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# Remembering the Role of Justice in Resolution: Insights from Procedural and Social Justice Theories

Nancy A. Welsh

It is surely a luxury, at this point in the field of dispute resolution, to be invited to identify those concepts that I view as absolutely essential to our canon. Borrowing a bit from Chris Guthrie's wine illustration, I think it is fair to suggest that today's presentations reveal a very impressive wine cellar, with many bottles of fine wine from which to choose. I will spotlight one part of this wine cellar, where concepts regarding procedural and social justice theories can be found. I will focus primarily on procedural justice but will also reference those theories of social justice that link these two dimensions of justice, particularly in a democracy.

I begin, however, with a plea. For a while now, it has seemed to me that justice has been increasingly marginalized as a sweet, old-fashioned notion that is *not* viewed as an essential component of the dispute resolution canon. Instead, our canon, our teaching, and our scholarship focus increasingly on the different mechanisms that enable negotiators and mediators to get the deals they desire. Partisan perceptions, loss aversion, risk aversion, reactive devaluation, framing, anchoring—these are the concepts drawn from social and cognitive psychology that seem to capture our current imaginations. The examination of these and other examples of cognitive and emotional vulnerability enables us, like trainers of sales representatives, to teach our students to be more effective in their efforts at persuasion. These concepts, and our pedagogical embrace of them, also have the potential to legitimize manipulation.

Of course, effective persuasion is a key function of every lawyer and part of every dispute resolution process. The current balance in emphasis is troubling, however, when I consider that we as law teachers serve as mentors for students who will soon take their places in a system that has as its mission the provision of justice. Ever since I was asked to present as part of this panel, I

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have heard echoes from the 1960s and 1970s. One phrase in particular has relevance to our field today: “There can be no peace without justice.” Though we may congratulate ourselves on the success that our field has experienced, we should also acknowledge that there can be no real or lasting *resolution* unless sufficient attention is paid to justice.

Why does it seem so difficult to talk about justice within our field of dispute resolution? I am reminded of a couple of Canadian attorneys’ responses to Julie Macfarlane and her associate Ellen Travis, as they conducted research on the impact of court-connected mediation.<sup>1</sup> Asked to differentiate between a “good” outcome and a “just” outcome, one attorney answered: “There’s no justice; it’s just a game. What are you, new? That’s a really funny question.” The other attorney responded more pithily: “Justice is way too deep for me.”<sup>2</sup> Perhaps justice *is* a notion that has no real relevance to today’s system of dispute resolution or is so undefinable and unattainable that thinking about it generates more self-doubt than clarity.<sup>3</sup> Perhaps the field of dispute resolution need not focus on justice because we are confident in our faith that the disputants (particularly in consensual processes, but even in the selection of nonconsensual processes like arbitration) are defining justice for themselves as part of their exercise of self-determination—and frankly doing a better job of it than anyone else could do for them.<sup>4</sup>

Or perhaps—as Owen Fiss suggested over two decades ago—we hesitate to wrestle with the place of justice in dispute resolution because we have not quite grasped the implications of our field’s successful and thorough institutionalization in our nation’s courts and public agencies.<sup>5</sup> As we introduce our students to mediation and arbitration, for example, we still tend to invoke one-on-one disputes that include many of the following characteristics: the disputants are peers; they are able to exercise self-determination and thus able to control the outcome; they have or could have a beneficial relationship; they live or work in a community that will benefit from resolution and harmony; they have voluntarily and knowingly chosen to pursue an alternative to the courts or public agencies; and they participate without attorneys but with their own visions of justice. For many of us, the mediation of a neighborhood dispute frames our (and our students’) understanding of the primary purposes and process of mediation. Similarly, many of us understand and intro-

1. See Julie Macfarlane, *Culture Change? A Tale of Two Cities and Mandatory Court-Connected Mediation*, 2002 J. Disp. Resol. 241.
2. E-mail correspondence from Julie Macfarlane to Nancy Welsh (Aug. 31, 2003) (on file with author).
3. See also Judith Resnik, *Mediating Preferences: Litigant Preferences for Process and Judicial Preferences for Settlement*, 2002 J. Disp. Resol. 155, 165.
4. *Id.* But see Jean Sternlight, *Mandatory Binding Arbitration and the Demise of the Seventh Amendment Right to a Jury Trial*, 16 Ohio St. J. on Disp. Resol. 669, 673–74 (2001).
5. See Owen Fiss, *Against Settlement*, 93 Yale L.J. 1073, 1076–78, 1089 (1984). Fiss’s concerns about ADR and settlement bear a second look in light of the successful institutionalization of ADR, but it must also be noted that his rosy assessment of litigation can be criticized—and has been—for its lack of realism. See Carrie Menkel-Meadow, *Ethics and the Settlement of Mass Torts: When the Rules Meet the Road*, 80 Cornell L. Rev. 1159, 1172–73 (1995).

duce arbitration primarily as a tool developed by and for equal and independent merchants who place primary emphasis upon efficient and cost-effective resolution.

Yet these iconic images (rather like the image of the jury trial<sup>6</sup>) reflect small and increasingly isolated segments of the current practice of mediation and arbitration. The teaching of dispute resolution is now an integral part of many law school curricula *precisely because* courts, agencies, and corporations have embraced mediation and arbitration to resolve a wide variety of family, personal injury, contract, employment, consumer, and regulatory disputes. Most of these disputes do not involve peers, or desired relationships, or communities. The empirical evidence that is developing in court-connected mediation reveals that many of these disputants have not voluntarily chosen mediation; they have been ordered or “encouraged” to participate in the process. These disputants generally are accompanied by their attorneys, and—except in family disputes—the attorneys are likely to dominate the discussions.<sup>7</sup> Very frequently, the mediators are also attorneys who will disclose their own thoughts regarding the “justice” that will be meted out by the courts.<sup>8</sup> From these and other pieces of data,<sup>9</sup> it is not so clear that the disputants in these mediation sessions perceive they have any more actual control—or self-determination—in mediation than they do in adjudicated processes. It is not so clear that the disputants’ definitions of justice play an important role in the process. Ultimately, it is not so clear that we can or should cling to our old assumptions and expectations about the place of the “alternative” field of dispute resolution, particularly as that field has become imbedded within the social institutions that are responsible for delivering justice.

I would argue that the evolution and institutionalization of mediation—as well as the courts’ embrace and enforcement of mandatory arbitration outside the commercial context—reveal the danger of defining our field solely in terms of “resolution.” Over the years, we have revisited and debated the meaning of the A in ADR.<sup>10</sup> It is now time, in this new world, to examine the sufficiency of the R. I offer a plea that we as law teachers begin and infuse our dispute resolution courses with a commitment to *both* resolution *and* justice.

If that is so, let us begin by examining the classic concept of procedural justice, which should be part of every dispute resolution course—and part of

6. See Hope Viner Samborn, *The Vanishing Trial*, A.B.A. J., Oct. 2002, at 24, 24.
7. See Nancy A. Welsh, *Making Deals in Court-Connected Mediation: What's Justice Got to Do with It?* 79 Wash. U. L.Q. 787, 801–03 (2001) [hereinafter *Making Deals*]; Nancy A. Welsh, *Reconciling Self-Determination, Coercion and Settlement in Court-Connected Mediation*, in *Mediating Family and Divorce Disputes: Current Practices and Applications* (forthcoming 2004) [hereinafter *Reconciling*].
8. See Welsh, *Making Deals*, *supra* note 7, at 805–06; Welsh, *Reconciling*, *supra* note 7.
9. See Nancy A. Welsh, *Disputants’ Decision Control in Court-Connected Mediation: A Hollow Promise Without Procedural Justice*, 2002 J. Disp. Resol. 179, 181–84.
10. See Carrie Menkel-Meadow, *Whose Dispute Is It Anyway? A Philosophical and Democratic Defense of Settlement (in Some Cases)*, 83 Geo. L.J. 2663, 2689–90 (1995) (urging that *appropriate* should replace *alternative* in describing mediation and other nontrial dispute resolution processes).

the evaluation of every dispute resolution process. What is procedural justice? Is it enough to say that dispute resolution processes just ought to “feel” fair? How far does that get us? How do we know whether a dispute resolution process will feel fair?

Substantial research has been done in this area by social psychologists building on the pioneering work of John Walker and Laurens Thibault<sup>11</sup> and on more recent research and theories developed by Allan Lind and Tom Tyler.<sup>12</sup> That research has revealed four procedural elements that reliably lead people to conclude that a dispute resolution process is procedurally fair: the process provides an opportunity for the disputants to express their views (generally described as “an opportunity for voice”);<sup>13</sup> the third party demonstrates consideration of what the disputants have said;<sup>14</sup> the third party treats the disputants in an even-handed way and tries to be fair;<sup>15</sup> and the third party treats the disputants with dignity and respect.<sup>16</sup> Very recent research arising out of the U.S. Postal Service REDRESS employment mediation program (which uses a transformative model of mediation that focuses upon enhancing disputants’ interaction rather than achieving resolution) has shown that the disputants also care very much about the procedural justice they receive *from each other*, perhaps even more than they care about the procedural justice offered by the third-party mediator.<sup>17</sup> All of these results suggest that both the presence of a mediator and the mediator’s guidance of the disputants’ interaction have the potential to bring procedural justice to the hard bargaining that often characterizes settlement negotiations.<sup>18</sup>

The procedural justice literature further indicates that disputants’ perceptions of procedural justice can have profound effects. The procedural elements described briefly above do more than just make disputants feel good. In fact, disputants are more likely to conclude that they have received *distributive*

11. See E. Allan Lind & Tom R. Tyler, *The Social Psychology of Procedural Justice* 7–40 (New York, 1988) [hereinafter *Social Psychology*]; Tom R. Tyler & E. Allan Lind, *Procedural Justice*, in *Handbook of Justice Research in Law*, eds. Joseph Sanders & V. Lee Hamilton, 65, 69–70 (New York, 2001) [hereinafter *Procedural Justice*]; Laurens Walker et al., *Reactions of Participants and Observers to Modes of Adjudication*, 4 *J. Applied Soc. Psychol.* 295 (1974); Welsh, *Making Deals*, *supra* note 7, at 841–43.
12. See Lind & Tyler, *Social Psychology*, *supra* note 11, at 61–127; E. Allan Lind, *Procedural Justice, Disputing, and Reactions to Legal Authorities*, in *Everyday Practices and Trouble Cases*, eds. Austin Sarat et al., 177 (New York, 1998) [hereinafter *Everyday Practices*]; Tyler & Lind, *Procedural Justice*, *supra* note 11, at 70–74. See also Debra L. Shapiro & Jeanne M. Brett, *Comparing Three Processes Underlying Judgments of Procedural Justice: A Field Study of Mediation and Arbitration*, 65 *J. Personality & Soc. Psychol.* 1167 (1993); E. Allan Lind et al., *In the Eye of the Beholder: Tort Litigants’ Evaluations of Their Experiences in the Civil Justice System*, 24 *Law & Soc’y Rev.* 953 (1990).
13. See Welsh, *Making Deals*, *supra* note 7, at 820–22, 841–44.
14. *Id.* at 820–23.
15. *Id.* at 821–24.
16. *Id.* at 820–26.
17. Tina Nabatchi & Lisa Bingham, *Expanding Our Models of Justice in Dispute Resolution: A Field Test of the Contribution of Interactional Justice* (paper presented at conference of the International Association for Conflict Management, June 9–12, 2002) (on file with author).
18. See Welsh, *Making Deals*, *supra* note 7.

justice<sup>19</sup> to the extent that they perceive that they have been treated in a procedurally just way. They are more likely to *comply* with the outcome of the dispute resolution process if they feel that they have been treated fairly. And, if people perceive that a process was procedurally just, they are more likely to view the social institution that provided the process as *legitimate*.<sup>20</sup> This last consequence of disputants' perceptions of procedural justice appears particularly important as formerly alternative processes for dispute resolution become imbedded within significant social institutions.

Several theories have been developed to explain why people care so much about procedural justice. Three are especially noteworthy and are supported by research. Walker and Thibault originally theorized that people cared about procedural justice because they wanted to be sure that they were given a meaningful opportunity to influence the outcome of the dispute resolution process.<sup>21</sup> The U.S. Supreme Court's due process jurisprudence reflects this "instrumental" or "social exchange" theory as a means of understanding the significance of procedural justice.<sup>22</sup> For the Court, procedural safeguards matter only to the extent that they contribute to achieving reasonably accurate and just decisions.<sup>23</sup> More recent research has shown, however, that the opportunity for voice has an importance that stands on its own. Indeed, researchers found that people cared about the opportunity for voice even when they knew that they could not influence the outcome.<sup>24</sup> Lind and Tyler developed the "group value" theory, which explains that people "read" their interactions with third parties to discern whether the third party (who represents an important social institution) values and respects them. The unfolding of the procedure itself, therefore, manifests the individual disputant's place within society.<sup>25</sup>

Most recently, Allan Lind has bridged the social exchange and group value theories of procedural justice by proposing that people use their perceptions of procedures' fairness as a heuristic, or mental shortcut, to determine whether they received substantive justice.<sup>26</sup> Disputants make commonsense judgments about the extent to which they were allowed to express themselves and whether the decision maker considered what they said and treated them in an evenhanded and dignified manner. They then use those perceptions to reach conclusions about whether the procedure is likely to yield a substantively fair

19. Focusing on the substantive fairness of the outcomes themselves. See Morton Deutsch, Justice and Conflict, in *The Handbook of Conflict Resolution*, eds. Morton Deutsch & Peter T. Coleman, 41, 41–44 (San Francisco, 2000).

20. See Welsh, *Making Deals*, *supra* note 7, at 818–20.

21. *Id.* at 826–27.

22. See Welsh, *supra* note 9, at 187–91; Jerry L. Mashaw, The Supreme Court's Due Process Calculus for Administrative Adjudication in *Mathews v. Eldridge: Three Factors in Search of a Theory of Value*, 44 U. Chi. L. Rev. 28, 46–48 (1976).

23. See Welsh, *supra* note 9, at 187–91.

24. See Lind, *supra* note 12, at 180–81.

25. See Welsh, *Making Deals*, *supra* note 7, at 827–29.

26. See Lind, *supra* note 12, at 177; Tyler & Lind, *Procedural Justice*, *supra* note 11, at 77–81.

outcome. Is this just another example of the “absurd and ridiculous” heuristics that Chris Guthrie described earlier? To the extent that the indicia of procedural justice can be manipulated, yes.<sup>27</sup> But it is important to recall that heuristics, though sometimes flawed, generally work quite well to assist us in understanding and operating within a complex world. Cross-cultural and intergroup research, for example, may support the connection drawn by Lind’s “fairness heuristic theory”<sup>28</sup> between procedure and outcome. Such research suggests that when conflicts arise, people are more likely to be open-minded and respectful in dealing with those they perceive as members of their in-group.<sup>29</sup> Research also suggests that human beings are likely to treat members of their in-group *substantively* better than they treat outsiders.<sup>30</sup> Thus, the tenor of our interaction with each other as we try to resolve disputes may indeed predict (or perhaps even predispose<sup>31</sup>) substantive fairness.

This brings us to theories of social justice and their place in the canon of dispute resolution. In embracing dispute resolution processes, are society’s major social, political, legal, and economic institutions serving the goal of social justice? Is the field of dispute resolution contributing to the just distribution of “the burdens and benefits of social cooperation among the members of society”?<sup>32</sup> Owen Fiss and others have argued that the informality and privatization of “alternative” dispute resolution actually are antithetical to the achievement of social justice.<sup>33</sup> Limited research comparing litigated and mediated outcomes in court-connected mediation has raised serious concerns about the substantive justice that people of color receive when their mediators are from the majority culture.<sup>34</sup> But simultaneously a significant number of mediation advocates have explained the emergence and significance of mediation in terms of “the social justice story”—the potential of the mediation process to empower and organize the powerless.<sup>35</sup>

Part of the difficulty in discerning a clear connection between the field of dispute resolution and the goal of social justice lies in a lack of consensus on

27. See Nancy A. Welsh & Barbara Gray, Searching for a Sense of Control: The Challenge Presented by Community Conflicts over Concentrated Animal Feeding Operations, 10 Penn. St. Envtl. L. Rev. 295, 306 (2002); Tyler & Lind, Procedural Justice, *supra* note 11, at 80.

28. Tyler & Lind, Procedural Justice, *supra* note 11, at 77.

29. See Keith Allred, Anger and Retaliation in Conflict, *in* The Handbook of Conflict Resolution, *supra* note 19; Ronald Fisher, Intergroup Conflict, *in* The Handbook of Conflict Resolution, *supra* note 19, at 170–74.

30. See Kwok Leung & Michael Morris, Justice Through the Lens of Culture and Ethnicity, *in* Handbook of Justice Research in Law, *supra* note 11, at 369.

31. See Allred, *supra* note 29, at 250.

32. Allen Buchanan, A Critical Introduction to Rawls’ Theory of Justice, *in* John Rawls’ Theory of Social Justice: An Introduction, eds. H. Gene Blocker & Elizabeth H. Smith, 3, 7 (Athens, Ohio, 1980) [hereinafter John Rawls’ Theory].

33. Fiss, *supra* note 5, at 1076–78, 1085.

34. See Gary LaFree & Christine Rack, The Effects of Participants’ Ethnicity and Gender on Monetary Outcomes in Mediated and Adjudicated Civil Cases, 30 Law & Soc’y Rev. 767, 789 (1996).

35. See Robert A. Baruch Bush & Joseph P. Folger, The Promise of Mediation: Responding to Conflict Through Empowerment and Recognition 18–19 (San Francisco, 1994).

the criteria that determine the existence of social (or distributive) justice.<sup>36</sup> Indeed, in a democracy, the definition of social justice is likely to be subject to constant change and evolution. This essay will illustrate the insights available from only one of the available social justice theories,<sup>37</sup> John Rawls's theory of justice as fairness, which he developed in part as a reaction against utilitarianism's focus upon the maximization of aggregate or average utility.<sup>38</sup> Rawls, who grounds his theory in the ideals of democracy, asks: "[V]iewing society as a fair system of cooperation between citizens regarded as *free and equal*, what principles of justice are most appropriate to specify basic rights and liberties, and to regulate social and economic inequalities in citizens' prospects over a complete life?"<sup>39</sup> He then proposes the following principles that should characterize a just social order:

- (a) Each person has the same inalienable claim to a fully adequate scheme of equal basic liberties, which scheme is compatible with the same scheme of liberties for all; and
- (b) Social and economic inequalities are to satisfy two conditions: first, they are to be attached to offices and positions open to all under conditions of fair equality of opportunity; and second, they are to be to the greatest benefit of the least-advantaged members of society . . . .<sup>40</sup>

On the basis of these two principles, Rawls views society's major social, political, legal, and economic institutions (which he calls the "basic structure") as having two primary roles: specifying and assuring that all citizens have basic liberties, and providing background institutions of social and economic justice in the form most appropriate to citizens seen as free and equal.<sup>41</sup> In a society guided by Rawls's two principles, social and procedural justice then seem to merge: "The basic structure is arranged so that when everyone follows the publicly recognized rules of cooperation, and honors the claims the rules specify, the particular distributions of goods that result are acceptable as just (or at least as not unjust) whatever these distributions turn out to be."<sup>42</sup>

Social and procedural justice merge further when one examines the extent to which the two primary roles of the "basic structure" are inevitably interde-

- 36. See Deutsch, *supra* note 19, at 41 (describing distributive justice). Many theories have been developed to serve as the bases for defining a just society, including utilitarianism, liberalism, socialism, libertarianism and communitarianism, to name just a few.
- 37. There are other approaches, besides that of Rawls, which also have potential links to procedural justice in their elaboration of social justice. See, e.g. Georgia Warnke, *Justice and Interpretation* (Cambridge, Mass., 1993) (critical hermeneutics); Jürgen Habermas, *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy*, trans. William Rehg (Cambridge, Mass., 1996) (discourse theory); Alasdair MacIntyre, *After Virtue: A Study in Moral Theory*, 2d ed. (Notre Dame, 1984) (Aristotelian virtue ethics as the development of a tradition).
- 38. See Buchanan, *supra* note 32, at 6.
- 39. John Rawls, *Justice as Fairness: A Restatement* 41 (Cambridge, Mass. 2001) (emphasis added) [hereinafter *Justice as Fairness*]. See also John Rawls, *A Theory of Justice* (Cambridge, Mass., 1971); John Rawls, *Political Liberalism* (New York, 1996).
- 40. Rawls, *Justice as Fairness*, *supra* note 39, at 42–43.
- 41. *Id.* at 48.
- 42. *Id.* at 50.



pendent. If citizens are secure in their basic liberties—e.g., freedom of thought, liberty of conscience, freedom of association—determining the “most appropriate” form of social and economic justice “can be adjudicated, though not always properly, within the existing political framework.”<sup>43</sup> Indeed, Rawls asserts that society’s institutions are responsible for educating citizens in the exercise of their liberties in order to permit them to fulfill their political responsibility to engage in the public culture.<sup>44</sup> But the reality of citizens’ freedom and equality is also dependent upon the achievement of social and economic justice. Rawls writes that the accumulation of great wealth and property in the hands of a few is very likely “to undermine fair equality of opportunity, the fair value of the political liberties, and so on.”<sup>45</sup> This political concern explains Rawls’s argument that society should “compare schemes of cooperation by seeing how well off the least advantaged are under each scheme, and then . . . select the scheme under which the least advantaged are better off than they are under any other scheme.”<sup>46</sup>

Rawls’s theory of justice as fairness aids in understanding both the social justice promise and critique of the field of dispute resolution. To begin with the promise, much of the enthusiasm for “alternative” dispute resolution arose out of popular dissatisfaction with the courts. The costs associated with litigation and the delay in reaching trial made public adjudication virtually inaccessible to many citizens. Some citizens also questioned the legitimacy of attorneys’ and judges’ dominance over the litigation process and their control over the norms to be used for decision making.<sup>47</sup> Viewing these concerns through the prism of Rawls’s analysis, it could be argued that dispute resolution advocates perceived the courts as failing to operate in a manner that assured all citizens the opportunity to exercise their basic liberties, particularly the right to trial and the right to free expression, which are essential for the achievement of political and social justice.

The courts’ embrace of mediation and arbitration may thus be seen as an attempt to find other legitimate mechanisms that would allow citizens to exercise these liberties, at least to an acceptable degree. Both mediation and arbitration offer citizens the opportunity for free expression—perhaps even freer expression than is available in the courts—and the opportunity to reason together. Isabelle R. Gunning has highlighted this connection between mediation, social justice, and procedural justice in urging that disadvantaged people “need, even more so than advantaged group members, a forum in

43. *Id.* at 49. Rawls, unlike most attorneys, seems to use *adjudication* to include all forms of political deliberation and decision making.

44. *Id.* at 56.

45. *Id.* at 53.

46. *Id.* at 60. It is noteworthy that Rawls does not demand equality, just the scheme that most improves the position of those who may still be described as the least advantaged.

47. See Nancy A. Welsh, *The Thinning Vision of Self-Determination in Court-Connected Mediation: The Inevitable Price of Institutionalization?* 6 *Harv. Negot. L. Rev.* 1, 15–18; Thomas E. Carbonneau, *The Story of Arbitration Law*, 14, No. 6 *World Arb. & Mediation Rpt.* 162, 163 (June 2003); Warren E. Burger, *Isn’t There a Better Way?* 68 *A.B.A. J.* 274, 274–76.

which their authentic voices and experiences can be expressed” and that mediation, as a forum fostering the expression of such authentic voices, offers “another locus in American political, social and legal life where ideas about equality are defined and redefined.”<sup>48</sup> Each mediation session thus represents a powerful, individualized opportunity for citizens to grapple directly with the law and engage in the mutual deliberation and decision making so prized by Rawls. Depending upon a mediator’s management of the disputants’ interaction, a mediation session also can offer citizens an empowering “civic education”<sup>49</sup> in the respect, responsibility, and dialog that “fair and equal” citizens extend to each other and that ease public deliberation and decision making.<sup>50</sup> Dispute resolution processes that occur in the public eye—such as regulatory negotiation and consensus decision making—even more clearly seem to support and enhance citizens’ role in public deliberation.<sup>51</sup>

The primary social justice critiques of “alternative” dispute resolution, however, are that mediation, arbitration, and the other processes do not actually deliver free, equal, and public participation and thus cannot be expected to deliver socially just results. First, critics argue that mediation and arbitration do not effectively protect disputants from preexisting social, political, and economic inequalities.<sup>52</sup> The resulting incorporation of such inequalities means that disadvantaged disputants cannot truly engage as equals in the deliberation and decision making that occur within a dispute resolution process.<sup>53</sup> Second, because these dispute resolution processes and their outcomes often are private, the broader citizenry is unable to engage in public discussion and deliberation.<sup>54</sup> Last, because the freedom and equality of the disputants are not guaranteed and their deliberations are not public, critics argue that there is no assurance that the resulting “distribution of goods [will be] just (or at least not unjust).” These questions of whether the field of dispute resolution—particularly as it has become integrated into the courts and public agencies—provides forums that effectively “aspire[] to an au-

48. Diversity Issues in Mediation: Controlling Negative Cultural Myths, 1995 J. Disp. Resol. 55, 67, 86 (1995).

49. Robert A. Baruch Bush, Mediation and Adjudication, Dispute Resolution and Ideology: An Imaginary Conversation, 3 J. Contemp. Legal Issues 1, 11 (1989–90).

50. See Jonathan Cohen, Let’s Put Ourselves Out of Business: On Respect, Responsibility and Dialogue in Dispute Resolution, 108 Penn St. L. Rev. 227 (2003).

51. See Tyler & Lind, *Procedural Justice*, *supra* note 11, at 86–88.

52. See Fiss, *supra* note 5, at 1076–78, 1089; Richard Delgado et al., Fairness and Formality: Minimizing the Risk of Prejudice in Alternative Dispute Resolution, 1985 Wis. L. Rev. 1359, 1400–04; Trina Grillo, The Mediation Alternative: Process Dangers for Women, 100 Yale L.J. 1545, 1600–10 (1999). See also Eric Yamamoto, ADR: Where Have the Critics Gone? 36 Santa Clara L. Rev. 1055 (1996).

53. This criticism bears some similarity to critics’ attack on Rawls’s “original position” in which agents deliberate behind the “veil of ignorance.” See Robert G. Bone, Agreeing to Fair Process: The Problem with Contractarian Theories of Procedural Fairness, 83 B.U. L. Rev. 485, 531–39 (2003); Louis Katzner, The Original Position and the Veil of Ignorance, *in* John Rawls’ Theory, *supra* note 32, at 42.

54. See Sternlight, *supra* note 4, at 839; Menkel-Meadow, *supra* note 10, at 2670.

tonomy from distributional inequality<sup>55</sup> and that truly encourage public deliberation and decision making are important ones. Indeed, Rawls's theory of justice as fairness helps to explain some critics' calls for a reexamination of "alternative" dispute resolution and a renewed focus on making democratically selected judges and juries more accessible on a timely basis and at a reasonable cost.<sup>56</sup> Perhaps it is true that if such access could be assured, citizens would be less likely to resolve their cases through settlement, and courtrooms would resume their role as central sites for citizens (as parties, jurors, and observers) to engage directly in the public deliberation and decision making that should characterize a democratic nation.<sup>57</sup> At this moment in the evolution of institutionalized dispute resolution, we just do not know.

Law students certainly can be encouraged to learn and grapple with these theories of procedural and social justice. For example, at the beginning of my Dispute Resolution and Civil Procedure courses, I ask students to imagine that they have been accused of an honor code violation and will soon appear before a faculty member who will make a recommendation to the dean. As they imagine the proceeding before this person, what do the students hope will happen? How do they hope to be treated? And why does that treatment matter to them?<sup>58</sup> Reliably, the students mention the four indicia of procedural justice outlined above and describe in their own words the underlying theories that have been developed to explain the importance of this dimension of justice. Their responses offer a rich segue into a discussion of the procedural justice literature. This exercise works, in part, because it draws upon students' own experiences of vulnerability and thus places them in a situation in which they are likely to notice and care about the procedures used by authorities for decision making.<sup>59</sup>

If we hope to do more than introduce procedural and social justice and actually *infuse* our dispute resolution courses with these concepts, we can return to justice concerns (along with concerns about efficiency and effective persuasion) as we evaluate every simulation or process. It is also possible to develop simulations that specifically encourage a focus on procedural and social justice. For example, I have adapted a mediation simulation, originally developed by Kimberlee Kovach,<sup>60</sup> that is based on a real mediation of a civil

55. Fiss, *supra* note 5, at 1078.

56. See Deborah Hensler, *Our Courts, Ourselves: How the Alternative Dispute Resolution Movement Is Re-Shaping Our Legal System*, 108 Penn St. L. Rev. 165 (2003); Deborah Hensler, *Suppose It's Not True: Challenging Mediation Ideology*, 2002 J. Disp. Resol. 81, 96-99; Resnik, *supra* note 3.

57. See Judith Resnik, *Trial as Error, Jurisdiction as Injury: Transforming the Meaning of Article III*, 113 Harv. L. Rev. 925, 1034 (2000).

58. This represents a variation of Babcock and Massaro's problem case, "The Due Process Game." Barbara Babcock & Toni Massaro, *Civil Procedure: Cases and Problems*, 2d ed., 1 (Gaithersburg, 2001).

59. This is to counteract the disconnect that can afflict the attorney-client relationship. See Welsh, *Making Deals*, *supra* note 7, at 840; Deborah Hensler, *The Real World of Tort Litigation*, in *Everyday Practices*, *supra* note 12, at 155.

60. "The Death Case" (unpublished classroom simulation) (on file with author).

rights action brought by the parents of a slain teenager against several police officers, a city, and its police department.<sup>61</sup> In this simulation I specifically instruct the mediator to share her evaluation of the strengths and weaknesses of the plaintiff's case—accurately but also very early and very aggressively. Because the students playing the parents of the slain child can find it difficult to identify with this role, I provide them with extensive instructions, including the language from actual hearing transcripts in which the parents described the effects of their son's death and what they hoped to accomplish through their lawsuit. The debrief generally is quite good after this mediation simulation and necessarily leads to important discussions about the procedural and social justice implications of different approaches to mediation.

There are other ways to adapt existing simulations such as these to highlight for students the choices that sometimes need to be made between resolution and justice. Caucus, for example, is an important tool that deserves closer examination by those of us in the legal academy.<sup>62</sup> As Jennifer Brown observed earlier, this technique can be very effective for overcoming strategic barriers to resolution. As we debrief simulations with our students, we can ask them to evaluate the effect of caucus upon such barriers; we can also ask them to consider the effect of caucus upon the disputants' perceptions of procedural justice *and* the likelihood of achieving social justice. Similarly, we can direct students' attention to the significance of context. Do students' procedural and social justice concerns change if the mediation they are simulating is voluntary rather than mandatory? How are their perceptions affected by the knowledge that the mediation is part of a court-connected or agency-sponsored program? To what extent do such changes in context also change disputants' expectations of procedural and social justice? Are such expectations legitimate?

Ultimately, invoking the theories of procedural and social justice developed by social psychologists and political philosophers can help us and our students explore the relevance of justice in a field devoted to resolution. The waters of justice may indeed be "deep," as that Canadian attorney pronounced. It is up to us to help our students dive in and start swimming.

61. See Welsh, *supra* note 47, at 7–15.

62. See Nancy A. Welsh, *Stepping Back Through the Looking Glass: Real Conversations with Real Disputants About the Place, Value and Meaning of Mediation*, 19 Ohio St. J. on Disp. Resol. 573, 669–71 (2004).