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The Appropriateness of Mediation: A Case Study and Reflection on Fuller and Fiss

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The philosopher, as Whitehead says, is the 'critic of abstractions.' He starts, not with the purely concrete, for which abstractions are to be found, but with more or less suitable abstractions as are already available, and seeks to improve them, having in mind experiences of the concrete.¹

—C. Hartshorne

I. THE STORY OF A MEDIATION

On an afternoon quite some years ago now, three women arrived on time for a mediation. Two sat close together and spoke in animated whispers. The other sat across the office, alone, eyes cast down, hurriedly shuffling and staring at a handful of legal-looking documents. Most of the whispering—partly in English, partly in Spanish—was done by the younger of the two: late twenties, red dress stylishly above the knee, concentric circles of pre-Colombian gold necklaces, bracelets, four rings, longish red fingernails, high cheekbones, hot and quick, a banty-hen looking for a fight. She had initiated the mediation. We'll call her Julie. Her companion was older, looked anxiously across the room at the third woman, seemed unhappy, perhaps embarrassed, to be there. The woman who sat alone was the largest of the three, slightly overfilled a dark dress of the length then going out of style, sweet face, no rings, round eyes, tanned cowhide briefcase. We'll call her Maureen. It turned out that she was a vice-president of a small real-estate development and management company which managed a building of which she was herself the owner. The two Puerto Rican women were tenants in this building. When the pair first came into the room she had picked herself up, walked over to them, and handed Julie a five-day notice of termination of lease.

The mediation occurred in late winter. Julie had moved into the apartment two falls before. Her written lease, signed by the previous owner of the building, had expired by its own terms during the fall just

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1. C. HARTSHORNE, CREATIVE SYNTHESIS AND PHILOSOPHIC METHOD 57 (1970).

past, about the time when Maureen had bought the twenty-four flat building. Since then Julie and her five-year-old son had remained in the building, paying the \$320 per month rent that was the original lease amount. Everyone agreed that since Maureen had bought the building, she had done extensive repairs on at least one apartment. Maureen claimed to have rented that apartment out for \$425. It appeared that most of the tenants were Puerto Rican. The immediate issue that brought the case to mediation was Julie's withholding \$200 from the previous month's rent. She had spent the money for vinyl floor covering for two rooms in the apartment. As we shall see, Maureen had told Julie, in a manner that Julie thought provocative, that this was unacceptable and Julie had initiated the mediation in response to Maureen's protest.

I sat on one side of our wide square table. Maureen sat on the side to my left, the pair on the side to my right. I gave my usual introduction, explaining how we would proceed, why people often find mediation more useful or appropriate than litigation as a means of solving problems. Since Julie initiated the mediation she would explain what brought her here. Then Maureen would have an opportunity to speak. The only rule was the basic rule of courtesy: while each person spoke the others would not interrupt. Each would have her chance to speak as fully as she wished.

Julie began eagerly, like a lightweight boxer, happy that the tension of waiting was over, jab, jab, jab—in lightly accented, clipped English. She looked directly at Maureen.

"Maureen, you called me at my job. That shows no respect. I work in an open office, people all around. I could not say what was on my mind back to *you*, Maureen! And what you told me: 'You have no power over anything in the apartment.' No power! What do you mean, Maureen, to say I have no power? You told me that, Maureen, when I could say nothing back to you, nothing!

"Maureen, I showed the empty apartment across the hall three times for you. I got up from dinner to do this—in the middle of dinner—to show it. You rented that apartment but I received no \$50 commission for renting that apartment for you, Maureen."

She stopped. What did she want? Should I ask her or let this emerge? Maureen had her own theory: mediation as preemptive strike. She spoke next.

"I still don't know why you brought me here. Are you just trying to take time from everything you know I have to do?" She sighed and lowered her voice. "Look, I didn't mean anything by the word 'power.' I just wanted you to know that I have to have some control over the kinds of changes made in the apartments. I can't have tenants deciding to make changes I could make at half the price, *especially* when you haven't had a rent increase in almost two years."

“Maureen, I tried for two weeks to phone about the linoleum. I could never reach you. My messages were not returned. It is true, Maureen. A rent increase is fair if the apartment is kept up. I have been looking for an apartment and I haven’t found anything for \$320 in a neighborhood where I feel safe.”

Unsettled by her own concession, Julie reached into a large purse and pulled out five or six photographs. They showed uncovered old wood floors in two rooms and some loose plaster around the kitchen sink. Not sightly, but certainly not shocking to my eyes, and certainly nothing that would give rise to defense to non-payment of rent. Maureen might know this. Julie probably did not. “And what kind of good faith does *this* show?” Julie challenged, waving the five-day notice.

Maureen responded in cross-examination style:

“Now Julie, you moved in two falls ago, did you not?” “Yes.”

“There was floor covering in every room then, wasn’t there?” “Yes.”

“Including the two rooms portrayed in these pictures, isn’t that right?” “Yes.”

“And there’s floor covering today in all rooms but those two, right?” “Yes.”

“And you know exactly why there is no floor covering in those two.” Silence.

“That’s because *you* removed it, true?”

“Yes, I did. I had to. Maureen, it was tattered and my little boy kept tripping and falling over it. I tried tacking it down, but that didn’t work.”

“You didn’t tell . . . ask me about that either did you?” No response.

Maureen then reached into her cowhide bag and pulled out a long legal-sized lease. She said that she wanted to read a section of that lease. It was the “holdover” clause which gave the landlord the right to elect by written notice to consider the tenant a trespasser and seek eviction. Failing this election, the tenant would become a month-to-month tenant, whose tenancy, under existing law, would be ended at the landlord’s discretion upon 30 days notice. In any event, it assessed liquidated damages of twice the usual rental amount for the period of the holdover.

I broke in to interrupt this potentially disruptive interrogation and legal lecture. I asked Maureen to describe how she saw the situation. She did so, repeating some of what she had already said. The women spoke directly to each other across the table, with ebbs and flows of emotion. I was making judgments throughout about direction to try to provide. To an unusual degree, what seemed to be at stake was the shape of the relationship of these two strong and bright people. This tense conversation was important so long as they wanted to remain engaged in it.

Maureen told Julie that she knew Julie was an “instigator” among the tenants: she had discouraged tenants from taking their garbage down to the central pick-up station, telling them that this was the landlord’s responsibility. Julie had just “announced” a few months back that she would be paying her rent on the twentieth of the month, though Maureen needed the rent earlier to meet her own mortgage payment for the building. (The note Maureen produced actually read, “I would if possible pay my rent on the twentieth of each month.”) Finally, Maureen said point-blank that Julie had shown no respect for any of her legitimate concerns and no respect for her.

The level of mutual accusation was high, but I sensed something unusual (for landlord-tenant matters) in this heated interchange. They seemed to be listening to each other and taking account, in gesture and facial expression, of what the other said. *They* did not seem to regard each other’s words to be mere weapons or tools for manipulating the other into the most favorable zero-sum outcome. Thus unlike many lawyers’ negotiations, their goal was not to utterly resist real persuasion while mining the “opponent’s” statements for tactically useful information.

I explained that they could settle their problems in court or try to settle here. Maureen surprised me, after the last round of accusation, by saying that Julie had always been a “good tenant” and that she was willing to make the effort that the mediation required.

I caucused first with Maureen. Almost as soon as Julie and her companion had left the room, Maureen began crying. Tears covered her round face. She was unable to talk through her sobs. She took a few deep breaths, wiped away the last tears, and began:

“I got into real estate in the first place because people shouldn’t have to live in inhuman conditions. Julie is a leader of the Puerto Rican tenants. I respect her for that. But their attitude is just, ‘Get the landlord because she’s a white _____.’ And who does she bring with her here as a “witness”—a woman who is \$800 behind in her rent. I had to borrow money last month to meet my mortgage payment because of this non-payment. I’m losing control over the building. I let one elderly woman pay on the twentieth; then Julie asked me if I was really permitting this; then she decided she would pay late, too.” She just barely swallowed a sob. She saw herself as the Good Woman of Setzuan!

I could see her struggling to keep her business mask on. “I am not a slum landlord! But it is important to me that Julie admit that what she did was wrong. I am willing . . . I want to work things out. I’m willing to offer her a new lease beginning on the first of the month after next. It’s at \$400 per month but that’s two years’ raises for an improved building. You know, her boyfriend should pay something. And I expect to continue to make improvements including significant improvements in Julie’s apartment.”

APPROPRIATENESS OF MEDIATION

As a prelude to the serious negotiations that now seemed imminent, I discussed with Maureen the costs and delays of proceeding through the courts. Traditional “reality testing.” She was well aware of them. Without telling her why I wanted it, I asked to see the old lease. Its holdover provision assessed double rent liquidated damages for a tenant remaining in an apartment past the lease date without the landlord’s written approval. Under the provision Julie could owe Maureen about \$2,000 in back rent. I didn’t know whether or not it was enforceable. Whether or not it was enforceable, it played absolutely no part in the subsequent negotiations.

I then spoke privately with Julie. She wanted first to assess her best alternatives to a negotiated settlement. Could a landlord raise the rent upon expiration of a lease by any amount? Unless there was discrimination or retaliation for Building Department complaints, yes. She then resumed her original scattered combativeness.

“Why did Maureen scratch the name of my boyfriend off my original lease?” I looked at it. There was the name, “Ramon Torrez” scratched off the “lessee” section. I noted that Torrez had not signed the lease. “Are you sure that it wasn’t your previous landlord who crossed it out?” “No, I’m not.” “Maybe he thought that since Torrez had not signed the lease and so wasn’t legally obligated, his name shouldn’t be on the title.” “Maybe.”

Julie was silent for a moment. She regrouped and flailed out again: “See how Maureen contradicts herself? Look at this.” Maureen had written these words on a copy of Julie’s lease: “Please bring the garbage down to the alley—this is for you and the building.” I was first puzzled. “Contradiction?” Then I saw what she meant. She was implying that the last phrase in the note implied that it was the building’s *responsibility* to bring the garbage down. I thought it was Maureen’s attempt to invoke some common allegiance: the tenants and the building itself will benefit from everyone doing her part. “The building” as “the community.” I didn’t pursue this—didn’t want solely to be speaking in Maureen’s voice when I spoke with Julie. Instead we talked about the possibility of a settlement, what terms it might contain, and the like. During this conversation Julie came out from behind her lines and said that she did not dislike Maureen and wanted to reach some agreement. Her embarrassed concern was the money it would take.

Meanwhile Maureen waited in the reception room surrounded by new word processors with their printers’ authoritative chuggings and ringings and by well-dressed people full of purposes and projects. She had time to reconsider her tears and her undefended decencies to these people. It made her ashamed, then angry.

When we returned Julie said softly that she wanted to try to work things out. Now it was Maureen’s sally. Fixed on me, giving only

occasional glances, more unhappy than hostile, to Julie, she pushed out the words, "I don't believe anything she's saying. She didn't contact me by phone, she's never cared at all about my concerns."

This was, I thought later, quite true. Not that Julie was generally thoughtless. Just that Maureen's landlord concerns were quite outside the circle of light within which stood Julie's child and job and other central concerns. She had enough to do to focus on those.

Julie then started to speak seriously of moving. When would she have to leave? Could she use her security deposit for her last month's rent? Now Maureen seemed disheartened—she had only meant to demand respect. The truth is the truth. You can't talk it away: to think so is just manipulation. That *is* manipulation. She looked down: "Your moving is one solution . . . though it's not the solution I want."

I then tried to summarize fairly each woman's concerns and to describe the outlines of a possible settlement. This was not quite neutral. I could feel, for good or for ill, that this recitation in which I tried to be "fair" to the participants' actual expressed concerns, "legitimized" those concerns. This effect is, of course, one of the "conservative" features of mediation.

Maureen began tentatively to suggest terms of a settlement. She showed Julie the lease she had prepared and a written agreement in which Julie would pay the current month's and the next month's rent by the tenth, would repay the money withheld over the next two months, would pay \$20.00 late fees for last month and this. Julie, softly and as if thinking out loud, muttered, "You're charging a late fee for March?" Maureen quickly responded with a series of unilateral concessions. She dropped the late fees, then proposed that Julie pay only the difference between the amount withheld and what Maureen's cost for the "linoleum" would have been (forty dollars a month over two months). Julie then explained that, at least for the present month and for the next month, she would have to pay her rent from her second monthly paycheck, the one that arrived on the fifteenth. Maureen immediately surrendered on this issue of principle—Julie could pay this month's rent on the 21st and next month's on the 16th. Julie remained unsure that she could manage the rent rise for the month after next and thereafter. "I really have to think if I can afford \$400 per month. I don't know if I can." She didn't ask directly for a lower rental amount. We agreed that she would have four days within which to decide whether to sign a new lease. If she decided not to sign the lease Maureen agreed that Julie could use her security deposit to pay for the next month's rent, her last month in the apartment—yet another concession.

This calm, matter-of-fact talk of dates, times, amounts, details had broken the force of Julie's initial anger. (She would organize no tenant union.) Her tone softened into a weak appeal. (For what? The agreement had already been reached.)

"Maureen, do you know how hard it is to be poor? I finished four years of college and I am hardly making enough to get by. All day, every day, I help needy people in my job. I see every day what happens when you are poor. And I am not safe. I cannot even pay my rent. I do not know if I can pay \$400."

Maureen turned her eyes away. Both women seemed immediately embarrassed. It was palpable. By exposing her fears and self-doubts, Julie had gone over the line, violated some unwritten rules about the extent to which such personal truths should be allowed to appear in this segment of the public world. Julie wasn't telling these things to a friend or a counselor. That would have been alright. She was telling them to someone to whom she had been speaking with a kind of proud respect from behind her political and legal mask. But it was this very person whose projects (which did not "take account of" Julie, certainly as an individual) were in part the perceived occasion of Julie's own renewed anxieties. This person might actually *do* something. And so this sort of appeal *could* be manipulative, though here probably was not viewed as such. *We all* regretted the change from initial combativeness to this plea. (Julie quickly changed the subject.) A good fight would be better than *this*.

Maureen was especially uneasy. She had, after all, earlier protested Julie's lack of personal concern for her situation and problems. But of how much of Julie's own situation could *she* take account? She was afraid, I think of two things. She feared that Julie was using this personal appeal manipulatively as an instrument to extracting something of value from her. But there was a more troubling possibility. Julie was just telling the truth. As Fuller had suggested, this forum had allowed, perhaps encouraged, a more developed personal engagement of the parties.² Because they were decent people, they were led by the "speech situation" itself to "take account" of a relatively fuller, more concrete, understanding of each other. During those tense and embarrassed moments, Maureen was trying to decide how much of Julie's truth she could accommodate. Did that depend on the balance she could strike among her own projects, that is, the shape of her own identity: her early goal of providing decent housing to poor people and, I assume, her project of making a living at some more or less vaguely defined level of adequacy? Of course, as she listened to the other woman, she had to imagine herself doing this under the impersonal constraints set by the market for all the goods and services she would have to buy in order to run the building, and the "political reality" of the tenants in the building, their opinions as to what was "unequal treatment," or "favoritism."

2. Fuller, *Mediation—Its Forms and Functions*, 44 S. CALIF. L. REV. 305 (1971).

II. PLAN OF INQUIRY

I don't want to overemphasize this one account. One can always chew more than one bites off. Still, this simple story focuses some central institutional and philosophical questions on the comparative propriety of mediation. It helps me to see what the discussion about the "appropriateness" of the various forms of social ordering is about, and serves as a partial antidote, I think, for our "craving for generality" in these matters. Without such a narrative (or better, number of narratives) theorizing can easily think without object. "[N]o ideas but in things."³ "[D]on't think, but look!"⁴ Even our theorists suggest that story-telling helps us remember what is all too easy to forget in political and legal debate.⁵ And, in any event, it will help the reader to see exactly where I have gone wrong in my own more abstract reflections.

I begin with a short description of some personal history I brought to the mediation. I do this to set the problematic for the article but also for a methodological reason. Part of the inquiry I am doing here has roots in phenomenology, but I am skeptical of some phenomenologists' strongest claims to "see" the essential structure—the "empirical essence"—of a situation by sustained attention and by pure, careful description. What is revealed in such an interpretation depends in large part on the "preunderstanding" and in the set of questions the investigator brings to the situation.⁶ So I am showing my cards.

I then discuss and criticize in light of our mediation one eloquent attack on the use of mediative methods and one classic attempt to identify the characteristics of situations where mediation is appropriate. Then I try to identify the theoretical issues inherent in the question of the appropriateness of the mediation here, and finally, to give my interpretation of the mediation I described.

III. PERSONAL INTERLUDE:

IS THERE A JUSTICE A TENANT CAN LIVE WITH?

The landlord-tenant context had some significance to me as a mediator. Over the dozen years during which I had practiced as a "poverty lawyer," many of my cases were landlord-tenant cases, and I always represented the tenant. I was a minor participant in the expansion of tenants' rights in a number of ways. I had engaged in appellate litigation which extended and secured the initial victory in the Illinois warranty

3. WILLIAM CARLOS WILLIAMS, *The Delineaments of the Giants*, in PATERSON 14 (1946).

4. L. WITTGENSTEIN, *PHILOSOPHICAL INVESTIGATIONS* 31 (1953).

5. R. BEINER, *POLITICAL JUDGMENT* 125-28 (1983).

6. H. GADAMER, *TRUTH AND METHOD* 235-333 (1975).

of habitability case.⁷ I was a foot soldier in the day-to-day trench warfare in the housing court, in which clerks and judges were our more effective opponents than were landlords' lawyers. Here you could never make a technical mistake, never have the disposition of your case depend on an unreviewable discretionary ruling: practice absolutely by the book. I had given legal advice, in cases where full-scale representation was impossible, that often gave a tenant a technical defense or a bargaining point that she wouldn't have otherwise seen. At least so it seemed to tenants who reported back their shock that saying certain words in court could make the difference. All these cases were, I assume, among those that Fiss⁸ refers to as especially appropriate for adjudication and inappropriate for settlement on at least two of his grounds: (1) the existence of "significant distributional inequalities"; and (2) at least during the period in which the law was unsettled (and a *very* high percentage of "simple" cases did and continue to raise unresolved legal issues) the likelihood that "justice needs to be done, or to put it more modestly, where there is a genuine social need for an authoritative interpretation of law."⁹

During the Seventies, I had worked in a particularly depressed neighborhood on the south side of Chicago. Here, big rental real estate management companies had managed many slum properties in a climate of regulatory graft and corruption. Except in some publicized or life-threatening situations our belief was that the building code courts all too often functioned willy-nilly as enforcement mechanisms in which politically connected inspectors could continue to enhance their official income.¹⁰ A tenant's threat of a complaint to the Building Department was greeted by a sneer and a derisive dismissal by a landlord who, for unexpressed but understood reasons, felt he had nothing to worry about.

This bred a take-it-or-leave-it attitude among landlords, in the practical operative "justice" of which they seemed really to believe. When counseling a tenant we usually thought there were two real alternatives. The tenant could accede to the landlord's wishes, perhaps gaining through "soft" negotiation a little more time in which to do so. In the alternative, the tenant could choose to fight in the legal system. Here she might have the advantage of free representation through legal aid and of a number of recent "tenants rights" precedents, including most significantly the "implied warranty of habitability" defense which provided that truly deplorable conditions might provide a defense against a landlord's demands for continued rent. In some cases we even achieved

7. *Fisher v. Holt*, 52 Ill. App. 3d 164, 367 N.E.2d 370 (1977).

8. Fiss, *Against Settlement*, 93 YALE L.J. 1073, 1087 (1984).

9. *Id.*

10. In one federal criminal prosecution, a large section of the electrical inspection division pled guilty to federal bribery charges.

some of what Fiss calls "justice." But our advice was always the same: If you decide to fight, by hard bargaining or through serious litigation, be ready to move. You might save some thousands of dollars and might recoup a significant amount of what the law said you had "overpaid" for your apartment, but your landlord would want you out and you will probably want to move as well. Indeed, a continuing relationship would go aground on two shoals (1) your likely disinclination to expose your family to hundreds of discretionary decisions of a now hostile landlord; and (2) his eagerness to be rid of a tenant who disrupted the way things went previously, and perhaps the way the texture of his work life had convinced him that things *should* go. You feared a hostile landlord and he despised an opportunistic tenant who had the benefit of low rent, knew what she was getting and now was violating her agreement. "Doing justice" would end the ongoing relationship, it seemed, until the legal norms had come to be accepted by landlords as truly authoritative norms.

My experience, then, was that litigation, and so "justice," invariably ended the landlord-tenant relationship. Did this suggest that mediation might have more promise at least in certain defined situations? Perhaps some disputes at least could be resolved in ways that had less drastic consequences. Perhaps the personal dynamics of the mediation situation could, at least sometimes, engender a justice that both parties could live with, but which could be recognized as something more than a mere truce-line.

So much for the personal history I brought to this mediation.

IV. FISS AND FULLER ON THE PROPRIETY OF MEDIATED SETTLEMENT

Any discussion in legal literature of the propriety of mediation must consider the arguments of Owen Fiss¹¹ and Lon Fuller,¹² the former as provocative, the latter as classic. At the heart of Fiss's polemic is the notion that American litigation and adjudication allows our deepest ideals and norms to shape social reality. The task of the courts "is not to maximize the ends of private parties, nor simply to secure the peace, but to explicate and give force to the values embodied in authoritative texts such as the Constitution and statutes: to interpret those values and to bring reality into accord with them."¹³

Fiss would, it seems, say this case ought not to have been mediated. The case exhibits two of his four grounds for preferring adjudication to settlement: there were significant distributional inequalities and the

11. Fiss, *supra* note 8.

12. Fuller, *supra* note 2.

13. Fiss, *supra* note 8, at 1085.

APPROPRIATENESS OF MEDIATION

case might have served to call forth an “authoritative interpretation of the law,” specifically the propriety of and conditions on “repair and deduct” in circumstances where there is a real need for a repair but the apartment is not grossly in violation of the building code.¹⁴

Because this case was mediated, the courts were deprived of their opportunity to interpret our public values and bring “a recalcitrant reality closer to our chosen ideals,”¹⁵ those embodied in our statutes and constitutions, in a forum that “struggles against” the actual inequalities of the parties. The achievement of “private ends” and of peace should not have been allowed to interfere with those paramount goals.¹⁶

It seems to be an inevitable aspect of even balanced polemics (and certainly of litigation argument) to compare an idealized version of your favored position to the grim and all-too-human reality of the rejected alternative. There is some of this rhetorical comparison of the real and the ideal in Fiss’s argument. There *is* adjudication that closely approaches the ideal Fiss described, though I didn’t see much of it in Housing Court in the Seventies. He compares this idealized form of litigation and adjudication to settlement negotiations in all their sometimes seamy concreteness. Here for example, the wealthy use their staying power as a bargaining advantage to squeeze the disadvantaged. In the real world, a ragged but fair trial may be preferred to that kind of manipulation. Likewise, in the real world a mediation inferior to an ideal trial may well be preferred to a truly awful trial. A constant danger of intellectual confusion and practical corruption lurks, however, in those sorts of compromises, of which daily life is made.

There is thus an important point to examining a relatively well-conducted mediation against the possibility of a well-conducted trial, even though one or both may not actually be available. Something closer to the inherent strengths and weaknesses of this mode of social ordering may then emerge. It is important to understand ideals in order to chart directions should social reality present the opportunity.

There may well have been landlord-tenant cases more appropriate for mediation than was this one. The parties might be relatives or the landlord might live in the building, perhaps a two-flat. On the other hand, the large-scale private mass-bureaucratic handling of tenants that I experienced on the south side of Chicago would not, to say the least, be mediation’s natural home. What was interesting, I think, about the

14. Since the time of this mediation, Chicago has enacted a repair-and-deduct ordinance which both formalizes and limits the remedy. CHICAGO, ILL., MUNICIPAL ORDINANCE Ch. 193.1 (1988).

15. Fiss, *supra* note 8, at 1089.

16. Professor Fiss concedes that the parties should not be “forced” to litigate, since that would interfere with their autonomy and distort the adjudicative process.” *Id.* at 1085. Presumably institutional incentives should attempt to draw parties to judgment rather than to mediation or other settlement devices.

landlord-tenant relation I described was that, for reasons I will try to identify below, this case did not fall at either extreme, not because it fell quietly in the middle, but because there were strong personal forces pulling in both directions. It may offer the opportunity to refine Fiss's absolute categories.

Fuller is not, of course, generally opposed to mediation. His special interest in mediation stems in part from a felt lack in legal education, the neglect of the social processes by which the "various forms of 'law' come into being."¹⁷ This defect spawns a deeper normative problem, which directly concerns him and concerns me here, that "we inevitably lack a perspective from which to appraise the relative aptness, for solving a given problem, of the various competing forms of social ordering."¹⁸ This question of "aptness" must recognize what is distinctive about mediation, that it "is commonly directed, not toward achieving conformity to norms, but toward the creation of the relevant norms themselves."¹⁹ After attempting an enumeration of the standard characteristics of situations where, as a matter of (normatively significant) fact, mediation is often employed, Fuller concedes that this sort of enumeration fails to touch the "central quality of mediation, namely, its capacity to reorient the parties toward each other, not by imposing rules on them, but by helping them achieve a new and shared perception of their relationship, a perception that will redirect their attitudes and dispositions toward one another."²⁰ This doesn't mean that mediation is appropriate only for intimate personal relations. No, situations where there is some element of economic trade often employ mediation. The process of mediation routinely includes "delicate sounding out procedures by which the two parties' interests are revealed and gradually fitted together into

17. Fuller, *supra* note 2, at 307.

18. *Id.*

19. *Id.* at 308.

20. *Id.* at 325. Fuller finds the characteristics of the collective bargaining situation which are useful to "analyzing" the functions of mediation generally to be that

the parties concerned (1) being two in number, find themselves (2) in a relationship of heavy interdependence exerting a strong pressure to reach an agreement, an agreement that will (3) combine elements of an economic trade with (4) elements of a written charter or constitution for the governance of their future relations; this agreement is (5) negotiated by agents, not principals, and (6) the employer occupies throughout a dual role, being, on the one hand, director of the enterprise and, on the other, a coequal with the union in the negotiation and administration of the collective bargaining agreement.

Id. at 311.

I shall leave to the reader a one-to-one comparison of our landlord-tenant case to the typical collective bargaining situation, where mediation is accepted, noting only the following conclusions. The fifth characteristic does not apply. The others do, though, of course, analogously. The interesting question is, I think, why number 2 applies, even analogously. See *infra* text accompanying notes 74 to 82.

APPROPRIATENESS OF MEDIATION

some workable pattern.”²¹ A good mediation’s calculated indirection searches out “the possible margins of cooperative success.”²² Indeed, it may “aptly” be employed even to end a (contractual) relationship,²³ presumably where the sounding out revealed that there existed no “possible margin of cooperative success.”

Fuller argues that two tests mark out the “proper domain of mediation.”²⁴ The first test asks whether the “underlying relationship [is] such that it is best organized by impersonal act-oriented rules?”²⁵ These are rules “requiring, prohibiting, or attaching specific consequences to acts,” are characteristic of contract law, and “typically prescribe acts or performances, not resolutions of the will or dispositions of the spirit.”²⁶ A Chicago absentee landlord-tenant relationship was typically “act-oriented.” This is in contrast to marriage, the place where mediation finds its natural home, where “a legalistic conception of the relationship would be destructive of the spirit of mutual trust and confidence essential for the success of a marriage [and] . . . the shifting contingencies of married life . . . would require reading so many tacit exceptions into the rules that they would, in any event, forfeit their efficacy as an organizing principle of the relationship.”²⁷ This first test tells us when mediation “*should* not be used.”²⁸ There is, however, one exception. Even where the relationship is best organized by impersonal act-oriented rules, mediation may still be “employed to create or modify rules.”²⁹

Fuller argues that mediation *can’t* be used where there are more than two parties.³⁰ Here there were formally two parties, though others were virtually present. Maureen was concerned about the effects of any

21. Fuller, *supra* note 2, at 322.

22. *Id.* at 316 (quoting C. BARNARD, *THE FUNCTIONS OF THE EXECUTIVE* 255 (1953)).

23. *Id.* at 308.

24. *Id.* at 330.

25. *Id.*

26. *Id.* at 329. Fuller argues that where the legal standard is clear and the case presents mainly an issue of relatively unadorned fact (“whether A drove through a red light.”)

even the most ardent advocate of conciliative procedures would hardly recommend mediation as the standard way of dealing with such problems. A pervasive use of mediation would here obliterate the essential guide posts and boundary markers men need in orienting their actions toward one another and would end by producing a situation in which no one could know precisely *where he stood or how he might get to where he wanted to be*. As between black and white, grey may sometimes seem an acceptable compromise, but there are circumstances in which it is essential to work hard toward keeping things black and white.

Id. at 328. See also Alschuler, *Mediation with a Mugger: The Shortage of Adjudicative Services and the Need for a Two Tier Trial System in Civil Cases*, 99 HARV. L. REV. 1808 (1986).

27. Fuller, *supra* note 2, at 331.

28. *Id.* at 330.

29. *Id.*

30. *Id.*

accommodation with Julie on her ability to manage the building and, of course, in the financial effects on her allocating money for renovation elsewhere and in realizing, by her own personal standards, an acceptable rate of profit. Fuller argued further that mediation *can* be used where there was "an intermeshing of interests of an intensity sufficient to make the parties willing to collaborate in the mediational effort."³¹

Would Fuller have found this case appropriate for mediation? Insofar as the conversation was oriented "not toward achieving conformity to norms but toward the creation of the relevant norms themselves" it would, in his view, be appropriate. Were the parties "creating" the relevant norms? To a very limited extent. In the main, Maureen was insisting that Julie accede to "pre-existent" notions of landlords' prerogatives as ultimate decision-makers. But we must be more refined. Maureen's willingness to compromise on the late fees and the amount deducted and to continue the landlord-tenant relationship with someone who now had partial success in challenging her authority was very unusual. One "traditional" norm of the landlord-tenant relation, as I knew it in Chicago, had changed. Having once been partially successful and having had this respectful, what Cavel calls "moral"³² conversation, there was, I think, a kind of implicit assurance that Maureen would continue to take account of Julie's claims in making business decisions. Already navigating in a financially tight place, Maureen would find her business decisions subject to more complex norms. To a limited extent, assuming of course that her required cash flow from the building was not precisely fixed by market forces, Maureen would become like Fuller's "watermaster," involved in a process equivocally "mediative."³³ The "mediative" aspect of the relationship would lie in her attempt to make her decisions "by consultation" with the person "whose interests are at stake."

So, to some extent, what was up for grabs here was *both* whether the relationship would be organized by the imposition of clear "act-oriented rules" and, if so, what those rules would be. This was not an either-or but a more or less. Maureen insisted on the right to control the expenditures made on the apartment—in effect the old "clear rule" of independent covenants (now qualified by the warranty of habitability defense). She compromised on the earlier instance of repair-and-deduct. She wanted a clear rent-due date, but was willing to accommodate the tenant's salary schedule in determining what that would be. Whole swaths of the form lease were irrelevant to the relationship they were forging. In general, the parties implicitly agreed that large portions of

31. *Id.*

32. *See infra* text accompanying notes 36 to 73.

33. Fuller, *supra* note 2, at 336.

APPROPRIATENESS OF MEDIATION

the relationship should be governed by clear rules and Fuller would probably agree that, as in most contracts, this was "best." This was, however, surely no absolute.³⁴

The mediation met another of Fuller's criteria: there was a strong interest in continuing the relationship and so of continuing the mediation. This was because each really was very interested in the dispositions the other bore toward her. They both initially wanted something like an apology. They both felt abused—manipulated—and wanted respect. In order to continue their relationship it was crucial to achieve "a new and shared perception of their relationship, a perception that [would] . . . redirect their attitudes and dispositions toward one another." To the extent that this was important, mediation would be appropriate.

There was here a delicate and subtle relationship between "respect for me" and "respect for my projects and interests." Conviction that the first existed could lead to some flexibility on the requirements of the second. In sum, this situation exhibited some of Fuller's criteria. Whether it was appropriate for mediation would, I assume, be for him then a question of prudential judgment.

V. THEORETICAL INTERLUDE

Should this case have been mediated? I said earlier that the question presents both institutional and philosophical questions. Indeed, perhaps it is better to talk about institutional and philosophical idioms. I will argue that the conversation that took place was a moral conversation in the specific sense of that word, the sense in which the moral sphere is distinct from the political or legal. These women treated their problematic situation primarily as a moral problem, and not as a legal or a political problem. Maureen kept open the option of treating it legally and Julie, it seems, of treating it politically.³⁵ They slowly and cautiously let go of those options as the mediation progressed. As I said, mediation was not neutral in this, but it was not neutral in the sense that it was to a very large extent moral conversation itself. One of the aspects of

34. The reference to C. GILLIGAN, *IN A DIFFERENT VOICE: PSYCHOLOGICAL THEORY AND WOMEN'S DEVELOPMENT* (1982) is here unavoidable. Gilligan argues that women's notions of moral action are far less "rule" or "principle" oriented than are men's and focus far more on the appropriate degree of caring responsibility for the individual person. One could easily interpret this mediation as exhibiting the conflicts between a "feminine" notion of decency to another person and the "iron laws" that govern the economic and social milieux within which these two women were moving. In many discussions one can substitute "moral" for "feminine" and "political" for "masculine" and emerge with another completely coherent discussion.

35. I use the term "politically" in only one of its senses here. In this sense acting politically is the use of collective power to achieve group interest, if necessary, at the expense of another group or individual.

mediation is that, to a relatively large extent, social ordering takes place in the shadow of moral conversation. The reasons for the parties not to mediate were the reasons not to engage in that kind of conversation.

What was interesting about this conversation was that these women were walking along the edges of three realms: the moral, the legal, and the political. There is a sense, of course, in which resolving a situation legally is resolving it morally (not by violence, for example). Likewise there is a moral use of politics. And a legal use of morality (what would a reasonable man have done?). So Donagan³⁶ charges Weber with sentimentality and romanticism, in holding that political men acting politically take immoral positions for the common good, lose their souls for our sake.

Still there is a sense in which moral discourse is different from legal and political discourse. The language itself is different and the dispositions and virtues it calls upon are different. "More" of the person is revealed; the mask is off. (Speaking deftly from behind the legal or political mask requires high virtue of a different kind.) The masks embody relatively fixed roles and rules that have always embodied disparate, though often extraordinarily complex power relations, but that also protect the person from the thoughtless behavior of others. They also allow us to count on performances—of doctors, garbage men, pilots—that we deeply need. There seems to be an aspiration, however, which Enlightenment thought found in the human mind and Medieval thought found in the nature of things, and which the linguistic in turn prefers to find in the dynamics of language, toward the equality and concreteness of the moral point of view and of moral conversation. Legal conversation is abstract; the abstractions serve many purposes, among them to structure expectations of others' performances in relations that are largely instrumental. Moral conversation has an Edenic quality: it is what the equality and mutual respect implicit in personal communication seems itself to aspire to. More sober spirits, legally and politically experienced and worldly-wise, always warn against this everyday utopianism. It can lead to the excesses of the "politics of compassion" and can easily be manipulated. Still, the difference between the moral point of view and legal and political points of view *and* their relationships prevents the legal from ossifying into amoral stability and the political from cascading into amoral civil strife.

The forum here was unlike litigation, where claims are quickly dismissed for failure to state a legal "cause of action" or evidence refused as "legally irrelevant." Mediation legitimizes the actual opinions of the participants, and thus their identities. Here, opinions and identities change *only* insofar as the process of face-to-face encounter, the "speech

36. A. DONAGAN, *THE THEORY OF MORALITY* 184 (1977).

APPROPRIATENESS OF MEDIATION

situation," invites the parties themselves to take account of each other, to "fuse their horizons," often in a manner that affects their identities in a painful way. To use the religious metaphor, the process of real understanding involves a partial death of the "old self." In the related language of modern philosophical idealism, the self may be partially "dismembered" in this process.³⁷ Of course this need not be so. The parties may treat the encounter as an opportunity for wholly manipulative hard bargaining of the sort that has two salient and related characteristics: (1) each party's words are exhaustively determined by their instrumental relationship to a goal exhaustively determined by that party's *pre*-established desires, and, derivatively, (2) neither is open to persuasion, at least as to her ends. At the other extreme, a party may lose touch with her reflective identity by the more subtly coercive aspects of a speech situation that any salesman, detective, or trial lawyer understands, and may be "coerced," "borne away," "seduced" into an agreement to which even the person who emerges from the encounter cannot give a reasonably settled allegiance. (Only "reasonably settled" because the winds of self-indulgence and resentment will likely blow through the soul of even the most integrated personality.)

I have spoken of moral, legal, and political spheres, distinct but related. Authors critical of liberalism often focus directly upon the rigid separation of the spheres of human activity in liberal societies.³⁸ Norms of mutuality and personal reverence prevail within the family and, more rarely, in a small group of friends. Here the distributional norm approaches "from each according to his ability, to each according to his need."³⁹ Personal talents may, in Rawls' words, tend to be regarded here as a common asset.⁴⁰ There is a strong, though never absolute, commitment to the continued coordination of personal and communal goals. Indeed, a strong personal goal is the common good and a strong element of the common good is the flourishing of the person, one of whose central developing qualities, excellences, is the capacity to understand and promote the common good.

Most problematic situations that arise in this personal context are resolved without recourse to anything so formal as mediation, even mediation of another family member. Where the level of conflict rises, family members may resort to mediation. Indeed, Fuller suggests that mediation has its natural home here, at least where the conflict is within the husband-wife "dyad."

37. M. TAYLOR, *JOURNEYS TO SELFHOOD* 159-62 (1980).

38. See, e.g., R. UNGER, *FALSE NECESSITY: ANTI-NECESSITARIAN SOCIAL THEORY IN THE SERVICE OF RADICAL DEMOCRACY* (1987).

39. Marx, *Critique of the Gotha Program*, in 3 K. MARX & G. ENGELS, *SELECTED WORKS* 23 (1951).

40. J. RAWLS, *A THEORY OF JUSTICE* 100 (1971).

Other authors, themselves often from divergent traditions, suggest that a delineation of spheres of human action, each with its own distinctive principle of action, is not merely a pathology of liberal societies. Arendt's⁴¹ linguistic phenomenology reveals a multiplicity of principles in different realms of human practice that must be kept distinct if they are to "redeem" each other. Kantians more or less sharply distinguish perfect from imperfect duties and, derivatively, the moral world of virtue from the legal world of external conformity.⁴² Aristotelian thinkers, including those whose thought is strongly influenced by Aquinas, likewise find different realms differentiated by distinctions that have a "natural" *fundamentum in re*.⁴³ These distinctions will suggest, in different ways, different modes of resolving fundamentally different problematic situations in the different spheres of human practice. Adjudication will be fundamentally more appropriate to some of these situations, an argument that Alschuler and Fiss have made in more specifically institutional idiom just recently.

The most balanced social theory, it seems to me, recognizes the importance of the separation of spheres and sees the corruption that can occur when it is ignored. When the distinction between the political-legal and the moral-religious is ignored, for example, politics can become a "hunt for hypocrites"⁴⁴ and "generate a despotism in which every witness-box becomes a confessional."⁴⁵ Tyrants, great and petty, see every disagreement as an immoral attack on the beloved community. Moral denunciation seems to come most easily to the most oppressive attorneys. On the institutional side, the attempt to extend mediation to "circumstances in which it is essential to work hard toward keeping things black and white"⁴⁶ can lead to further manipulation and harm.

On the other hand, there exists the danger of fixism: of entitizing the differences among the realms and thus of sealing off one realm from the benign, even necessary, influence of another. There is a moral dimension to politics. There is a political dimension to law. There is a legal dimension to personal relations. Even "domestic" norms such as "brotherhood" must have a (carefully mediated) place in the political and legal world.⁴⁷ A theoretical fixism can lead to practical sterility. Likewise on the institutional side the processes of social ordering, including mediation and adjudication, must have some relation to each

41. See generally H. ARENDT, *THE HUMAN CONDITION* (1958).

42. See generally P. RILEY, *KANT'S POLITICAL PHILOSOPHY* (1983). See also A. DONAGAN, *supra* note 36.

43. B. LONERGAN, *A THIRD COLLECTION* 179 (1985).

44. H. ARENDT, *ON REVOLUTION* 96-106 (1963).

45. P. RILEY, *supra* note 42, at 176.

46. Fuller, *supra* note 2, at 328.

47. See generally W. McWILLIAMS, *THE IDEA OF FRATERNITY IN AMERICA* (1973).

other⁴⁸ and the judgment as to the forum in which any problematic situation belongs cannot rely on rigid and abstract categorization of the kinds of "disputes."

I have spoken of a "distinctively" moral conversation and will suggest that one important strand of this mediation should be so conceived. I take this notion from Hanna Pitkin's study of Wittgenstein and Cavell.⁴⁹ In this view, there exist truly, though problematically, distinct "language regions" or "language strata" with different grammars and standards of meaningfulness and truth. Such are the languages of science, religion, morality, politics, and, though Pitkin does not explore this, of law. The ontological significance of these differences—the extent they reflect essential distinctions in reality—is problematical⁵⁰ and need not detain us except for this. This idiom of language regions may "foster the illusion of systematic rules, of sharply distinct fixed subdivisions whose boundaries may not be violated" when in fact "any subdivisions we distinguish in the main body of our language will be only questionably distinct."⁵¹

Moral discourse in ordinary life "centers on actions, and on actions gone wrong."⁵² Its focus is "the assessment and repair of human relationships when these have been strained or damaged by the unforeseen results of some action,"⁵³ its "center of gravity . . . falls . . . in personal conversation between an actor and someone affected adversely by what he did,"⁵⁴ and it may employ "what Austin calls 'excuses,' Cavell 'elaboratives'—those pleas, explanations, justifications, and other modifiers that allow us to defend 'conduct which comes to grief.'"⁵⁵ Morality is, then, "both conventionally traditional and pragmatically mundane, and consequently . . . having very definite limitations."⁵⁶ This invocation of a set of categories that has evolved culturally and linguistically over generations allows the appeal "from contemporary incoherence to the coherence of a whole moral tradition."⁵⁷ (As Kant put it, "who would think of introducing a new principle of all morality, and making himself,

48. Burns, *The Enforceability of Mediated Agreements: An Essay on Legitimation and Process Integrity*, 2 OHIO ST. J. ON DIS. RES. 93, 100-10 (1987).

49. H. PITKIN, WITTGENSTEIN AND JUSTICE 149-57 (1972). See also S. CAVELL, *THE CLAIM OF REASON* (1979).

50. H. PITKIN, *supra* note 49, at 146.

51. *Id.*

52. *Id.* at 149.

53. *Id.*

54. *Id.* at 150.

55. *Id.* at 149.

56. *Id.* at 150.

57. *Id.* (quoting M. OAKESHOTT, *RATIONALISM IN POLITICS AND OTHER ESSAYS* 106 (1962)). Pitkin quotes Austin: "Our common stock of words embodies all the distinctions men have found worth drawing, and the connexions they have found worth marking, in the lifetimes of many generations." H. PITKIN, *supra* note 49 (quoting J. AUSTIN, *PHILOSOPHICAL PAPERS* 130 (1961)).

as it were the first discoverer of it, just as if all the world before him were ignorant what duty was or had been in thoroughgoing error?"⁵⁸ Moral conversation is thus generally adjudicative, not legislative: "normal moral discourse, our ordinary exchanges about conduct, do not involve the altering or innovating of moral concepts, but their application."⁵⁹ This is one source of its limitations:

It provides *one* possibility of settling conflict, a way of encompassing conflict which allows the continuance of personal relationships against the hard and apparently inevitable fact of misunderstanding, mutually incompatible wishes, commitments, loyalties, interests and needs, a way of healing tears in the fabric of relationships and of maintaining the self in opposition to itself or others. Other ways of settling or encompassing conflict are provided by politics, religion, love and forgiveness, rebellion, and withdrawal. Morality is a valuable way because the others are so often inaccessible or brutal; but it is not everything; it provides a door through which someone, alienated or in danger of alienation from another through his action, can return by the offering and the acceptance of explanation, excuses and justification, or by the respect one human being will show another who sees and can accept the responsibility for a position which he himself would not adopt. . . .⁶⁰

Thus moral argument need not culminate in agreement, though without the perception that agreement is possible argument would be senseless. "The point of moral argument is not agreement on a conclusion, but successful clarification of two people's positions . . ."⁶¹

Its function is to make the positions of the various protagonists clear—to themselves and to the others. Moral discourse is about what was done, how it is to be understood and assessed, what position each is taking toward it and thereby toward the other, and hence what each is like and what their future relations will be like. The hope, of course, is for reconciliation, but the test of validity in moral discourse will not be reconciliation but truthful revelation of self. 'The direct point' of moral discourse, Cavell says, is 'to determine the positions we are assuming or are able or willing to assume responsibility for . . .'

Moral discourse is useful, is necessary, because the truths it can reveal are by no means obvious. Our responsibilities, the 'extensions of our cares and commitments, and the implications of our conduct, are not obvious . . . the self is not obvious to the self.'⁶²

So any conversation that in fact succeeds in excusing behavior and restoring a relationship is not necessarily a moral conversation. *Truthful* revelation of the self will treat my conversation partner as a person, an

58. H. PITKIN, *supra* note 49, at 150-51 (quoting S. Cavell, *The Claim to Rationality* 321 (unpublished dissertation, Harvard University)).

59. *Id.* at 151.

60. *Id.* at 151-52 (quoting S. Cavell, *The Claim to Rationality* 353-54 (unpublished dissertation, Harvard University)).

61. *Id.* at 153.

62. *Id.* at 153-54 (quoting S. Cavell, *The Claim to Rationality* 417 (unpublished dissertation, Harvard University)).

end in himself and not merely as a means to my goals or in my projects. I respect him in his independence of those goals and projects.⁶³ “Moral discourse, then, is precisely the kind of exchange which Martin Buber calls an ‘I-Thou’ relationship, in which the other is addressed and conceived of as a human being, a person basically *like oneself*.”⁶⁴

Moral conversations do not then have the same kind of standards for validity and proof as do conversations about simple empirical facts. (“My wallet must be somewhere in the apartment; I had it when I returned last night and I have not left since.” “But perhaps someone else took it from the apartment.” “No, no one has been here: the only door is still bolted from the inside, there is no fire escape, and the apartment is on the twentieth floor.”) There is much less room in the latter for personal judgment about whether the sets of reasons given are adequate. Moral conversation is largely an exploration of what positions I will take responsibility for and whether I can really live with the self that those reasons reveal.⁶⁵ Here I can refuse to accept a challenge to the rightness of an action without absolutely denying its validity. “What I *cannot* do, and yet maintain my position as morally competent, is to deny the *relevance* of your doubt ([w]hat difference does it make that I promised, that he’s an enemy of the state, that I will hurt my friends.)”⁶⁶ In sum, the goal of moral discourse is “self-knowledge and the knowledge of actions, and what constitutes rationality does not depend on ultimate agreement but on truthful clarification of positions” whose point is “to determine *what* position you are taking, that is to say, *what position you are taking responsibility for*—and whether it is one I can respect.”⁶⁷

Now it’s easy to see why two persons engaged in a moral conversation who cannot reach agreement might choose to submit to the decision of a court where they regarded the court as providing an authoritative interpretation of their common norms. This sometimes happens. Why should they litigate, though, if they viewed litigation as a struggle subject to norms and procedures they did not accept (or understand)? They always have the option of compromise.⁶⁸ I think people often

63. *Id.* at 155.

64. *Id.*

65. I H. ARENDT, *THE LIFE OF THE MIND: THINKING* 180-83 (1978).

66. H. PITKIN, *supra* note 49, at 156 (quoting S. Cavell, *The Claim to Rationality* 350 (unpublished dissertation, Harvard University)).

67. *Id.* (quoting S. Cavell, *The Claim to Rationality* 351 (unpublished dissertation, Harvard University)).

68. I have mediated a case where one of the parties said to me in the presence of the others something to the following effect: “I despise this man [pointing to one other party]. I think he is just a bad person. But I would much prefer to deal with him than the lawyers and judges who will decide my fate if this goes to trial. *They* make this guy look like a saint.”

litigate because their sense of self-respect, and, strangely, their respect for the other party, require a struggle.

This is one situation where a fair fight will take place. I am convinced of something. (Even if that something is my right not to be shoved by you, it is my *conviction* that makes the fight possible. If I believe that you have the right to shove me, there will be no fight, except through a burst of anger that I will soon repudiate.) You are convinced of something that, under the circumstances in which we find ourselves (perhaps Fuller's bilateral monopoly, the need for an agreed single course of action), dictates a course of action incompatible with my conviction. The circumstances and convictions are such that no compromise solution is concretely imaginable.⁶⁹ I maintain, to the extent that I can trust my own sincerity, that my conviction is so closely intertwined with my personal identity that *I* cannot surrender it, even though I may, on balance, respect your sincerity. This would be dishonorable, unauthentic. I would rather be defeated than dishonored. But the circumstances may be such that this impasse must be broken. Let's fight: let nature or fortune decide. At the end of our battle, we may still have our integrity and, perhaps, renewed respect for one another.⁷⁰

The limitations we impose on our fight embody our respect for one another beyond this impasse. The fight will not be to the death. Litigation, I believe, is often *subjectively perceived* by the parties as this sort of stylized combat. This is, of course, discontinuous with a vision of litigation as the forum within which consensual norms, norms the parties implicitly accept, are interpreted and applied, but that vision, taken to an extreme, fails to explain agonistic aspects of much litigation. There is much "fight" in litigation, something conceded by those who denounce it.⁷¹ As I suggested in the last paragraph, there can be reason to carry on this limited, formalized struggle even if the norms that the court will "apply" are viewed by the parties, as Macaulay⁷² found, to be utterly alien to the parties' personal norms or the norms that are generally accepted in the social matrix where the parties address each other.

I fully understand how superficial the above is. Fights as often engender resentment and hatred. There is a special danger here in litigation, where the struggle takes place, for all the formal legal structuring, in the traditional idiom of forensic rhetoric, *moral* praise

69. One reason for that may be my belief that a compromise, otherwise possible, will be perceived by you as a surrender. Because my self-respect is dependent in part on *my* not doing something that *I* believe you will despise, my belief about your perception leads to impasse.

70. E. ERIKSON, *INSIGHT AND RESPONSIBILITY* 241 (1964). Erikson argues that the explicitly military expression of this ethic is outmoded and dangerous.

71. See generally M. FRANKEL, *PARTISAN JUSTICE* (1980).

72. Macaulay, *Elegant Models, Empirical Pictures and the Complexities of Contract*, 11 *LAW & SOC'Y REV.* 507 (1977).

and blame. Some parties accept this and distance themselves from the trial. ("It's part of the game.") Most, I think, do not. A trial for these women could have involved some degree of moral denunciation that might have wounded self-esteem. Liberal legal formalisms, and the corresponding doctrines of evidentiary relevance, would actually have limited that effect. (The alternative is "a despotism in which every witness-box becomes a confessional.")⁷³ In other words, there was moral hazard to the parties in litigation-talk as well as in moral talk.

VI. AN INTERPRETATION

[I]n Ahmedabad a hollowed and yet eminently concrete event had occurred. . . . I refer, of course, to Gandhi's leadership in the lock-out and strike of the mill-workers in 1918, and his first fast in a public cause. . . .

The utopian quality of the principles on which he determined to focus can only be grasped by one who can visualize the squalor of the workmen's living conditions [and] the latent panic in the ranks of the paternalistic millowners (beset by worries of British competition) . . . Gandhi announced the principle which somehow corresponds to our amended Rule: "That line of action is alone justice which does not harm either party to a dispute." By harm he meant—and his daily announcements leave no doubt of this—an inseparable combination of economic disadvantage, social indignity, loss of self-esteem, and latent vengeance.

Neither side found it easy to grasp this principle.⁷⁴

These women chose to address their problematic situation primarily through the medium of moral conversation. Each began by accusing the other of injuring her. Each offered the other more or less traditional sets of excuses and explanations for the offending conduct. Each learned something important about the position she was taking responsibility for, that is, about herself. This was, I think, personally costly for both. The forum provided them the opportunity to reassess their projects and identities in relation to those of the other party. In litigation those would have remained fixed. Indeed the function of legal institutions is usually to maintain the more or less fixed boundaries between persons that are the conditions of the public exercise of freedom⁷⁵ at all.

Much has been made of the "conservative" nature of mediation, often in contrast to litigation. It is true that this process of social ordering does not offer a place to stand outside the identities, that is the projects, interests, and opinions of the parties. It "legitimizes" them.

73. P. RILEY, *supra* note 42, at 176.

74. E. ERIKSON, *supra* note 70, at 238-39.

75. H. ARENDT, *THE ORIGINS OF TOTALITARIANISM* 465-66 (1973).

However, it also clarifies them by the process of often intense conversation with someone whose projects, interests, and opinions have led her into conflict. This clarification or determination may limit and change the identities the parties bring to the mediation. In this, mediation may be the vehicle for a kind of ordering that is not traditional, but peculiarly contemporary:⁷⁶ the qualification and modification of received roles through dialogue. Throughout the mediation both parties, perhaps particularly Maureen, were judging the extent to which their moral "respectfulness" of the other should affect their received conventions and roles.

These conventions and roles had been assumed by both parties in their projects. Not having to negotiate or deliberate about every aspect of the relationship made focused planning possible. The channels in which complex plans flow should be hard in most places. *Every* relationship can't be up for personalized reconsideration all the time. This mediation showed, though, that the small still voice of personal dialogue could modify, to some degree, perceived roles and expectations, as could the more thunderous voice from the bench, which in *many, many* cases would be more inflexible.

It simply is not the case that these women approached settlement as an opportunity for highly rationalized, calculated, and manipulative behavior. Indeed, their problem was quite the opposite, of getting from moral dialogue to a discussion of how they could reconstitute the terms of the relationship in relatively more impersonal terms. It seemed that each wanted to be assured that the other did not "disrespect" her before this second task could be initiated. Each wanted an apology; Maureen explicitly wanted an admission of wrongdoing. Neither got one straight out. Rather, each received one of the traditional moral "elaboratives." Maureen answered that she had not intended the effect of her words, and that she was merely asserting a right embedded in her legitimate expectations and obligations. Julie provided an *excuse* for her action— inability to contact the landlord—while conceding the principle of market determination of rents ("I've looked elsewhere . . .") subject to the landlord's prior obligation "to keep the building up." Maureen continually reminded Julie that she was aware that this moral talk could be used manipulatively ("Are you just trying to take time . . ."), but was convinced *enough* of Julie's sincerity to want to proceed. Even late in the mediation she may have fallen back into an over-moralizing of a relationship in which there were divergent interests. ("I don't believe anything

76. D. KOLB, *THE CRITIQUE OF PURE MODERNITY: HEGEL, HEIDEGGER AND THE AFTERMATH* 259 (1986) ("Our task is less to create constantly new forms of life than to creatively renew actual forms by taking advantage of their internal multiplicity and tensions and their friction with one another.").

she's saying. . . . She's never cared about my concerns") Julie, in a different way did the same,⁷⁷ but that was part of the "cost" of this sort of dialogue, just as surely as litigation or "politicizing" the relationship would have had its costs.⁷⁸

Throughout, the two were struggling with the significance of a barely achieved retrospective mutual recognition and respect for the structure of their future relationship. Was the mediation then, an example of the distortions of "essentially" legal and political questions that occur in a forum that transforms such questions into issues of personal morality?⁷⁹ Such a charge can be levelled most consistently by social theories that transform elements of persons' more public identities, opinions, and legitimate expectations into instances of inexorable social scientific or normative laws themselves disconnected from "personal" morality. Such theories destroy the operative assumptions of the parties here, that the spheres were related but distinct. Maureen sought the protection of the legal harbor at various points, and Julie wanted to get her bearings here too, but Julie was offended at the suggestion that legal proceedings were to be initiated and Maureen relied very little on the legal definition of her rights. Her assertion of those rights was really a response to what she regarded as Julie's manipulative half-truths.

The opinion that owning and managing residential real estate could be a real service expressed old ideals of "stewardship" and *were* elements of Maureen's *personal identity*. One voice told her that she was doing good and it ought to be appreciated. But she was doing her work in a social matrix of much larger forces—market forces, divergent interests, ethnic prejudices. Her interests were in many ways distinct and opposed to those whom she wanted to "serve." A good deal of the difficulty of the mediation for her involved a difficult harder look at the limits of her ideals when she sought concretely to embody them. Otherwise she could be a self-deceived Pharisee—savoring the illusory sweetness of her own "goodness" while reaping the financial benefits of a conventional real estate business.

My immediate feeling upon the end of this mediation was one of a kind of sadness for the participants, and especially for Julie. I thought she had been led to commit a very localized version of the "error rather prevalent among modern philosophers who insist on the importance of communication as a guarantee of truth . . . is to believe that the intimacy of the dialogue . . . can be extended and become paradigmatic for the

77. See *infra* text accompanying notes 80 to 81.

78. By "politicizing" in this context I refer to Julie's *perceived* ability (whether or not it existed) to initiate the tenant's group action against the landlord's interests.

79. See, e.g., Delgado, *ADR and the Dispossessed: Recent Books About the Deformalization Movement*, 13 LAW & SOC. INQUIRY 145 (1988).

political sphere.”⁸⁰ Perhaps, however, she slipped over that line only at the end of the mediation, took off too much of her public mask, and it was that slip that made it necessary to end the relationship. Until then, perhaps mediation’s moral dialogue was serving well to give a moral quality to and to some extent modify the mainly legal and political relationship these people had with each other. This inevitably meant a more complex relationship and made it more difficult for both parties to focus precisely on what it required.⁸¹

There was, finally, one disheartening possibility: Julie’s recognition of Maureen’s concerns as legitimate was precisely what broke her spirit. If you are surely right to raise the rent on the only reasonably safe apartment I can afford for my son and myself then the disability is mine. I am wrong to want the apartment at a price I can afford. This desire is for something that you deserve. I am coveting my neighbor’s, my sister’s, goods.

Oh, yes. It turned out that Julie exercised her option not to sign the lease. I never found out why. Perhaps she found a better apartment. Perhaps a cold look at her finances convinced her that she could not afford this apartment. Perhaps this relationship with her landlady had become too complex. By ending a relationship that had become “de-conventionalized,” in part by the very process of mediation, they reached a kind of “agreement” that was more of a mutual understanding than an instantaneous meeting of the minds—that their concrete personalities with projects and prior commitments of a more personal sort could not accommodate what was necessary to continue the relationship at all. Did the mediation then promise what it could not deliver? Or did it serve effectively to show them concretely that there was no “possible margin of cooperative success?”⁸²

Though mediation is often portrayed as a “conservative” process, this mediation showed that this need not be so. Surely there are costs and dangers, which were apparent here. Isn’t there also promise in a forum in which the person can reflectively try to coordinate the various spheres in which she moves, where personal responsibility for the specific shape

80. 2 H. ARENDT, *THE LIFE OF THE MIND: WILLING* 200 (1978).

81. J. MACNEIL, *THE NEW SOCIAL CONTRACT* (1980):

The discrete [contractual] norm is a norm of precision, a focusing norm. It enables people to deal precisely with one thing at a time—to keep their eyes on the ball—a vital factor in much human endeavor. It is true that the associated evils of over-specialization have led us to belated recognition of the high costs of such focus on single facets of human endeavor. But no society in the world has rejected either the norm or high levels of specialization; the most any society, even Maoist China, has done is to try to keep them under control.

Id. at 63.

82. Fuller, *supra* note 2, at 316 (quoting C. BARNARD, *THE FUNCTIONS OF THE EXECUTIVE* 254-55 (1953)).

APPROPRIATENESS OF MEDIATION

of that coordination is unavoidable? This was not solely a hard bargaining bit of negotiation in which threat value triumphs. Rather this was an opportunity for two mature people respectfully to decide just what their relationship would be. If either had decided that an aspect of the other's projects was illegitimate then resort to another forum would have been appropriate. That didn't happen here. Perhaps it wasn't so bad that they decided, reflectively and with some difficulty, that there could not be a continuing relationship. Perhaps it was good that they took personal responsibility for that decision. Perhaps all they lost were a few illusions.

