

The Hopes and Fears of All the Years: 30 Years Behind and the Road Ahead for the Widespread Use of Mediation

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In the business world, the rearview mirror is always clearer than the windshield.

- Warren Buffett¹

Over the next generation, I predict, society's greatest opportunities will lie in tapping human inclinations towards collaboration and compromise rather than stirring our proclivities for competition and rivalry. If lawyers are not the leaders in marshaling cooperation and designing mechanisms that allow it to flourish, they will not be at the center of the most creative social experiments of our time.

- Derek Bok²

Looking through the windshield in 1985, the dispute resolution community was enthusiastic about mediation's promise: the promise of a radically different paradigm premised on party-driven resolution and collaborative decision-making. Peering ahead, mediation's pioneers anticipated a quiet revolution in conflict management toward more therapeutic and democratic processes. What do events in the last three decades tell us about the high and low points in the journey of that endeavor? Looking forward, how might we best align reality with our highest aspirations and avoid the disappointing troughs we encountered in those past decades?

I. HOPES AND FEARS

To answer those questions and to measure the success or failure of mediation over the last period of time, we need to examine the aspirations and fears of the movement. What did Derek Bok mean when he talked about "the most creative social experiments of our time"?³ We must begin by asking: What were the hopes surrounding mediation's introduction into the legal arena? We believe they were twofold:

¹ Warren Buffet, *The Letter to Shareholders of Berkshire Hathaway Inc.*, 1991.

² Derek Bok, "A Flawed System," *Harvard Magazine*, May-June, 1983, p. 71.

³ *Id.*

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- 1) Mediation promised a way to avoid the costs, delays, emotional stress, and relational havoc entailed by adversarial processes; and
- 2) The mediation process offered a more forgiving, understanding-enhancing route toward settlement where parties could understand themselves and one another better, repair relationships, collaborate in problem-solving, and craft individually and jointly optimal outcomes.

And what were the fears harbored by thoughtful practitioners and observers? Again, we focus on two:

- 1) What if it didn't take? Some feared that the movement towards mediation would be championed by only a few lone voices offering a less travelled and more emotionally risky collaborative approach. Such an approach in a rights-based society, drawn to adversarial combat and to winners and losers, simply might not have a following.
- 2) What if it did take? Others feared that justice would be compromised if disputants, en masse, chose to negotiate settlements behind closed doors, unconstrained by formal rules of procedure and evidence, and guided by a third party ethically proscribed from providing legal guidance or protection.⁴ If mediation truly took off, the hard-won rights of minorities, women, and other marginalized groups might be jeopardized; the opportunity for creating precedents might be lost.⁵

⁴ Owen M. Fiss, *Against Settlement*, 93 YALE L.J. 1073 (1984). See also Harry T. Edwards, *Alternative Dispute Resolution: Panacea or Anathema*, 99 HARV. L. REV. 668 (1986) (raising concerns about the quality of ADR processes and highlighting the importance of litigation in constitutional and public law cases); Judith Resnick, *Due Process: A Public Dimension*, 39 U. FLA. L. REV. 405 (1987) (exploring the public dimension of due process); Judith Resnick, *Many Doors? Closing Doors? Alternative Dispute Resolution and Adjudication*, 10 OHIO ST. J. ON DISP. RESOL. 211, 212 (1995) (raising concerns about the institutionalization of ADR).

⁵ *Id.* See also Penelope E. Bryan, *Killing Us Softly: Divorce Mediation and the Politics of Power*, 40 BUFF. L. REV. 441 (1992) (discussing how mediation places men in a dominant position in divorce mediation); Richard Delgado et al., *Fairness and Formalities: Minimizing the Risk of Prejudice in Alternative Dispute Resolution*, 1985 WIS. L. REV. 1359 (1985) (discussing how the informal nature of mediation and other forms of dispute resolution may allow racial and ethnic prejudice to influence outcomes).

These hopes and fears have framed debates surrounding mediation's growth over the past thirty years. We believe that the debates of the future will incorporate these strands of optimism and anxiety, and will expand to include additional questions: What aspects of mediation's original form will endure? Will mediation reshape the course of disputing in the courts, or will traditional adversary practices deform mediation beyond recognition? Who will have access to alternative processes? Will mediation become a luxury, available only to the 1%? Will some derivative and degraded mediation process be offered to the 99%?

Since the past is an indicator of the future, we offer the following somewhat personal and idiosyncratic timeline of events in the last thirty years as markers of hopes and fears that made the goals of mediation seem attainable and bright at some points, and receding and dim at others.

A. *An Idiosyncratic⁶ Chronology Tending Towards Hope*

1. *A Mediation Clinic*

In 1985, the Benjamin N. Cardozo School of Law Mediation Clinic was founded. The introduction of mediation into the law school curriculum marked the acceptance of another way of approaching dispute resolution by a law school faculty. The Cardozo Mediation Clinic was, and remains, a living laboratory in terms of both the efficacy of mediation itself and the ability of mediation's promises to inspire law students.

Each year students report involvement in 300 plus cases, either as a mediator, co-mediator, or observer. Currently, with students operating in Manhattan and Brooklyn Civil and Small Claims Courts and the Brooklyn Mediation Center, roughly 50% of the cases come to a settlement. In many

to the detriment of minorities); Trina Grillo, *The Mediation Alternative: Process Dangers for Women*, 100 YALE L.J. 1545 (1991) (discussing how cultural assumptions about and relational tendencies of women can present disadvantages to women in mediation).

⁶ Many more events and movements might be added to these chronologies. As scholar and mediator Jeremy Lack points out, the last few decades have witnessed great strides in our understanding of the neuroscience of conflict resolution as well as the role of emotions in decision-making. Over the same time period, ADR has been rebranded to mean "Appropriate" rather than "Alternative" Dispute Resolution, and Online Dispute Resolution (ODR) has flourished. We have no doubt that if ten mediator scholars were asked about the hopeful and fearsome portents of the last thirty years, the responses would be extensive and diverse. The chronologies we detail here are "idiosyncratic" in that they capture the developments and initiatives that most raised the hopes and fears of the authors of this article.

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cases, parties have an opportunity to understand their counterpart and work out nuanced agreements.

A recent case in the Brooklyn Civil Court illustrates the excitement surrounding the program. Several law student mediators spent six hours working with a Nigerian plaintiff and defendant, both now residing in New York. The parties had been friends, had helped each other in multiple ways, and had started a business together that involved the purchase of a car, the shipment of the car to Nigeria, and the refurbishment of a building in Nigeria as a storehouse with the hope of starting a lucrative import business. Things went wrong. The business couldn't get the necessary clearances to export peanut oil and other commodities. The defendant owned the building in Nigeria and the car, though both had little value to him as a New York resident. The plaintiff wanted full value for her investments. So, longtime comrades who had initially trusted each other enough to partner in a financial enterprise were now busy suing each other in Brooklyn Civil Court with claims and counter-claims. Student mediators managed to help the parties work out a plan to disentangle the assets and divide up the losses. The business was over, but the relationship looked like it might endure. Whether or not the relationship continued, the exercise of coming to a clearer understanding among themselves as to what happened and of working out an acceptable agreement seemed like a good route to an outcome that avoided a win-lose scenario. Neither party had particularly good evidence of the various purchases and expenses, so it was hard to imagine what a court might rule. The parties together understood what had happened, and their self-generated resolution seemed fitting. These sorts of mediations, which are not uncommon, reaffirm the hope that mediation increases understanding, supports problem solving, and results in beneficial closure.

The Cardozo Mediation Clinic also stands as a testament to the possibility for change within the legal profession. In a school that hosts the famous Innocence Project begun by Barry Scheck, as well as an array of other exciting programs teaching traditional adversarial skills, the Mediation Clinic is among the most popular clinics; in 2015 it received the most applications—115—for its sixteen spots. Thirty years old and running strong, the Clinic validates the hopes of decades past that mediation could catch fire in the legal community and inspire new ways of thinking about legal disputes. Its continued popularity nurtures optimism that “social experiments” can take hold, garner excitement among the rising generation, and endure over time.

2. *The Model Standards of Conduct*

In 1992, three important ADR trade organizations, the ABA Dispute Resolution Section, the American Arbitration Association, and the Society for Professionals in Dispute Resolution (SPIDR),⁷ came together to work on a code of conduct for mediators, a two-year project that culminated in the *Model Standards of Conduct for Mediators*.

The *Standards* were organized around six core concepts: self-determination; impartiality; conflicts of interest; confidentiality; competence; and quality of process. Ten years later, the original drafting organizations determined that updates were in order. In 2005, a revised set of standards, hewing closely to the original architecture but providing more detail and nuance, were published.

The 2005 *Standards* articulate the field's most basic aspirations. Formulated to "guide the conduct of mediators, inform mediating parties and promote public confidence in the process,"⁸ the ten-page document represents the mediation community's efforts to hold itself accountable to consumers and establish a set of best practices. The *Standards* represent a turning point for a field that originally sought to "let a thousand flowers bloom" and eschewed guidelines that might render certain practices "beyond the pale."

What is noteworthy about both sets of standards is the clarity with which the fundamental precepts of party self-determination and mediator impartiality are stated and reiterated. This is somewhat remarkable given the degree to which mediation, by the end of the twentieth century, had become an established cog in many state and federal courts' bureaucratic machine and how tempting it would have been to de-emphasize the user's experience in favor of efficiency-based metrics. If anything, the revised 2005 *Standards* are stronger in their assertion of the primacy of party self-determination than the 1994 version in that they explicitly recognize party control in process design, mediator selection, and decisions to terminate. Moreover, the *Standards* anticipate the pressures of an ever-more-competitive marketplace, clarifying that party self-determination shall not be undermined by the push for higher settlement rates, increased fees, or programmatic interests.⁹

The revised *Standards* reflect the field's maturation and increased sophistication. Standard VI, "Quality of the Process," was a largely new

⁷ The successor organization to SPIDR is the Association for Conflict Resolution (ACR).

⁸ See MODEL STANDARDS OF CONDUCT FOR MEDIATORS Preamble (AM. BAR ASS'N 2005).

⁹ *Id.* at Standard I(B).

addition, designed to sensitize mediators to the importance of careful devotion to craft. Mediators were exhorted to ensure that they had adequate time and energy to devote to each case; to refrain from labeling a process as mediation if they are, in fact, doing something else; to solicit party consent before slipping into a different role—such as arbitrator or neutral evaluator; and to be aware that mixing the role of mediator with a separate professional function creates complications and subjects mediators to additional duties. Working with experts from the disability community, drafters included a provision that dealt with parties whose physical or emotional or cognitive deficits appeared to interfere with their ability to participate in the process.¹⁰ Finally, the Standards began to hint, if only slightly, that some of the ethical mandates being delineated were in tension with one another and that the pursuit of one mandate to its logical extreme could result in underserving another.¹¹

In their well-known text, *The Social Organization of Work*, sociologists Hodson and Sullivan identify the hallmarks of a profession.¹² The hallmarks are specialized knowledge, autonomy, authority, and altruism. Professional altruism is evident when a field self-regulates and adopts rules or guidelines designed to improve practice and protect the public. In this way, the Model Standards mark a significant step forward in mediation's evolution from a loosely bound together set of dispute-resolvers into a more tightly knit quality-conscious profession.

3. *A Shaping Point Mediation*

In 1993, a “shaping point” mediation in Glen Cove, New York, resulted in a collaboration on a variety of fronts between the town and a minority group. For many in the ‘80s, our experience was based on Small Claims Court, community centers, and lower value civil court cases. This highly

¹⁰ See R. Wayne Thorpe & Susan M. Yates, *An Overview of the Revised Model Standards of Conduct For Mediators*, DISP. RESOL. MAG., no. 2, Winter 2006, at 30 (“Standard VI(A)(10) is a good example of the value of input from the mediation community during the drafting process, in this case mediators who work with people with disabilities.”).

¹¹ Michael L. Moffitt, *The Wrong Model Again: Why the Devil is Not in the Details of the Model Standards of Conduct for Mediators*, DISP. RESOL. MAG., no. 3, Spring 2006, at 31.

¹² See RANDY HODSON & TERESA SULLIVAN, *THE SOCIAL ORGANIZATION OF WORK* (5th ed. 2012).

publicized 1993 mediation showed that mediation's promise could be fulfilled in higher stakes conflicts implicating constitutional values.¹³

In this contentiously litigated case, mediation allowed parties to pivot in a different direction and discuss local issues and build community rather than fighting—a justice value that is arguably as important as creating precedents.¹⁴

The case was about a large group of Salvadoran men that congregated every morning on a busy thoroughfare in front of a deli in Glen Cove, New York. The men were there seeking employment from contractors who stopped and negotiated wages on the spot—a so-called “shaping point.” The town objected to these gatherings because of interruptions in traffic flow at rush hour, cat-calling to women, obstruction of businesses, public urination, and the like. So, the town passed an ordinance forbidding conversations between motorists and pedestrians for the purpose of seeking employment.¹⁵ An advocacy group for the Salvadorans at the shaping point, supported by a Constitutional Law Clinic at Hofstra Law School, challenged the ordinance as unconstitutional and litigation followed.

Because this case, on its litigation track, was about the constitutionality of an ordinance, one might well wonder how such a clear legal question could be mediated. One might wonder as well about the desirability of mediating such a question. Wouldn't a valuable legal precedent be lost? The answer validates some of the key hopes about mediation.

First, the two-day mediation avoided the time, risk, and costs of further protracted litigation. The relationship between the town and its minority Salvadoran community was already stressed; it would have become even more fractured as the litigation proceeded. Both sides faced legal risks, and

¹³ Lela P. Love, *Glen Cove: Mediation Achieves What Litigation Cannot*, CONSENSUS, Oct. 1993, at 1, reprinted in THE NEW YORK MEDIATOR NEWSLETTER (Unified Court System of the State of New York) Fall/Winter 1993–94, at 1.

¹⁴ Jonathan M. Hyman & Lela P. Love, *If Portia Were a Mediator: An Inquiry into Justice in Mediation*, 9 CLINICAL L. REV. 157, 171–72 (2002) (exploring different dimensions of “justice” including improved relationships and the re-establishment or harmony or the status quo in a family, business, or community); Carrie Menkel-Meadow, *Practicing “In the Interests of Justice” in the Twenty-First Century: Pursuing Peace as Justice*, 70 FORDHAM L. REV. 1761 (2002) (arguing that the resolution of human problems is a dimension of justice).

¹⁵ In March, 1990, Glen Cove adopted an ordinance that made it illegal “for any person to stand on a street or highway and solicit . . . business . . . from an occupant of any motor vehicle. Drivers were also banned from stopping, parking, or standing a motor vehicle on a street or highway for the purpose of hiring workers.” See *NEWSDAY* (March 14, 1990).

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the costs of litigation, particularly to the town, had become burdensome. But those were not the most compelling reasons for turning to mediation.

Having a conversation about all the concerns of the parties allowed for a general re-crafting of social relations in the town of Glen Cove. That is, together the parties developed protocols for police when they encountered non-English speaking persons; together the parties worked out how town notices about the city soccer field and other services and amenities could be translated to Spanish; together the parties gave the police a platform at Salvadoran meetings and gatherings to talk about concerns of citizens; together the parties worked out the site and amenities at a new shaping point; and together the parties re-drafted the ordinance so that it achieved the goal of traffic safety but, at the same time, was not constitutionally offensive to a minority community. The exercise of collaborating to achieve a consensus, in and of itself, promotes a different sort of relationship than an adversarial proceeding. Glen Cove is different today because of that mediation.¹⁶

Had the case remained on its preexisting track, the litigation would have focused narrowly on the language of the ordinance and whether its prohibitions passed constitutional muster. Whether the ordinance was upheld or struck down, all of Glen Cove's social problems would remain. If the ordinance was declared a nullity, the town could pass another statute. Litigation might create a good precedent for the books, but it would not solve the real problems on the street.

Glen Cove embodied mediation's capacity to define problems broadly, thereby allowing for more holistic consensus-based outcomes.¹⁷ Broad problem-definition, as the Glen Cove settlement revealed, places on the table business interests, a range of community concerns, cultural and emotional blockages, reputational worries, as well as practical and political challenges.¹⁸ Glen Cove became a public symbol of how a capacious approach to conflict can, paradoxically, generate more durable and satisfying resolutions than those contemplated by a more remedially myopic court.¹⁹

¹⁶ Lela P. Love & Cheryl B. McDonald, *A Tale of Two Cities Day: Labor and Conflict Resolution for Communities in Crisis*, DISP. RESOL. MAG., Fall 1997.

¹⁷ See, e.g., Love, *supra* note 13. See also Leonard L. Riskin, *Mediator Orientations, Strategies and Techniques*, 12 ALTERNATIVES 111 (1994) (describing narrow and broad problem definition).

¹⁸ See, Riskin, *supra* note 17.

¹⁹ Of course, a litigation romanticist would point to the impact of *Brown v. Board of Education* and argue that such public precedents are critical. See Fiss, *supra* note 4. They are right. The point is that different approaches will generate different benefits, and the benefits gained by the Glen Cove parties were arguably as significant, but in a different way, as a new legal precedent. See also, David Luban, *Settlements and the Erosion of the Public Realm*, 83 GEO. L.J. 2619 (1995) (noting that adjudication is a

And, as for precedents, the town set precedents in terms of how community-minority relationships could be improved, how an ordinance could be re-crafted to serve different and legitimate needs, and how a police department could change to be more responsive to a minority constituency.²⁰ This latter achievement is certainly resonant today as a goal of civil society and our justice system.²¹

4. *Mandela Becomes President of South Africa*

In 1994 Nelson Mandela became president of South Africa. Mandela's ascent from political prisoner to democratically elected president of South Africa was a game-changing milestone for conflict resolution. South Africa had been a poster child for hopeless and endlessly escalating conflict with its brutal apartheid, economic boycotts, and killing of key members of the African National Congress (ANC). Nelson Mandela was in prison for 27 years. And then he became president.

It is, for the purpose of this timeline, not so much Mandela's remarkable political achievements that we celebrate, but his magnanimity of spirit. Without doubt, the social change Mandela and his colleagues wrought was extraordinary. Mandela and his fellow activists helped enfranchise the entire non-white population, effectuate a shift from virtual mass slavery to a multi-racial democracy, and empanel a Truth and Reconciliation Commission to uncover a shared national history.

But, in considering the psychological shift required for Bok's creative social experiment to succeed, it is Mandela's extraordinary strength and capacity for forgiveness that inspires hope. Mandela, the man, demonstrated the amazing grace that is usually encountered only in religious texts and

public good for the precedents it produces, but also noting that too many precedents may be like the "Tower of Babel," creating incoherence and bad adjudication).

²⁰ See, e.g., Love, *supra* note 13 (noting that community meetings will be held in Glen Cove to educate the police, city officials, and the Hispanic community about the rights and culture of one another; that two Glen Cove police officers will take a Central American Awareness course and will learn Spanish; and that future relations among the police, the city, and the Hispanic community will be bettered); Memorandum of Understanding between CARACEN and Glen Cove dated December 14, 1992 (stating that the two officers who received the cultural awareness training will provide four hours of training to all officers on the police force, that Spanish language ability would be a hiring consideration if other factors were equal, and that a written protocol would be adopted for handling situations where a party did not speak English) on file with authors.

²¹ The upheavals resulting from the 2012 shooting of Trayvon Martin in Sanford, Florida; the 2014 shooting of Michael Brown in Ferguson, Missouri; and the 2015 fatal ride of Freddie Gray in Baltimore, Maryland are three examples of the importance of this.

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gospel hymns. When his prison door opened, he embraced his jailors and moved forward without rancor. This state of mind changed his world, and painted a realistic picture of what human beings can do with a generous heart and a strong will.

With poetry²² to sustain him, Mandela left prison to rebuild his country. This achievement, of turning adversity into a building block for humanity, is captured at the entry way to Robben Island, the prison that held Mandela and many of his comrades:

*While we will not forget the brutality of apartheid,
We will not want Robben Island to be a monument of our hardship and suffering
We would want it to be a triumph of the human spirit
Against the forces of evil,
A triumph of wisdom and largeness of spirit
Against small minds and pettiness,
A triumph of courage and determination
Over human frailty and weakness.*
Ahmed Kathrada 1993

If mediation, as a larger movement, would be relevant to important disputes, then it would require the largeness of soul that Mandela demonstrated was possible. And, importantly, he showed what could be achieved if one adopted such a stance, as he moved from prisoner to president—loved and applauded around the world.

5. *An Accord in Northern Ireland*

In 1998 George Mitchell finally shepherded the Northern Ireland Peace talks to the Good Friday agreement.²³ As a good facilitative mediator, George Mitchell slogged through 700 days of what he calls “failure” to get to the Good Friday Peace Accords in Northern Ireland—the final day of

²² “Invictus” is the title of a movie (Spyglass Entertainment & Malpraso Productions 2009) about Nelson Mandela and derives from a poem by that name by William Ernest Henry, *Book of Verses* (1888). The poem sustained Mandela in prison. (“*Out of the night that covers me black as a pit from pole to pole I thank whatever gods there be for my unconquerable soul....*”).

²³ George Mitchell, *Peace Can Prevail*, 8 DISP. RESOL. MAG. 4 2001–2002.

“success.”²⁴ This was an amazing feat; a feat of patience and perseverance and understanding of the mediation process. If South Africa and Mandela revealed that one indomitable and persevering man could alter the tide of history, George Mitchell’s achievement stands for the power of mediation itself, even in the face of seemingly intractable conflict, to bring deeply hostile and wounded groups into an accord. Mitchell proved, on a huge world scale, the rare power of facilitative mediation, as practiced by a determined and talented mediator.

6. *Markers of Globalization*

Several events in the last decade have marked an expansion of mediation globally and generated hope that mediation was catching on.

In 2008, the European Mediation Directive²⁵ was promulgated, making it mandatory for member states to enact legislation to make mediation available in commercial and civil cross border disputes by 2011.

In 2009, the American Bar Association Dispute Resolution Section hosted the International Mediation Leadership Summit at the Peace Palace in the Hague. This event invigorated the Section’s International Committee and spawned a new generation of collaborations between people from different countries.

7. *Stories Told by Mediators*

In 2012, *Stories Mediators Tell*²⁶ was published. The book contained thirty-one stories by prominent mediators who had been called upon to “shed light on the dynamics and realities of a process little known to the public.”²⁷ Writers were asked to convey stories about “moving, successful, unsuccessful, happy, sad, and funny mediations.”²⁸ With few exceptions, the stories celebrated mediation’s capacity to enable individual parties to assess their situation more capably,²⁹ to connect human beings in times of crisis,³⁰

²⁴ Ronan McGreevy, *George Mitchell Says Son’s Birth Drove Him in Peace Talks*, IRISH TIMES (Apr. 10, 2016) <http://www.irishtimes.com/news/ireland/irish-news/george-mitchell-says-son-s-birth-drove-him-in-peace-process-1.2605611>.

²⁵ 2008/52/EC.

²⁶ STORIES MEDIATORS TELL (Eric R. Galton & Lela P. Love eds., AM. BAR ASS’N 2013).

²⁷ *Id.* at xiii.

²⁸ *Id.*

²⁹ *See, e.g., id.* at 14.

³⁰ *See, e.g., id.* at 3–17.

to bridge differences,³¹ and to build unique solutions.³² Many of the stories celebrated the sort of generosity of human spirit, exemplified by Nelson Mandela, that could be brought to the fore by mediation. For many people, the book confirmed their fondest hopes about mediation's potential.³³ Importantly, the stories in the book were written by active and prominent mediators, many of whom did primarily commercial cases. So, their celebration of the process was particularly meaningful insofar as accolades about mediation were more typically heard from practitioners of family and community cases.

B. *An Idiosyncratic Chronology Tending Towards Fear*

1. *A Mediation Clinic*

In 1991 the Thomas Jefferson Mediation Clinic formed. The San Diego branch campus of Western State University (which later evolved to become Thomas Jefferson School of Law) was one of the few schools placing students at a community mediation center where they worked on intake and educating the public about the benefits of mediation. Within five years, students had moved from performing intake and public education roles at a community center to serving as mediators in small claims courts scattered around the southern and eastern points of San Diego County.

The students' mediation experiences gave credence to both the aspirations and anxieties of mediation enthusiasts. Like the Cardozo students, Thomas Jefferson students had their fill of heartwarming reconciliations. Working with estranged neighbors, alienated homeowner association members, and aggrieved consumers, students began to see for themselves how small misunderstandings can escalate into large ones, and how guided conversation can dispel suspicion and return citizens to peaceful co-existence. San Diego is a diverse community. Its southern and eastern regions are host to a variety of ethnic groups including Chaldean, Hmong, Vietnamese, Mexican, and Guatemalan communities. Students worked hard to transcend cultural barriers and help mend relationships that had been strained by divergent life experiences and expectations.

³¹ See, e.g., *id.* at 33–49.

³² See, e.g., *id.* at 75–84, 85–90.

³³ See, e.g., Wayne Brazil, *Stories Mediators Tell: A Review*, 34 CARDOZO J. OF CONFLICT RESOL. 2415, 2415 (2013) (“There is, in these stories, a sustained lyricism about the capacities of human beings—about their ability to ... re-orient their energy, to forgive, and to re-connect.”).

While students generally felt that they were doing noble work, they occasionally came to class troubled by their morning mediations. They reported on cases where one party, in ignorance and doubt, signed on to an agreement that the student felt was clearly disadvantageous. The students bridled at their inability to provide information to litigants who clearly did not know their legal rights and who would have benefitted from legal counseling.³⁴ Students followed the standard ethical script of advising small claims litigants of their right to counsel, but given these litigants' lack of resources, the advice sounded hollow. Students talked about savvy repeat players who seemed to be using the mediation process to extract settlements more favorable than anything they could have obtained in court. And, students worried about the hapless one-shotters who paid or relinquished excessive amounts because they found the prospect of talking to a judge intimidating and had no benchmark to guide them.

Was small claims mediation a place where swords were being communally transformed into ploughshares, or where the least resourced amongst us are asked to give more and get less in the service of a harmony ideology? What, my students asked, is a proper price to pay for peace—and what to do when it appears that one side is disproportionately paying it?³⁵

2. *The Riskin Grid*

In 1996, Leonard Riskin published an article entitled *Understanding Mediators' Orientations, Strategies, and Techniques: A Grid for the*

³⁴ See Jacqueline M. Nolan-Haley, *Informed Consent in Mediation: A Guiding Principle For Truly Educated Decisionmaking*, 74 NOTRE DAME L. REV. 775, 780 (1999) (arguing that “unrepresented parties need more disclosure than parties who have lawyers and that when courts require unrepresented parties to mediate, fairness demands that they have a basic knowledge of their legal rights.”). See also James H. Stark, *The Ethics of Mediation Evaluation: Some Troublesome Questions and Tentative Proposals, from an Evaluative Lawyer Mediator*, 38 S. TEX. L. REV. 769 (1997) (arguing in favor of providing disputants with legal information and advice in order to facilitate informed decision-making).

³⁵ See generally Gary LaFree & Christine Rack, *The Effects of Participants' Ethnicity and Gender on Monetary Outcomes in Mediated and Adjudicated Civil Cases*, 30 L. & SOC'Y REV. 767 (1996) (showing possible disadvantage to minority claimants in terms of monetary outcomes in mediated cases, which might be alleviated by the ethnicity and gender of the mediator(s)); but see, Lisa Blomgren Bingham, Tina Batchi, Jeffrey Senger & Michael Scott Jackman, *Dispute Resolution and the Vanishing Trial: Comparing Federal Government Litigation and ADR Outcomes*, 24 OHIO ST. J. ON DISP. RESOL. 225 (2009) (reporting a study of civil cases handled by ASSISTANT US Attorneys, finding that ADR and litigated outcomes were not significantly different, indicating the process did not favor either side).

Perplexed that put forth his now famous schema, aptly called The Riskin Grid.³⁶ Riskin's grid, which was presented as a descriptive, rather than prescriptive framework, described mediation practices as chartable along two continuums: facilitative and evaluative, and broad problem definition and narrow problem definition.³⁷ An evaluative mediator urges parties to accept a particular proposal, develops and proposes a settlement, predicts court outcomes, and assesses the strength and weakness of the parties' case.³⁸

These activities of the evaluative mediator are strategies and techniques of neutral evaluators and nonbinding arbitrators. They are accepted practices in the larger world of neutral interventions. Riskin's grid, though clarifying in certain respects, blurred essential definitional boundaries between ADR processes beyond recognition. The welcoming of mediator evaluation into the universe of acceptable mediation practice takes, in our view, the practice down a road that confuses mediators about the essence of mediation.³⁹ Evaluative mediation, as it has come to be called, nudges mediation practice away from understanding, problem-solving, and party-built agreement and pushes it back towards evaluation as its core function. It moves mediation towards being an adversarial process where each side vies for the neutral's favor in the anticipated evaluation.

Riskin's grid legitimated and popularized evaluative mediation—a form of mediation that can achieve unhappy results.⁴⁰ One of us (Lela) was provided a bird's-eye view of this unhappiness when her husband Peter, in his role as the general counsel of a large shipping company, traveled to Florida for a mandatory mediation session involving a multi-million dollar dispute with a union. This was exciting because Peter was going to be able to experience, firsthand and for the first time, what all the excitement around mediation was about. The session, in Riskin-Grid parlance, was narrow and evaluative. The court-appointed mediator warned the company—in a joint session—that they did not have a chance of winning on appeal. The talks broke down. In other words, the mediation killed the negotiation process because the union, taking seriously the “mediator's” evaluation, lost any

³⁶ Leonard L. Riskin, *Understanding Mediators' Orientations, Strategies, and Techniques: A Grid for the Perplexed*, 1 HARV. NEGOT. L. REV. 7 (1996).

³⁷ *Id.* at 22.

³⁸ *Id.* at 27–28.

³⁹ See Kimberlee K. Kovach & Lela P. Love, *Mapping Mediation: The Risks of Riskin's Grid*, 3 HARV. NEGOT. L. REV. 71 (1998); Lela P. Love, *The Top Ten Reasons Why Mediators Should Not Evaluate*, 24 FLA. ST. U. L. REV. 937 (1997).

⁴⁰ At the same time, we would like to emphasize that neutral evaluation, nonbinding arbitration, summary jury trials, and other ADR mechanisms where a third party provides evaluative feedback can be highly beneficial in terms of generating flexibility and perspective-taking with negotiating parties.

flexibility that they might have otherwise had.⁴¹ Several years and hundreds of thousands of dollars in legal fees later, the company won a complete victory in court.

After Riskin's grid, it became uncontroversial to include ever-more directive, coercive activities within the "big-tent" of evaluative mediation. Bashing, trashing,⁴² opining, predicting, and proposing all became part of the standard mediation toolbox. It became hard to figure out what techniques might be said to fall beyond the pale.⁴³

We digress to make a point about losing direction under pressure: Thirty years before Riskin revealed his grid, civil rights groups embarked on the March Against Fear to protest continued resistance to the black vote. During that march, a man named Jim Lawson (who was Martin Luther King's advisor on matters of nonviolence), was walking with Stokely Carmichael. The march was brutal. Demonstrators were treated to indignities and injuries from law enforcement professionals and citizens alike. When Mississippi Highway Patrol shoved four demonstrators off the pavement, Stokely Carmichael had had enough and complained bitterly to Jim Lawson, wanting to fight back. Lawson replied, "You see, Stokely, the difference between you and the military is that a soldier has singleness of purpose. When you get shoved you get confused. If you're really not nonviolent, you ought to get a gun and be a guerilla." Stokely, indeed, left the march and thereafter formed the Black Panthers.⁴⁴

Len Riskin's grid was the graphic representation of a field becoming confused about its primary focus and direction. The grid legitimized some of the evaluative practices that are now the norm in many venues. These practices moved us ever farther from the emphasis on understanding, problem-solving, and party engagement that animated mediation's original vision. They encourage adversarial presentations to influence neutral evaluation. The actions of the mediator in Peter's Florida case not only derailed negotiations but also soured relationships between the union and the company. That is not a good outcome for a mediation!

⁴¹ Even had, hypothetically, the mediator given his opinion to the company only in caucus, thereby not wreaking havoc with the negotiation, the mediator's lack of effort or savvy in terms of developing rapport or a conversational agenda between the company and union, is, to say the least, regrettable.

⁴² James Alfani, *Trashing, Bashing and Hashing It Out: Is This the End of "Good Mediation"?* 19 FLA. ST. U. L. REV. 47, 66 (1991).

⁴³ See James Coben, *Mediation's Dirty Little Secret: Straight Talk About Mediator Manipulation and Deception*, 2 J. ALTERNATIVE DISP. RESOL. EMP. 4, 4 (2000) (arguing that mediators engage in manipulation to foster settlement).

⁴⁴ Spencie Love, Profile: James M. Lawson, Jr. (unpublished manuscript) (on file with authors).

Some felt—and it is our fear—that the mediation world took a step back in adopting the methods and strategies of an adversarial process. Machiavelli's warning regarding the difficulty of sustaining novel ideas appeared particularly apt:

It must be remembered that there is nothing more difficult to plan, more doubtful of success, nor more dangerous to manage, than the creation of a new system. For the initiator has the enmity of all who would profit by the preservation of the old institutions and merely lukewarm defenders in those who would gain by the new ones.⁴⁵

3. *The Rand Report*

In 1996, the *Rand Report* was published, raising questions about mediation's efficacy to reduce delay and litigation costs.⁴⁶ The *Rand Report*, a multi-million dollar U.S. government funded study measuring efficiency in terms of costs and time saved when mediation (and other dispute resolution processes) was used in federal courts, found no statistical verification that time to disposition or costs were reduced by mediation. Other studies did find evidence of cost and time reduction in federal courts.⁴⁷ But after the *Rand Report*, there was no slam dunk case to be made that mediation avoided the costs of an adversarial process.

Where mediation is attempted early, before massive discovery and pre-trial preparation has ensued, burdensome costs are indeed avoided. But, as the *Rand Report* showed, the cost-reduction feature is not clear, particularly where the mediation effort comes late in the litigation process, and particularly since many litigated cases settle before trial with or without a mediation intervention. Nor does mediation assure finality, so there are scenarios in which the cost of a mediation that does not resolve the dispute is simply added on to the cost of adjudication.

⁴⁵ THE FORBES LEADERSHIP LIBRARY, THOUGHTS ON LEADERSHIP 10 (1995) (quoting NICCOLO MACHIAVELLI, THE PRINCE (1531)).

⁴⁶ JAMES S. KAKALIK, TERENCE DUNWORTH, LAURAL HISS, DANIEL MCCAFFREY, MARIAN OSHIRO, NICHOLAS PACE & MARY VAIANA, AN EVALUATION OF MEDIATION AND EARLY NEUTRAL EVALUATION UNDER THE CIVIL JUSTICE REFORM ACT 4 (Rand Report 1996) (finding no strong statistical evidence that time to disposition or litigation costs were reduced by mediation).

⁴⁷ DONNA SIENSTRA ET. AL., REPORT TO THE JUDICIAL CONFERENCE COMMITTEE ON COURT ADMINISTRATION AND CASE MANAGEMENT: A STUDY OF THE FIVE DEMONSTRATION PROGRAMS ESTABLISHED UNDER THE CIVIL JUSTICE REFORM ACT OF 1990 6-7 (Federal Judicial Center 1997) (finding some cost and delay reduction in several court ADR programs).

4. *Labeling Litigators and Mediators*

In 1998, the Dispute Resolution Section of the ABA hosted its first independent conference. One panel was devoted to the narrative of “recovering lawyers.” The name choice was troubling. That budding mediators were choosing to define their trajectory from traditional advocacy to neutral intervention as a movement from sickness toward health did not bode well for future relationships between mediators and litigators. For mediation to truly succeed, attorneys needed to believe in the merit and usefulness of the process. The mediation field needed attorneys to appreciate that talk—civil, collaborative, honest talk—could obviate the need for warfare. And, attorneys needed to believe that they could fulfill their role as zealous advocates while talking in the same room with legal adversaries. Labeling those same attorneys as “unrecovered” was, arguably, a backward step in our own evolution as recruiters in an inclusive campaign to improve access to both formal and informal justice.

5. *Mediation’s Dirty Secret*

In 2000, after building a database which included all the litigated cases about mediation, Professor James Coben wrote an article exposing what he found to be *Mediation’s Dirty Little Secret*.⁴⁸ The so-called secret was that mediators were master manipulators, deceiving parties so that they would enter into agreements, regardless of whether those agreements were in the parties’ best interests. The methods of manipulation cited by Coben included tried and true strategies: reframing, using empathy, leveraging awkward silences, engaging in neuro-linguistic programming (mirroring), overreporting progress, threatening stalemate, controlling the agenda and physical setting, imposing deadlines, and so on. Coben’s article exploded the notion that mediators were simply conversation enhancers, process experts with no role over shaping outcomes. In fact, Coben argued, mediators were exercising frighteningly large quanta of control, sometimes in ways so canny and subterranean that the parties themselves were not even aware of it.

⁴⁸ Coben, *supra* note 43, at 4.

6. *Mediation Moves Towards Arbitration*

In 2012 Jacqueline Nolan-Haley, following other scholars,⁴⁹ declared that mediation was moving towards becoming arbitration.⁵⁰ Professor Nolan-Haley cited the growth of adversarial posturing by lawyers in mediation, adjudication by third party neutrals in the role of mediators, and control of the process by lawyers rather than by parties exercising self-determination.

7. *The Disappearing Joint Session*

In 2014 and 2015, in a related development, numerous sources reported the decline and, in some cases, abandonment of a joint session in mediations.⁵¹ Instead of parties meeting and conversing with one another during mediation sessions, conversations were had between the mediator and each side in caucus settings with no joint meetings at all. Professor James Coben, developing videotapes of different mediators for CLE purposes in Minnesota, reported that none of the local mediators used a joint session at all. Professor Jay Folberg conducted a survey of JAMS neutrals and found that the use of an initial joint session was shrinking.⁵² Eric Galton called the abandonment of the joint session and marginalization of the parties ubiquitous in contemporary court-annexed mediation—and viewed this trend as nothing short of the structural dismantling of the mediation process.⁵³

⁴⁹ Robert A. Baruch Bush, *Substituting Mediation for Arbitration: the Growing Market for Evaluative Mediation and What It Means for the ADR Field*, 3 PEPPERDINE DISP. RESOL. L. J. 111 (2002); Leonard L. Riskin & Nancy A. Welsh, *Is That All There Is?: The “Problem” in Court-Oriented Mediation*, 15 GEO. MASON L. REV. 863 (2008); Nancy Welsh, *The Thinning Vision of Self-Determination in Court-Connected Mediation: The Inevitable Price of Institutionalization*, 6 HARV. NEGOT. L. REV. 1 (2001).

⁵⁰ Jacqueline Nolan-Haley, *Mediation: The “New” Arbitration*, 17 HARV. NEGOT. L. REV. 61 (2012).

⁵¹ James R. Coben, *Barnacles, Aristocracy and Truth Denial: Three Not So Beautiful Aspects of Contemporary Mediation*, 16 CARDOZO J. CONF. RESOL. 779, 779–80 (2015) (describing parties being “locked away from one another” and settlement having become “a prime directive and driving force” of mediation).

⁵² Jay Folberg, *The Shrinking Joint Session: Survey Results*, DISP. RESOL. MAG., Winter 2016, at 14, 15 (showing that mediators in east/central parts of the United States use an initial joint session 68.5% of the time, in the northwest, 34% of the time, and in the southwest, 23.6% of the time).

⁵³ Eric Galton, *The Mediation Witches*, 16 CARDOZO J. CONFLICT RESOL. 825, 826 (2015).

8. *The Untold Stories*

In 2013, a year after the publication of *Stories Mediators Tell*, a critique of the book was published in a symposium edition of the *Cardozo Law Review*. Countering the hope and optimism of the book, Ellen Waldman told the story of the Vitakis case,⁵⁴ in which an impatient and evaluative mediator presses the plaintiff in a divorce action to give up her frozen embryos. She does so but later regrets it.

The critique points out that we celebrate the happy stories, but there are other less happy stories to be told. A rich body of case law now exists featuring plaintiffs seeking to unravel the agreements they signed in mediation.⁵⁵ The arguments are varied. Usually, they center on claims of fraud, coercion, mistake or duress. Behind every plaintiff seeking to undo the fruits of their mediator's labors lies a tale of disappointment and dismay. Aganette Vela, the protagonist in *Vela v. Hope Lumber & Supply Co.*,⁵⁶ would tell how she was lied to and threatened by the mediator and her own attorney; how she cried for an hour and no one in the room offered her a Kleenex.⁵⁷ Teresa Berg⁵⁸ would likely recount her very bad, no good day in mediation, starting with the timing; the mediation was scheduled at 9 a.m. on the very day of her former husband's funeral. She would next describe how her car was rammed by a hit and run driver while parked outside the mediator's office, how she was gulping Prozac throughout the day to try and stay calm, and how it all ended finally at 11 p.m. with an agreement that, in the clearer light of day, she was desperate to disavow.⁵⁹ Bert Randle could outline a noir encounter with stubborn, tough guys who, despite fatigue and chest pain from a bum heart, said he could not leave until he signed on the dotted line.⁶⁰ Finally, Som Nath Chitkara could lay bare the perils of relying on a mediator's casual case evaluation and inaccurate predictions when deciding whether to settle.⁶¹ Each of these individuals signed a mediation agreement but later claimed that the process that produced a signed

⁵⁴ Ellen Waldman, *Story as Sermon and Seduction*, 34 *CARDOZO L. REV.* 2443, 2453 (2013).

⁵⁵ See James Coben & Peter Thompson, *Disputing Irony: A Systematic Look at Litigation about Mediation*, 11 *HARVARD NEG. L. REV.* 43 (2006).

⁵⁶ *Vela v. Hope Lumber & Supply Co.*, 966 P.2d 1196 (Okla. Civ. App. 1998)

⁵⁷ *Id.* at 1198 n. 2.

⁵⁸ *Berg v. Bregman*, No. B149130, 2002 WL 31256677 (Cal Ct. App. Oct. 8, 2002).

⁵⁹ *Id.* at *4.

⁶⁰ *Randle v. Mid Gulf Inc.*, No. 14-95-01292-CV, 1996 WL 447954, at *1 (Tex Ct. App. Aug. 8, 1996).

⁶¹ *Chitkara v. N.Y. Telephone Co.*, 45 *Fed. Appx.* 53, 2002 WL 31004729 (2d Cir. 2002).

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document was terribly flawed. Running through each of these stories is the theme that somewhere along the way a process being hawked as self-determining and autonomy-enhancing had become anything but. The growing numbers of these cases signal that for every eye-misting story of reconciliation and redemption there may be a story of hard-knuckle tactics being brought to bear on disputants who feel bullied rather than empowered. These stories deserve attention—perhaps a volume of their own for the mediation community to reflect upon. And, of course, they raise questions about mediation as a private process where abuses do not come to light unless a disputant takes the expensive and exhausting step of trying to open up the process to the scrutiny of a state or federal judge.

II. THE WINDSHIELD

Looking ahead, the windshield is clouded. There are both positive and negative developments, as well as indications of movement that are hard to categorize one way or another—only time will tell. We highlight a few here.

A. *Saving the Joint Session*

On the positive side, mediator Eric Galton has led an effort to publicize the growing disuse of the joint session and started an initiative to save the joint session.⁶² He has argued that mediation must maintain a format that can deliver on its promise of advancing understanding and human connection. He and others have begun to point out that mediation can hardly promote empathy and creativity when parties are stuck in separate rooms stewing in their own solitary juices. Disputants must be able to share narratives and gain an opportunity for shifts in perspective. Both the telling and the listening are crucial if disputants are to move closer together.

Mediators like Eric Galton recognize that mediation's continued development as a force for positive change is not guaranteed and have devoted themselves to ensuring that the joint session remains a vibrant part

⁶² See generally Eric Galton & Tracy Allen, *Don't Torch the Joint Session*, DISP. RESOL. MAG., Fall 2014.

of the process. Articles,⁶³ a Facebook page,⁶⁴ and numerous blogs augment this effort.⁶⁵

B. *Upping the Bar for Mediator Competency: IMI and Mediator Credentialing and Competencies*

Another positive development for the future is the appearance of the International Mediation Institute (IMI), a global nonprofit seeking to establish worldwide professional standards for both mediation practice and training. The IMI is comprised of mediation practitioners, users and thought leaders invested in the continued sophistication, improvement and elevation of the field of dispute resolution.

IMI's achievements to date are impressive. The organization's Independent Standards Committee (ISC), a group of more than 70 individuals from roughly 27 countries, has developed a set of procedures whereby Mediation Service Providers and Training Organizations whose programs meet certain criteria can qualify individual mediators to become IMI certified. The criteria that would entitle an Organization to qualify a candidate for IMI certification are designed to ensure rigorous and continuous evaluation of mediator/mediation advocacy skill and competency. Organizations who meet these criteria—and thus earn the designation of Qualifying Assessment Programs (QAP)—must show: “a methodology for ensuring that [mediator/mediation advocacy] Applicants have a substantial level of experience...a methodology for determining [mediator/mediator advocacy] Applicants have a demonstrated understanding of mediation theory and practice...; a methodology for evaluat[ing] candidates' performance in terms of mediation techniques....; and a method for assuring the ongoing monitoring of Assessor practices and evaluations.”⁶⁶

The goal of these efforts is to provide mediation users assurance that when hiring an IMI certified mediator/advocate, a certain skill level is guaranteed. As noted by one IMI board member and general counsel for a global oil and gas provider:

⁶³ See, e.g., Galton & Allen, *supra* note 62.

⁶⁴ See Eric Galton, *Save the Mediation Joint Session and Promote Party Participation*, FACEBOOK, <https://www.facebook.com/groups/758455404189531/> (Eric Galton's Facebook page for joint sessions).

⁶⁵ Joseph Markowitz, *Joint Sessions Redux* (Dec. 13, 2014), <http://www.mediate-la.com/2014/12/joint-sessions.html>.

⁶⁶ *Criteria for Assessment Programs Qualifying Mediators to be IMI Certified*, INT'L MEDIATION INST., <http://imimediation.org/criteria-for-qualifying-assessment-programs>.

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For every case in which I propose mediation to the other side, perhaps one in twenty, maybe fewer, will actually get to mediation. Why? For a variety of reasons.... But a key reason for rejection is a lack of confidence in the independent professionalism of mediators and the sense that it is difficult to find a suitable mediator. A uniform international system for certifying competency of mediators is sorely needed.⁶⁷

To add to the value of its credentialing system, IMI has developed Feedback Digests, a summary of prior user reviews compiled by a neutral third party for easy access by would-be mediation consumers.

There are more than 27 training and service providers that have achieved QAP status, and more are in the pipeline. Existing programs are located in far-flung spots around the globe, in Third World as well as First World venues.⁶⁸ Together these programs have qualified over 400 IMI-certified mediators.

The transformation of the certification process started in 2015 with the establishment of the Singapore International Mediation Institute (SIMI). This is the first of many organizations that will promote the concept of “glocal”: which translates to local organizations applying global standards that are adapted to the indigenous culture in order to promote high standards of mediation practice. A similar organization is on the drawing board in Africa and being explored in the Middle East.

C. Aligning Disputant Needs with Mediation Provider Capacity: The Global Pound Conference Series

Another promising IMI initiative is the Global Pound Conference Series designed to take the pulse of both ADR providers and users in an effort to ensure that the field's supply and demand curves are functioning in synchrony rather than disarray.⁶⁹ Named after the 1976 Pound Conference

⁶⁷ Irena Vanenkova, *What's In It for Me? Mediator Certification and the Laws of Supply and Demand*, 5 N.Y. DISP. RESOL. LAW. 51, 51 (2012) (quoting Michael McIlwrath, Associate General Counsel-Litigation for GE Oil & Gas).

⁶⁸ QAPs are located in Albania, Australia, New Zealand, Belgium, Canada, Denmark, France, Hong Kong, India, Italy, Ireland, Netherlands, Nigeria, Portugal, Romania, Russia, Singapore, Spawherein, South Africa, and Switzerland, as well as the United States. See *Find a Qualifying Assessment Program*, INT'L MEDIATION INST., <https://imimediation.org/find-a-qualifying-assessment-program>.

⁶⁹ See The Global Pound Conference Series: “Shaping the Future of Dispute Resolution & Improving Access to Justice” <http://www.globalpoundconference.org/>.

held in the United States nearly 40 years ago, the Global Pound Series aspires toward a similarly catalytic function, igniting interest in dispute resolution among private entities, agencies, and governments that have been content to pursue traditional adversarial tracks. Citing a lack of “reliable, comparative and actionable data,” IMI proposes to stage a series of 40 events throughout the globe, organized around a set of core questions that will be posed to attendees on-site using interactive technology. A preliminary conference organized in London, in October of 2014, foreshadowed the focus of future inquiry. At that conference, dispute resolution users, providers, and advisers were asked: 1) what are the most important factors leading to the choice of alternative dispute resolution mechanisms; 2) when in a dispute life cycle should dispute resolution mechanisms be introduced; 3) should courts mandate parties attend mediation or initiate a dispute resolution process with an opt-out provision; and 4) should mediation be used in the construction of international contracts?⁷⁰ Data generated from that first conference indicates that what users want and think about ADR, including mediation, is out of step with provider beliefs and assumptions. For example, while two-thirds of users rank risk reduction and cost containment as the two most important factors in choosing an alternative dispute resolution process, advisers and providers ranked other factors, such as focusing on key substantive issues, as more important. Users were in favor of mandatory mediation or other court-driven incentives, although advisers and providers were opposed to such external nudging. The one area where users, providers, and advisers were in agreement was that more global conferences should be established with the goal of harvesting more data. The task of organizing and staging these global events is well underway, and we can look forward to an emerging picture of user needs and provider capacities for dispute resolution at both a macro and local, granular level. As should be obvious, the IMI is at the center of some of the most creative thinking in the industry.

Other projects spear-headed by IMI thought leaders include training and certification in inter-cultural competency, mediation advocacy, the promulgation of ethics guidelines for Mediation Provider Organizations as well as a Young Mediators Initiative designed to support neophyte mediators and mediation advocates in their quest to gain experience and create community. That one organization can transcend national boundaries and knit the mediation community together in a joint quest to elevate practice and

⁷⁰ Deborah Masucci & Michael Leathes, *The Urgent Need for Data: Are the Users and the Dispute Resolution Market Misaligned?* (Nov. 3, 2014), <https://imimmediation.org/private/downloads/sHhtAEIfaZ26vyEJ4AomAw/Blog/%20piece%20Guildhall%20Convention%20Summary.pdf>.

build consumer confidence is a happy portent for future developments in the field.⁷¹

D. *Developing an UNCITRAL Convention on the Enforcement of Mediated Settlements.*

Current discussions at the United Nations about the development of a convention that would make commercial mediation settlement agreements enforceable around the world—comparable to what the New York Convention did for arbitration—promise to make mediation a larger player in international dispute resolution should such a convention be adopted.⁷²

E. *Impairing Access to Mediation for the 99%: Budget Cuts*

One troubling development is the loss of public monies devoted to supporting community mediation and some court-annexed programs. Traditionally, middle and lower class disputants accessed mediation through community mediation centers, as well as mediation programs located on site at small claims, probate, and family courts throughout the country. These centers received funding through a variety of mechanisms, including civil filing fee assessments, foundation grants, fees for service, and charitable donations. By far, however, the largest sustaining source of funding is government appropriations, both state and federal.⁷³

This dependence on public monies has presented serious challenges as state courts and agencies have been subject to deep budget cuts. In 2011, the New York State Unified Courts System lost \$140 million in government funds, resulting in a 41 percent decrease in funding for statewide community mediation programs.⁷⁴ During the three year period from 2008-2011, the California court system saw more than a 30% reduction in state general

⁷¹ See generally, <https://imimediation.org>.

⁷² Ellen Deason, *Enforcement of Settlement Agreements in International Commercial Mediation: A New Legal Framework?* DIS. RESOL. MAG., Fall 2015, at 32.

⁷³ See Justin R. Corbett & Wendy E.H. Corbett, NAT'L ASS'N FOR COMMUNITY MEDIATION, THE STATE OF COMMUNITY MEDIATION: 2011 REPORT 23 (2011), <https://docs.google.com/file/d/0B9u4jnRBYN27WE9Eb00wZzJqVDQ/edit> (noting that 49% of revenue for community mediation comes from local, state or federal appropriations).

⁷⁴ Doug Van Epps, *Public Funding of Community Dispute Resolution Centers*, DIS. RESOL. MAG., Winter 2013, at 8.

funds.⁷⁵ This funding crisis has shuttered small claims and family courts throughout the state and eviscerated staffing for mediation trainers and providers as well as legal advisers' offices for small claims disputants. In North Carolina, community mediation centers handling court-referred juvenile and criminal cases lost the entirety of their judicial funding, nearly 20% of their operating budget. To make up the shortfall, centers cut staff and began charging for services that had previously been offered without charge.⁷⁶ Kentucky's Court-Annexed Mediation Program, which had handled thousands of small claims and misdemeanor cases for the Kentucky Courts, lost funding in 2009 and shut down entirely.⁷⁷ A ten million dollar budget cut in judicial funding in Connecticut similarly led to the closure of community mediation centers around the state.⁷⁸ What does this mean for a tenant trying to recover her security deposit from an unresponsive landlord, a consumer seeking compensation for a car repair negligently performed, or a patron injured by a slip and fall in a neighborhood bodega? It means that mediation services that may have once existed may no longer be available. If the service still exists, it is likely thinly staffed by over-stretched providers and lacks the assistance of necessary ancillary services, such as court translators and security personnel.

Most alarming, mediators working in these bare-bones venues will no longer have legal adviser offices available to counsel litigants who would like to learn more about their legal rights but cannot afford a lawyer. Mediation critics and enthusiasts alike have recognized that mediation functions poorly when parties possess vastly different power levels. Information is power. If one party understands the available options—including what might happen in a courtroom—and the other does not, the balance of power is deeply skewed. And, that is exactly the situation in many small claims programs around the country in this era of constrained government resources. As the economy recovers, one may hope that public resources will again be harnessed to rebuild mediation programs that have been gutted or vastly reduced. But, if attention is not paid to the means by

⁷⁵ See Mac Taylor, CAL FACTS 2013 56 (2013) http://www.lao.ca.gov/reports/2013/calfacts/calfacts_010213.pdf.

⁷⁶ See RESOL. SYSTEMS INST., ECONOMIC DOWNTURN AND THE USE OF COURT MEDIATION (2012), <http://www.aboutrsi.org/pfimages/CourtADRbudgetcuts.pdf> (the effect of budget shortfalls on mediation centers).

⁷⁷ *Id.*

⁷⁸ See Pamela McLoughlin, *Funding Cut for Criminal Court Mediation Program in New Haven, Wilton and Hartford*, NEW HAVEN REGISTER, Oct. 16, 2011 <http://www.nhregister.com/general-news/20111016/funding-cut-for-criminal-court-mediation-program-in-new-haven-wilton-and-hartford>.

which most middle and working class individuals access mediation, it may be that alternative dispute resolution becomes a luxury available only to those with means.

F. *Lacking on the Demand Side: The Problems of Persistent Under-Utilization*

While cuts in provider services degrade the quality of mediation provided to low income disputants in many regions, public apathy and disinterest pose an equally grave threat to mediation's continued vitality. Although middle and upper-class disputants can well afford to pay a third party neutral's fee, many would rather beat the tried and true path to the courtroom than try a less familiar route toward closure. While mediation training programs abound, few trained mediators can make a living "bringing peace into the room."⁷⁹

JAMS' neutrals and a small number of private mediators enjoy a brisk business, but the process they offer lacks many of the distinguishing characteristics of traditional mediation: busy commercial mediators emphasize neither party self-determination, communication exchange, nor creative problem-solving. Rather, the busiest mediators veer sharply toward more traditional evaluative practices.⁸⁰

In a recent article about the underutilization of mediation in the European Union, Giuseppe de Palo and Romina Canessa conclude that mediation is sleeping and only mandatory mediation for litigants with an opt-out provision can bring the process to life in the EU.⁸¹ Mandating mediation has been widely used in the United States as a tool to get parties to participate in a process that society believes will be "good for them" and good for the system. But why do we still need to mandate mediation if it's as good as we think it is? Shouldn't the public have caught on by now? Moreover, mandating a "voluntary" process seems convoluted at best and hypocritical at worst. Can we really justify taking away disputant choice in the service of disputant choice? It bodes ill that mediation will not be used unless parties are forced into it.

⁷⁹ BRINGING PEACE INTO THE ROOM: HOW THE PERSONAL QUALITIES OF THE MEDIATOR IMPACT THE PROCESS OF CONFLICT RESOLUTION (David Hoffman & Daniel Bowling eds., 2003).

⁸⁰ *Supra* notes 49–52 and accompanying text.

⁸¹ Giuseppe De Palo & Romina Canessa, *Sleeping? Comatose? Only Mandatory Consideration of Mediation Can Awake Sleeping Beauty in the European Union*, 16 CARDOZO J. CONFLICT RESOL. 713, 729 (2015).

III. CONCLUSION

In considering whether “one of the most promising social experiments of our time”⁸² has a promising future, looking through the clouded windshield, we jump back to mediation’s original premise: that in helping resolve conflict, parties can achieve not only their own resolution, but a greater sense of self, agency, empathy, creativity and, perhaps, reconciliation. These aspirations are as old as the human proclivity toward adversarial wrangling and war. They resonate with the teachings of major religions and the shared human yearnings for stability, connection, and peace. These aspirations prompt global efforts, both on the individual and organization level, to build community, begin dialogue, focus attention on problems, understand difference, and build consensus. This idea is too big to kill. Maybe we still need to mandate mediation in our courts to educate the public. Maybe the process needs a trajectory that is longer than 30 years to catch a firm hold. It still seems worth the try. Or, to put it more boldly, it may be, more and more, one of the most important social experiments of our time, deserving of our enhanced collective attention and energy.

⁸² Bok, *supra* note 2.