) [hereinafter *ALTERNATIVE DISPUTE RESOLUTION IN THE NORTHERN DISTRICT OF CALIFORNIA*]. The survey asked attorneys to gauge the helpfulness of the ADR process in “[g]iving one or more parties an opportunity to ‘tell their story.’” *Id.* See also Chris Guthrie & James Levin, *A “Party Satisfaction” Perspective on a Comprehensive Mediation Statute*, 13 OHIO ST. J. OF DISP.

mediation process “handle[d] [their] case fairly,”<sup>242</sup> whether litigants perceived that the mediator was “fair and impartial in dealing with [their] case[.]”<sup>243</sup> and whether “the other side heard”<sup>244</sup> what they had to say. As should be evident, from the beginning of mediation’s institutionalization within the courts, the process was treated differently than negotiation. Although there was no suggestion that negotiation should be procedurally fair, both mediation proponents and the courts<sup>245</sup> consistently demanded procedural fairness of mediation and even indicated that the quality of mediation would be measured by the extent to which it delivered procedural justice to the disputants.<sup>246</sup>

As mediation has transmogrified in the court-connected context, however, commentators have begun to observe that courts need to be reminded of their earlier definition of and commitment to quality in mediation. Professor Hensler recently urged that there is a need to “challenge courts to make good on . . . promises [regarding the quality of the mediation process] that are made to disputants” and added that this need is “becoming ever more critical as courts order people to use these procedures on the claims that these procedures are doing something better for them.”<sup>247</sup> Magistrate Judge Wayne Brazil has echoed this concern and has observed that the quality of mediation reflects upon the quality and mission of the courts:

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RESOL. 885, 891 n.19 (1998) [hereinafter Guthrie & Levin, *A “Party Satisfaction” Perspective*] (listing examples of evaluation data that focus on the opportunity for voice provided by the mediation process).

242. KOBBERVIG, *supra* note 59, at 38; ALTERNATIVE DISPUTE RESOLUTION IN THE NORTHERN DISTRICT OF CALIFORNIA, *supra* note 241, at 5. *See also* Guthrie & Levin, *A “Party Satisfaction” Perspective*, *supra* note 241, at 892 n.20 (listing examples of evaluation data that focus on the perceived fairness of the mediation process).

243. KOBBERVIG, *supra* note 59, at 39; ALTERNATIVE DISPUTE RESOLUTION IN THE NORTHERN DISTRICT OF CALIFORNIA, *supra* note 241, at 3.

244. KOBBERVIG, *supra* note 59, at 38; ALTERNATIVE DISPUTE RESOLUTION IN THE NORTHERN DISTRICT OF CALIFORNIA, *supra* note 241, at 3. This survey asked attorneys to rank the neutral third party based on whether she was “[a] good listener” or “[a] poor listener.” *Id.*

245. I am not suggesting here that civil litigators ever demanded that mediation should be judged by its procedural fairness.

246. Mediation proponents particularly recommended that as courts ordered litigants into mediation (and thus reduced litigants’ autonomy), the courts’ responsibility for insuring quality increased. *See* CENTER FOR DISPUTE SETTLEMENT & THE INSTITUTE OF JUDICIAL ADMINISTRATION, NATIONAL STANDARDS FOR COURT-CONNECTED MEDIATION PROGRAMS ii (noting that “[t]he goal of the Standards is to inspire court-connected mediation programs of high quality”).

247. Hensler, *ADR 2000: Court-Sponsored ADR Programs*, *supra* note 237. *See also* Edward F. Sherman, *A Process Model and Agenda for Civil Justice Reforms in the States*, 46 STAN. L. REV. 1553, 1571 (1994) (“The further ‘institutionalization’ of ADR as a settlement device has raised additional fears of undermining the voluntary nature of ADR and subordinating its problem-solving and relationship-building goals to cost-efficiency and docket-clearing objectives.”).

The goal of an ADR program that is sponsored by a public court cannot be simply to have the disputing be over. The business of the courts is not business—it is justice. And the dimension of justice for which courts are primarily responsible is process fairness—which includes, among many other things, assuring that all people stand equal before the law and are greeted by the judicial system with the same presumption of respect. It follows that the primary concern of any court that sponsors an ADR program must be with the process fairness of the services that are provided in that court's name. Those processes must be fully respect-worthy.<sup>248</sup>

This concern about the process quality of mediation is not simply altruistic. As revealed by the procedural justice studies previously described, courts actually invite questions about their legitimacy to the extent that they fail to deliver dispute resolution processes that are perceived as procedurally just.<sup>249</sup> Viewed in this way, it is in the courts' institutional self-interest<sup>250</sup> to ensure that court-connected mediation is structured to maximize the experience of procedural fairness.

If it is accepted that perceptions of procedural justice are relevant and even essential to the definition of quality in mediation within the court context, the next step is to apply the lessons from the procedural justice literature to the new model of mediation used in the courts. Part II of this Article examined the four most significant adaptations that have occurred in court-connected mediation and applied negotiation theory and research

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248. Wayne D. Brazil, *Comparing Structures for the Delivery of ADR Services by Courts: Critical Values and Concerns* 14 OHIO ST. J. ON DISP. RESOL. 715, 727-28 (1999) [hereinafter Brazil, *Comparing Structure for the Delivery of ADR Services*]. See Brazil, *Continuing the Conversation*, *supra* note 230, at 24 (The courts' "most precious asset is the public's trust" and such trust is grounded in the public's belief "that the aspect of justice for which [the courts] are primarily responsible is process fairness, process integrity. It follows that the characteristic of our ADR programs about which we must be most sensitive is fairness, especially process fairness.").

249. See LIND & TYLER, *supra* note 148, at 209 (summarizing studies that have "found that procedural justice judgments affect the evaluation of authorities and institutions").

250. Although fearing that his views will be perceived as "institutional selfishness or narcissism," Magistrate Judge Wayne Brazil has written eloquently on this point:

Courts are charged with performing what is probably the most important function of government: peacefully resolving disputes and thus giving order and stability to relationships that do not order and stabilize themselves. Courts cannot perform this essential function unless the vast majority of people in our society will comply peacefully with the courts' decisions. Over time, in a democracy, the people will comply only if they trust and respect the courts as institutions. It follows that we must take great care to do nothing that jeopardizes that trust and respect. This is the main chance. So when we design court-sponsored ADR programs our greatest concern should be to preserve, at least, and to increase, if possible, the people's respect for, confidence in, and gratitude toward our system of justice.

Brazil, *Comparing Structures for the Delivery of ADR Services*, *supra* note 248, at 738.

findings to explain and generally affirm these changes. Part IV revisits these changes in order to evaluate them according to the research findings and theories of procedural justice.

#### IV. THE APPLICATION OF THE PROCEDURAL JUSTICE PARADIGM TO THE ADAPTATIONS IN COURT-CONNECTED MEDIATION

##### *A. The Reduced Role for Disputants in Court-Connected Mediation*

As previously described, even though mediation arose to empower disputants to resolve their own disputes, these disputants generally are not the central actors in court-connected mediation sessions and, in some courts' programs, are rarely in attendance.<sup>251</sup> To what extent is this modification of the mediation process consistent with the procedural justice paradigm?

There can be little doubt that de facto exclusion of the disputants from mediation sessions is inconsistent with delivering a procedure that people will perceive as procedurally just. As noted earlier, when researchers evaluated litigants' reactions to bilateral negotiation, judicial settlement conferences, arbitration, and trial, they found that the litigants gave the lowest marks for procedural fairness to bilateral negotiation and judicial settlement conferences.<sup>252</sup> Further, even though the litigants arguably retained the most control in both of these consensual processes (there were no settlement outcomes unless the litigants agreed to such outcomes) they did not perceive themselves as having any more control in these processes than in trial or in arbitration.<sup>253</sup> One important difference between the consensual processes (i.e., bilateral negotiation and judicial settlement conferences) and the adjudicative processes (i.e., trial and arbitration) may help to explain these findings. Simply, the disputants generally did not participate in the bilateral negotiations or judicial settlement conferences. They were excluded from these consensual process by their attorneys and the judges.<sup>254</sup> In both procedures, for the negotiation-enhancing reasons previously described, the

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251. See *supra* Part I.A. See also *supra* note 75 and accompanying text.

252. See Lind et al., *In the Eye of the Beholder*, *supra* note 176, at 965. For a discussion of perceptions of procedural fairness in a variety of contexts, see generally *supra* Part III.

253. See Lind et al., *In the Eye of the Beholder*, *supra* note 176, at 967, 993-94.

254. Indeed, only five of the fifty-three settlement conference litigants included in the final analytic sample reported in *In the Eye of the Beholder* indicated that they attended the conference. *Id.* at 963 n.11. See also Riskin, *The Represented Client in a Settlement Conference*, *supra* note 52, at 1105 (observing that judges' and lawyers' shared anxieties about client attendance and participation "may cause an unspoken and, perhaps, unconscious conspiracy between lawyers and judges to exclude clients from all or important parts of settlement conferences").

attorneys and judges likely viewed the disputants' participation as "unnecessary and possibly counterproductive."<sup>255</sup>

The effect of excluding the disputants is to deny them even the opportunity to observe their attorneys' presentations and arguments. Such a denial is likely to reduce the disputants' perception of the procedural fairness of the decision making process<sup>256</sup> for two reasons, both related to the theories that have been developed to explain the potency of procedural justice considerations. The social exchange theory posits that disputants value the opportunity to have their voice heard and considered because this represents their means to influence the outcome of the decision making process. The group value theory explains that disputants desire the opportunity to have their voice heard and considered, as well as the opportunity to be treated with dignity and respect, because this reassures them of their place in society. When disputants are excluded from mediation sessions, they do not have the opportunity to hear their attorneys express their voice, to assess the extent to which the mediator and the other side consider this voice, or to be treated by the court's representative with dignity and respect. Thus, they cannot be reassured that their story was ever communicated, let alone that it influenced the outcome.<sup>257</sup> Further, in excluding the disputants from the mediation session, courts, attorneys, and mediators send a message that is directly contrary to the social reassurance sought by disputants. The message goes something like this: "You, disputant, cannot count yourself as included within the 'group' that will discuss and try to resolve your dispute. Despite the fact that this is your dispute, you are inadequate to participate in this 'group.' Only the professionals are truly capable here." The de facto exclusion of disputants from mediation sessions is clearly inconsistent with the procedural justice paradigm.

Fortunately, in many court-connected mediation programs, the disputants do attend mediation sessions. However, as noted earlier, the disputants'

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255. Lind et al., *In the Eye of the Beholder*, *supra* note 176, at 963. See also Riskin, *The Represented Client in a Settlement Conference*, *supra* note 52, at 1098-105 (describing the advantages and disadvantages of client attendance at settlement conferences and lawyers' and judges' preferences).

256. See LIND ET AL., *THE PERCEPTION OF JUSTICE*, *supra* note 100, at 79 (observing that "[a]t least some of the unfavorable impressions of settlement conferences may be due to impressions formed by litigants who could not attend the conferences and who therefore could not see that the conferences were dignified, careful, or otherwise desirable even if they were").

257. Indeed, some research suggests that when lawyers give a general overview of the legal process and describe particular procedures to their clients, they emphasize the extent to which disputants' stories are not heard or considered by judges and opposing counsel. See Austin Sarat & William L.F. Felstiner, *Lawyers and Legal Consciousness: Law Talk in the Divorce Lawyer's Office*, 98 YALE L.J. 1663, 1676-82 (1989) (describing divorce lawyers' discussions with their clients).

participation is likely to be limited because their attorneys dominate the discussion and negotiation.<sup>258</sup> Is this reduced role for disputants inconsistent with procedural justice (i.e., the opportunity to have a voice, to have this voice considered, and to be treated with dignity and respect)? The procedural justice literature reveals that the response to this question depends very much upon the relationship between attorneys and their clients.

On one hand, even with the disputants in attendance, attorneys' domination of mediation sessions can be understood to mean that the disputants never have a real opportunity to tell their own stories. The attorneys express the disputants' voice. Research suggests that attorneys often fail to hear their clients' experiences, perceptions, or objectives.<sup>259</sup> It is hard to imagine that these attorneys will then be able to recount their clients' stories in a way that fully captures the clients' experiences and perceptions.<sup>260</sup> Further, in some mediation sessions, the attorneys effectively waive the opportunity to tell their clients' stories by making brief opening statements in joint session (or none at all), based on the assumption that everyone in the room already knows what occurred and that the available time will be better spent hammering out a negotiated agreement. If the disputants perceive that their attorneys are not truly vocalizing their interests—either because the attorneys choose not to tell their clients' stories

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258. See *supra* Part I.A.

259. See Hensler, *The Real World of Tort Litigation*, in EVERYDAY PRACTICES AND TROUBLE CASES, *supra* note 86, at 156-63 (contrasting tort plaintiffs' desire for accountability and vindication of their legal rights with lawyers' monetary focus in assessing claims). See also Clark D. Cunningham, *The Lawyer as Translator, Representation as Text: Towards an Ethnography of Legal Discourse*, 77 CORNELL L. REV. 1298, 1367-85 (1992) (describing lawyers' translation of a clinical client's racial harassment case into a "stop and frisk" case for purposes of litigation); Gay Gellhorn, *Law and Language: An Empirically-Based Model for the Opening Moments of Client Interviews*, 4 CLINICAL L. REV. 321, 350-53 (1998) (describing a clinical law student's failure to hear a client's concern regarding her mental state); Carl Hosticka, *We Don't Care What Happened, We Only Care About What Is Going to Happen*, 26 SOC. PROBS. 599, 601-05 (1979) (describing lawyer-client interviews in which lawyers quickly interrupted client's narrative and began pursuing a legal pigeonhole for case); Sternlight, *supra* note 90, at 320-31 (describing monetary, nonmonetary, and psychological divergences between lawyers and clients that result in lawyers blocking settlements or reaching settlements that are inconsistent with clients' self-defined interests).

260. See Cunningham, *supra* note 259, at 1375 (describing effect of lawyers' presentation of case as a stop and frisk case, rather than racial harassment case); Gellhorn, *supra* note 259, at 350-53 (describing effect of failure to hear information regarding a client's psychiatric disorder on the theory of a case); David B. Wilkins, *Everyday Practice Is the Troubling Case: Confronting Context in Legal Ethics*, in EVERYDAY PRACTICES AND TROUBLE CASES, *supra* note 86, at 68, 86 [hereinafter Wilkins, *Everyday Practice Is the Troubling Case*] ("Individual clients . . . often come to lawyers . . . because the system forces them to resolve their problems through legal channels. In these circumstances, what the client is often really seeking from her lawyer is help with, or at least understanding of and compassion about, the real circumstances of her life. By forcing the client to define the problem in legal terms, and then to maximize every available legal advantage, lawyers often neglect the issues that are most important to their clients.") (citations omitted).

or because the attorneys do not fully understand or convey those stories—the disputants will not likely perceive that the mediation process affords them the opportunity to be heard.

On the other hand, many attorneys do effectively represent their clients' stories in mediation, both in joint session and in caucus. These attorneys fully understand their clients' experiences and perceptions and eloquently describe them to the mediator and the other side. The clients of these attorneys may sit quietly, satisfied and indeed relieved that their attorneys are speaking on their behalf. Some mediators and commentators may nonetheless object, contending that the behavior of these articulate attorneys and their silent clients violates the participatory and client-centered underpinnings of mediation.<sup>261</sup> Within the context of the courts, the more relevant question is whether this behavior violates procedural justice.

The procedural justice literature strongly suggests that clients will perceive that they were given an opportunity for voice if they believe that their attorneys effectively communicated their stories. In the early studies that first uncovered the effect of voice on perceptions of procedural and distributive fairness,<sup>262</sup> the disputants' voice was communicated entirely through their attorneys' presentations to a judge. The perception of whether or not there was an opportunity for voice depended upon the relationship between the disputants and their attorneys.

A bit of detail regarding the design of these early studies<sup>263</sup> is helpful in understanding their findings. Half of the disputants in the studies experienced an adversarial trial procedure; the other half experienced a nonadversarial or "inquisitorial" trial procedure.<sup>264</sup> The procedures were similar in many ways:

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261. FOLBERG & TAYLOR, *supra* note 13, at xiii ("Those involved in mediation are not simply recipients of a service; they are actively involved in the process as participants."); Rifkin & Sawyer, *supra* note 238, at 22 ("Participation in the resolution of their own disputes can give clients a sense of control over their own lives in contrast to the feeling of being victims of a legal process they do not understand.").

262. See Stephen LaTour, *Determinants of Participant and Observer Satisfaction with Adversary and Inquisitorial Modes of Adjudication*, 36 J. OF PERSONALITY AND SOC. PSYCH. 1531 (1978) [hereinafter LaTour Study]; E. Allan Lind et al., *Procedure and Outcome Effects on Reactions to Adjudicated Resolution of Conflicts of Interest*, 39 J. PERSONALITY & SOC. PSYCHOL. 643 (1980) [hereinafter Lind Study]; Laurens Walker et al., *Reactions of Participants and Observers to Modes of Adjudication*, J. OF APPLIED SOC. PSYCH. 295 (1974) [hereinafter Walker Study].

263. The early studies were very similar in design. The Walker Study was conceived primarily in response to contemporary proposals to expand the use of inquisitorial procedures in the United States. Walker Study, *supra* note 262, at 296-98. (distinguishing adversarial and inquisitorial models and describing their significance). The LaTour and Lind Studies were designed to follow up on the "preliminary" results of the Walker Study. LaTour Study, *supra* note 262, at 1532; Lind Study, *supra* note 262, at 644.

264. See LaTour Study, *supra* note 262, at 1535 (using four models—nonadversarial with single investigator, nonadversarial with two investigators, adversarial with assigned adversary, and

the disputants were interviewed by attorneys; the attorneys then made unemotional and substantively-identical presentations of evidence and arguments<sup>265</sup> to the judges presiding over the trials; the disputants attended but never spoke at their trials;<sup>266</sup> and after hearing the evidence presented, the judges issued written verdicts that had been prepared in advance.<sup>267</sup> The differences between the procedures related primarily to the relationship between the disputants and the attorneys. The disputants involved in the adversarial trial procedure selected their own attorneys.<sup>268</sup> These attorneys then represented the disputants and presented their cases at trial “in the most favorable light possible.”<sup>269</sup> The half of the disputants involved in the nonadversarial or inquisitorial trial procedure were also interviewed by attorneys, but these attorneys were selected by the court, not the disputants, and the attorneys did not represent the disputants. Instead, this group of attorneys—called the court’s “investigating attorney[s]” in one study<sup>270</sup>—was responsible to the court.<sup>271</sup> These attorneys gathered and presented evidence to the judge for both sides and did so “in the most impartial fashion possible.”<sup>272</sup>

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adversarial with a choice of adversary); Lind Study, *supra* note 262, at 645 (using two models—adversarial and nonadversarial with one investigator); Walker Study, *supra* note 262, at 299-300 (using two models—adversarial and inquisitorial with a single investigator).

265. The number of attorneys involved in the nonadversarial or inquisitorial hearing varied somewhat among the studies. The inquisitorial model used in the Walker Study featured only one attorney-investigator who made a presentation before the judge, which applied to both disputants. Walker Study, *supra* note 262, at 299. Similarly, in the Lind Study, the inquisitorial (or nonadversary) model featured one investigator who made a presentation regarding both of the disputants. *See* Lind Study, *supra* note 262, at 645. The LaTour Study introduced two variations of the inquisitorial model. In half of the inquisitorial hearings, one investigator made a presentation regarding both disputants. LaTour Study, *supra* note 262, at 1535. In the other half, there were two investigators, each of whom made a presentation regarding one of the disputants. *Id.*

266. *See* LaTour Study, *supra* note 262, at 1535; Lind Study, *supra* note 262, at 645; Walker Study, *supra* note 262, at 300.

267. Handwritten cards containing the verdicts had been prepared in advance and were distributed independently of the evidence presented and arguments made at the trial. *See* Lind Study, *supra* note 262, at 645.

268. This is true of the Walker and Lind Studies. *See* Lind Study, *supra* note 262, at 645; Walker Study, *supra* note 262, at 299. The LaTour Study, however, introduced an additional variation to this design element. For half of the adversarial hearings, the disputants were able to choose their own attorney. LaTour Study, *supra* note 262, at 1535. In the other half, the attorney was assigned to them. *Id.*

269. Lind Study, *supra* note 262, at 645.

270. *Id.*

271. Walker Study, *supra* note 262, at 299-300.

272. Lind Study, *supra* note 262, at 645. *See also* LaTour Study, *supra* note 262, at 1535 (noting that a sign on the attorney’s chair indicated alignment with the disputant); Walker Study, *supra* note 262, at 300 (same).

The disputants who selected their own attorneys and who perceived that their attorneys advocated on their behalf rated their process—the adversarial trial procedure—as fairer and were more satisfied with the resulting verdicts than those disputants involved in the non-adversarial trial procedure.<sup>273</sup> The disputants that had been represented by attorneys who advocated for them concluded that they had more control over the evidence, the quality of their lawyers' presentations was higher, and their influence on the verdict was greater.<sup>274</sup> Interestingly, the disputants reacted positively to the adversarial procedure regardless of whether they won or lost.<sup>275</sup> By some measures, those who lost in the adversarial procedure actually gave their procedure higher marks than those won in the nonadversarial procedure.<sup>276</sup> In the final analysis, then, it appears that disputants' voice can be achieved through attorneys.

In fact, there is some suggestion from procedural justice studies that disputants actually prefer dispute resolution processes in which their attorneys speak on their behalf<sup>277</sup> and are more likely to perceive a quasi-

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273. See LaTour Study, *supra* note 262, at 1540 (finding that “[b]oth separation of presentations and attorney alignment . . . were required to increase male defendants’ perceptions of procedural fairness and opportunity for evidence presentation, whereas choice [of attorney] was required in addition to these two factors to produce a significant difference in overall satisfaction with the procedure”); Lind Study, *supra* note 262, at 649; Walker Study, *supra* note 262, at 303-05 (reporting that the subjects expressed greater satisfaction with the adversarial procedure than the inquisitorial procedure).

274. See Lind Study, *supra* note 262, at 648-49. The LaTour Study also reported that the separation of attorneys’ presentations created heightened perceptions regarding “the extent to which the lawyer was an ally” and “the quality of the attorney’s presentation[.]” LaTour Study, *supra* note 262, at 1538-39. In addition, the LaTour Study found that control over the selection of an attorney “significantly increase[d] perceptions of involvement in the decision-making process.” *Id.* The subjects in the Walker Study reported that both sides had more opportunity to present evidence in the adversary procedure, trusted the adversary lawyer more, and believed the adversary attorney made a better presentation of their case. Walker Study, *supra* note 262, at 303.

275. Lind Study, *supra* note 262, at 649.

276. Lind, *Procedural Justice, Disputing, and Reactions to Legal Authorities*, *supra* note 151, at 179.

277. See LaTour et al., *Procedure: Transnational Perspectives and Preferences*, *supra* note 168, at 265-68 (describing research in which disputants in the United States and Germany were asked to judge the similarities among twelve model procedures, to state their preferences among the procedures, and to evaluate the characteristics of the procedures). See also WISSLER, AN EVALUATION OF THE COMMON PLEAS COURT, *supra* note 92, at viii (finding that parties reported greater understanding of and satisfaction with the mediation process and felt less pressured to settle “if their attorneys spent more time talking during mediation to present their side’s case”); ROSELLE L. WISSLER, STATE JUSTICE INSTITUTE, TRAPPING THE DATA: AN ASSESSMENT OF DOMESTIC RELATIONS MEDIATION IN MAINE AND OHIO COURTS 91 (1999) (finding that for court -connected domestic relations cases, parties whose cases had settled in mediation were more likely to assess the mediation process as fair if they had attorneys; in cases that did not settle, parties’ assessments of fairness were not affected by whether they had attorneys); Peter J. Kuriloff & Steven S. Goldberg, *Is Mediation a Fair Way to Resolve Special Education Disputes? First Empirical Findings*, 2 HARV. NEGOT. L. REV. 35, 55-56 (1997)

legal procedure as unfair if they are not represented by attorneys.<sup>278</sup> In a study comparing disputants' preferences among twelve different decision making procedures,<sup>279</sup> researchers found that subjects considered the presence or absence of representatives or investigators to be a meaningful characteristic for distinguishing among decision making procedures,<sup>280</sup> and further, they associated "pleasantness" with this characteristic.<sup>281</sup> The researchers speculated that representatives or investigators might be perceived as "buffer[s] against severe interpersonal conflict because they eliminate the need for direct interaction between the disputants."<sup>282</sup> The researchers also raised the possibility that the disputants' preference might be based on their perception that representatives or investigators could "give more expert and persuasive presentation of the case"<sup>283</sup> (perhaps thereby enhancing the disputants' voice),<sup>284</sup> but the researchers noted that "this attribute was not assessed."<sup>285</sup>

The simple fact that attorneys dominate court-connected mediation sessions has raised serious concerns for many mediators and mediation advocates. However, attorney dominance does not, by itself, raise doubts regarding the procedural fairness of the process. Instead, the procedural

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(reporting in special education mediation, "[parents] with attorney-advocates found the mediation process fairer than those with non-attorney advocates or with no representation" and that school officials' perceptions of fairness related to their perceptions of the effectiveness of their attorney). See also LIND ET AL., THE PERCEPTION OF JUSTICE, *supra* note 100, at 66-67 (reporting findings that litigants' participation did not result in heightened perceptions of procedural fairness).

278. ADLER ET AL., *supra* note 148, at 72 (reporting that *pro se* litigants were more likely than represented litigants to perceive that they had been treated unfairly and that arbitrators were biased; though these differences were described as "disturbing," they were not large enough to be statistically significant).

279. The twelve decision making procedures are as follows: (1) single court investigator with an active judge; (2) single court investigator with the judge playing a passive role; (3) double investigator; (4) autocratic; (5) arbitration; (6) adversary; (7) mediation; (8) moot with representatives for each disputant; (9) mediation with representative for each disputant; (10) moot; (11) bargaining with representatives for each disputant; and (12) bargaining. LaTour et al., *Procedure: Transnational Perspectives and Preferences*, *supra* note 168, at 263-64.

280. *Id.* at 270.

281. *Id.* at 272.

282. *Id.* at 274.

283. *Id.* at 274 n.53.

284. The presence or absence of representatives or investigators, however, did not significantly affect the disputants' perception of their control over the presentation of evidence. LaTour et al., *Procedure: Transnational Perspectives and Preferences*, *supra* note 168, at 273. Indeed, to the extent that the subjects did perceive a correlation between the disputants' process control and the presence of representatives or investigators, the correlation was a negative one. *Id.* Specifically, the correlations between control over the presentation of evidence and the characteristic of presence or absence of representatives or investigators were weaker for the disadvantaged party than for the advantaged party. LaTour et al., *Procedure: Transnational Perspectives and Preferences*, *supra* note 168, at 273.

285. *Id.* at 274 n.53.

justice research results and theories described here illustrate the importance of assessing the relationships between disputants and their attorneys.<sup>286</sup> If there is a strong, positive relationship between a client and her attorney, it is very likely that the client will perceive that the attorney's presentation and the mediator's consideration of the presentation adequately fulfills the desire for "voice," influence on the outcome, and personal inclusion in the mediation process.<sup>287</sup> Conversely, if the relationship between the attorney and the client is not so positive or the client perceives that something personally valued was not included in the attorney's presentation, perceptions of procedural justice may suffer.

Ultimately, then, what does the procedural justice literature reveal regarding the impact of the reduced role of disputants in mediation? First, the procedural justice literature makes it quite clear that disputants should be invited and encouraged to attend mediation sessions. Second, disputants' perceptions of procedural justice in mediation will depend upon their relationships with their attorneys. Because mediators cannot be aware of the nature of every lawyer-client relationship, mediators should routinely invite (but not require) the disputants to speak and to be heard during mediation sessions. Such invitations will demonstrate the explicit inclusion of the disputants in the process (and the group) and will provide the disputants with a direct opportunity to provide the information that they believe should influence the outcome. Those who are satisfied with the voice provided by their attorneys (and this may include a sizable proportion of the disputants involved in civil, nonfamily cases) will decline the mediator's invitations. However, those who do not have a strong and positive relationship with their

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286. See LIND ET AL., *THE PERCEPTION OF JUSTICE*, *supra* note 100, at 61 (reporting finding that litigants were more likely to perceive procedures as fair "when they trusted their attorneys and viewed them as having a good grasp of the case"); WISSLER, *AN EVALUATION OF THE COMMON PLEAS COURT*, *supra* note 92, at vii (finding that "[p]arties who had more preparation for mediation by their attorneys had more favorable assessments of the process"); Sternlight, *supra* note 90, at 320-31, 339-45 (examining potential monetary, nonmonetary, and psychological divergences between attorneys and clients and how these divergences affect the appropriate role of the attorney in mediation); Tyler, *The Psychology of Disputant Concerns*, *supra* note 178, at 372 (describing research that found that criminal defendants' perception that they had received fair process was closely linked to "judgment about issues such as how often their attorney had consulted with them in deciding how to resolve their case").

287. See Lind et al., *In the Eye of the Beholder*, *supra* note 176, at 972 (noting that "evaluations of the attorney were positively correlated with procedural justice judgments"). Interestingly, this issue regarding the disputant's relationship with her spokesperson may also arise when the mediator leaves the caucus in order to communicate the disputant's story to the other party. To the extent that the relationship between the mediator and the disputant is positive and strong, it is more likely that the disputant will feel that the mediator's conveyance of her message represented her voice. To the extent that the disputant does not trust that the mediator has fully heard, understood, and affirmed her story, the disputant's confidence that her voice has been expressed and heard is reduced.

attorneys or are not fully satisfied with their attorneys' expression of their voice<sup>288</sup> will then be able to participate in a manner consistent with procedural justice.<sup>289</sup>

### *B. The Preference for Evaluative Interventions in Court-Connected Mediation*

When mediation was first introduced to the courts, it was defined as a "facilitative" process in which the mediator engaged in "conduct intended simply to allow the parties to communicate with and understand one another."<sup>290</sup> Court-connected mediation, however, often involves evaluative interventions by the mediator. For example, mediators regularly provide disputants with "reality checks" by critically assessing the strengths and weaknesses of the disputants' cases and even opining regarding appropriate settlement ranges.<sup>291</sup> Some mediators go further than this and operate from an overall evaluative, narrow orientation,<sup>292</sup> believing that their primary role is to "provide . . . guidance as to the appropriate grounds for settlement"<sup>293</sup> and even to define for the disputants the particular settlement that they should reach. As previously demonstrated, negotiation theory, particularly the distributive negotiation theory,<sup>294</sup> supports the application of legal norms and the use of evaluation. At this point, however, it is important to examine the likely effect of evaluative interventions upon disputants' perceptions of procedural justice.

Evaluative mediation, despite its widespread use in the court-connected

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288. See MNOOKIN ET AL., *BEYOND WINNING*, *supra* note 82, at 82-90 (describing the tension between principals and agents in the legal context and suggesting approaches to manage this tension).

289. Recent research regarding mediator interventions in court-connected domestic relations cases indicates that in cases that settled, parties are more likely to report that the mediation process was fair and the outcome satisfactory if the mediator encouraged them to express how they felt. In cases that did not settle, this mediator intervention did not affect parties' assessment of the mediation's fairness. See WISSLER, *TRAPPING THE DATA*, *supra* note 277, at 42.

290. Leonard L. Riskin, *Understanding Mediators' Orientations, Strategies, and Techniques: A Grid for the Perplexed*, 1 HARV. NEGOT. L. REV. 7, 24 (1996) [hereinafter Riskin, *Understanding Mediators' Orientations*].

291. See *supra* Part I.B.

292. See Riskin, *Understanding Mediators' Orientations*, *supra* note 290, at 26-28 (describing the evaluative-narrow orientation).

293. *Id.* at 24.

294. It should be noted, however, that even integrative negotiation advocates assert the value of accurately assessing one's BATNA (Best Alternative to a Negotiated Agreement). See generally FISHER ET AL., *supra* note 97, at 97-106 (discussing the benefits of developing a BATNA). In the court-connected context, the determination of a BATNA generally includes assessing the disputant's case and how it will be received by a judge or jury.

context, has been controversial.<sup>295</sup> Many commentators have objected to this form of mediation because, among other things, it denies disputants the opportunity to control—and broaden—the norms that will be applied to the resolution of their dispute.<sup>296</sup> Suppose, for example, that a mediator provides both disputants with an initial opportunity to tell their stories but asks them to confine their remarks to a discussion of the legal merits of their cases.<sup>297</sup> Although the disputants now have the opportunity for voice, their presentations may be hindered by the parameters asserted by the mediator.<sup>298</sup> Perhaps they also have personal, psychological, or business concerns they wish to address.<sup>299</sup> The disputants could interpret the mediator's directive as an encroachment upon their control over their presentation and a limitation upon the consideration they can expect to receive from this mediator. Both of these interpretations could lead to reduced perceptions of procedural justice.

However, the procedural justice literature strongly suggests that the mere fact that the mediator invokes and later applies legal norms is unlikely to have an adverse effect upon a disputant's perception of procedural justice. Most of the procedures that have been examined in procedural justice studies assume the use and application of external norms for decision making. Indeed, most of the procedures that have been evaluated for procedural justice involve a third party whose role is to consider and apply such norms in order to make a decision.<sup>300</sup> As previously discussed, some research studies comparing different processes indicate that disputants actually prefer those processes in which the third party makes a decision<sup>301</sup> based

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295. See Welsh, *supra* note 14, at 27-32 (describing the facilitative-evaluative debate).

296. See, e.g., Kimberlee K. Kovach & Lela P. Love, "Evaluative" Mediation Is an Oxymoron, ALTERNATIVES TO THE HIGH COST OF LITIG., Mar. 1996, at 31, 32 ("Again, these practices are inconsistent with primary objectives of mediation: promoting self-determination of parties and helping the parties examine their real interests and develop mutually acceptable solutions.").

297. See, e.g., Videotape: Mediators at Work: Breach of Warranty (Program on Negotiation 1998) (on file with the Dickinson School of Law of the Pennsylvania State University) (encouraging attorneys to "focus on the issues with respect to merits—whether it's liability, damages or both—that you think are the most salient issues that have kept this case from settling"). Even if the mediator does not suggest a legal focus to the parties for their opening statements, the mediator may express impatience or discomfort with a disputant's expression of emotions or the recounting of "irrelevant" material.

298. See Joseph B. Stulberg, *Fairness and Mediation*, *supra* note 33, at 915 (observing that an "imposed conversational lens might instantly straitjacket one party and place it at an unfair disadvantage").

299. See WISSLER, TRAPPING THE DATA, *supra* note 277 and accompanying text.

300. See *supra* Part II.B.

301. See, e.g., LaTour et al., *Procedure: Transnational Perspectives and Preferences*, *supra* note 168, at 275 (finding that United States subjects preferred procedures in which the third party exercised decision control—i.e., adversary, double investigator, arbitration, autocratic, single investigator (passive judge), and single investigator (active judge)—and least preferred bargaining); Lind et al., *In the Eye of the Beholder*, *supra* note 176, at 980-83 (finding that litigants judged trial and arbitration as

presumably on relevant, objective norms.<sup>302</sup> All of this suggests that disputants generally do not expect the authorities presiding over decision making procedures to abandon the norms upon which their sponsoring institutions are based or to abstain from sharing their norm-based judgments.<sup>303</sup> Once disputants conclude that they cannot resolve a dispute themselves, they accept the application of society's fairness norms as a means to achieve resolution.<sup>304</sup> Thus, disputants perceive that they have voice in court proceedings, even though the courts require and even condition access upon the invocation of and adherence to legal norms.<sup>305</sup>

Nonetheless, the procedural justice literature indicates that when and how the mediator invokes the application of legal norms is likely to affect disputants' perceptions that they were heard, that their views were considered, and that they were treated with dignity and respect. Suppose that a mediator, who has reviewed the court's case file before the mediation, begins the first session by sharing with the parties an assessment of the most important strengths and weakness of their cases. The mediator may do this in order to avoid wasting the time of the participants, who may otherwise mistakenly believe that they need to educate the mediator regarding their cases. The mediator also may do this to focus the discussion more quickly

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more procedurally fair than either bilateral negotiation or judicial settlement conferences). *But see* Guthrie & Levin, *A "Party Satisfaction" Perspective*, *supra* note 241, at 890 n.10, 891 n.19 (describing research in domestic relations, small claims, and victim-offender mediation programs showing greater satisfaction with mediation than adjudication).

302. *See supra* notes 206-07 and accompanying text.

303. WISSLER, AN EVALUATION OF THE COMMON PLEAS COURT, *supra* note 92, at viii (observing that while parties that did not settle felt more pressured to settle if mediators recommended particular settlements, these parties also had more favorable assessments of the mediation process and the mediator); Wissler, TRAPPING THE DATA, *supra* note 277, at 43 (observing that in domestic relations mediation, settling parties were more likely to say that the mediation process was fair if the mediator suggested several options for settlement, while nonsettling parties were *less* likely to say the mediation process was fair if the mediator recommended one *particular* settlement).

304. There is some evidence, however, that compliance with the mediated agreement improves if disputants are able to discuss their "true underlying problems." *See* Pruitt et al., *supra* note 117, at 324. Placing normative restrictions upon disputants' voice also appears inconsistent with the view that court-connected mediators should structure their interventions to respond to the individual disputants' preferred conceptions of the mediation process. *See, e.g.,* Cynthia A. Savage, *Culture and Mediation: A Red Herring*, 5 AM. U. J. GENDER & LAW 269, 279-84 (1996) (describing three different conceptions of mediation process—agreement conception, individual personal growth conception, and relationship conception—and suggesting that mediators must accommodate these conceptions in order for mediation to be effective).

305. *See generally* FED. R. CIV. P. 12(b)(6) (listing grounds for dismissing claims when certain conditions in the pleadings are not met). *See also* James H. Stark, *Preliminary Reflections on the Establishment of a Mediation Clinic*, 2 CLINICAL L. REV. 457, 487 (1996) ("[E]valuative law-based mediations can . . . disempower[] parties from settling on the basis of 'community norms or values that are broader than those the court can consider.'") (quoting Menkel-Meadow, *Toward Another View of Legal Negotiation*, *supra* note 136, at 825)).

upon the pivotal issues. Arguably, the mediator's summary of the disputants' cases demonstrates that the mediator understood and considered what the parties had to say through the vehicle of their submissions to the court and is now efficiently moving the process beyond the storytelling stage. Yet, the timing of this intervention also has the effect of denying the disputants sufficient opportunity to express their voice and to experience the mediator's (and each other's) consideration prior to the mediator's announcement of any conclusions.<sup>306</sup> Indeed, this sort of timing can raise questions regarding whether the mediator's evaluation is sufficiently informed by the disputants' presentations (consistent with the social exchange theory)<sup>307</sup> and whether the mediator is treating the disputants with sufficient dignity and respect (consistent with the group value theory).

The timing and delivery of evaluative interventions also are likely to have a significant impact upon disputants' perceptions regarding whether they were treated with dignity and respect. Mediators demonstrate respect for disputants and their control over their own decision making process if they refrain from using an evaluative intervention until the disputants request it. Mediators also treat disputants with respect and dignity if they offer disputants their evaluations as something to consider, explain the basis for their evaluations,<sup>308</sup> and make it clear that they understand and accept the

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306. See WISSLER, AN EVALUATION OF THE COMMON PLEAS COURT, *supra* note 92, at viii (observing that the mediation process and the mediator were assessed more favorably by the parties "if the parties spent more time talking during mediation to present their side's case"); WISSLER, TRAPPING THE DATA, *supra* note 277, at 42-43 (reporting that in domestic relations mediation, parties were more likely to say that they felt the mediation process was fair if the mediator summarized their position); Tyler, *Conditions Leading to Value-Expressive Effects*, *supra* note 162, at 339 (reporting results of studies that found that, in interactions with police and judges, "increased opportunities to state one's case before a decision is made heighten feelings that one has been involved in a fair process and lead to positive feelings about and support for the police officers and the judges citizens encounter" and increased the "voice effect" is significantly greater if citizens believe that decisionmakers consider their views prior to making a decision).

307. In research comparing tort litigants' process and outcome perceptions of bilateral negotiations with their perceptions of judicial settlement conferences, researchers found that the litigants were more likely to feel "uncomfortable about" the judicial settlement conference process. Lind et al., *In the Eye of the Beholder*, *supra* note 176, at 967. In addition, the litigants expressed more dissatisfaction with the outcomes of settlement conferences. *Id.* at 980. The researchers concluded that litigants' greater dissatisfaction occurred because the outcomes of the settlement conferences were more likely to fall below the litigants' subjective expectations. *Id.* If, then, a mediator delivers an evaluation of the value of a plaintiff's case *before* hearing the plaintiff's story and learning how the plaintiff (or, more likely, the plaintiff's attorney) values the case, the mediator risks the possibility that his evaluation will diverge immediately (and rather dramatically) from the disputants' subjective expectation.

308. It is possible that mediators' evaluations may be less persuasive if accompanied by the underlying reasoning. Research regarding attorneys' ability to influence their clients' settlement decisions suggests that clients are slightly less likely to follow their attorneys' advice if their attorneys also provide the underlying basis for the advice. Korobkin & Guthrie, *supra* note 85, at 121 (reporting

disputants' authority to adopt or reject their evaluations. The disputants' sense that they are being treated with respect and dignity in the mediation process is not likely to be threatened by evaluation as elective education.

The procedural justice literature suggests, however, that the greatest threat to the disputants' experience of justice arises when mediators' evaluative interventions and orientations become so aggressive that they actually manifest disrespect for the disputants and constitute attacks upon disputants' dignity. As I have described elsewhere,<sup>309</sup> a growing number of mediation participants are complaining to ethical boards and courts that some mediators engaged in evaluation are behaving abusively,<sup>310</sup> berating disputants who hesitate to accept the mediators' evaluation as the basis for settlement<sup>311</sup> and making threats regarding the consequences of failing to settle.<sup>312</sup> These

the finding and hypothesizing that "the opinion of the respected lawyer-advisor" standing alone carries more persuasive value than the lawyer's opinion coupled with "a justification that some clients might find unconvincing"). However, other research from the field of medicine suggests that this short-term loss in influence is balanced by a long-term gain in acceptance of the consequences. For example, some studies have demonstrated that patients are less likely to sue their doctors if the doctors are open and honest regarding likely medical problems and explain their diagnoses and treatment recommendations. Fielding, *supra* note 104, at 109.

309. Welsh, *supra* note 14, at 9-12 & nn.26-45, 37 & nn.150-53.

310. See, e.g., *Mediator Qualifications Board Update*, THE RESOL. REP. (Fla. Disp. Resol. Ctr.), Dec. 1999, at 14 (complainant in a family case "alleged that [the] mediator . . . was abusive (yelled, pointed his finger in the complainant's face and threw papers during the session), . . . inappropriately prolonged the session . . . tried to intimidate [the complainant] and made decisions for the parties"); Transcript of Proceedings Before the Honorable David Hittner, Settlement Hearing at 36-38, Allen v. Leal, 27 F. Supp. 2d 945 (S.D. Tex. 1998) (No. H-96-CV-30) (reporting that during the last hour and a half of a mediation session, the mediator "just beat up on [the plaintiffs] vigorously" until the clients signed the settlement agreement even though one of the plaintiffs felt "shamed").

311. See, e.g., *Mediator Qualifications Board Update*, THE RESOL. REP. (Fla. Disp. Resol. Ctr.), Jan. 1996, at 3. A 1995 grievance alleged that

the mediator told the complainants that they were "too poor" to try their case; addressed one of the complainants as "a spoiled brat"; and declared the complainants "poor slob" who would never be recognized in court. The mediator admitted having told the complainants that "in [the mediator's] experience, if people are too poor to properly prepare their case the results are always disastrous."

The mediator offered to go across the street to the courthouse to discuss this with the judge so that the complainants would understand.

*Id.* (alteration in original). The grievance further alleged that the mediator, without the defendant's consent, attempted to impose the plaintiff's offer of settlement for the defendant's counterclaim onto the defendant. *Id.*

312. See, e.g., Mediation Complaint Form, Nov. 3, 1996 (on file with the Office of the Executive Secretary of the Supreme Court of Virginia) (alleging that "the mediator assumed the role as a judge meeting privately with the attorneys," repeatedly spoke in a threatening and manipulative manner, and made the decisions and divisions of assets without [the complainant's] input or financial considerations). See also *Mediator Qualifications Board Update*, THE RESOL. REP. (Fla. Disp. Resol. Ctr.), Jan. 1995, at 3 (reporting that a recent complaint alleged that "[d]uring caucus, the mediator 'used coercion and threats to garner the agreement' and told the complainants to be more cooperative since 'they would not be pleased with [the judge in case's] decision'") (alteration in original); *Mediator Qualifications Board Update*, THE RESOL. REP. (Fla. Disp. Resol. Ctr.), Apr. 1998, at 7 (reporting allegations that the mediator was abusive because in a single session family mediation, the

tactics, frequently associated with “muscle mediation,”<sup>313</sup> are designed to force parties to accept the mediators’ evaluations and settle their cases. Some mediators argue that these heavy-handed techniques are for the disputants’ own benefit, that only this brand of “tough love” will enable disputants to abandon their unrealistic hopes and resign themselves to the gritty and sometimes unpleasant truth of their cases.<sup>314</sup> These tactics, however, are not consistent with procedural justice. Such interventions do not send the message that the disputants are valued and respected members of society. Rather, because these disputants hesitate or refuse to settle their case according to the mediator’s design, they are treated as uncooperative, recalcitrant, and perhaps intellectually inferior. Disputants who receive this message are highly unlikely to perceive that they were treated with dignity and respect.<sup>315</sup>

Mediators’ evaluative interventions, which require using and applying legal norms to the situation described by disputants, represent potent tools. These interventions have the potential to be consistent with (and even to enhance) disputants’ perceptions of procedural justice if they are used after the disputants have had sufficient opportunity to tell their stories and if it is clear that the disputants may choose to reject the mediator’s assessment. In contrast, if evaluation is used too early (i.e., before the disputants have had the opportunity to present their cases and to observe the mediator’s consideration of their presentations), perceptions of procedural justice are likely to suffer. If evaluation is used too aggressively, it denies disputants the respect and dignity that are so important to perceptions of procedural justice.

### *C. The Abandonment or Marginalization of the Joint Session in Court-Connected Mediation*

Increasingly, court-connected mediation is abandoning or marginalizing the joint session in favor of shuttle diplomacy through sequential caucuses.<sup>316</sup> From the perspective of mediation as assisted negotiation, which has been described previously, much is gained in this development.<sup>317</sup> However, this

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mediator forced the parties to remain for eleven hours).

313. FOLBERG & TAYLOR, *supra* note 13, at 135 (emphasis omitted).

314. *See Allen*, 27 F. Supp. 2d at 947 (observing that a prominent Texas mediator had stated, “[W]hat some people might consider a little bullying is really just part of how mediation works.”) (quoting Charlotte Aguilar, *No Decision in Allen Case*, 14 S.W. NEWS 1, 22 (1998)).

315. This concern may also arise if a facilitative or transformative mediator consistently fails to keep one party from verbally attacking or belittling the other party.

316. *See supra* Part I.C.

317. *See supra* Part I.C.

adaptation, like the early or overly-aggressive use of evaluative interventions, poses a threat to the provision of procedural justice in mediation.

When the mediator abandons the joint session or the disputants' attorneys present only cursory summaries of their clients' cases in joint session, they are likely to sacrifice procedural justice for more efficient deal-brokering.<sup>318</sup> It is at the storytelling stage in the joint session that the disputants are best able to assess whether the mediator permits all disputants to fully express themselves,<sup>319</sup> considers what all disputants have to say,<sup>320</sup> and generally manages the process in an even-handed, fair way.<sup>321</sup> The joint session also provides the disputants with their best opportunity to assess the respect and dignity offered by the mediation process.<sup>322</sup> They can observe whether the mediator personally interacts with all of the disputants in a respectful and dignified manner and controls the session to ensure that all disputants receive respectful consideration from each other.<sup>323</sup>

Obviously, the initial joint session—with its promise of uninterrupted time for each of the disputants to tell their stories—can be lengthy, stiff, and even somewhat uncomfortable.<sup>324</sup> From the perspective of the efficient brokering of a settlement, these characteristics are likely to be viewed as disadvantages. Yet, these same qualities reassure the disputants that their resolution will be informed and made more accurate by their face-to-face exchange of information<sup>325</sup> and that they (and their dispute) are important

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318. See Hensler, *A Research Agenda*, *supra* note 5, at 17 (“After initial presentation of the dispute, evaluative mediators appear to move quickly to ‘shuttle diplomacy.’ Parties may not meet together again until an agreement has been struck . . . . Whether parties view this process as a welcome departure from adjudication, on the one hand, or simple negotiation, on the other, is currently unknown.”); Lind et al., *In the Eye of the Beholder*, *supra* note 176, at 982 (suggesting that “it may be settlement, rather than trial, that is seen as difficult to understand and that diminishes feelings of participation” and affects perceptions of procedural justice).

319. See WISSLER, *AN EVALUATION OF THE COMMON PLEAS COURT*, *supra* note 92, at viii (reporting that litigants assessed the mediation process and the mediator more favorably “if the parties spent more time talking during mediation to present their side’s case”).

320. See *supra* Part II.B.

321. See *id.*

322. See *id.*

323. The joint session also represents the disputants’ opportunity to hear the other side. This opportunity may be most significant for plaintiffs who are searching for the reasons why they suffered a misfortune. Research indicates, for example, that plaintiffs in medical malpractice cases want to learn the truth about what happened. Fielding, *supra* note 104, at 107-09. Studies further indicate that learning what happened and holding a provider accountable are important steps in the emotional healing process for plaintiffs. *Id.* at 139.

324. See Riskin, *The Represented Client in a Settlement Conference*, *supra* note 52, at 1060-62 (describing the discomfort of a mediation in which the disputants, as well as their attorneys, participated).

325. This concern about the accuracy of the decision, of course, invokes the social exchange theory described *supra* Part III. See also MOORE, *supra* note 62, at 325 (noting that caucuses, in contrast to joint session, “provide mediators with the greatest opportunity to manipulate parties into an

enough to be worth the devotion of substantial time and dignified attention by the mediator, the other disputant, and the attorneys.<sup>326</sup>

The positive effects of a dignified, serious process and the substantial commitment of time are highlighted in litigants' varying reactions to court-connected procedures. In one study, tort litigants perceived that the procedures of trial and arbitration (procedures that explicitly provide the disputants with an opportunity to tell their stories in joint session) afforded them more procedural justice than their attorneys' bilateral negotiations or judicial settlement conferences.<sup>327</sup> This difference resulted primarily from the litigants' perception that the trials and arbitration hearings that they experienced were more "dignified,"<sup>328</sup> more "careful,"<sup>329</sup> and ultimately more "thorough"<sup>330</sup> than bilateral negotiations or judicial settlement conferences.<sup>331</sup> Indeed, the researchers found that "the perception of procedural dignity was the crucial variable leading to higher procedural fairness ratings for trials than for bilateral settlements."<sup>332</sup> In other studies, litigants' satisfaction with the mediation process has been related to the length of the process<sup>333</sup> and, particularly, to the amount of time provided to the parties to present their cases.<sup>334</sup> It follows that a dispute resolution process that gives disputants more time to fully explain their stories and that treats all disputants in a dignified manner is likely to represent "one of the most meticulous, most individualized interactions that [a disputant has] ever experienced in the course of his or her contacts with government agencies."<sup>335</sup> Such a process, which is not structured solely or even primarily

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agreement because disputants do not have the advantage of face-to-face communication to test the accuracy of information exchanged").

326. The need for such reassurance relates directly to the group value theory, described *supra* Part III.

327. LIND ET AL., THE PERCEPTION OF JUSTICE, *supra* note 100, at 44-45; Lind et al., *In the Eye of the Beholder*, *supra* note 176, at 965.

328. Lind et al., *In the Eye of the Beholder*, *supra* note 176, at 967.

329. *Id.*

330. LIND ET AL., THE PERCEPTION OF JUSTICE, *supra* note 100, at 45 (comparing perceived fairness among trial, arbitration, and judicial settlement conferences).

331. Lind et al., *In the Eye of the Beholder*, *supra* note 176, at 967.

332. *Id.* at 981.

333. In a study finding that litigants reacted more favorably to face-to-face mediation than to the informal adjudication of their small claims cases, the mean of estimated trial times was 14.4 minutes; the average estimate for the length of mediation was 25.7 minutes. See McEwen & Maiman, *Small Claims Mediation in Maine*, *supra* note 150, at 255.

334. See WISSLER, AN EVALUATION OF THE COMMON PLEAS COURT, *supra* note 92, at viii (reporting that greater amount of time spent talking during the mediation yielded greater satisfaction and understanding among litigants).

335. Lind et al., *In the Eye of the Beholder*, *supra* note 176, at 981. See also McEwen & Maiman, *Small Claims Mediation in Maine*, *supra* note 150, at 256 (finding that litigants rated mediation more highly than adjudication because mediation gave the disputants more opportunity to tell their stories

to achieve efficient resolution, is more likely to be perceived as procedurally just.

The procedural justice literature's suggestion that disputants are likely to value the dignified and joint opportunity to speak that is uniquely available in the joint session reveals that this procedural element is not just a meaningless relic from the early days of mediation. Instead, and particularly in court-connected mediation, the carefully-managed joint session represents a necessary foundation for the provision of an opportunity for voice and for the authority's demonstration of respect for the dignity and value of the individual disputant.<sup>336</sup> If there is no initial joint session, the disputants do not have the opportunity to tell their stories in an open, dignified setting. Instead, they are forced directly into the process of brokering a deal. This is unlikely to feel like a careful process in which justice will be done.

Interestingly, it is the mediators and the attorneys who may find it most difficult to comprehend the value of the joint session to disputants' perceptions of procedural justice. This should not be surprising. Lawyers regularly fail to appreciate and accommodate their clients' need to tell their stories.<sup>337</sup> Based on relatively little information, attorneys (and attorney-mediators) may quickly conclude that they possess sufficient understanding of the clients' situation to understand where it fits in "the world of the legally possible."<sup>338</sup> Thus, it appears inefficient and unnecessary to devote the time to a full re-telling of the disputants' stories in joint session. In addition, particularly in court-connected mediation, the attorneys and attorney-mediators do not require reassurance regarding their social standing.<sup>339</sup> This is their world. They, unlike many of their clients, can take their status for granted.<sup>340</sup>

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and therefore they had greater confidence that the third party understood what their dispute was about).

336. See *supra* Part III.

337. See Hensler, *The Real World of Tort Litigation*, *supra* note 86, at 163 (describing lawyers' focus on monetary concerns); Hosticka, *supra* note 259, at 601-05 (describing lawyer-client interviews in which lawyers quickly interrupted client's narrative and began pursuing legal pigeonhole for case). Other professionals also regularly fail to give their patients/clients sufficient time to talk or do not fully listen to them. See, e.g., FIELDING, *supra* note 104, at 87-90 (reporting that in interviews with patients who sued their doctors, most "felt marginalized" as a result of their doctors' patronizing remarks, lack of empathy, evasiveness, and overall failure to listen carefully to statements that might be relevant to medical condition).

338. See Felstiner & Sarat, *Enactments of Power*, *supra* note 88, at 1460.

339. See Austin Sarat & William L. F. Felstiner, *Law and Social Relations: Vocabularies of Motive in Lawyer/Client Interaction*, 22 *LAW & SOC'Y REV.* 737, 740 (1988) (observing that while clients in their dealings with lawyers interpret events "in terms of their impact on the self," lawyers are more likely to consider "technical rules and a problem-solving orientation . . . [as] more important than emotional reactions and justifications of self").

340. See Felstiner & Sarat, *Enactments of Power*, *supra* note 88, at 1457 (describing interactions between a divorce lawyer and a client as taking place in "the space of law," which may be

In sum, the procedural justice literature strongly suggests that the abandonment or marginalization of the joint session in court-connected mediation is inconsistent with disputants' perceptions of procedural justice. An unhurried and carefully-managed joint session provides needed dignity and time for the telling and consideration of the disputants' stories. The reduction and potential disappearance of the joint session most clearly demonstrates a conflict between adaptations designed to enhance deal-making in mediation and the need to ensure that the process also provides disputants with an "experience of justice."

#### *D. The Lack of Creativity in the Settlements Produced by Court-Connected Mediation*

As noted previously, even though mediation originally was lauded for its creative potential,<sup>341</sup> relatively few court-connected mediation sessions actually produce creative, nonmonetary settlement agreements.<sup>342</sup> Is this adaptation of mediation likely to affect perceptions of procedural justice?

Based on the research that has been conducted in the field of procedural justice, the mere fact that the disputants reach a monetary settlement seems unlikely to affect their perception of the fairness of the mediation process. Most civil lawsuits, after all, involve claims for and potential payment of money damages as compensation for harm. In addition, many of the procedures judged as procedurally fair by disputants have resulted in the exchange of money.<sup>343</sup>

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unwelcoming to the client but quite comfortable for lawyer). Sophisticated institutional litigants also may not require reassurance regarding their social standing in this context. *See, e.g.,* ADLER ET AL., *supra* note 148, at 76 (reporting that, unlike "unsophisticated individual litigants," institutional litigants who made extensive use of the arbitration program "appear[ed] to care little about qualitative aspects of the hearing process . . . . judg[ing] arbitration primarily on the basis of the outcomes it delivers"); Wilkins, *Everyday Practice Is the Troubling Case*, *supra* note 260, at 84-86 (contrasting corporate clients with individual clients). *But see* Lind et al., *Individual and Corporate Dispute Resolution*, *supra* note 148, at 247 (reporting that researchers found that procedural justice judgments strongly influenced litigants' decisions about whether or not to accept nonbinding arbitration awards, regardless of whether litigants were individuals, small business owners, or corporate officers; only corporate employees demonstrated no link between their procedural justice judgments and their decisions to accept awards).

341. *See, e.g.,* McEwen & Maiman, *Mediation in Small Claims Court*, *supra* note 150, at 33-34 (suggesting that "consensual processes affect compliance in part because they lead to settlements with features not commonly found in adjudicated outcomes").

342. *See supra* Part I.D.

343. *See supra* Part II.B. It is possible, on the other hand, that disputants simply have fallen prey to cognitive tendencies to simplify conflict and to assume the existence of a fixed pie. Such biases can cause disputants to be unaware that "creative" settlements are realistic possibilities that they should expect dispute resolution processes to attain. *See* Thompson & Nadler, *Judgmental Biases*, *supra* note 107, at 214-19. My thanks to Christopher Honeyman for suggesting this possible explanation.

However, if a mediator or a disputant's attorney rushes to transform the disputant's story into financial terms, this action may have the unintended effect of impeding the disputant's opportunity for voice and respectful consideration. Research has shown that attorneys have a tendency, even in their first meetings with their clients, to focus on monetary concerns.<sup>344</sup> Also, as previously noted, attorneys facilitate settlement by encouraging their clients to think in terms of the expected financial value of their cases.<sup>345</sup> Attorneys prefer mediators who can evaluate the disputants' cases.<sup>346</sup> Indeed, mediators' evaluative interventions support the transformation of the clients' stories into financial terms.<sup>347</sup> One significant advantage of a reduced joint session is that the mediator, attorneys, and disputants can then turn more quickly to the brokering of a financial deal.<sup>348</sup>

All of these adaptations promote the quick transformation of disputants' stories into financial terms—potentially before they have had the opportunity to experience a dignified, even-handed procedure in which they can tell their stories and be heard. This prompt transformation is likely to run directly counter to disputants' desire for dispute resolution procedures that provide reassurance that the outcome will be based on full information (social exchange theory) and that the disputants are individuals whose unique perspectives and troubles will be treated with dignity and respect (group value theory).<sup>349</sup>

If, on the other hand, disputants' stories are not quickly transformed into financial terms and if the disputants are provided with a full opportunity to describe their situation, procedural justice will almost certainly be served even if the settlement is purely monetary. However, it is worth noting that if the disputants' presentations also include discussion of their underlying needs and interests, it is more likely (though certainly not guaranteed) that opportunities for creative, non-monetary solutions will arise. Consequently, the frequent failure of court-connected mediation to produce creative, nonmonetary settlements does not violate procedural justice considerations per se. Instead, this development may be the natural consequence of other changes in court-connected mediation that are aimed more at settlement than at ensuring that disputants receive an "experience of justice."

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344. Hensler, *The Real World of Tort Litigation*, *supra* note 86, at 163. *See supra* Part I.D.

345. *See supra* Part I.B.

346. *See supra* Part I.B.

347. *See supra* Part I.B.

348. *See supra* Part I.C.

349. *See supra* Part III.

*E. Summarizing the Application of Procedural Justice Theory and Research to Court-Connected Mediation*

The application of procedural justice principles to the current evolution of court-connected mediation ultimately yields a mixed result. Clearly, procedural justice research and theories show that disputants want and need the opportunity to tell their stories, feel that their stories have been considered, and believe that they have been treated in an even-handed, respectful, and dignified manner. Many of the changes in the mediation model—the reduced role of the disputants, the preference for evaluative interventions, the lack of creativity in settlements—are not inconsistent *per se* with the indicia of procedural justice. Indeed, some of these changes, if they are handled appropriately, have the potential to enhance perceptions of procedural justice. For example, attorneys speak for their clients in many of the processes that clients perceive as procedurally just. The key here is the relationship between the attorney and client and the extent to which the attorney truly understands and expresses what his client wants to say. If there is a strong and positive connection between attorneys and clients, and if clients are permitted to observe attorneys' presentations, it is likely that clients will perceive that they had an opportunity for voice and (through their attorneys) were treated with dignity and respect. Similarly, many of the processes that have been judged as procedurally fair involve the even-handed application and use of objective social norms. Thus, it appears that evaluative interventions by mediators can be consistent with procedural justice considerations.

However, these changes in court-connected mediation also present the potential for violation of procedural justice considerations. The attorney who does not fully understand or chooses not to tell his client's story in a mediation session cannot be viewed as effectively expressing his silenced client's voice. The mediator who offers his financial assessment even before the disputant has the opportunity to present her case cannot be viewed as giving the disputant the opportunity to tell her story. The mediator who garners a settlement by aggressively pressuring the disputant to submit to his evaluation of her case cannot be viewed as treating the disputant with respect and dignity.

Finally, a few elements of mediation's new "look" are patently inconsistent with disputants' procedural justice preferences. Specifically, the *de facto* exclusion of disputants from mediation sessions is not consistent with disputants' desire for procedures in which they can be assured that they were given the opportunity to speak and were treated as valued members of society. Exclusion from mediation sessions certainly cannot signal social

inclusion. Similarly, the increasingly common marginalization or outright abandonment of joint sessions is inconsistent with the need for a dignified, even-handed opportunity for voice.

Although it is beyond the scope of this Article to propose specific means to ensure that the bargaining and settlement that occur in mediation are tempered by procedural justice considerations, several themes and suggestions quickly emerge from the foregoing application of the procedural justice literature to the current evolution of court-connected mediation. For example, although mediation is often lauded as an infinitely flexible process, it may now be necessary for legislatures or courts to mandate that court-connected mediation programs shall always invite the actual disputants to attend and participate in the mediation sessions, rather than conditioning the disputants' presence and their level of participation upon the preferences of individual mediators. It also may now be necessary for court rules or statutes to mandate that court-connected mediation sessions shall always provide the disputants themselves with an opportunity to speak, rather than permitting mediators to rely automatically and exclusively upon the representations of the disputants' attorneys. Statutes or court rules may need to specify that mediation sessions shall always include an initial joint session, which will be managed to permit the disputants (or their attorneys) to tell their stories in a dignified and open setting. Lastly, courts or legislatures may need to amend the rules, codes of ethics, or statutes that apply to court-connected mediation to provide that mediators shall not engage in evaluative interventions until after the disputants have had sufficient opportunity to tell their stories and that such interventions shall be delivered in a manner that demonstrates respect for the dignity and self-determination of the disputants.<sup>350</sup>

### CONCLUSION

It is important to acknowledge that whenever an institution adopts an innovation, the institution nonetheless remains (and perhaps must remain) true to its own defining norms. Context does matter. In remaining loyal to its own norms, an institution may consciously or unconsciously disregard the norms of those that created the innovation and brought it to the attention of the institution.

In the case of mediation, early advocates for the process became believers for several reasons. They promoted it as a mechanism for the empowerment of citizens who found themselves caught in a dispute. The disputants

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350. I have suggested elsewhere possible means to tame over-aggressive evaluation. *See* Welsh, *supra* note 14, at 86-92.

themselves participated directly and actively in the resolution of their own disputes, controlled the norms that would guide their decision making, generated their own options for resolution, and controlled the final decision regarding whether or not to reach a resolution and on what terms.<sup>351</sup>

Advocates promoted the mediation process as a means to make the process of receiving some sort of “justice” more accessible<sup>352</sup> and more democratic.<sup>353</sup> They also argued that mediation would permit disputants to achieve better solutions, solutions that responded directly to the disputants’ needs and their personal definitions of justice.<sup>354</sup>

The courts, however, are not institutions that are defined by the principles of democracy, empowerment, or creative, de-legalized justice. Instead, in civil litigation, the courts are committed to the “just,” “speedy,” and “inexpensive determination of every action.”<sup>355</sup> To the extent that mediation’s new “look” is supported by negotiation and decision-making theory and research, it appears that mediation is aiding the courts in achieving the last two of these three goals.

The very first of these goals, however, and its application to mediation have been the focus of this Article. What does justice have to do with dealmaking in court-connected mediation? Simply, when the courts actively sponsor and even require litigants to use the third party process of mediation to resolve their disputes, the courts’ commitment to a just determination necessarily implicates procedural justice considerations. Indeed, the rules of civil procedure—and, more broadly, the current state of the law regarding the requirements of due process<sup>356</sup>—represent the result of countless struggles to ensure that deserving litigants are sufficiently heard, that their presentations

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351. See *supra* Part I.

352. See Edward A. Dauer, *Justice Irrelevant: Speculations on the Causes of ADR*, 74 S. CAL. L. REV. 83, 95-96 (2000).

353. See *supra* Part I.

354. See *supra* Part I.

355. FED. R. CIV. P. 1.

356. See, e.g., *Connecticut v. Doehr*, 501 U.S. 1, 11-18 (1991) (applying the *Mathews* test to prejudgment attachment of real estate); *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976) (establishing a three-part balancing test to determine when a hearing is necessary, and how complete such a hearing must be, before deprivation may occur); *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945) (requiring that the exercise of personal jurisdiction over a defendant not offend “traditional notions of fair play and substantial justice”) (quoting *Milliken v. Meyer*, 311 U.S. 457, 463 (1940)). See also Lind et al., *In the Eye of the Beholder*, *supra* note 176, at 958 (observing that the Supreme Court’s interpretation of the due process clauses in the Fifth and Fourteenth amendments “in essence relies on a political and legal tradition that uses process to express a commitment to limited state power and to the protection of individuals’ autonomy and dignity”). But see Jerry Mashaw, *The Supreme Court’s Due Process Calculus for Administrative Adjudication in Mathews v. Eldridge: Three Factors in Search of a Theory of Value*, 44 U. CHI. L. REV. 28, 49-52 (1976) (raising concerns regarding the Supreme Court’s failure to reference the dignitary aspects of due process).

and arguments are sufficiently considered, and that something that looks like justice is being done to resolve their legal actions.<sup>357</sup> Thus, within the context of the courts, the third party process of mediation should and must be judged against the standard of procedural justice.

Measured against this standard, most of the adaptations that now exist in court-connected mediation are not objectionable, at least not per se. This is helpful to understand, particularly as debates continue to rage about the appropriateness of evaluative mediation in the court context and lawyers' de facto (and sometimes de jure) capture of civil nonfamily court-connected mediation. Settlement is a worthy goal. Indeed, disputants' satisfaction with mediation is consistently enhanced when the process enables them to reach settlement.<sup>358</sup> Generally, the changes in court-connected mediation that enhance bargaining and thus improve the disputants' ability to reach settlement are laudable.

However, a few of the adaptations in court-connected mediation that make bargaining more efficient and settlement more likely (e.g., the de facto exclusion of disputants and the marginalization or abandonment of the joint session), raise very serious problems for perceptions of procedural justice. Other adaptations, such as the reduced role of the disputants who attend mediation sessions, attorneys' strong preference for evaluative interventions, and even the focus on monetary settlements, have the potential to cause problems if mediation continues to evolve in order to fit exclusively within a bargaining paradigm. Left unchecked by court rules, state statutes, or ethical rules, some of the adaptations that enhance deal-making and settlement "may

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357. For example, FED. R. CIV. P. 8(a)(2), which requires that the plaintiff provide "a short and plain statement of the claim showing that the pleader is entitled to relief," attempts to balance both the plaintiff's and the defendant's rights to a proceeding in which they will be heard. *Id.* On one hand, the rule requires the plaintiff to give the defendant fair notice of the claim and the grounds for the claim, in order to permit the defendant to advocate sufficiently on his own behalf. *Id.* On the other hand, the rule does not unduly restrict plaintiff's access to the courts and discovery by requiring that the plaintiff immediately plead all of the facts needed to establish all elements of her claim. Similarly, although FED. R. CIV. P. 55(a) punishes dilatory litigants by providing for entry of default, FED. R. CIV. P. 55(c) permits the default to be set aside for "good cause shown." In establishing the factors to be considered in determining whether this standard has been met, courts prefer that litigants be given the opportunity to be heard and to have their cases decided on the merits. *See, e.g., Shepard Claims Serv., Inc. v. William Darrah & Assoc.*, 796 F.2d 190, 195 (6th Cir. 1986) (reversing the trial court's denial of defendant's motion to set aside the entry of default and remanding for further proceedings, based on the following considerations: whether the plaintiff would be prejudiced, whether the defendant had a meritorious defense, and whether culpable conduct of the defendant led to default).

358. WISSLER, AN EVALUATION OF THE COMMON PLEAS COURT, *supra* note 92, at vii (reporting that parties who reached a full settlement reported more favorable assessments of the mediation process and the mediator); Guthrie & Levin, A "Party Satisfaction" Perspective, *supra* note 241, at 895 n.34 (listing studies finding that satisfaction rates are higher for parties whose cases settled in mediation).

in fact diminish [the] perceived justice”<sup>359</sup> that can be furnished by court-connected mediation. This development could tarnish the legitimacy and authority of the courts.

These troubling adaptations require attention and tempering with the lessons arising from the procedural justice literature. The experience of justice should not be set aside as some “sweet old fashioned notion”<sup>360</sup> that has outlived its usefulness to modern, settlement-directed civil litigation. Instead, mediation, the “alternative” process now struggling with its own success, should be allowed to demonstrate that justice can and should have *everything* to do with the “world of bargaining,”<sup>361</sup> particularly when the bargains are being struck within the realm of our courts.

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359. Lind et al., *In the Eye of the Beholder*, *supra* note 176, at 982.

360. TINA TURNER, *What's Love Got To Do With It*, on PRIVATE DANCER (Capitol Records 1984) (“What’s love got to do, got to do with it?/What’s love but a sweet old-fashioned notion?”).

361. Galanter, *supra* note 23.







