

Variations on a Theme by Sander: Does A Mediator Have A Philosophical Map?¹

JOSEPH B. STULBERG*

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*I shall be telling this with a sigh
Somewhere ages and ages hence:
Two roads diverged in a wood, and I—
I took the one less traveled by,
And that has made all the difference.*
--Robert Frost

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¹ Our title references the interests and work of two persons widely known to the ADR community, whom we are privileged to know and admire. The first part of the title parodies the widely admired "Variations on a Theme by Hayden" by Johannes Brahms; we count ourselves among the many persons whom Professor Emeritus Frank E. A. Sander has showered with his counsel, support, affection, and intellectual insights—and his love of classical music. The second component deploys the device—phrase—"philosophical map"—that Professor Leonard Riskin so elegantly used in his article entitled, *Mediation and Lawyers*, referenced and discussed in Part III below.

* Professor of Law and Michael E. Moritz Chair in Alternative Dispute Resolution, The Ohio State University Moritz College of Law.

** Professor of Law and Director, Dispute Resolution Institute, Mitchell/Hamline School of Law.

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I. INTRODUCTION

Can a mediator play a constructive role in helping citizens confront and resolve the most divisive issues of our times? We believe the answer is affirmative, but we worry that such a view, though richly grounded in our historical tradition, is now neither widely endorsed nor effectively implemented.

We belong to a group of dispute resolution professionals who learned both from mentors and experience that ADR—and mediation, in particular—offers a philosophical map for conducting problem-solving activities among fellow citizens that systematically supports and advances our most noble aspirations for a fair society. Be it the urban riots of the 1960s or the recent, polarizing events from Ferguson to Baltimore, we thought—and were inspired—by the perhaps naïve notion that a mediator, in the soaring terms of our Constitution's Preamble, could effectively trigger disputants to become "We, the people;" assist citizens to "...form a more perfect union;" work collaboratively with multiple stakeholders to "...establish justice;" and, in so doing, "...secure the blessings of liberty to [themselves] and to [their] posterity."²

At its core, this approach to mediation—this philosophical map—embraces the right of each participant to be treated with respect; participate in the decision-making process; have an equal voice in determining the outcome of the controversy; assume a meaningful role in shaping the fundamental structures of his or her community; and, significantly, shoulder personal responsibility for the progress and outcome of his or her engagement and dialogue.

That map—emphatically—affirms that all participant conduct, including the mediator and all stakeholders, and activities that occur within the mediation process³ are, constitutionally, justice-based events.

Two questions, then, arise about this mediator's map that we find persuasive: first, is it coherent? Second, if coherent, does it comport with contemporary mediation practice?

² U.S. CONST. pmb1.

³ Historically captured by the acronym, ADR.

We believe that the answers are, respectively: yes—and not entirely. Our hesitation to answer affirmatively stems from our deep concern that the approach to mediation that seems widely embraced by law-trained mediators—what Riskin and Welsh describe as a ‘thin vision’ of mediation⁴—appears to operate at cross purposes with this conception of the mediator’s philosophical map. Specifically, a “thin” approach eliminates as inappropriate the use of mediation in matters laced with social justice dimensions.⁵

II. BACKGROUND

Professor Frank E. S. Sander’s imprint on the vision and development of the contemporary dispute resolution movement is deep, sustained, and engaging.

Many scholars and practitioners point to his presentation at the 1976 Pound Conference—“Varieties of Dispute Processing”⁶—as a transformative moment in the development of the ADR field

In his “Pound” remarks, Professor Sander encouraged lawyers, judges and court personnel to examine how the legal profession, in his later phrase, fit the forum to the fuss.⁷ He and others, including then Chief Justice Burger, noted that trying to resolve every controversy filed in a court by conducting an adversary trial was misconceived in at least three ways: (i) at a practical level, the potential ‘mismatch of process to grievance’ led people not to pursue their claims due to economic, time, or psychological costs; (ii) the litigation experience and outcome often left clients feeling frustrated because they believed that they did not have an opportunity to address and discuss their primary concerns; and (iii), even when their claim was affirmed, the judicial remedy often failed to meet their interests.

Professor Sander then offered two broader observations. He noted that, at a policy level, the use of alternative procedures might be warranted because the projected increased caseload numbers would require judicial resources that far outstripped judicial capacity or the likely political willingness to finance additional judgeships. And, at a normative level, he questioned whether the judicial process, even if accessible to all and ideally conducted, effectively addressed litigant concerns in a manner that promoted other

⁴ Leonard L. Riskin & Nancy Welsh, *Is That All There Is? ‘The Problem’ in Court-Oriented Mediation*, 15 GEO. MASON L. REV 863 (2008).

⁵ *Id.*

⁶ Frank E. A. Sander, *Varieties of Dispute Processing*, 70 F.R.D. 79 (1976).

⁷ Frank E. A. Sander & Stephen B. Goldberg, *Fitting the Forum to the Fuss: A User-Friendly Guide to Selecting an ADR Procedure*, 10 NEGOT. J. 49, 49–68 (1994).

values, including civility, respect, and constructive interpersonal relationships following the outcome.

All of this is powerful background setting. As many know, Professor Sander, in his paper, proceeds to analyze how it might be possible to develop multiple dispute resolution procedures that could then be matched to—or available for—parties and their particular type of dispute. In the terminology of our contemporary technological society, he envisioned an arrangement in which the court system would not offer simply a “one size fits all” justice procedure to all participants but would support parties tailoring—customizing—their process to meet their dynamics. Many have justifiably identified the picture emerging from Professor Sander’s remarks as constituting the conceptual framework for launching what today we refer to as Multi-door Courthouse.⁸

While some scholars write that Professor Sander’s paper “officially launched” the field of ADR,⁹ they, regrettably, have systematically ignored two other significant insights Professor Sander shared at that time. What were those?

First, he noted that creating multiple dispute resolution processes might actually increase the number of disputes that warrant attention. In his words: “[O]ne byproduct may be not only to divert some matters now handled by the courts into other processes but also that it will make available those processes for grievances that are presently not aired at all.”¹⁰ Second, he observed: “At one time, perhaps the courts were the principal public dispute resolvers. But that time is long gone.”¹¹

Why are those insights so stunning?

His first remark invites us to expand the notion of what constitutes a “harm,” (a “grievance,” in Professor Sander’s terminology). His insight

⁸ Sander, *supra* note 6, especially at page 131 where Professor Sander suggests that one might enter a dispute resolution center with a directory signaling different rooms for mediation, arbitration, ombuds, trials, etc.

⁹ See *i.e.*, CARRIE MENKEL-MEADOW ET AL, DISPUTE RESOLUTION: BEYOND THE ADVERSARIAL MODEL (2d ed. 2010) at xxxvii. But even Professor Sander is more humble than that, for in those very remarks he acknowledges the important initiatives of multiple persons in the preceding decades that stimulated thinking about and use of non-trial dispute resolution processes for resolving controversies.

¹⁰ *Id.* at 113.

¹¹ *Id.* at 125. He noted the existence of specialized tribunals, such as those created by the development of administrative law (126) as well as the judicial system itself developing specialized courts (family and tax) or, as was his hope, the creation of multiple process options for parties.

implies that expanding the “jurisdictional reach” for problem solving requires the public (including courts) to assume responsibility for providing, or at least identifying, dispute resolution fora to address these multiple grievances. Stated more provocatively, his comment challenges the notion that a disputant must first assert or restrict his complaint to only those matters that constitute a ‘legal cause of action’ in order to initiate or gain access to a publicly-identified or supported dispute resolution process.¹²

His second observation strongly asserts that there must be multiple forums in our communities, not just courts, for conducting problem-solving conversations in fair, efficient ways.

These are the two “variations” we want to explore. We believe that they invite a robust, energizing conception and vision of using mediation to advance justice considerations.

We believe that consistent with Professor Sander’s insights—and a crucial part of our ‘horizon’—is the implicit suggestion that law-trained individuals should be involved in assisting citizens resolve disputes that erupt in some, if not all, of these expanded categories of “grievance.” Why should lawyers be involved? Why not leave dealing with these significant challenges to talented personnel, law-trained or not, who work as elected or appointed public officials, direct local government outreach offices, or design and implement economic and social service programs, or operate community mediation programs?

A cynic may respond that it is because lawyers will lose economic business if they are not involved.

But we don’t believe that captures what Professor Sander was suggesting. Consider the following: Ferguson and Baltimore erupt; college students, especially females, report sustained incidents of unwanted, forced sexual activity and harassment; citizens divide when discussing appropriate practices for addressing an increased immigrant presence in their community. And the list of disputing contexts that confront us can readily expand to include controversies about how to best address matters relating to gun-use; cyber-bullying; privacy invasions; and climate change. There is no shortage of disputing contexts that divide communities.

¹² *Id.* at 113. Importantly, he went on to observe: “Whether that will be good (in terms of supplying a constructive outlet for suppressed anger and frustration) or whether it will simply waste scarce societal resources (by validating grievances that might otherwise have remained dormant) we do not know.”

Where are courts and lawyers in assisting persons to address these matters? Barely visible. Why?

The conventional response is that such controversies often cannot be properly or comprehensively viewed as legal causes of action; they must be framed differently: the protestors' conduct in the street constitutes a "riot," thereby making it a "law enforcement" problem; sexual harassment incidents require an institution—e.g. a university—to generate a 'policy' to address it, not a court to develop one; and citizen confrontations involving law enforcement practices, immigration challenges or environmental challenges are 'political issues' for elected or appointed public officials to handle, not legal issues for the courts. When conflicts are interpreted in these ways, the legal profession escapes any responsibility for addressing them.

This is not an arbitrary or blind response. It is thoughtful. And it would not be disgraceful but for what we believe to be two wide-spread, justifiable beliefs: first, these social challenges raise questions of fair treatment and justice among citizens in our communities; second, lawyers and courts exist, in large measure, to establish justice and, more robustly, develop and sustain a culture that respects the rule of law.

So, at least our conclusion—perhaps not others—is that the apparent absence of lawyers and law-trained personnel in leadership roles in such settings is distressing. Professor Sander's first remark suggests that there should be a role for the legal profession in these matters—that perhaps controversies involving these concerns should be made to fit on the philosophical map of a law-trained mediator.¹³ We believe that the history—and leadership—of the contemporary ADR initiative triggered 50 years ago, at least in the United States, embraced that perspective.

III. USING ADR IN DISPUTES THAT DIVIDE COMMUNITIES¹⁴

A. Context

The recent visible controversies that expose deep, sustained divisions within our communities are regrettably not new to our nation's history. We focus only on obvious episodes in the past fifty years.

¹³ We are borrowing these terms from Leonard L. Riskin, *Mediation and Lawyers*, 43 OHIO ST. L. J. 29, 44 (1982) in which he introduces the notion of a lawyer's philosophical map and then distinguishes it from that of a mediator.

¹⁴ Much of this section comes from Chapter I of JAMES J. ALFINI ET AL., *MEDIATION THEORY AND PRACTICE* 4–12 (3d ed. 2001).

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The urban riots of the 1960s sharply exposed how our communities were divided along racial, economic and social lines. Citizen activists engaged in political movements to advance multiple causes, including calling for expanding civil rights; eliminating poverty; increasing diversity in universities along student, faculty, and curricular dimensions; terminating U.S. military involvement in Vietnam; and reducing the use of nuclear power. Many protests triggered confrontations that were vicious, brutal, and costly. The disruptions tore at the fabric of our democratic life-style; they challenged our notion of what constituted the rule of law. How did we respond? We deployed the approaches with which we were comfortable and to which we were committed: protestors were arrested; persons who engaged in “lawless behavior” were advised that authentic acts of citizen civil disobedience required the protester to publicly, not covertly, “break the law” and to accept incarceration as the legitimate consequence; and disgruntled citizens were encouraged to “change the system by working from within” by participating in the political process at the local, state or federal level.

In hindsight, it is easy to identify the fundamental drawback to having used these traditional—and cherished—responses: first, the parties most affected by the matters in question could not discuss the concerns that were most significant to them—they were compelled to answer what they perceived to be tangential charges, such as trespassing or failure to follow a lawful order to disperse the crowd. Second, persons charged with law violations did not have the political standing or reputation to engage the interests and time of political leaders or institutional representatives; they were effectively disenfranchised—and for multiple reasons.

In short, parties living with the problems were effectively excluded from participating in resolving them. Understandably, they proceeded to engage in conduct that was designed, in part, to provoke attention and command dialogue.

The use of mediation in the 1960s and 1970s—triggered and made possible by significant funding commitments from philanthropic foundations¹⁵ and governmental initiatives—can be viewed as an

¹⁵ The Ford Foundation, in 1968, provided significant funding to the American Arbitration Association as well as to Theodore Kheel’s Automation House (later the Institute for Mediation and Conflict Resolution) to engage in such experimentation. Substantial grants and funding during the 1970s supported experimentation in intervening in social controversies over environmental-related matters, for which Gerald Cormick, Jane McCarthy, Howard Bellman and Lawrence Susskind were early pioneers as interveners and dispute systems designers.

experimental, then structured, response to meet this fundamental “participation” challenge.¹⁶

B. *Personnel*

Who were the persons who assumed leadership or visible mediation roles in these early efforts? They were individuals who reflected strikingly different backgrounds. They included, among others: James Laue, an eminent theologian and activist academician; Theodore Kheel and Ronald Haughton, each nationally prominent labor mediators and arbitrators; Sam Jackson and Willoughby Abner, two African-American community and political activists and former mediators with the Federal Mediation and Conciliation Service who became the first and second directors of the National Center for Dispute Resolution of the American Arbitration Association; and Linda Singer and Michael Lewis, attorneys with a commitment to experimenting with mediation’s use in prison settings. On the government side, the Community Relations Service of the U.S. Department of Justice, a creature of the 1964 Civil Rights Act, provided comparable services utilizing the talents of multi-disciplined individuals with backgrounds ranging from youth services work to community economic development. And the Department’s Law Enforcement Assistance Administration (LEAA) program provided targeted grants to support community-based mediation initiatives.

C. *Disputes*

In what types of situations did these and other individuals become involved? They intervened in disputes involving citizen opposition to the implementation of court-ordered school desegregation plans; controversies between police departments and citizen groups over law enforcement practices; environmentalists and developers; school districts and parents; universities and protesting students; and Native Americans and United States citizens.¹⁷ Their involvement was fluid: defining and measuring what constituted “success” was part of the experiment. Results were uneven, though everyone appreciated how significant a resource investment was required to sustain such efforts.

¹⁶ ALFINI, *supra* note 14, at 7.

¹⁷ An account of selected activities is reported in R. GOLDMANN, *ROUNDTABLE JUSTICE* (1980).

D. *Aspirations*

What energized such experiments? It was, at least in part, a shared vision that creating a forum in which disputing parties could meet to discuss their concerns and jointly engage in problem-solving—and to take that forum affirmatively “to the participants” rather than wait for an invitation for engagement—would enhance the dignity of citizens’ lives. The values embraced in that vision, consistent with the democratic ideals stated with such power in the country’s founding political documents, include the beliefs that meeting in such a setting would affirm each stakeholder as democratic partners, engender citizen responsibility and accountability, establish a base for triggering citizen imagination to design and implement effective programs, foster and sustain relationships, and create a sense of shared responsibility for institutional practices.

E. *Outcomes*

Why did their efforts enjoy some success? The individual trailblazers noted above had significant experience in, and a comfort level with, dealing with disputants who themselves were immersed in hostile conflict with one another, had a mutual stake in their institution’s survival and public reputation, and used collective bargaining and mediation to develop shared governance rules. So when these interveners envisioned becoming engaged as mediators in such social conflicts as school desegregation confrontations or prisoner hostage negotiations, they did so hoping that their mediating experience in fiercely contested and strike-riddled union-management collective bargaining confrontations might be transferrable. Though they quickly acknowledged that the union-management relations paradigm was not a perfect template, they noted significant similarities: managing the participation of multiple parties and constituencies; addressing significant topics; structuring and sustaining numerous negotiating sessions to forge partnerships; appreciating the need to conduct conversations in a neutral forum; and recognizing that their intervener conduct itself could generate significant public, and perhaps controversial, consequences.

With this modicum of similarities, and with an optimism that there was no such thing as an “intractable” dispute, these interveners, and others like them, attempted to make significant contributions to help resolve these

explosive, polarizing disputes that, Professor Lon Fuller, observed in another setting, were “polycentric.”¹⁸

This intervener’s “map” that perceived such possibilities was certainly not that which Professor Riskin was later to describe as the standard lawyer’s philosophical map;¹⁹ perhaps that explains why the legal profession qua profession did not assume a leadership role in trying to meet these developments.

F. Transition.

Much has occurred in the dispute resolution world since the initiatives referenced above took place. Two developments are prominent: the formal court system, at both the state and federal levels, has assumed a primary role in promoting, if not mandating, the use of ADR for litigation-related conflicts; and the intellectual home and context for studying mediation, at least in the United States, has shifted significantly from its dominant homes of schools of industrial and labor relations and its cognate disciplines of economics and psychology to its massive presence among legal scholars. Though business school, peace studies and international diplomacy remain important sources of academic disciplinary engagement, we do not believe there is much question that the “elephant in the room” regarding concepts and practices shaping mediation theory and practice in the United States is in the legal academy.

Given these developments, we can pose the question to the legal profession more directly: given its predominance in the field, doesn’t the legal profession have an obligation to play a central role in helping to resolve disputes that divide our communities? Despite the contemporary history sketched above in which persons regularly used mediation in such contexts, it appears that any vision of such a possibility has been sharply reshaped—undercut—from two distinct directions.

IV. THE PHILOSOPHICAL MAP OF CIVIL TRIAL MEDIATION PARTICIPANTS.

There are multiple players in today’s mediation world. One dominant domain—perhaps its most influential sector—involves those mediators who

¹⁸ Lon L. Fuller, *Collective Bargaining and the Arbitrator*, 1963 WIS. L. REV. 3, 32–33 (1963).

¹⁹ ALFINI, *supra* note 14.

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assist lawyers and their clients resolve cases that would otherwise be litigated in state or federal court.

Many acknowledge that most litigation ends without an adjudicated outcome. A growing number of lawsuits are settled in privately conducted mediation sessions, and those settlements range across case-types, including catastrophic personal injury cases, medical malpractice claims, business contract disputes, employment discrimination complaints, and intellectual property controversies, to name a few. For the most part, private practitioners, not court personnel, mediate these matters.

What does “mediation” in such matters involve? One distinguished advocate recently described the mediation of legal disputes as follows:

Our profession has changed...I tried an injury case nine months after I was admitted. Now the civil trial is a dinosaur, nearly extinct—a loss of the soul of the profession, some maintain. Almost time, perhaps, for a proper Irish wake. Yet, those ancient days of picking jury after jury and battling adversaries and judges were the joy that made the law exhilarating and rewarding.

But no more. Instead of inspiring a lethargic jury, we sit in lifeless conference rooms and advocate before restrained, thoughtful mediators with nervous eyes. We argue with all the passion of an accountant at tax time. It’s business, everyday business, lacking the fervor of cross-examination, the thrill of closing argument.

Now, every case is mediated—and some numerous times. After all, mediation settles cases efficiently and frugally. Parties walk from those rooms without exhilaration or despair, but with relief that the contentious dispute will no longer consume their thoughts.²⁰

After he offers thoughtful advice about how an advocate should prepare for and participate in a mediated conference, that writer concludes:

Ultimately, the decision to settle is a business one. Can I do better at trial? Few cases allow you to answer affirmatively and definitively. The overwhelming majority should be mediated. Not that much fun, but it works.²¹

²⁰ Kenneth P. Nolan, *Mediation*, 39 LITIGATION J. 59 (2013).

²¹ *Id.* at 60.

We find nothing stimulating, or frankly, satisfying, about this image—this picture—of “legal mediation”: conversations in a “lifeless” room? Conducted by a “restrained” intervener? Involving advocates communicating arguments in a “dull, boring presentation,” all so that parties make a “business decision” that enables them to leave “without exhilaration or despair?”

That approach might be effective in the litigation setting the author describes. It is a clear mismatch, though, for possible intervener service in a social conflict, where engaging appropriate stakeholders might involve: (i) convening parties on a street corner at midnight rather than at a scheduled time in a comfortably-appointed conference room; (ii) listening to partisan advocates communicate arguments in electrifying, perhaps provocative, ways; (iii) conducting dialogue in a manner that generates trust and confidence to develop resolutions that require more than one party writing a check to pay another; and (iv) concluding the gathering with participants feeling confident that, whether or not they secured agreement, they had participated meaningfully in a problem-solving process.

What accounts for what we observe as two distinct visions of the mediation process? One explanation derives from the insight that those who participate in the process of mediating legal disputes view it as “simply business” while the other views it as a justice event. Is there anything wrong with having differing conceptual contexts? Many are quick to assert that it is appropriate to use different mediation models to meet different needs.²² They argue that mediation philosophies and approaches that could be effective for civil litigation cases might not be apt for addressing matrimonial cases, let alone divisive community conflicts. Indeed, some would note, the Riskin grid licenses all such approaches.²³

That is an important, valued observation, but it is not persuasive. Why?

Let’s apply the same observation to the following hypothetical: assume that in a bench trial of a civil case, judges in City X prohibit lawyers who are

²² Dean and Professor Emeritus, H. Jay Folberg, made this comment in his public remarks at the JDR Symposium, January 30, 2015, in Columbus, Ohio. See John Bickerman, *The Mediator’s Role: As Little As Possible But As Much As Necessary*, 6 ACRESOLUTION 14 (2007), for similar sentiment and appeal.

²³ Leonard L. Riskin, *Mediator Orientations, Strategies and Techniques*, 12 ALTERNATIVES TO HIGH COST LITIG. 111 (1994). Riskin notes that the grid was intended to be descriptive of mediator behavior, not normative. *Id.* Nonetheless, many practitioners cite the grid as licensing all such approaches. *Id.*

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representing their clients from making opening statements or cross-examining witnesses; the judges' rationale is that advocate opening statements are polarizing, not helpful, and that judges are skilled at assessing witness credibility without assistance from an adversary counsel. By contrast, judges presiding over such trials in City Y, geographically removed from City X but within the same state jurisdiction, permit such advocate conduct.

Would our observation of this situation be that what works in one place may not be appropriate in another, yet they are all civil trials?

We believe that such a response would make us pause. Why?

We acknowledge and accept latitude in having some trial procedures reflect local culture. We believe, though, that the rules of state or federal civil procedure embrace the principle that a necessary component of a civil trial is the concept of due process—and that although that concept can be satisfied in multiple ways, the absence of some features, such as providing notice to parties of the nature of one's charge and an opportunity to prepare a response, the capacity to discuss or evaluate in some manner the credibility and thoroughness of the evidence presented by other participants, or the absence of some standard similar to burden of proof, substantially diminishes if not completely removes due process values from the activity. And we believe that such removal, *even if* endorsed by all participants in the name of efficient claim processing and the exercise of party self-determination, should not necessarily be determinative. Why? Because permitting the "trial" to occur without due process principles permits the participants to wrap themselves in the aura of participating in a 'justice event' when, in fact, we would charge it as a hoax—or, more generously, their resolving a "business dispute."²⁴

This is not to say—nor should one insist—that mediation must be conducted in one and only one way. But mediation practices should bear a "family resemblance" to one another so that process participants and the general citizenry have a shared understanding of the meaning of the activity.²⁵ The question, then, is whether those trained and skilled at mediating legal disputes are, in principle, performing the same kind of work as those interveners who might attempt to advance problem-solving dialogues over divisive community conflicts. We are skeptical—

²⁴ We develop and expand on this conclusion in a related discussion below in Part III.

²⁵ See LUDWIG WITTGENSTEIN, *PHILOSOPHICAL INVESTIGATIONS* 65–71 (1953).

disappointed, but skeptical—that there is much resemblance or transferability.

The mediation of legal disputes described above appears to reflect what Riskin and Walsh describe as a “thinning vision”²⁶ of mediation. Though included in Riskin’s grid, we believe that such mediating conduct more closely resembles practices that have led Riskin and Welsh to ask: “Is That All There Is?”²⁷ Implicit in the Riskin/Welsh question is their criticism that mediation is conceptually capable of embracing more robust dynamics than the process as described by Nolan²⁸. Not only might mediation advance a different participant experience in the problem-solving process—engagement, participation, and personal accountability—but also trigger participants to view their controversy in more flexible terms. Indeed, Bush and Folger’s powerful theoretical framework of transformative mediation targets this type of ‘thinning’ as the central misunderstanding of what mediation, distinctive among dispute resolution processes, is capable of achieving.²⁹ To attribute words to Bush and Folger, but in their spirit, “thin” legal mediation effectively demolishes “The Promise of Mediation.”

But this ‘thinning’ direction of mediation practice is not simply the result of elevating economic efficiencies to be the clients’ highest priority. Rather, it appears to us to stem from a more pervasive source: namely, the “lawyer’s philosophical map” that Riskin described has now reshaped and overtaken the problem-solving framework of the mediation process. What do we mean?

Riskin described the lawyer’s philosophical map as consisting of two features: first, dispute outcomes have only winners and losers; second, those outcomes are determined by a third-party intervener—a judge—who impartially applies public rules to the legally-admissible facts at hand.³⁰

How does that map influence how law-trained persons conduct or participate in a mediation conference? Nolan’s comments suggest that the impact is straightforward: first, mediation participants define and restrict the issues discussed in mediation to those constituting the lawsuit; second, the mediator conducts the session in a way that focuses primarily on examining

²⁶ Nancy A. Welsh, *The Thinning Vision of Self-Determination in Court-Connected Mediation: The Inevitable Price of Institutionalization?*, 6 HARV. NEGOT. L. REV. 1 (2001).

²⁷ Riskin, *supra* note 4.

²⁸ Nolan, *supra* note 23.

²⁹ See ROBERT BUSH & JOSEPH FOLGER, *THE PROMISE OF MEDIATION* (2d ed. 2004).

³⁰ “(1) that disputants are adversaries—*i.e.* if one wins, the others must lose—and (2) that disputes may be resolved through application, by a third party, of some general rule of law.” Riskin, *supra* note 13.

the relative strengths and vulnerabilities of each party's legal case and their respective BATNA, with the goal of positioning participants to make an economic ("business") decision about whether to settle or pursue another option³¹.

What is the practical consequence of conducting the mediation process with this map? It makes it irrelevant for participants to embrace the conventional wisdom that each party should examine their interests, not just their positions;³² it reinforces the dominant, pervasive prism that a lawyer and her client must "bargain [negotiate] in the shadow of the law."³³

In short, the analytical framework for participating in the mediation of legal disputes is identical to the central tenets of preparing to conduct a trial; the fact that the intervener has no authority to impose a binding decision on the parties, while important, does not change that advocate orientation or practice.

Quite obviously, those persons who participate in the mediation session that deploy this framework must, and do, display admirable analytical and rhetorical skill-sets. And, as Nolan reports, the process so conceived and executed helps parties move ahead.

But such an approach offers no constructive context for bringing together disputing stakeholders around issues of significant community or institutional life. Why? The legal mediation framework operates within a system that "tees up" the mediation session by initially identifying some, if not all, necessary participants, the issues in controversy, and the range presumptive remedies. In a significant sense, the legal system defines what constitutes "a case." By contrast, in a divisive community conflict, the framework itself—what is 'the case'—must be developed and built by the participants themselves; with a mediator's assistance, parties identify appropriate participants to the conversation; examine concerns and practices that matter to them, whether or not they constitute 'legal causes of actions' (Sander's reference to 'grievance'); engage in bargaining that is not constrained by "the shadow of the law," since the relevant law might, itself, be the very matter that needs adjustment; and establish engagement protocols—"issues of entry"—that, for a mediator, involve making exposed judgments impacting power relationships and bargaining equality among potential participants.

So we are left disappointed. The legal profession, qua profession, with its stunning depth of talented, insightful, individuals who are trained and

³¹ Nolan, *supra* note 23.

³² See, e.g., ROBERT MNOOKIN ET AL., *BEYOND WINNING* 35–37 (2004).

³³ Robert Mnookin & Lewis Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 *YALE L.J.* 950 (1979).

attuned to examine considerations of fair treatment, respect, dignity, and problem-solving, appears to have embraced an approach to conducting the mediation process that is narrow in focus, non-inclusive in participation, and privileges economic outcomes. That approach is not consistent with the history of mediating efforts referenced earlier and, regrettably, will likely result in depriving the community “writ large” of their talents and leadership in helping community citizens address and resolve explosive divisive disputes.

The absence of law-trained practitioners from serving as interveners in divisive community conflicts³⁴ is not the result simply of deploying the traditional lawyer’s philosophical map. The *mediator’s* philosophical map for intervening gets reshaped—contracted—from a different direction as well.

V. THE MEDIATOR’S PHILOSOPHICAL MAP THAT CELEBRATES “SELF-DETERMINATION”

Many who advocate using mediation to resolve conflicts cite the mediator’s duty to promote party “self-determination” as her most important professional responsibility.³⁵

Unlike a judge, Standard I of The Model Standards of Conduct for Mediators prescribes that the mediator’s job is to promote the exercise of party autonomy with regard to both process and outcome.³⁶

³⁴ We wish to continuously emphasize that we do not believe that it is necessary for one to be law-trained in order to be a skilled, effective mediator of divisive community disputes. We referenced in Section III (B), for illustrative purposes, a few individuals who effectively executed the mediator’s role and, importantly, reflected multiple backgrounds and profiles. We focus on the law-trained individual in recognition of the significant role that s/he plays in current mediation practice, and specifically in order to explore whether persons with concentrated studies in and insights regarding principles of due process and advocacy skills can, within an appropriate conception of the mediation process and role of the mediator, participate in a manner consistent with professional obligations.

³⁵ A representative statement to this effect appears in Timothy Hedeem, *Coercion and Self-Determination in Court-Connected Mediation: All Mediations Are Voluntary, But Some Are More Voluntary than Others*, 26 THE JUST. SYS. J. 273, 274 (2005).

³⁶ See MODEL STANDARDS OF CONDUCT FOR MEDIATORS, Standard I (AM. ARB. ASS’N, ET. AL. 2005). The mantra, “promote self-determination,” takes on the sound, if not substance, of the libertarian philosophy, though, of course, approaches such as transformative mediation support party empowerment from a different ethical framework.

What is the practical effect of celebrating party “self-determination”? It has played out in multiple ways and settings. The following examples shared at professional meetings are illustrative:

If mediating parties want to discard joint sessions, then, in supporting the “exercise of party self-determination,” a mediator should support this party choice.³⁷

If all parties agree that one party will pay the mediator’s fee, the mediator should accept the compensation arrangement.

If the proposed mediator was a former law partner of one of the advocates participating in mediation, and that prior relationship is disclosed and everyone (in practice, the lawyers for the parties) agrees to proceed, the mediator should do so in the name of ‘self-determination.’

And what price might a mediator pay for not supporting such party choices of “self-determination?” She will not be hired.³⁸

Designers of court mediation programs embrace support for the self-determination principle as well. In the family law area, for instance, policy makers, concerned that an advocate representing a client might distort or undermine party participation and self-determination, enable the mediator to restrict the participation of a party’s legal counsel to either a non-speaking, observer-status only or exclude them entirely.³⁹

This picture of supporting party autonomy—“do whatever you find acceptable”—is problematic. Why?

Initially, this principle appears to affirm a profoundly significant ethical norm, particularly in our culture: promote, celebrate, and cherish individual autonomy.

³⁷ See separately reported studies of mediator conduct by Thomas Stipanovich, *Insights on Mediation Practices and Perceptions* and Jay Folberg, *The Shrinking Joint Session*, in *DISP. RESOL. MAG.* 4–19 (Winter 2016).

³⁸ Eric Galton & Tracy Allen, *Don’t Torch the Joint Session*, *DISP. RESOL. MAG.* 25 (Fall 2014).

³⁹ The mediator has authority to exclude counsel from participation in the mediation proceedings pursuant to this chapter if, in the mediator’s discretion, exclusion of counsel is appropriate or necessary. *CAL. FAM. CODE* § 3182(a) (West 1994).

But stating the autonomy principle in this way is a red herring. Why? We live in a political community. We must interact with one another, preferably in a non-violent manner. But the vision of mediation that makes ‘self-determination’ the ‘trumping’ value eradicates the distinction between a party exercising autonomy and her acting selfishly: “I will do what I want, and if you won’t help me, we won’t settle.” That approach systematically cements power disparities into the very foundation of the dispute resolution procedure, thereby rendering ineffective, if not meaningless, the significant concepts of party participation, problem-solving, creativity, and responsibility; these latter concepts become wasted words, for the “my way or the highway” claim of autonomy is simply the exercise of raw power.

How might this claim of “self-determination” arise in ways that clash with mediation being viewed as a ‘justice’ event? Regrettably, it does not take much imagination to envision a hypothetical: a party or stakeholder, in the name of exercising self-determination, refuses to participate in mediation because of his or her discriminatory attitudes and convictions towards their counterpart’s or mediator’s ethnic, racial or religious background. To put it less charitably, exercising self-determination can support strikingly bigoted or offensive behavior; if the mediation process design does not embrace other, competing values, then, at least from a justice viewpoint, its desirability is considerably diminished.

What is the significance of these observations? Two matters stand out.

First, the exercise of party autonomy, particularly in divisive community conflicts, is a central value and must be supported. No one can or should be able to compel a police chief or a social activist to “come to the table” to negotiate matters that might be visibly, and dangerously, polarizing community residents. But that observation must not be misunderstood or overstated. As noted above, it is possible for a party with significant power to insist, in principle, on designing or executing the mediation process in a manner that systematically reinforces power disparities and those at a power disadvantage might agree to proceed or participate because they perceive it as a necessary condition to having the opportunity for their voice to be heard.⁴⁰ But party endorsement of proceeding does not warrant doing so. The mediator has an independent obligation to insure process integrity:

⁴⁰ Although it might seem an implausible possibility in contemporary U.S. society, consider a hypothetical in which one party—a commercial enterprise in a given community with a substantial-size workforce—refuses to meet with the representative of a community advocate organization that is demanding an aggressive policy of hiring local immigrant residents unless the spokesperson for that group is a Caucasian lawyer

Although party self-determination for process design is a fundamental principle of mediation practice, a mediator may need to balance such party self-determination with a mediator's duty to conduct a quality process in accordance with these Standards.⁴¹

The assertion that "it is the parties' process" ignores this crucial injunction—and can result in a procedure that can reproduce in practice the "thin" vision of mediation previously analyzed.

Second, for a person invited to serve as a mediator, it is an important, normative choice as to whether he should accept the request. There is nothing "neutral" about a person making this decision. It constitutes a political judgment of significant importance requiring the mediator to weigh competing considerations regarding potential benefits or harms to the respective stakeholders were they to proceed, the desirability of the available alternatives, and the like. But every mediator, whatever his practice context, makes this political decision about this "entry issue." Though the criteria and consequences are more exposed when deciding whether to intervene in a highly public, fluid controversy, the identical need arises when parties and their counsel to a litigated case request a mediator's services—filing a lawsuit might camouflage the mediator's decision—making process, but it does not eliminate it.

The significant consequence can be stated as follows: while it is important to affirm that different individuals can make different—and reasonable—decisions regarding entry issues,⁴² the need to make the decision reaffirms that the values surrounding process integrity—matters that relate to justice principles—clash with, and can appropriately outweigh, the important principle of self-determination.

If the "mediator" map makes self-determination trump all values, then efforts to mediate divisive community issues will be ineffective. Why? In these explosive controversies, power relationships are front and center. If those with significant economic, social and political advantages can establish, under the umbrella of 'self-determination,' procedural practices and

from the community—and the community organization agreed. Would or should a mediator proceed?

⁴¹ MODEL STANDARDS OF CONDUCT FOR MEDIATORS (I)(A)(1) (AM. ARB. ASS'N, ET. AL. 2005).

⁴² For a discussion of a mediator's responsibility for structuring process fairness and remaining neutral regarding substantive outcomes, see Joseph B. Stulberg, *The Theory and Practice of Mediation: A Reply to Professor Susskind*, 6 VT. L. REV. 85, 110–16 (1981).

substantive agenda items that reinforce the inequities of the parties' original position, they can eviscerate the opportunity for conducting respectful dialogue; and, ironically they can do so while simultaneously, yet justifiably, escaping moral criticism for such conduct.

VI. A MEDIATOR'S PHILOSOPHICAL MAP THAT CAPITALIZES ON SANDER THEMES

We return to Professor Sander's untapped themes. Multiple roads emerge.

First, when the judicial branch of government explores and supports flexibility and creativity in matching non-trial dispute resolution procedures to citizen disputes, it can do so in two ways: first, it can divert the traditional litigated case to some dispute resolution process other than a trial, at least in the first instance.⁴³ Second, it can—or should—make other dispute resolution processes available to parties so that they can address grievances that have not been aired at all.⁴⁴

There is a third way, one that reaffirms Professor Sander's additional observation that courts, meaning judges and our traditional trial process, no longer are the principal public dispute processor. There are many sites with skilled players at which persons can raise and address their grievances, including but not limited to political institutions and their elected political leaders and civil servants; administrative agency processes; private sector dispute resolution programs and their providers; community mediation programs; and ODR platforms. These multiple dispute resolution venues serve various audiences and numerous challenges. They operate with distinctive focal points and strengths.

And, significantly, for some institutional platforms, it is entirely appropriate, and crucial, that its participants—leadership—affirmatively take the process to the stakeholders to explore possible service rather than wait for an invitation to assist.⁴⁵

Why is it useful to note these separate paths? We believe that law-trained individuals have distinctive contributions to make to each sector—but if that is true, then ADR advocates must advance a conception of mediation that is

⁴³ For instance, Minnesota Rule 114 requires potential litigants to identify some ADR process it will use incident to trial. MN ST. GEN. PRAC. RULE 114.

⁴⁴ Sander, *supra* note 6, at 113: "...[W]e may be encouraging the ventilation of grievances that are now being suppressed."

⁴⁵ See ROGERS ET AL., DESIGNING SYSTEMS AND PROCESSES FOR MANAGING DISPUTES 16 (2013).

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more robust than its ‘thinning vision.’ It must be one that includes and reaffirms two fundamental norms: first, that the mediation process, suitably conducted, is a ‘justice’ process; second, that the mediation process, at least in its more ‘formal’ setting, is a ‘public’ process.

What do these two features involve?

To assert that mediation is a ‘justice’ process is to reject viewing it primarily or exclusively as a process that should be used “to forge agreement.” As one judge-serving-as-mediator described his job to one of our students representing a client in a court-ordered mediation, “I view my role as that of a car salesman: I want to get each of you to agree to a number that will settle the case—that’s all.”⁴⁶

That is a bankrupt conception of mediation: it ignores who participates, what concerns get discussed, what settlement options might be workable, and the manner in which the dialogue between disputants is conducted.⁴⁷ Conducting a mediated conversation in this manner has no purchase or effectiveness when facilitating a conversation among such stakeholders as parents protesting the closing of their elementary school or concerned citizens demanding alternative practices for providing water to city residents.

Second, mediation is a ‘public’ process, not in the sense that it must be conducted in an open forum but rather in that its practitioners must structure

⁴⁶ Comment reported to Stulberg in November 2010 by one of his civil litigation clinic students and his supervising attorney following their participation in a mediation of a civil action claim conducted by a trial court judge in that jurisdiction.

⁴⁷ Jeffrey Krivis, a well-known commercial mediator, advances a more nuanced statement of this approach that we are criticizing when he states, when answering a question regarding the impact of the marketplace on mediator conduct:

“The market that drives my practice is the civil litigated case. It is highly competitive based on the concept of give and take. That concept means that limited financial resources are negotiated and traded back and forth until a deal is done. Non-monetary resources are also traded but that is the exception rather than the rule. This market succeeds about 97 percent of the time unless a case is resolved through an adjudicatory procedure like trial. Litigators, as gatekeepers to the adversarial system, set this market in motion. These litigators have legitimate economic interests, both personally and on behalf of their clients. Mediation within this marketplace often results in a zero-sum exchange where each participant’s gain or loss is balanced by a gain or loss to the other side. It’s that simple.” DISP. RESOL. MAG. 21 (Winter 2016).

For important alternative responses to that question, see Watson, 21–22 DISP. RESOL. MAG. (Winter 2016) and Meyer, DISP. RESOL. MAG. (Winter 2016).

their conduct in a way that reflects or is consistent with fundamental norms of fair treatment and dignity.⁴⁸ No public justice system—i.e. court—permits one party to dictate procedural or substantive guidelines systematically that skew due process principles or process quality. Neither should the ‘private’ system of mediation permit that to occur.⁴⁹

VII. CONCLUSION.

During the past 50 years, there has been an explosion of experiments, interest, and practice in dispute resolution processes and practices. The “field” has expanded in part because many thoughtful, caring individuals have become more conscious and thoughtful about how we, as human beings, deal with differences.

We do not believe that there is a “one-size-fits-all” approach for how mediators, in particular, execute the process to help persons resolve the disparate range of disputes that dot our daily lives. But we do believe—firmly—that the mediation process has fundamentally defining attributes that distinguish it from other dispute resolution processes and that support and advance essential norms that, in the standard situation, must be honored. The current imprint of mediation’s ‘thinning vision’ might be the current highway in mediation practice; but if our “horizon⁵⁰” is one in which we continue to advocate the regular use of mediation as a distinctive process for resolving disputes that otherwise affect the public square, we can do so only if we embrace an approach that allows us to follow the road less traveled.

⁴⁸ It is more than “the customer is always right” mentality. A mediator, by himself, or more importantly, the “public square,” approve using the mediation process predicated on affirming the belief that the procedure, in design and implementation, is one whose fundamental framework passes the ‘overlapping consensus’ criterion of fair treatment and dignity. No one would endorse supporting the use of mediation if, in form or function, it operated as a disguised gunfight.

⁴⁹ For an elaborate version of this argument and analysis, see Joseph B. Stulberg, *Mediation and Justice: What Standards Govern?*, 6 CARDOZO J. CONFLICT RESOL. 213 (2005).

⁵⁰ The JDR symposium title, “Horizon,” asks each of us to look ahead, and our hope is that the future of mediation practice includes the vision we have set forth.