Veils and Cloaks of Ignorance: Under-used Tools for Conflict Resolution

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In his influential work, A Theory of Justice, John Rawls (1971) introduced the notion of a "veil of ignorance" as a conceptual device for promoting just choices. On the premise that getting conflicting parties to think more fairly is a good first step toward achieving agreement, we develop Rawls's notion into a set of mediator tools. Potentially biasing information can be excluded from consideration by means of thin veils, thick veils, or cloaks. A thin veil consists of instructions to disregard information that is known and already in consciousness. A thick veil makes it more difficult for information that is known but not in consciousness to be brought to consciousness. A cloak withholds information that is not yet known.

Opportunities to apply cloaks and veils of ignorance arise in fact conflicts, value conflicts, and interest conflicts. To maximize effectiveness, preference should be given to cloaks over thick veils and to thick veils over thin veils.

Finally, we explore the ethical considerations facing the mediator when using cloaks and veils.

I. INTRODUCTION

In his *A Theory of Justice*, John Rawls introduced the concept of a veil of ignorance as a device for encouraging the fair and unbiased judgments required for decisionmakers to move toward sound principles of social justice.[1] Rawls asked his readers to assume that decisionmakers planning an

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[1] *See generally* JOHN RAWLS, A THEORY OF JUSTICE (1971).

ideal society would be operating as in an original position of equality, behind a veil of ignorance as to their actual positions in life.[2]

We demonstrate in this paper that the same device has much greater application than has yet been realized as a practical tool for day-to-day mediation. Veils can be a very effective way to encourage the parties to a conflict to think more fairly and thus to move more rapidly toward a mutually satisfactory resolution. We also demonstrate that cloaks are even more effective than veils.

Our analysis begins with an overview of Rawls's ideas and a consideration of supporting psychological research that bears on the importance of fairness and the importance of veiling irrelevant and potentially biasing information. We then consider psychological research that points to the weakness of veils, as Rawls described them; and we then add the concepts of *cloaks* and *thick veils* to the *thin veils* described by Rawls.

Next, we consider applications of veils and cloaks in current practice, beginning with a hypothetical mediation, and then we consider practices in mediation generally, in the law, and in decision analysis.

Finally, we conclude with suggestions for recognizing opportunities to apply cloaks and veils, with some ethical caveats.

II. RAWLS AND THE VEIL OF IGNORANCE

The locus classicus for the "veil of ignorance" is John Rawls's *A Theory of Justice*. Rawls used the concept of a veil of ignorance to further a thought experiment in which he asked readers to imagine a group of decisionmakers who, under favorable conditions, want to create an ideal, just society.[3] He asked his readers to consider how a rational decisionmaking process might proceed with the decisionmakers selecting courses of action from behind a veil of ignorance.[4] While not essential to our paper, the principles that Rawls believed such a process would lead to are: (a) basic liberties for all, (b) offices open to all, and (c) wealth enhancement for the poor whenever the wealth of the rich is enhanced.[5]

Two features of the circumstances that Rawls specified are paramount. First, consistent with prevailing economic assumptions, Rawls asked his readers to assume that the decisionmakers would be rationally self-interested

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[2] *Id.* at 136–7.

[3] *Id.*

[4] RAWLS at 136–7.

[5] *Id.* at 141.

and not altruistic.[6] Second, Rawls asked his readers to assume that these decisionmakers would be operating as in an original position of equality, behind a veil of ignorance as to their actual positions in life.[7] Here is Rawls's description of the veil of ignorance:

> In justice as fairness, the original position of equality corresponds to the state of nature in the traditional theory of the social contract... Among the essential features of this situation is that no one knows his place in society, his class position or social status, nor does anyone know his fortune in the distribution of natural assets and abilities, his intelligence, strength, and the like. I shall even assume that the parties do not know their conceptions of the good or their special psychological propensities. The principles of justice are chosen behind a veil of ignorance.[8]

Rawls introduced the veil of ignorance as a conceptual device to increase the fairness of decisionmakers so they would move more surely toward sound principles of social justice. The same device can be used in mediation to make the parties to a conflict think more fairly and thus to move more rapidly toward a mutually satisfactory resolution.

In the conduct of our daily lives, we often make efforts to view ourselves, our beliefs, our motives, or our actions from a more objective point of view. Adam Smith described our efforts to achieve greater objectivity in this way:

> When I endeavor to examine my own conduct, when I endeavor to pass sentence upon it, and either to approve or condemn it, it is evident that, in all such cases, I divide myself, as it were, into two persons; and that I, the examiner and judge, represent a different character from that other I, the person whose conduct is examined into and judged of. The first is the spectator, whose sentiments with regard to my own conduct I endeavor to enter into, by placing myself in his situation, and by considering how it would appear to me, when seen from that particular point of view. The second is the agent, the person whom I properly call myself, and of whose conduct, under the character of a spectator, I was endeavoring to form some opinion. The first is the judge; the second the person judged of. But that the judge should, in every respect, be the same with the person judged of, is as

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[6] *Id.* at 137.

[7] *Id.*

[8] *Id.*

> impossible that the cause should, in every respect, be the same with the effect.[9]

Philosopher Thomas Nagel has described this process as one of "gradual detachment."[10] According to Nagel, the process works like this: we "step back from ourselves" and place our particular view of something in the world and then try to view the world with our own view in it. By doing so, we form a new conception of the world that has our view in it (as well as the relations between our view and the world in the new conception).[11] "In other words, we place ourselves in the world that is to be understood."[12] Our old view becomes part of the world we are viewing and can now be corrected or confirmed from the perspective of our new, more objective viewpoint. Nagel's process of "gradual detachment" may be more difficult than what can reasonably be expected from parties to a dispute.

Rawls takes a more promising approach to enhancing objectivity and fairness. Instead of adding perspectives to the decisionmaker's awareness, Rawls argues that each decisionmaker must remove from his or her awareness what is unique about his or her own perspective.[13] A criticism of this approach, however, is that we, as humans, may be incapable of blocking out our knowledge and beliefs in this way and are, therefore, unable to imagine neutral decisionmakers in an original position without allowing our own preferences and circumstances to seep into the neutral picture we are asked to create.[14]

When we participate in Rawls's thought experiment, the objectivity of our participation depends on the extent to which we can keep our own beliefs, motives, and actions bracketed out of the imagined original position. In the next section, we discuss research evidence on the psychological obstacles to obtaining objectivity. Despite these obstacles, however, this concept Rawls has called attention to is potentially a very powerful tool for moving conflicting parties toward greater objectivity and a shared understanding of reality, toward greater fairness, and, finally, to agreement.

Rawls's effort is to get us as rational but self-interested actors to reason our way to a "justice as fairness" position where we willingly endorse

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[9] ADAM SMITH, THE THEORY OF MORAL SENTIMENTS 113 (D.D. Raphael & A. L. Macfie eds., Oxford: Clarendon Press 1976) (1792).

[10] THOMAS NAGEL, THE VIEW FROM NOWHERE 7 (1989).

[11] *Id.*

[12] *Id.* at 4.

[13] RAWLS, at 137.

[14] *Supra* note 1.

principles that transcend our individual, self-interested natures.[15] He is, thus, working in the Kantian tradition of attempting to bridge the divide between ourselves in the Hobbesian world of nature (Kant's phenomenal aspect of the world) and ourselves in the ideal world of justice or morality (Kant's noumenal aspect of the world).[16] The former is perspective-dependent, appearing different to different observers; the latter is perspective-invariant, appearing the same to different observers.[17] If we can get participants in a dispute closer to achieving a perspective-invariant representation, we are more likely to achieve a mutually satisfactory resolution.

While Rawls's focus is on what he calls "substantive justice" (outcomes that recognize rights and liberties and involve a fair distribution of benefits and burdens), veils of ignorance would seem also to contribute to what he calls "formal justice" (institutional processes that are impartial and consistent).[18] Thibaut and Walker conducted the seminal psychological work on formal justice, which they called procedural justice.[19] Their principal finding was that unfavorable outcomes in legal settings are more readily accepted when the procedures are judged to have been fair.[20]

A more recent study with M.B.A. students found mediational styles of dispute resolution are judged to be both procedurally fairer and to lead to fairer outcomes than the two most common management styles.[21] They are: 1) the inquisitorial style, in which managers retain most of the control, and 2) the motivational style, in which managers employ incentives and threats.[22] Among the features considered important to procedural justice is neutrality, or freedom from bias.[23] One may reasonably expect that placing cloaks or

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[15] JOHN RAWLS, A KANTIAN CONCEPTION OF EQUALITY (1975), *reprinted in* JOHN RAWLS: COLLECTED PAPERS 254–266 (Samuel Freeman ed., Harvard U. Press 1999).

[16] *Id.*

[17] Lawrence Kohlberg, *From Is to Ought: How to Commit the Naturalistic Fallacy and Get Away With It in the Study of Moral Development, in* COGNITIVE DEVELOPMENT AND EPISTEMOLOGY 151–235 (Theodore Mischel ed., 1971).

[18] Rawls, *supra* note 1, at 59–60.

[19] JOHN. W. THIBAUT & LAUREN WALKER, PROCEDURAL JUSTICE: A PSYCHOLOGICAL ANALYSIS 94–96 (1975).

[20] *Id.*

[21] Rehka Karambayya & Jeanne M. Brett, *Managers Handling Disputes: Third-Party Roles and Perceptions of Fairness*, 32 ACAD. MGMT. J. 687–704 (1989).

[22] *Id.* at 697.

[23] Gerald S. Leventhal, *What Should be Done with Equity Theory? New Approaches to the Study of Fairness in Social Relationships, in* SOCIAL EXCHANGE: ADVANCES IN THEORY AND RESEARCH 27–55 (K. Gergen, M. Greenberg & R. Willis eds., 1980); Tom

veils of ignorance over biasing information will result in enhanced procedural justice and a greater chance at successful mediation.[24] (For a detailed analysis of procedural justice and conflict resolution, *see* Shapiro, 1993).

III. RELEVANT PSYCHOLOGICAL RESEARCH

Psychological research calls attention to the importance of fairness in conflict resolution and clarifies the ways in which veiling and cloaking can contribute to fairness. The case for cloaks, in particular, is made all the stronger by Kahneman's[25] recent description of the important role of the emotions in "thinking fast" in comparison to "thinking slow." Additionally, Haidt[26] argues that it is the power of the "elephant" of intuition and emotion that keeps good people from agreeing and renders appeals to reason, the "rider" of the elephant, so ineffective. We emphasize the use of cloaks to delay and diminish the effect of a rush of the "elephant" of intuition and emotion into the room. By using cloaks early in the mediation process, we introduce reason early, and we do not have to place such a heavy reliance on reason, as the "rider" of the elephant, to guide or turn it late in the process toward agreement between the parties. Like large ships, elephants turn slowly and with difficulty. We do not recommend that the elephant be ignored. We recommend that reason be introduced into the process by cloaks or by veils so that reason can do a lot of its work before the elephant of intuitions and emotions can take over the room.

Professor of Law Nancy A. Welsh argues that citizens "want the courts to resolve their disputes in a manner that *feels like justice is being done*," and that a perception of fairness contributes to a perception of the legitimacy of the institution providing or sponsoring the process and compliance with the outcome of the dispute resolution process.[27] Ultimately, insuring that mediation comes within a procedural justice paradigm serves some of the

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R. Tyler, *The Psychology of Procedural Justice: A Test of the Group Value Model*, 57 J. PERSONALITY AND SOC. PSYCHOL. 830 (1989).

[24] *See generally* Debra L. Shapiro, *Reconciling Theoretical Differences Among Procedural Justice Researchers by Re-Evaluating What it Means to have One's Views "Considered": Implications for Third-Party Managers*, *in* JUSTICE IN THE WORKPLACE: APPROACHING FAIRNESS IN HUMAN RESOURCE MANAGEMENT 51–78 (Russell Cropanzano ed., 1993).

[25] *See generally* DANIEL KAHNEMAN, THINKING, FAST AND SLOW (2011).

[26] *See generally* JONATHAN HAIDT. THE RIGHTEOUS MIND: WHY GOOD PEOPLE ARE DIVIDED BY POLITICS AND RELIGION. (2012).

[27] Nancy A. Welsh, *Making Deals in Court-Connected Mediation: What's Justice Got to Do with It?*, 79 WASHINGTON U. L. Q. 787, 791 (2001).

courts' most important goals—delivering justice, delivering resolution, and fostering respect for the important public institution of the judiciary.[28]

The fact that positions judged by third parties to be fair almost always lie between those advocated by the conflicting parties testifies to the importance of fairness in conflict resolution. Psychological research adds further testimony. Consider *The Ultimatum Game*,[29] in which one person is given, say, $10 to share with another person. This person can offer the other person any amount from $0 to $10. If the second person accepts the offer, he or she gets the amount offered, and the first person gets the rest. If the second person rejects the offer, neither person gets anything. Rationally, the second person should accept any amount above $0, because the alternative is to get exactly $0. Nevertheless, offers are usually $5 or close to it, and offers much below $5 are usually rejected. People are willing to sacrifice gains if, in doing so, they can avoid being treated unfairly.[30]

A. *Psychological research shows irrelevant information has a number of deleterious effects.*

Irrelevant information (a) biases judgment, (b) weakens the impact of relevant information on judgment, and (c) takes up cognitive capacity required for judgment. Psychological research also shows that thin veils of ignorance (most commonly instructions to ignore irrelevant information) are generally not effective, unless they fulfill stringent requirements. Once the genie is out of the bottle, it is difficult to get it back in. Cloaks of ignorance, for example, withholding information at the beginning of a mediation, are generally more effective than veils, such as revealing information and then asking that it be set aside.[31]

Irrelevant information biases judgment even when its irrelevance is perfectly clear. In a well-known study, each subject was asked percentage questions, such as, "What percentage of African countries are in the United Nations?" After each question, a spinner was spun, and the subject watched as the spinner stopped on a number from 0–100. The subject was first asked whether his or her judgment was lower or higher than this randomly

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[28] *Id.* at 792.

[29] Richard H. Thaler, *Anomalies: The Ultimatum Game*. 2 J. OF ECON. PERSP., 195–206 (1988).

[30] *Id.*

[31] *See*, Andrew J. Wistrich, Chris Guthrie, and Jeffrey J. Rachlinski, Can Judges Ignore Inadmissible Information? The Difficulty of Deliberately Disregarding *available at* http://faculty.lls.edu/workshops/documents/rachlinski.pdf.

determined number and then asked for a final, best answer. Strikingly, the researchers found that final answers were influenced by the patently irrelevant information from the spinner, answers following higher spinner numbers being higher than answers following lower spinner numbers.[32]

The order in which information is presented is often quite irrelevant to the judgment being made, yet "first impressions count" is a truism supported by abundant research evidence. In one study, for example, subjects shown the series PRAYER-CHURCH-CATHEDRAL-SKYSCRAPER rejected SKYSCRAPER as not belonging, while subjects shown the series SKYSCRAPER-CATHEDRAL-CHURCH-PRAYER rejected PRAYER as not belonging.[33] In negotiation, the initial offer affects the final settlement, though which party's offer is presented first is entirely irrelevant to determining a fair resolution.

An important kind of biasing information is information about the source of the message.[34] In negotiation, the knowledge that an offer or concession has come from an adversary can diminish its apparent value (reactive devaluation) in the eyes of the recipient. During the Cold War, American respondents were asked to evaluate the terms of a nuclear disarmament proposal that called for an immediate 50% reduction in long-range strategic weapons. This was to be followed over the next decade and a half by further reductions in both strategic and short-range tactical weapons until, very early in the 21st century, all such weapons would have disappeared from the two nations' arsenals. When this proposal was attributed to a group of unknown strategy analysts, 80% of respondents reacted favorably. Attribution of the proposal to President Reagan increased this to 90%, and attribution to Gorbachev (who had actually made the proposal) decreased it to 44%![35]

Another kind of bias important to conflict resolution is gain-loss bias created by ownership.[36] The seller often prices an item to include not only its market value but also a value for his or her emotional attachment to it.[37] In

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[32] Amos Tversky & Daniel Kahneman, *Judgments Under Uncertainty: Heuristics and Biases*, 185 SCI. 1124–1131 (1974).

[33] Charles N. Cofer, *Verbal Behavior in Relation to Reasoning and Values, in* GROUPS, LEADERSHIP, AND MEN 206–217 (Harold Guetzkow ed., 1951).

[34] Lee Ross, *Reactive Devaluation in Negotiation and Conflict Resolution, in* BARRIERS TO CONFLICT RESOLUTION 26–28 (Kenneth J. Arrow et al. eds., 1995).

[35] Constance A. Stillinger, Michael Epelbaum, Dacher Keltner & Lee Ross, The "Reactive Devaluation" Barrier to Conflict Resolution 1–18 (1988) (unpublished manuscript, on file with the University of Chicago Library).

[36] Daniel Kahneman, Jack L. Knetsch, & Richard H. Thaler, *Experimental Tests of the Endowment Effect and the Coase Theorem*, 98 J. POL. ECON. 1325 (1990).

[37] *Id.*

one study, the sponsors found: (a) those who had been told they had been given a coffee mug suggested selling prices whose median was $7.12; (b) those who had been told they would have an opportunity to buy the mug suggested selling prices whose median was $2.87; and (c) those who had been told that they would have an opportunity to choose between the mug and an amount of money that they judged to be equal in value, suggested values for the mug whose median was $3.12.[38] Thus, a compromise resolution to a conflict is likely to seem unfair to both parties, unless it is possible to place a cloak of ignorance between the items being evaluated and knowledge of who owns what.

In hindsight bias, the outcome biases the decisionmakers' judgment of how foreseeable it was that the conflict would turn out that way. "Monday morning quarterbacking" is a well-known phenomenon that is supported by abundant research. Subjects who are told how an uncertainty was resolved and then asked what probability they would have attached, in advance, to the way things turned out give higher probabilities than subjects who are not told how the uncertainty was resolved before making their judgments. In a conflict involving an injury, hindsight bias will incline observers to see the injury as having been more foreseeable than it actually was to the participants.[39]

B. *Irrelevant information weakens the impact of relevant information.*

Vivid irrelevant information about the case at hand can mask more abstract, relevant information. Subjects who were told that a personality description had been randomly drawn from a set of descriptions of 70 lawyers and 30 engineers, correctly judged the probability that it was the description of a lawyer to be .70.[40] However, some subjects were also provided information that could apply as well to a lawyer as to an engineer: "Dick is a 30-year-old man. He is married with no children. A man of high ability and high motivation, he promises to be quite successful in his field. He is well-liked by his colleagues." These subjects correctly saw this description as irrelevant but, ignoring the relevant information, judged the

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[38] *Id.* at 1339.

[39] Baruch Fischhoff, *Hindsight ≠ Foresight: The Effect of Outcome Knowledge on Judgment Under Uncertainty*, 1 J. EXPERIMENTAL PSYCHOL.: HUM. PERCEPTION & PERFORMANCE 288–299 (1975).

[40] D. Kahneman & A. Tversky. *On the Psychology of Prediction.* PSYCHOLOGICAL REVIEW, 80, 237–251 (1973).

probability that it was the description of a lawyer to be .50.[41] The irrelevant information had blocked the relevant information. Useless information is not the same as no information!

Various biasing effects of irrelevant information such as primacy, sunk costs, and arbitrary reference points have been shown to be weakened by prior commitment.[42] Thus, one would expect the diluting effect to be greater on information coming from the other party than on the information to which one has already become committed, and, thus, to make it more difficult to come to a shared understanding of the situation. Removing irrelevant information should make it easier for each party to understand the other party's perspective and incorporate it into his or her thinking.

C. *Irrelevant information takes up precious cognitive capacity.*

Another example of irrelevant information negatively influencing good decisionmaking involves the misleading impact of loyalty program points on consumer choices. When loyalty points are available, shoppers will discount salient information like price to their financial detriment. Research shows that irrelevant information has an impact beyond just a tiebreaker.[43] The parties to a negotiation usually need all their wits to come to a mutually satisfying resolution. Burdening their intellects with irrelevant information can be expected to interfere with conflict resolution by reducing the intellectual capacity they can bring to bear on attempts to see the other party's perspective and to understand creative solution proposals.

D. *Instructional veils are usually ineffective.*

In the well-known Stroop Test, subjects are presented names of colors printed in various colors. In one condition, each word is printed in the color it names. For example, RED would be printed in red, and YELLOW in yellow. In the other condition, each word is printed in some color other than the color it names. For example, RED might be printed in blue, and YELLOW in

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[41] *Id.*

[42] *See* Philip E. Tetlock, *Intuitive Politicians, Theologians, and Prosecutors: Exploring the Empirical Implications of Deviant Functionalist Metaphors*, *in* HEURISTICS AND BIASES: THE PSYCHOLOGY OF INTUITIVE JUDGMENT 588–593 (Thomas Gilovich, Dale W. Griffin & Daniel Kahneman eds., 2002).

[43] Stijn M.J. van Osselaer, Joseph W. Alba, Puneet Manchanda, Irrelevant Information and Mediated Intertemporal Choice, *Journal of Consumer Psychology,* 14, no, 3 257–270 (June 2004).

green. The instructions are to name the colors quickly, ignoring the words, for example responding "blue" to the word RED printed in blue. The instructions to ignore the words are never wholly effective. It is dramatically easier to name colors when they are applied to words that name those colors; that is, when there is no irrelevant information.[44]

Similar effects have been found in jurors. "In general, the four studies that examined the impact of courtroom-based rulings of inadmissibility suggest that jurors are influenced by inadmissible evidence to some degree, but the impact on jury verdicts is less clear."[45] By telling jurors to disregard information, the judge is actually calling attention to it.

Much of the mainstream advice to improve conflict resolution procedures consists of suggestions for changing behavior by informing or motivating rather than suggestions for changing behavior by re-arranging the environment, or setting, in which, as has been argued, conflict resolution takes place. Veils of ignorance fall in the first category, and it is difficult to make information or instruction effective. Cloaks of ignorance fall in the second category. It would seem wise, in view of the findings just discussed, to prefer the use of cloaks over veils. Veils of ignorance can be made to work, but it is not easy; multiple conditions must be satisfied for veils to be effective.

E. *Instructions need to meet several conditions to be effective.*

The first condition for instructions to disregard irrelevant information to be effective is that the person making the judgment becomes aware of the irrelevant information. When people are aware of potentially biasing information, they are better able to resist its influence, presumably because conscious processes are more controllable than unconscious processes.[46] The second condition is that the persons instructed to disregard irrelevant information be experienced in so doing. Thirdly, people need to be instructed to think the opposite to consider possibilities that are contrary to one's

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[44] John R. Stroop, *Studies of Interference in Serial Verbal Reaction*, 18 J. EXPERIMENTAL PSYCHOL. 643–662 (1935); Frederick N. Dyer, *The Stroop Phenomenon and Its Use in the Study of Perceptual, Cognitive, and Response Processes*, 1 MEMORY & COGNITION 106, 106–108 (1973).

[45] Dennis J. Devine, Laura D. Clayton, Benjamin B. Dunford, Rasmy Seying & Jennifer Pryce, *Jury Decision-Making: 45 Years of Empirical Research on Deliberating Groups*, 7 PSYCHOL. PUB. POL'Y & LAW 666, 687 (2001).

[46] *See* SUSAN T. FISKE & SHELLEY E. TAYLOR, SOCIAL COGNITION 284 (Philip G. Zimbardo ed., 1991) (1984).

beliefs.[47] Effective de-biasing techniques include counterfactuals—instructions to consider possibilities that are contrary to one's beliefs[48]—and to explain how those possibilities could come about.[49] In one study, listing reasons why one might be wrong was the only measure that had any effect in reducing overconfidence;[50] and, in another study, asking subjects to indicate how they could have explained the occurrence of the outcome that did not happen was the only measure that had any effect in reducing hindsight bias.[51]

F. *Benefits of cloaking or veiling information.*

From a psychological point of view, the benefit of cloaks and veils is that, by circumventing emotional and associative blocks, which are psychological processes that interfere with comprehension of the intended meaning of a message, disputants gain a fairer hearing. Deprived of any reason to classify a message prematurely as either favorable or unfavorable, disputants are left with no alternative but to process it in order to evaluate it. Information about the source, if truly relevant, can be taken into account later, weighted in proportion to its degree of relevance. Cloaks and veils thus counter the powerful tendency of human emotion and cognition to minimize the impact of new information by interpreting it in ways that are consistent with old feelings and beliefs.

From an economic point of view, the benefits of cloaks and veils are such that sound judgments on which to base decisions results in greater efficiency and greater equity. Openness to accurate information regardless of its source should improve all aspects of decisionmaking (creative thinking, fact judgment, and value judgment) and should contribute to the success of the final choice. In addition, openness to valid information about the

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[47] Stanley F. Biggs & Theodore J. Mock, *An Investigation of Auditor Decision Processes in the Evaluation of Internal Controls and Audit Scope Decisions*, 21 J. ACCT. RES. 234–255 (1983); Stanley F. Biggs, William F. Messier, Jr. & James V. Hansen, *A Descriptive Analysis of Computer Audit Specialists' Decisionmaking Behavior in Advanced Computer Environments*, 6 AUDITING: J. PRAC. & THEORY 1–21 (1987).

[48] Charles G. Lord, Mark R. Lepper & Elizabeth Preston, *Considering the Opposite: A Corrective Strategy for Social Judgment*, 47 J. PERSONALITY & SOC. PSYCHOL. 1231–1243 (1984).

[49] Craig A. Anderson, *Inoculation and Counterexplanation: Debiasing Techniques in the Perseverance of Social Theories*, 1 SOC. COGNITION 126–139 (1982).

[50] Asher Koriat, Sarah Lichtenstein & Baruch Fischhoff, *Reasons for Confidence*, 6 J. EXPERIMENTAL PSYCHOL.: HUM. LEARNING & MEMORY *107, 114* (1980).

[51] Paul Slovic & Baruch Fischhoff, *On the Psychology of Experimental Surprises*, 3 J. EXPERIMENTAL PSYCHOL.: HUM. PERCEPTION & PERFORMANCE 544–551 (1977).

distribution of impacts in the absence of knowledge of where the decisionmaker would fall in this distribution should increase fairness.[52]

Thus, the overall benefits of cloaks and veils on conflict resolution processes should be greater movement toward resolution, as the parties come to an incrementally greater common understanding of the situation and satisfactory ways for dealing with it. These caveats of awareness, experience, and thinking-the-opposite are unnecessary, however, if biasing information is effectively blocked from attention. We propose thick veils and cloaks as ways to achieve this. Let us look more closely now at the distinctions among thin veils, thick veils, and cloaks.

IV. THIN VEILS, THICK VEILS, AND CLOAKS

Rawls's goal is a noble and attractive one, but the devil is in the details. Not all veils of ignorance are the same. It is helpful to distinguish between thick veils, which block out unwanted information reliably, and thin veils, which do this less reliably. More broadly, veils and cloaks as a continuum: (a) from *thin veils*, which are no more than instructions to disregard information that is both known and available to thought, through (b) *thick veils*, which are distractions or processing demands that render information that is known less likely to become available to thought, to (c) *cloaks*, which keep information from becoming known, in the first place.

Rawls, himself, distinguished between cloaks and veils:

> Particularly important among the features of the original position for the interpretation of negative freedom are the limits on information, which I call the veil of ignorance. Now there is a stronger and a weaker form of these limits. The weaker supposes that we begin with full information, or else that which we possess in everyday life, and then proceed to eliminate only the information that would lead to partiality and bias. The strong form has a Kantian explanation: we start from no information at all; for by negative freedom Kant means being able to act independently from the determination of alien causes; to act from natural necessity is to subject oneself to the heteronomy of nature.[53]

Although Rawls made little of the distinction between veils and cloaks, we shall make much of it and will add to it the distinction between thin and thick veils.

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[52] Rawls, *supra* note 1; John C. Harsanyi, *Nonlinear Social Welfare Functions*, 6 THEORY & DECISION 311–32 (1975).

[53] Rawls, *supra* note 1, at 265.

A. *Thin veils*

Whether the viewer can see through a real or metaphorical thin veil depends on the focus of his or her attention. If the viewer focuses on the veil, itself, he or she sees nothing beyond. Yet to see through to what is on the other side, the viewer has only to focus beyond the veil. For thin veils to work, effort on the part of the viewer is required. Veils in the form of instructions in a court of law to disregard irrelevant information are examples of thin veils. Jurors must make an effort to disregard evidence that they have seen or heard.

The only veil that seems to be considered in discussions of Rawls's thought experiment is a thin veil. He does no more than ask readers to imagine that decisionmakers do not know basic information about themselves, such as their sex, race, religious preference, age, or economic and social status. Psychological research shows, as we have seen, that, at best, this is a difficult task with an unreliable outcome.[54] Loewenstein & Lerner commented, "[e]ven if people do become aware of undesirable influences on their judgments and choices, they may have difficulty discounting those influences without over- or under- compensation.[55]

B. *Thick veils*

In contrast, whether the viewer can see through a real or metaphorical thick veil depends on the effort he or she expends in trying to construct a meaningful representation based on partial cues. A thick veil can work to block irrelevant information unless the viewer makes special effort. Thick veils can arise from (a) failure to recall biasing information, (b) failure to infer biasing information, or (c) inattention to biasing information because of immersion in a demanding task. As a demonstration of both thick and thin veils, consider the following problem:

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[54] *See* George Loewenstein & Jennifer S. Lerner, *The Role of Affect in Decisionmaking*, *in* HANDBOOK OF AFFECTIVE SCIENCES 619–627 (Richard J. Davidson, Klaus R. Scherer & Harold H. Goldsmith eds., Oxford U. Press 2003).

[55] *Id.* at 627; *See* Fritz Strack, *The Different Routes to Social Judgments: Experiential versus Informational Strategies*, *in* THE CONSTRUCTION OF SOCIAL JUDGMENTS 249–275 (Leonard L. Martin & Abraham Tesser eds., 1992).

1. *A Thick Veil*

There are three light bulbs along the wall of a room. Outside the room, out of sight of the bulbs, are three switches. Each switch controls one, and only one, bulb. The problem is to determine which switch controls which bulb. To perform the test, the subject can arrange the switches in any way; however, the subject can go in the room only once to check the results.

This is a moderately difficult problem. To solve it, the subject has to access information that he or she knows perfectly well but that lies behind a thick veil of ignorance. It is not that the subject is aware of this information and has to exert effort to act as though he or she does not (thin veil). It is that the subject is not presently aware of this information and would have to exert considerable effort to bring it into awareness and see its relevance to this problem (thick veil).

The solution: Turn switch #1 on and leave it on long enough to allow its bulb to heat up. Then turn switch #2 on and immediately go in the room to check. The bulb that is on and warm is controlled by switch #1; the bulb that is on and cool is controlled by switch #2; and the bulb that if off is controlled by switch #3. The subject knows perfectly well that light bulbs heat up when left on, but that information was very likely hidden behind a very effective thick veil.

2. *A Thin Veil*

To test the effectiveness of thin veils, an experiment administrator could remind the subject that light bulbs heat up when left on, ask the subject to assume that the administrator did not remind them of this fact, and then give the subject the problem. The subject would surely solve the problem more quickly than someone operating behind a thick veil.

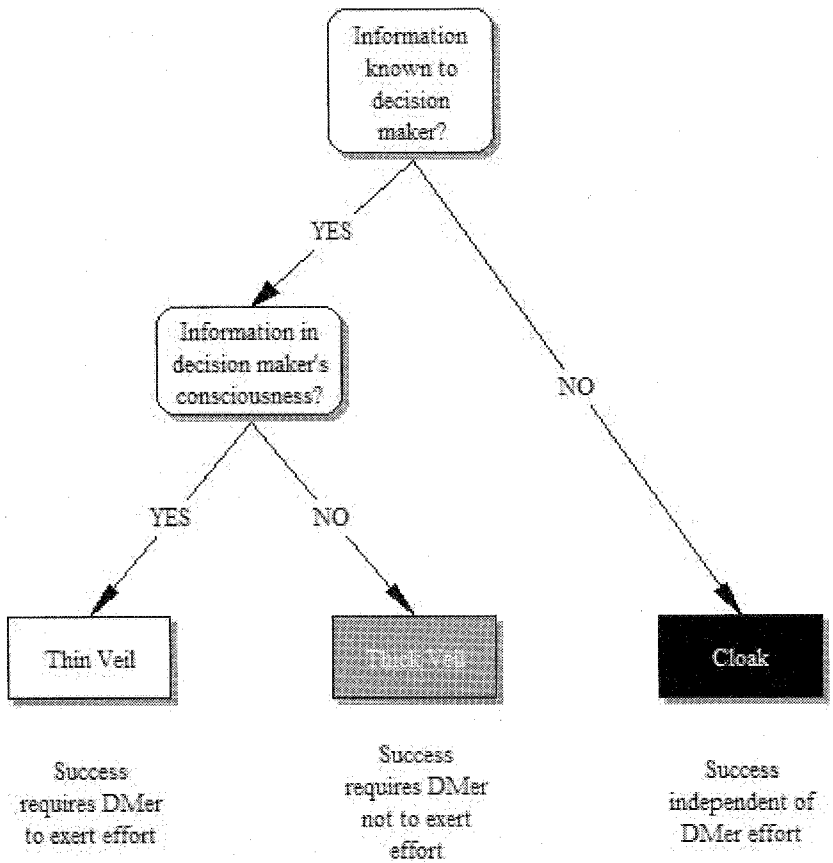
The thick veil in this example is the difficulty, under the circumstances, of recalling the basic information that, when turned on, a light bulb gradually heats up. The thin veil is the patently ineffective instruction to ignore this information once it has been brought to mind.

3. *Cloaks*

Cloaks involve actually withholding the information that is to be screened out. Whereas thin veils require effort on the part of the decisionmaker to work, and thick veils require effort on the part of the decisionmaker to fail, cloaks are effective regardless of what the decisionmaker does. If parties to a dispute want decisions in a mediation to

be based reliably on non-biasing factors, then they will want to use cloaks and thick veils more and thin veils less.

The graphic below illustrates the conditions under which cloaks, thick veils, or thin veils can be applied.



The following section discusses veils and cloaks in current mediation practice.

V. APPLICATIONS OF VEILS AND CLOAKS IN CURRENT MEDIATION PRACTICE

Much of the mainstream advice that is given for conflict resolution consists of suggestions for changing behavior (describe, share, invite, listen, reframe, invent, look to, talk) or for changing cognition (sort out, understand,

consider purposes, consider alternatives, consider other perspectives).[56] As important as such advice is, none of it establishes thick veils or cloaks of ignorance. In order to put a thick veil or cloak in place, or to avoid disturbing one that is already in place, a mediator must pay attention to the arrangement of the environment, or setting, in which conflict resolution takes place. As demonstrated in the following examples, attempts to change behavior or cognition indirectly by changing the environment are generally much more effective than attempts to change directly by means of suggestions or instructions.

Much of the popularity of the mainstream advice given for conflict resolution may well be based on an error that is so common that it has been dubbed the *fundamental attribution error.* When decisionmakers make the fundamental attribution error, they falsely conclude that the reasons for a person's behavior have to do mostly with the kind of person he or she is. When, in reality, the reasons have to do more with the kind of situation he or she is in.[57] For example, many attribute Nazism to the German national character and anti-black racism to the character of Southerners.[58] Yet some analyses have concluded, without justifying the behavior of those involved, that many Nazis were ordinary people responding to extraordinary pressures and that Southerners are no more or less racist than Northerners; their attitudes toward blacks having changed substantially once the legal framework and cultural norms began to change.[59]

In what is perhaps the best-known demonstration of situational pressure, Milgram found that, when pressured by a legitimate authority, 65% of a sample of "normal" subjects were willing to inflict "450 volts" of "dangerous" and "painful" electrical shocks on a subject who supposedly had a heart condition.[60] Prior to this study, clinicians had made the fundamental

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[56] B J. DIETMEYER & ROB KAPLAN, STRATEGIC NEGOTIATION: A BREAKTHROUGH 4-STEP PROCESS FOR EFFECTIVE BUSINESS NEGOTIATION (2004).

[57] 10 Lee Ross, *The Intuitive Psychologist and His Shortcomings: Distortions in the Attribution Process, in* 10 ADVANCES IN EXPERIMENTAL SOCIAL PSYCHOLOGY (L. Berkowitz ed., 1977).

[58] HANNAH ARENDT, EICHMANN IN JERUSALEM: A REPORT ON THE BANALITY OF EVIL (1963).

[59] THOMAS F. PETTIGREW, *REGIONAL DIFFERENCES IN ANTI-NEGRO PREJUDICE*, 59 J. OF ABNORMAL & SOC. PSYCHOL. 28, 36 (1959).

[60] STANLEY MILGRAM, *BEHAVIORAL STUDY OF OBEDIENCE*, 67 J. ABNORMAL & SOC. PSYCHOL. 371–378 (1963).

attribution error and seen such behavior as indicative of personality disturbances.[61]

The authors' conclusion from these demonstrations of the power of situational influences is that, if mediators wish to change parties' behavior in mediation, in addition to trying to motivate the conflicting parties to be open to new thoughts and approaches, they would do well to consider alternatives that focus on *changing the context in which behavior takes place.* This is a lesson still being learned by those who practice conflict resolution, even though environmental design is given considerable attention in the fields of law and decision analysis.

A. *Rawls's Four Stages?*

Rawls, in his four-stage sequence, uses a process of gradually pulling back the veil of ignorance to allow the parties to know more facts. He begins with the parties in the original position where they know only the first principles of social theory and nothing about the course of history or what societies presently exist. This is stage one where the parties decide on the basic principles of justice without knowing their own identity or circumstances. In stage two, the parties are to form a constitution and here they are assumed to know general facts about society including the size and level of economic activity, institutional structures, the natural environment, and the like. In stage three, the parties are enacting legislation and are assumed to know particular facts about individuals, their social positions, natural attributes, peculiar interests, and so on. The fourth stage is where rules are applied to particular cases by judges and administrators.[62] Here everyone has complete access to all of the facts.

Rawls explains that once the principles of justice have been chosen (stage one) the limitations on knowledge of the parties can be relaxed. Now, the level of information available to parties at the constitutional stage, and then the legislative stage, and finally the judicial and administrative stage can be determined by what is required to apply the principles of justice intelligently to the kind of question of justice that is at hand.[63]

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[61] STANLEY MILGRAM, BEHAVIORAL STUDY OF OBEDIENCE TO AUTHORITY: AN EXPERIMENTAL VIEW (1974).

[62] JOHN RAWLS, A THEORY OF JUSTICE 199–200 (1971).

[63] JOHN RAWLS, A KANTIAN CONCEPTION OF EQUALITY (1975), *reprinted in* JOHN RAWLS: COLLECTED PAPERS 175–176 (Samuel Freeman ed., Harv. U. Press 1999).

Appendix A involves a mock business mediation. It demonstrates a similar sequence of gradually pulling back cloaks and veils in the account of an actual mediation.

B. *Mainstream Conflict Resolution Approaches*

Mainstream approaches to conflict resolution include several practices for changing the environment so as to veil or cloak information that might otherwise impede conflict resolution. Four of these practices are: 1) the use of a code of conduct; 2) the single-text approach; 3) caucusing/shuttle diplomacy; and 4) the use of hypotheticals.[64]

1. *Code of conduct*

A code of conduct to regulate the behavior of the parties, also referred to as Operating or Collaboration Principles, is usually set up in advance of discussing the conflict. For example, the parties might agree in advance to refrain from personal attacks, to listen when the other party is talking, and so forth. Roberts Rules of Order is a widely used code of conduct, though one that is far too formal to be useful for mediation. At the point at which a code of conduct is being agreed upon, it is difficult for any party to foresee what provisions might be more or less favorable from his or her point of view. Indeed, it is quite likely that some provisions will be favorable on some occasions and unfavorable on others. For example, parties to a public policy mediation may agree to refrain from advocating for their positions away from the table in the spirit of good faith negotiations. On the one hand, all agree to play fair, which helps create an atmosphere of trust and transparency. On the other hand, parties can sometimes feel they are risking success by putting on hold their traditional methods of accessing power and influencing the political process. Behind such a thick veil of ignorance, there seems to be little choice but to seek a code of conduct that will be fair to all parties.

2. *Single-text approach*

In a single-text process, the parties' attention is focused on the same composite text (draft) instead of their individual list of demands. This creates a thick veil because the distractions and processing demands of working on the "single text" render unavailable information that would otherwise be

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[64] JOHN RAWLS, A THEORY OF JUSTICE 199–200 (1971).

available. The "single-text" approach was famously used by President Carter in negotiating the Camp David Accords between Egypt and Israel.[65]

In this process, a draft is suggested by a mediator or by the negotiators themselves. The parties then try to figure out from their own perspectives how the draft can be improved. Successive drafts do not constitute the mediator's recommendation or opinion of what fair or right settlement terms might be. Rather, they reflect the mediator's analysis of what terms and implementation details might be acceptable to all parties, based primarily upon dialogue with them about their objectives, concerns and constraints and the underlying principles, or formula, they are seeking to implement collaboratively.

This process allows the mediator to 1) act as a buffer if tensions have escalated within the parties, between the parties or by events in the larger mediation process, 2) keep the parties focused on implementing the concepts in their agreement in principle—the emphasis being on the process and a commitment to shared values rather than a goal with coerced compliance, and 3) supply a neutral memory on the spirit and basic parameters of the settlement where the parties' recollections diverge in doing so, aiding parties away from contentious issues, and guiding them to interests that are shared and can lay the foundation for future negotiations.

When a "single text" of the resolution is created over time by all parties working together, authorship becomes difficult to track. Indeed, everyone tends to take credit for the good ideas in the final agreement. This thick veil of ignorance makes it easier to focus on substance, undistracted by ownership and personalities, and easier to achieve acceptance.[66]

3. *Caucusing and shuttle diplomacy*

Caucusing and shuttle diplomacy (illustrated in Appendix A) are widely used, and for good reason. A caucus is the term for a private session with the mediator, which occurs during a joint session. Shuttle diplomacy is the term used to describe a negotiation process in which the parties are in separate spaces and the mediator travels back and forth. In both scenarios, keeping the parties separate establishes secure cloaks of ignorance that can be used to screen out such distracting information as the sources of ideas and judgmental anchors that may distort judgments of the likelihoods or values of

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[65] HOWARD RAIFFA, THE ART AND SCIENCE OF NEGOTIATION: HOW TO RESOLVE CONFLICTS AND GET THE BEST OUT OF BARGAINING 205–217 (1982).

[66] ROGER FISHER, WILLIAM URY, & BRUCE PATTON. GETTING TO YES: NEGOTIATING AGREEMENT WITHOUT GIVING IN, 112 (2d ed. 1991).

consequences. As an illustration of this, in the Rocky Flats study, discussed below, it was amusing to see ideas from a party who was considered to be out of the medical mainstream and not worth taking seriously be taken seriously by even the most eminent medical school faculty members when those ideas were presented by the mediator without indicating their source.

4. *Hypotheticals*

Hypotheticals generally assert nothing to be true but ask the parties to assume certain facts, values, or interests to be true. They ask the parties to consider specific possibilities as to what might lie behind a veil or cloak. "If Smith were to offer you $100,000 and a written apology, what would your response be? Smith isn't necessarily making that offer; I just want a better sense of what it is that you believe would be a fair resolution of this matter." Because different statements of hypotheticals support inferences that differ in number and reliability, hypotheticals are equivalent to veils whose thickness/thinness can be controlled.

Earlier in mediation, the mediator may, in accordance with Rawls's suggestion, block more information from the participants and later in mediation may gradually reveal more and more information to the participants. Appendix A describes a situation where a mediation progressed from the use of hypotheticals as progressively thinner veils and, in the end, to transparency and resolution. As an important note, no agreement was reached until all facts, value positions, and interests were on the table, transparently, for all of the parties to consider and discuss before final agreement was reached.

In sum, cloaks and veils, including hypotheticals, are generally used earlier in the mediation. Furthermore, veiling generally becomes thinner and eventually transparent as mediation proceeds, since, in the end, all parties should have access to all relevant information. We will later discuss mediator ethics in deciding what is to be cloaked or veiled.

Like other forms of mediation, public policy facilitation often relies on an impartial third party, but in this case to help groups make decisions surrounding issues that impact a broad array of citizens and institutions. The use of veils and cloaks can be used in these cases, as well as two-party disputes. For example, instead of each faction hiring an expert to provide technical analysis, the facilitator helps the group select a mutually agreeable expert in hopes of securing one fully independent (or mutually dependent, if you will) opinion, thus saving time and money while simultaneously reducing the ubiquitous bickering associated with dueling experts. As a second example, the facilitator first works with the group to establish and

rank key criteria upon which the ultimate decision will be based without reference to facts that will be held up against those criteria to determine the best course of action. In both examples, as the process progresses, the facilitator suggests the removal of cloaks and veils and putting all relevant facts on the table in a spirit of exploration rather than debate.

As effective as the mainstream conflict resolution tool kit may be, it can be enriched substantially by paying attention to how cloaks and veils are used in other disciplines. Cloaks and veils of ignorance are used extensively in the law and in decision analysis.

VI. APPLICATIONS OF CLOAKS AND VEILS IN THE COURTROOM

Cloaks and veils of ignorance are common tools in the law, used in the interests of "blind justice." For example, they are used in the rules of evidence and in the rules of civil procedure. In evidence law, there are many situations where, in order to minimize bias, the law provides that evidence is admissible for one purpose but not for another. Examples are considered in the next section.

A. *Veils*

One example of a thin veil is a limiting instruction from a judge. The judge may allow evidence of a prior criminal record for the purpose of impeaching a defendant, "You may choose not to believe the defendant; he has multiple convictions as a con artist;"[67] but, include a limiting instruction to the jury that evidence of past convictions is not to be considered in determining the defendant's guilt or innocence in the current case. There is empirical evidence (p. 11) showing that jurors are unable or unwilling to follow such instructions to disregard something they already know.

Other examples of judges' limiting instructions that serve as thin veils of questionable value include: (1) hearsay evidence, "You may consider the out of court statement to prove that the person making it could speak English, but you are not to use the statement as proof of the matter asserted by the person," and (2) changes made to dangerous machinery, "you may consider evidence that the defendant repaired the machine after the injury was caused to show that the defendant had the right to control the machine and to make repairs, but you are not to consider the evidence as any proof that the machine was unreasonably dangerous before the repairs were made." These

[67] RAIFFA, *supra* note 49, at 91.

are examples of thin veils they expect an active effort on the part of the jurors to ignore information that is in consciousness.

B. *Cloaks*

Consider two examples in which cloaks of ignorance are applied in the courtroom: 1) evidence that is excessively graphic, such as gory scenes depicted in photographs, may be excluded from the trial and not shown to the jury because of prejudicial impact; and 2) a trial may be divided into a liability phase and a damages phase, so that the liability issue can be decided on the basis of facts and expert testimony without the potentially biasing information about the injury and damages affecting the decision about liability, for example, in a case where the person's injuries are so unusually horrible that photographs and other demonstrative evidence would tend to inflame the jury on the issue of liability. Every decision by a trial judge that excludes evidence from a trial establishes a cloak of ignorance for the jury with respect to that particular evidence because it completely withholds the information from the jury.

VII. APPLICATIONS OF CLOAKS AND VEILS IN DECISION ANALYSIS

Decision analysis is arguably the most rational approach to conflict. Initially conceived as a way to manage *intra*personal conflict of an individual making his or her decisions, decision analysis has come to be used, as well, for managing *inter*personal conflict in decisions involving multiple parties. Decision analysis provides numerous opportunities to apply cloaks and veils of ignorance.

The very practice of analyzing a decision into its components establishes cloaks and veils of ignorance, though, surprisingly, this benefit of problem decomposition does not seem to have been recognized in the literature. In discussions of the various benefits of decomposition, one looks in vain for any consideration of the effects of decomposition in reducing the influence of irrelevant information.[68] Nevertheless, decision analysis sets up cloaks and veils of ignorance (a) in the analysis of a decision into its components; (b) in the distribution of different components to different judges; and (c) in agreement in advance of encountering the problem on rules for synthesizing

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[68] RALPH L. KEENEY & HOWARD RAIFFA, DECISIONS WITH MULTIPLE OBJECTIVES: PREFERENCES AND VALUE TRADEOFFS (1976); DETLOF VON WINTERFELDT & WARD EDWARDS, DECISION ANALYSIS AND BEHAVIORAL RESEARCH (1986); ROBERT T. CLEMEN, MAKING HARD DECISIONS: AN INTRODUCTION TO DECISION ANALYSIS 3–5, 291, 294 (2d. ed. 1996).

the component judgments. These cloaks and veils are discussed below under the headings of Analysis, Distribution, and Synthesis.

First, some definitions for clarity. The very term "decision analysis" indicates a divide-and-conquer approach. Analysis separates facts from values, values from values, and facts from facts. The key facts are the likely impacts of the alternatives under consideration. The key values are the pros and cons of these impacts. Key values and key facts are evaluated separately in decision analysis. They may even be evaluated by different people: experts for the facts and stakeholders for the values, a process known as distribution, or distributed decisionmaking.[69] Decision analysis separates facts from facts when the causal chain linking an alternative to its consequences is complex; decision analysis separates values from values when the consequences of the alternatives differ in multiple ways and tradeoffs are involved. Finally, all this information is synthesized to yield a single overall value for each alternative.

The potential for opacity in decision analysis increases as one proceeds from analysis, to distribution, to synthesis. Analysis involves a thick veil. Because one person is making all the judgments, all that is there to keep him or her from thinking about the implications of each judgment for the final decision is total immersion in a difficult task. Distribution may establish a thick veil or a cloak, depending on the circumstances. Having different people make different judgments puts a thick veil in place when the judgments are obtained from people who could, with a little thought; figure out how their judgments might influence the final decision. Distribution puts a cloak in place when the parties could not possibly figure this out. An especially clear case of the latter is when statistical information is combined with judgmental information. As a simple example, assume that a purchaser complains that a TV store that advertises "Lowest Price in Town" charged a higher price than the lowest in town. The statistical information, prepared without this case in mind, would be a listing of the various prices in town. The judgment arrived at without knowing this statistical information is that a price greater than the lowest price would be unfair in this case.

Below, the article discusses, in more detail, the ways in which analysis, distribution, and synthesis establish cloaks and veils in decision analysis.

A. *Analysis and thick veils*

Decision analysis sets up cloaks and veils of ignorance in the separation of fact judgments from value judgments, in the separation of fact judgments

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[69] DISTRIBUTED DECISION MAKING: COGNITIVE MODELS FOR COOPERATIVE WORK (Jens Rasmussen, Berndt Brehmer & Jacques Leplat eds. 1991).

from other fact judgments, and in the separation of value judgments from other value judgments.

1. *Fact-value separation*

Fact-value separation is illustrated in the Denver bullet study. A police officer in Denver had been killed with a hollow-nosed bullet. The police, understandably, wanted to be issued hollow-nosed bullets to "level the playing field"; however, segments of the public, just as understandably, were concerned about harm to innocent bystanders. The controversy raged for months, with no apparent end in sight. Eventually, Hammond and Adelman noted that both representatives of the public and ballistics experts made assertions reflecting both judgments of fact and judgments of value. Both groups made judgments of fact (judgments of the form: If *X*, then *Y*), regarding, for example, the relative stopping effectiveness of different bullets. In addition, both groups made judgments of value (judgments of the form: *Y* is preferable to *Y'*) for example, considering of the relative importance of a given increase in stopping effectiveness and a given increase in danger to bystanders. Hammond and Adelman analyzed the problem into fact components and value components, had the ballistics experts make just the fact judgments and the public stakeholders make just the value judgments, and then combined the judgments in a mathematical model. This quickly identified a bullet that satisfied all parties and settled a controversy that had seemed irresolvable.[70] This example illustrates fact-value separation both at the level of judgments and at the level of judges. At the level of judgments, the global judgment, *X* is preferable to *X'*, is analyzed into the fact judgments, if *X* then *Y*, and, if *X'* then *Y'*, and the value judgment, *Y* is preferable to *Y'*. At the level of judges, the fact judgments were made by experts and the value judgments were made by stakeholders.

2. *Fact-fact separation*

Fact-fact separation is illustrated in the Rocky Flats study. Since 1953, the Rocky Flats Plant had been suspected of discharging plutonium into the atmosphere at levels dangerous to health. In 1978, the Rocky Flats Monitoring Committee was formed to resolve the decades-old controversy and provide information and advice that the public could rely upon. After

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[70] Kenneth R. Hammond & Leonard Adelman, *Science, Values, and Human Judgment, Integration of facts and values requires the specific study of human judgment*, 194 SCI.389, 396 (1976).

two years, however, the Committee had been unable to come to agreement on any point, and an attempt to get the various experts on the Committee (health physicists, epidemiologists, and health statisticians) to agree on the risk of cancer, using an approach similar to that employed in the bullet study, failed.

A breakthrough was achieved when the problem was divided into a health physics portion and an epidemiological portion. A highly sensitive indicator, lung cancer, was chosen for the focus of the epidemiological portion. Epidemiologists were able to come quickly (within two weeks) to agreement on the factors that are predictive of lung cancer and on a mathematical model for their combination. The health physicists also came quickly to agreement on the ambient levels of these predictors in the areas surrounding the Rocky Flats plant and how these translated into the dosage levels required as inputs to the epidemiological model. Once this had been done, the model made clear that smoking presented a far greater risk than did historical releases from the plant and, moreover, that any effects of releases from the plant would be substantially greater for smokers than for non-smokers. One interesting conclusion was that smokers concerned about their health would do better to stop smoking than to try to get the government to spend more public dollars to reduce further the levels of omissions from the plant.[71]

3. *Value-value separation*

Value-value separation is illustrated in the original prioritization model for the Oregon Health Plan. The original model for prioritizing health services can be thought of as having four major value components: impact on health-related quality of life (QOL), duration of impact, number of persons impacted, and cost. Value judgments about QOL were obtained from a random sample of the public. The Health Services Commission, authorized by law to implement the Oregon Health Plan, judged two years of an improvement in QOL to be twice as valuable as one year of the same improvement and improvement in QOL to two persons to be twice as valuable as the same improvement to one person. These value judgments were expressed mathematically as gain in total quality-adjusted life years.

The Health Services Commission avoided having to make what would have been very difficult judgments about the dollar value of various improvements in QOL by basing prioritization on a benefit/cost ratio. The

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[71] Barry F. Anderson, Kenneth R. Hammond & Jeffrey Sutherland, *Improving Scientists' Judgments of Risk*, 4 RISK ANALYSIS 69, 69–78 (1984).

result was a mathematical expression of gain in total quality-adjusted life years per dollar that was to serve as the basis for prioritization. Unpublished data showed clearly that members of the Health Services Commission were unable to implement these values intuitively without the aid of the model. Unfortunately, the model had to be abandoned when the federal government ruled that quality of life could not be taken into account in prioritizing health services.[72]

B. *Distribution as a thick veil or cloak*

In distributed decision-making, different judgments are assigned to different persons. Distributed judgments of facts and values are illustrated in the Denver bullet study, with fact judgments being made by ballistics experts and value judgments being made by representatives of the public.[73] Distributed judgments of facts and values are also illustrated in the original Oregon Health Plan prioritization model. Fact judgments about the cost of each treatment were obtained from state experts, and fact judgments about the probable effects of each treatment on various aspects of QOL were obtained, in the form of probability distributions, from 50 panels of health care experts. Value judgments about the relative importance of various aspects of QOL were obtained from the public, and value judgments about changes in durations of impacts and numbers of people affected were made by the Health Services Commission.[74]

Two kinds of distributed fact judgments are illustrated in the Rocky Flats study. Judgments were obtained: (a) from experts with *different expertise*, health physicists and epidemiologists making judgments in their different areas of expertise; and (b) from experts with *overlapping expertise*, the various epidemiologists making epidemiological judgments and the various health physicists, making health physics judgments. A special case of obtaining fact judgments from experts with different expertise is when statistical information is combined with judgmental information.[75] For example, health physicists, in the second phase of the study, came to agreement on principles for translating ambient levels of plutonium in the

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[72] Barry F. Anderson, *Professor of Psychology, Portland State University The Oregon Medicaid Plan: Prioritizing Health Services Using Data and Values,* Address at the NATIONAL CENTER FOR HEALTH STATISTICS TOWARD THE YEAR 2000: REFINING THE MEASURES (July 21, 1993).

[73] Hammond, Anderson, Sutherland, *supra* note 71.

[74] Anderson, *supra* note 72.

[75] Hammond, Anderson, Sutherland, *supra* note 71.

atmosphere to dosage levels in the lungs, as required by the model. They did this behind a cloak of ignorance regarding the statistical information about the history of ambient levels of plutonium in the atmosphere around the Rocky Flats Plant.

C. *Synthesis as a cloak*

Much as a code of conduct establishes rules for behavior in advance of conducting a discussion, decision analysis has established rules for synthesizing analytic judgments in advance of any particular decision analysis. These rules are both precise and widely agreed upon: (a) Kolmogorov's axioms and Bayes' Theorem for combining probability judgments,[76] (b) multi-attribute utility models for combining value judgments[77] and (c) the expected utility model for combining probability judgments with value judgments.[78]

Only with regard to the best way to combine individual judgments of the same quantity is there not yet precise agreement.[79] However, the Delphi method, in which the identities of the parties who contribute various ideas to the discussion are kept behind a cloak of ignorance, is very widely used for this purpose.[80] This was the method used to combine the judgments of the various epidemiologists in the Rocky Flats study.[81] By cloaking the identities of the sources of the judgments, the Delphi method reduces the possibilities for groupthink.[82]

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[76] Daniel N. Osherson, *Judgment, in* THINKING: AN INVITATION TO COGNITIVE SCIENCE 3 (Daniel N Osherson & Edward E. Smith eds., 1990); Bayes, *An Essay Towards Solving a Problem in the Doctrine of Chances*, 53 PHIL. TRANSACTIONS ROYAL SOC'Y 370–418 (1963).

[77] KEENEY & RAIFFA, *supra* at note 68 at 233. CLEMEN, *supra* note 68.

[78] JON VON NEUMANN & OSKAR MORGENSTERN, THEORY OF GAMES AND ECONOMIC BEHAVIOR (1947); CLEMEN, *supra* note 68 at 193.

[79] William R. Ferrell, *Combining Individual Judgments, in* BEHAVIORAL DECISION MAKING, 142–43 (George Wright ed., 1985).

[80] THE DELPHI METHOD: TECHNIQUES AND APPLICATIONS 3–12 (Harold A. Linstine & Murray Turoff eds. 1975) IAN I. MITROFF & HAROLD. A. LINSTONE, THE UNBOUNDED MIND: BREAKING THE CHAINS OF TRADITIONAL BUSINESS THINKING 21–22 (1993).

[81] Hammond, Anderson, & Sutherland, *supra* note 71.

[82] IRVING L. JANIS, VICTIMS OF GROUPTHINK: A PSYCHOLOGICAL STUDY OF FOREIGN-POLICY DECISIONS AND FIASCOES (1972); J. Esser, *Alive and Well After 25 Years: A Review of Groupthink Research*, 73 ORGANIZATIONAL BEHAV. & HUM. DECISION PROCESSES, no. 2\3, 116–141 (1998).

VIII. RECOGNIZING OPPORTUNITIES TO APPLY CLOAKS AND VEILS IN MEDIATION

Proust said, "The real voyage of discovery consists not in seeking new landscapes but in having new eyes."[83] Rather than wait for conflicts in which opportunities to apply cloaks and veils of ignorance are obvious, it would seem more profitable to learn to look for such opportunities in every conflict. Such opportunities are more common than is generally thought. This section is intended to provide help in acquiring the eyes to see them.

It is a big step from understanding cloaks and veils in the abstract to recognizing opportunities to apply them amidst the passion and particularity of real conflicts.[84] Likewise, it is a big step from being able to discuss logical fallacies and statistical errors in the classroom to being able to spot instances of these errors as they race by us in the stream of life. To make this step, mediators may find it helpful to classify conflicts into three kinds and then consider particular opportunities for applying cloaks and veils that tend to present themselves in each. It is helpful to divide conflicts into fact conflicts, value conflicts, and interest conflicts.

First, in a fact conflict, the parties disagree about the consequences that would result from various courses of action. For example, some say that staying in Iraq will continue to fuel terrorism, while others say that withdrawing from Iraq will continue to fuel terrorism. Second, in a value conflict, the parties disagree about what is important. For example, environmentalists tend to see impacts on plant and animal populations as being the most important impacts of a project, while developers tend to see impacts on jobs and economic growth as being the most important impacts. Finally, in an interest conflict, the disagreement is not so much about the facts and values as about who should get what. The descendants of the deceased member of a partnership feel they should retain control of the business because it was their ancestor who was primarily responsible for its current success. To the contrary, the descendants of the deceased member's brother and partner feel that they should now be given control of the business, because it is "their turn." Of course, many conflicts—certainly the most serious ones—involve fact conflicts, value conflicts, and interest conflicts.

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[83] Rodger Shattuck, MARCEL PROUST 131 (1974).

[84] W. B. Lord, L. Adelman, P. Wehr, C. Brown, R. Crews, B. Marvin & M. Waterstone, Conflict Management in Federal Water Resources Planning (1979), in Program on Technology, Environment, and Man Monograph No. 28 (unpublished manuscript) (on file with the University of Colorado, Institute of Behavioral Science).

A. *Fact conflicts*

In fact conflicts, there are at least three kinds of opportunities to apply cloaks and veils of ignorance.

The first arises when, as is often the case, there is available *a more authoritative and trustworthy source for the factual information than the parties, themselves.* If this source is an expert, a book, or a database, the parties can decide on principles or a process for selecting the source from behind a veil or cloak of ignorance regarding the identities or opinions of the sources that might be selected. Often it is possible to select from among even identified sources without knowing what opinions they would express.

The second arises if the answer to the factual question is not known and *data must be waited for or actively collected.* In this case, the process for collecting and evaluating the data can be decided upon behind a veil or cloak of ignorance regarding the results that would be arrived at by an unbiased process.

A very important variant of this approach, and one that it is always well to keep in mind, is the creation of contingency contracts. In a conditional agreement, the parties commit to a course of action conditional on information that will become available in the future and that, thus, lies behind a cloak of ignorance. In its simplest terms, a conditional agreement is an agreement, for example, to do things your way if you're right and to do things my way if I'm right." Conditional agreement requires that the parties, so to speak, put their money where their mouth is. The mock personal injury mediation in Appendix C shows how a conditional agreement following fact-value separation could have saved a client the costs of a trial.

The third kind of opportunity arises when there is no convenient alternative but to make use of the *personal judgments* of the conflicting parties. Those judgments can often be made behind veils or cloaks of ignorance as to how they will impact attempts to resolve the conflict.[85] This involves the kind of problem decomposition described in the preceding section on decision analysis.

B. *Value conflicts*

In value conflicts, there are at least two kinds of opportunity to apply cloaks and veils. First, it may be possible for the parties to make trade-off judgments *without knowing what the facts are.* In an informal experiment

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[85] HOWARD RAIFFA, THE ART AND SCIENCE OF NEGOTIATION: HOW TO RESOLVE CONFLICTS AND GET THE BEST OUT OF BARGAINING 205-217 (1982).

regarding capital punishment, both parties placed substantial weight on costs to the government. Each party was allowed to make these and other value judgments behind a cloak of ignorance as to what the facts were, each believing that its proposal was the less costly. The actual cost difference in favor of eliminating capital punishment turned out to be sufficiently great to change the position of those who had initially favored it. Indeed, they had committed in advance to such a change.

Second, it may be possible for the parties to make tradeoff judgments with the knowledge that they will be used to try to create win-win alternatives but *without knowledge of what the alternatives might be.* The key concept here is that of value asymmetry. While many tend to think that differences contribute to disagreement, value asymmetries, honestly judged, are differences that can open the way to agreement. The classic example is that of two sisters who wanted the same orange, but for different reasons. The two positions, that one sister gets the orange or that the other sister gets the orange, are incompatible. Once the sisters examined their values, however, they found that one wanted the orange for juice, and the other wanted the orange for its peel, to bake a cake. The alternative was then obvious: one got the juice, and the other got the peel. In more complex cases, making the value judgments behind a veil of ignorance as to how they will be used to decide among, or even create, alternatives, can prevent dishonest gaming.

C. *Interest conflicts*

In interest conflicts, there are at least two kinds of opportunity to apply cloaks and veils.

First, the parties can *evaluate the fairness of divisions or of the process of dividing* without knowing how a fair process would assign the portions to the parties. A familiar example is "one cuts, and the other chooses," where one cuts the pie and the other chooses the first piece to motivate an equality in cutting. A process less subject to gaming would be for the parties to decide on a fair division and then to toss a coin or draw names from a hat to assign the portions to the parties. At Lake Balatan in Hungary, all of the anglers at the end of each day divided their catch into as many piles as there were anglers, taking care to make the piles as nearly equal as possible. Then they would put their penknives into a sack. Finally, the youngest among them would draw a knife blindly from the sack to determine who got the first

choice from the piles, then would draw a second penknife to determine who got the second choice, and so on.[86]

Second, each party can *evaluate the fairness of his or her own proposal* without knowing which proposal an arbitrator would select as more fair. This is done in *final-offer arbitration*, an especially promising approach. In final-offer arbitration, the arbitrator is restricted to choosing, without modification, whichever of the conflicting parties' proposals he or she judges to be fairer. This motivates the parties, not to take extreme positions in order to influence a compromise in their direction, but to take sufficiently fair positions that the arbitrator will choose their proposal as the fairer. This draws the parties together and also restricts the range of influence of the arbitrator, who, after all, usually knows less about the conflict and may be less able to come up with the best resolution than the parties, themselves.

Ultimately, wider knowledge of the concepts of cloaks and veils of ignorance and of the ways in which they can be applied to resolving conflicts will stimulate both application and research in this area. The great value of cloaks and veils of ignorance, as Rawls so clearly recognized, is that they have the potential to bring self-interested parties to judgments that are in the common interest.[87] What Rawls may not have fully appreciated in his thought experiment is that placing information behind a thin veil by the instruction not to make use of that information is generally ineffective. The associative or information-load blocks that put a thick veil into place, on the other hand, can be quite effective, as the light bulb example, hopefully, made clear. Most effective of all, however, is withholding, or cloaking, the potentially biasing information, so the parties never have knowledge of it in the first place. By thinking ahead and thoughtfully managing the environment in which conflict resolution takes place, it is possible to get self-interested parties with divergent perspectives to come to a common understanding that is perspective-invariant and fair. As they come to such a common understanding, their potential to make progress toward agreement should be enhanced.

D. *Ethical concerns*

The use of cloaks and veils of ignorance raises important ethical concerns. Cloaks and veils reduce transparency, and transparency of facts, values, and interests is an acknowledged goal of mediation. Indeed, open

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[86] RAIFFA supra note 65.

[87] James R.Chelius & James B. Dworkin, *An Economic Analysis of Final-Offer Arbitration*, 24 J. CONFLICT RES. 293–310 (1980).

information has been identified as one of the four dimensions of organizational justice.[88] Therefore, cloaks must be used with care.

Mediators use different approaches to mediation including transformative, evaluative, and facilitative. The central ethical issue is whether the disputants arrive at a resolution by their own self-determination or by the control of the mediator.[89] The hallmarks of mediation are the self-determination of the parties and the impartiality of the mediator. For example, the Oregon Mediation Association defines Self Determination in Standard I of the April 25, 2005 Oregon Mediation Association Core Standards of Mediation Practice in these words: "[m]ediators respect, value, and encourage the ability of each participant to *make individual decisions regarding what process to use* and whether and on what terms to resolve the dispute" (emphasis added).[90]

Also important is the concept of Informed Consent of the Parties. Core Standard II of the Oregon Mediation Association Core Standards of Mediation Practice defines Informed Consent as the following:

> To Support fully self-determination, mediators respect, value, and encourage participants to exercise Informed Consent throughout the mediation process. This involves making decisions about process, as well as substance, including possible options for resolution. Initially and throughout the mediation process, *mediators further support Self-Determination by making appropriate disclosures about themselves and the specific mediation approaches they use* (emphasis added).[91]

It has long been recognized in the ethical rules for practicing attorneys that an attorney has a heightened duty in negotiating with a client—a fiduciary duty of care to disclose all necessary information and to avoid overreaching and the kinds of undue influence that may be appropriate in negotiation with an adversary. Does this responsibility apply when the mediator holds a position of superior process knowledge that tends to carry greater weight in exploring the choice of mediation approaches? The mediator must exercise care in providing sufficient relevant information as to the range of options or approaches available. Without great care in delivering

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[88] *Id.*

[89] Maureen E. Laflin, *Preserving the Integrity of Mediation Through the Adoption of Ethical Rules for Lawyer-Mediators*, 14 NOTRE DAME J. L. ETHICS & PUB. POL'Y 479–526 (2000).

[90] Oregon Mediation Association, Oregon Mediation Association Core Standards of Mediation Practice (April 25, 2005), *available at* http://www.omediate.org/.

[91] *Id.*

even-handedly the information as to the available approaches, the mediator risks over-weighting his or her approach and thereby effectively eroding the Self-Determination of the parties.[92]

Finally, mediators talk about the ideal of "High-Quality Consent."[93] Professor John Lande has defined an ideal he refers to as "high-quality consent" as a condition in which mediation participants have the opportunity to make decisions in a dispute by sufficient consideration of alternatives and without excessive pressure. Laflin identifies seven factors that can be used to define the quality level of consent that a mediation process has achieved: 1) Explicit Consideration of Principals' Goals and Interests, 2) Explicit Identification of Plausible Options, 3) Principals' Explicit Choice of Options for Consideration, 4) Careful Consideration of Options, 5) Mediators' Restraint in Pressuring Principals to Select Particular Options, 6) Limitation on the Use of Time Pressure, 7) Confirmation of Consent.[94]

Some mediators believe, from the beginning, participants should be free to say what is important to them, to hear all that the other participants have to say, and to confront all of the facts, values, and interests that are at stake in the conflict. Other mediators believe the mediator has an important responsibility to take measures to reduce the potentially harmful effects of biasing information, confusing information, too much information, or the wrong sequence of information. Still others take a moderate stance between these facilitative and directive approaches to conflict resolution. As this article demonstrates, a skilled and experienced mediator can use cloaks and veils so as to keep the mediation from starting out in unproductive directions and to stimulate thought "outside the box" during the mediation, and then, by gradually removing cloaks and veils, to reach a state of transparency prior to any final settlement.

E. *Informed consent*

The ethics of using cloaks and veils requires, at the outset, the informed consent of the parties to the mediation. The following elements of informed consent would seem applicable here:

- *Description of procedures.* Disputants should be informed that potentially biasing information, such as initial positions, source of information (the other party, the mediator, or some outside source), and

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[92] Laflin, *supra* note 89, at 244.

[93] John Lande, *How Will Lawyering and Mediation Practices Transform Each Other?*, 24 FLA. ST. U. L. REV. 839–868 (1997).

[94] Laflin, *supra* note 244, at 871–79.

personal comments, could be screened out, at least during the early phases of the mediation.

- *Description of risks.* Disputants should be informed that the principal risk of screening is that a disputant may not have enough information to make a decision that is in his or her best interest. The mediator should guard against this risk. A secondary risk is the feeling of being manipulated or tricked. The parties should be encouraged to communicate any such feeling to the mediator.
- *Description of benefits.* Disputants should be informed that screening might make it easier to arrive at a satisfactory agreement if some information that, in the judgment of the mediator, could be biasing or confusing is kept out of the discussion initially. By doing this, the fairness of the process and the outcome may be enhanced.
- *Freedom to opt out.* It should be made clear that either party can request at any time that non-confidential information be no longer screened. It should also be made clear, however, that such a decision could deprive both parties of the benefits of being screened.[95]

F. *The business mediation example*

Appendix A involved a situation where the initial positions of the parties could have unnecessarily raised the emotional stakes in the conflict and detracted from more reasoned decision-making. The mediator gained the consent of the parties to: (a) have their initial positions given only to him and (b) the authority to reveal the parties' positions only if the parties agreed to do so upon the mediator's recommendation. Consequently, the first steps taken by the parties were taken behind: (a) cloaks of ignorance as to what the other parties were doing or (b) behind veils of ignorance in the form of hypotheticals used in caucusing with the parties. While these hypotheticals may have allowed the parties to make inferences as to what the other parties were doing, they nonetheless did not directly reveal information to any party about the actions taken by other parties. It is this process of cloaking information from the parties, initially, then releasing more and more information through thinner and thinner veils as negotiations advance, that we are recommending as a significant tool to the mediator. The business mediation example illustrates how this process works.

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[95] *Office for Human Research Protections* § 46.116.

G. *The use of outside data and experts*

Appendix B provides a hypothetical of the applications of analysis, distribution, and synthesis in a mock customer service mediation. Appendix C provides an example of the application of veils and cloaks in a mock personal injury mediation. Each technique must be used with careful attention to the general circumstances of the mediation.

Another example illustrates the importance of this precaution. If a mediator proposed to an elected public official that she agree to accept the decision of a third party expert on an important economic issue in a mediation where the expert is selected solely on the basis of resumes with names blocked out, the public official may have an ethical obligation to her constituents to know who the expert is before agreeing to the expert's conclusions.

Why would a public official have a greater duty to know the identity of an expert than a private party would in mediation? One reason would be that a public official might need to be more concerned about the reputation and character of an expert than does a private party. If the best expert in a field were a political radical, a known bigot, or someone with a questionable public reputation, a public official would not want to risk selecting him from among candidates whose names are blocked out. In addition, a public official generally needs to be in a position to justify with good reasons why a certain course of action is taken. The public might conclude that a public official is acting incompetently if he agrees to be bound by an expert's opinion but does not know who the expert is. On the other hand, a private party, feeling assured that the names in the hat are the top five experts in a complex field, might conclude that blindly choosing one of the five and abiding by that person's decision on some issue in dispute would be preferable to protracted litigation at great expense and an unpredictable ending. Decisionmakers in the private sector are generally freer to take risks and to try new approaches to problems than are their public sector counterparts.

Regardless of the mediator's preferred approach, the use of cloaks and veils are effective tools that are recommended for consideration when helping parties navigate the intersection of logic and emotion in hopes of negotiating a resolution based upon fairness.

IX. CONCLUSION

In summary, both philosophical analysis and psychological research point to the importance of fairness in conflict resolution and to the appropriateness of excluding potentially biasing information as a means to

fairness. Potentially biasing information can be excluded from consideration by means of thin veils, thick veils, or cloaks. A thin veil consists of instructions to disregard information that is known and already in consciousness. A thick veil makes it more difficult for information that is known but not in consciousness to be brought to consciousness. A cloak withholds information that is not yet known. Opportunities to apply cloaks and veils of ignorance arise in fact conflicts, value conflicts, and interest conflicts. To maximize effectiveness in applying cloaks and veils, preference should be given to cloaks over thick veils and to thick veils over thin veils. Informed consent of the participants must be obtained in advance. We hope that this article will contribute to the wider and more appropriate use of cloaks and veils of ignorance in conflict resolution.

APPENDIX A. Applications of Veils and Cloaks in a Mock Business Mediation

Keep in mind the differences between cloaks, thin veil hypotheticals, and strong and weak thick veil hypotheticals. Cloaks block information completely. Thin veil hypotheticals require a person to put out of mind what the person already knows. Strong thick veil hypotheticals yield weaker inferences and weak thick veil hypotheticals yield stronger inferences. Imagine a line with a thin veil hypothetical at the far left end and a cloak at the far right end. Hypotheticals can lie anywhere in-between, with the weaker thick veil hypotheticals toward the left and the stronger thick veil hypotheticals toward the right.

The mediator first meets with all of the parties and their attorneys together. After preliminary matters are covered, the parties and attorneys agree with the mediator that each party and its attorney will address their hopes, concerns, and positions to the group. The mediator decides to proceed by caucusing with the parties individually and to begin by using hypotheticals as cloaks and veils, to gain some initial momentum. The mediator decides to ask each of the parties to put forth their settlement positions without sharing them with each other. Only the mediator knows them. The parties agree to try this process.

The reason the mediator selects this strategy is that the Plaintiff is taking a very strong moral and emotional stand that it was wronged, and therefore, should not have to pay; that's why he filed the action for declaratory relief from the claims asserted by the defendants. The Defendants are taking a very strong stand that they want their demand accepted now, though they have confidentially informed the mediator that they will settle for considerably less than the opening demands. The mediator decides she does not want to begin the mediation with the parties taking very strong stands. She believes the parties will be more successful if, initially, each works on the settlement without knowing the other parties' positions. If some progress is made, then the mediator will reveal the positions of the parties, and the mediation process will continue in the traditional fashion.

The parties agree each will confidentially reveal to the mediator their first moves and that the mediator will continue to talk with the parties separately and confidentially. She will reveal information to all parties only when the mediator believes the time is right for that revelation, and all parties have agreed to such revelation.

The mediator also explains that if as a result of their moves there is more money on the table than is needed to reach a settlement, then each party will receive a pro-rata reduction to reach the lowest number necessary to effect a

settlement. If, on the other hand, their moves result in fewer dollars on the table than are needed to pay the demands made, then the mediator will continue to work with each party individually, and in confidence, in the hope of getting closer to an agreement satisfactory to all parties.

The mediator then goes to each party, in confidence, and asks the party to make its first move. The mediator reveals nothing to any party about anything that any other party has told the mediator. This is a cloak that the parties have agreed to. She asks them to try to set aside any strong feelings or strong positions they now have and to make an effort to keep open minds during the mediation. She asks the parties to step into the shoes of the other parties, or to take up the position of an impartial spectator, as they consider their next moves in the mediation process. The instruction to set aside their own emotions is a thin veil. Intentionally not mentioning the others' emotions is a thick veil, though a weak one. Each party and attorney knows how they feel about the situation and they, no doubt, have some idea how the other parties and attorneys feel and view the situation. The mediator is trying to get them to try to disregard what they already know. This, as we have pointed out previously, is a difficult task.

As the mediation progresses, she asks the following hypotheticals to move the parties together:

1) The mediator asked Defendant 1, "I know the bottom line you want, but if we can get you 75%, would you be willing to settle?" The mediator is using a thick veil. The party and the attorney are experienced in mediation settlements and can infer that there must be a fairly substantial sum of money on the table or the mediator would not now be suggesting a 75% goal for the settlement. In addition, they have worked previously with this mediator and know that she would not be suggesting it unless she thought she had a reasonably chance of getting it. They can reasonably draw strong inferences from the hypothetical making it for them a weak thick veil hypothetical. If neither had worked previously with this mediator, or if they were inexperienced in mediation, the same hypothetical to them might be a strong thick veil hypothetical yielding weaker inferences.

2) The mediator then asked the Plaintiff, "If we can reach a settlement without your having to pay anything, would you be willing to give up your claim to attorney fees?" The mediator is using a thick veil. It is a weak thick veil because the Plaintiff and its attorney can easily infer that there must be some substantial money on the table from the defendants or the mediator would not be talking about a prospective settlement.

3) The mediator then asked Defendant 2, "Would you be willing to increase your offer by X dollars if that would greatly increase the chances of a settlement? The mediator is using a thick veil. It is a weak thick veil

because the Defendant 2 and its attorney can readily infer that there is substantial movement coming from others; otherwise, the mediator would not have asked.

4) The mediator, with the permission of the parties, now reveals to all parties the amount of money on the table and the amount needed for a settlement. She reveals this information to show that considerable effort has been expended by the parties and progress made. She then presents the following hypotheticals, individually and in confidence, to close the gap.

5) The mediator says to the Plaintiff, "We now have a gap of Y dollars. If you will give up your claim for attorney's fees, the settlement gap will shrink to ½ Y dollars. You will be asked for no further concession, and there is a reasonable chance that the remaining gap can be bridged." The mediator is using a thick veil, but a weak one, even weaker than ones used previously. The Plaintiff knows the mediator has some hope for closing the gap or the mediator would not be saying to the Plaintiff that she would not come back and ask for anything more from the Plaintiff if the Plaintiff will give up entirely its claim for attorney fees.

6) The mediator says to Defendant 2, "If a certain contingency materializes, the gap will be down to ½ of Y dollars. If increasing your offer by Z dollars will close the remaining gap, would you be willing to do that?" The mediator is using a weak thick veil. The Defendant 2 and its attorney can see the mediator has hopes for obtaining more compromises from other parties because she is asking the Defendant 2 to go up only slightly.

7) The mediator then goes back to the Plaintiff with the following hypothetical, "The gap is down to ½ of Y dollars. If you will give up your claim to attorney fees, we may be able to bridge the remaining gap." The Plaintiff agrees. All of the parties convene together and the mediator informs all parties of the contributions made to the settlement by the other parties.

Summary. The process began with a thin veil when the mediator asked the Plaintiff to try to set aside its feelings of moral outrage, asked the other parties to try to set aside their feelings, and avoided bringing up the feelings expressed by other parties during the mediation. This was a thin veil because it asked the participants to disregard information they already knew. The mediator also used cloaks as she caucused with each party. She cloaked any new expressions of moral outrage or emotional outbursts that occurred in any caucus, and cloaked any hardline dollar positions that were taken.

The mediator also used cloaks to begin the mediation process. She obtained the parties' agreement that each party would make its first move in confidence to the mediator and that the mediator would begin sharing information with parties about what the other parties were individually doing only with the consent of all of the parties. The mediator then shifted to using

hypotheticals that were veils. These hypotheticals as veils were thick in the sense that the parties could draw some inferences from the words used by the mediator, and from their own background knowledge and from knowledge of the present circumstances, but they still did not know what each of the other parties was doing.

Most of the thick veil hypotheticals used were weak and tended to yield strong inferences. There were also examples of strong thick veils that tended to yield weaker inferences. The real point is a comparative one. The stronger the thick veil, the weaker the inferences and vice versa. In addition, the hypotheticals as veils became weaker and weaker as the mediation continued. That meant the parties could draw stronger and stronger inferences as the mediation progressed until there was transparency at the end. Before final settlement, every party knew, of course, exactly what every other party was contributing or getting out of the settlement.

Using cloaks at the beginning of the mediation lessens the influence of strong feelings, gives reason a better chance, and gets things moving in the right direction. It is generally better to introduce information that arouses strong feelings more slowly, using cloaks, veils, and hypotheticals as veils, moving gradually toward transparency. This permits feelings and emotions to enter into the process, but not in a disruptive rush. In addition, the mediator continues to cloak new expressions of moral or emotional outrage or strong position taking during the caucusing.

Hypotheticals that contradict what the listener believes to be true are called *counterfactuals*. "What if we could reach a settlement without your having to pay anything to the Defendant 1?" Counterfactuals have considerable value, as we noted earlier in connection with research evidence on "thinking-the-opposite."

APPENDIX B. Applications of Analysis, Distribution, and Synthesis in a Mock Customer Service Mediation

A customer plaintiff became dissatisfied with both the reliability of the equipment it purchased from the defendant and with the service it provided. They evaluate the situation quite differently.

Analysis. A mediator's first step might be to analyze these judgments. Logically, two components of these judgments would be the reliability of the computer equipment and the quality of the service. Focusing on them one at a time, a mediator may be able to get the parties to agree that the:

(a) claims made by the defendant were, essentially, that the computer equipment was "reliable" and that the service would be "good,"

(b) a satisfactory measure of reliability would be average breakdowns per month, and

(c) a satisfactory measure of service would be average hours to respond to a service call.

These agreements should not be difficult to get because the judgments will have been made behind a thick veil of ignorance. That is, they will agree on the measures before they learn whether existing data on these measures strengthen or weaken their positions.

Distribution. Distribution as a thick veil or a cloak is illustrated as follows. The plaintiff and the defendant agree on or the mediator appoints an expert to provide industry-wide data as to the average number of breakdowns/month that would correspond to "reliable" and "unreliable" equipment and the average number of hours to respond adequately in a service call that would correspond to "good" and "poor" service. The parties would agree on these experts behind a cloak, or at least a thick veil, of ignorance as to the data the expert might provide. The expert would work from behind a cloak of ignorance as to who is involved and the use to which the data might be put. When different portions of a problem are distributed to different persons for input, the work is more likely to be done behind cloaks of ignorance.

The expert(s) would then be asked by the mediator to provide the average (mean) industry standard charges for each of the following four reliability/service profiles.

	Reliable Equipment	Unreliable Equipment
Good Service		
Poor Service		

The final analytic step would be to obtain objective data from the records of both parties on average number of breakdowns/month, average number of hours to respond to a service call, and the charges/payments to date.

Synthesis. Synthesis as a cloak is illustrated by the very straightforward logic that would likely be involved in putting these pieces together:

- On the basis of the average number of breakdowns/month and the expert-provided data, the equipment is determined to have been reliable or unreliable;

- On the basis of the average number of hours to respond to a service call and the expert-provided data, the service is determined to have been good or poor;
- Based on the average (mean) expert-provided industry charges for the resulting scenario and the actual charges billed by the defendant, the overcharge or undercharge is computed.

This logic would presumably be agreed upon by nearly anyone, rendering their judgments from behind a cloak of ignorance as to how their judgments would affect the parties in any particular dispute.

While not yet a complete solution, such an evaluation of the appropriateness of the charges to the equipment and services rendered should provide a sound basis for resolving the differences. It would be a complete solution, if the parties agreed in advance, on how overcharges or undercharges would be dealt with. Restated, the experts and their data could be used as non-binding guidance or as the final word.

The costs of locating and preparing experts may make such an approach applicable only to disputes involving large amounts of money. However, simply framing the problem in a clearly rational way, with provision for fair judgments, can bring parties to a more reasonable point of view without having to incur the costs of implementing the plan.

APPENDIX C. Applications of Veils and Cloaks in a Mock Personal Injury Mediation

The following example shows another way in which a decision-analytic approach could help with mediation. The parties in mediation are a pregnant woman and the company that manufactured the product that was alleged to cause the loss of plaintiff's unborn child. The woman wants $1,000,000 in compensation. The manufacturer claims there is no way it is responsible, but offers $100,000 as a "good will gesture" recognizing, frankly, the cost of defense and adverse publicity of a trial.

The crucial difference between the positions of the woman and the manufacturer lies in their estimates of the probability that the miscarriage was caused by the product. The parties are at impasse and the mediator sees an opportunity to use a cloak of ignorance. This is what the mediator says to the woman:

> If you and the manufacturer can agree on an independent expert to assess the probability, p, that the miscarriage was caused by the product, you could agree beforehand to the following settlement based upon the expert's judgment of p:

- If the expert finds $p = 1$, the manufacturer pays you $1,000,000.
- If the expert finds $p = 0$, the manufacturer pays you $0.
- If the expert finds p to be between 0 and 1, the manufacturer pays you p times $1,000,000.

So long as the expert finds p to be greater than .1, the manufacturer will pay you more than the $100,000 it has offered, but you have rejected. Besides, you will avoid the expense of a trial, which could easily be $125,000.

The woman agrees, saying, "If I were just guessing, I'd say there's about .50 - .50 chance that the product was at fault, but I'm a lot more confident than that."

This is what the mediator says to the manufacturer:

If you and the plaintiff can agree on an independent expert to assess the probability, p, that the miscarriage was caused by the product, you could agree beforehand to the following contract conditional on the expert's judgment of p:

- If the expert finds $p = 1$, you pay $1,000,000.
- If the expert finds $p = 0$, you pay $0.
- If the expert finds p to be between 0 and 1, you pay p times $1,000,000.

So long as the expert finds p to be less than .1, you will pay less than the $100,000 you offered, which was rejected. Besides, you will avoid the expense of a trial, which could easily be $125,000.

The defendant agrees, saying, "We're not an irresponsible manufacturer. We have done a lot of research on the safety of our product, and we are confident that a qualified expert will come in with a judgment less than .1."

Having agreed to this conditional contract, the parties work cooperatively to identify the best expert they can get that is acceptable to both of them. This example shows how using fact-value separation and the assignment of different judgments to different persons can save a considerable amount of time, money, and emotion by avoiding a trial. In essence, the mediator was able to construct an efficient and fair process to break what would have been an impasse.