

Yeshiva University, Cardozo School of Law

LARC @ Cardozo Law

Articles

Faculty

2004

Preface to the Justice in Mediation Symposium

Lela P. Love

Benjamin N. Cardozo School of Law, love@yu.edu

Follow this and additional works at: <https://larc.cardozo.yu.edu/faculty-articles>



Part of the [Law Commons](#)

Recommended Citation

Lela P. Love, *Preface to the Justice in Mediation Symposium*, 5 *Cardozo Journal of Conflict Resolution* 59 (2004).

Available at: <https://larc.cardozo.yu.edu/faculty-articles/104>

This Article is brought to you for free and open access by the Faculty at LARC @ Cardozo Law. It has been accepted for inclusion in Articles by an authorized administrator of LARC @ Cardozo Law. For more information, please contact christine.george@yu.edu, ingrid.mattson@yu.edu.

PREFACE TO THE
JUSTICE IN MEDIATION
SYMPOSIUM

*Lela P. Love**

On March 12, 2004, the Benjamin N. Cardozo School of Law held a symposium on *Justice in Mediation*. The papers below represent the first group of articles emanating from that event. More articles will follow in the next issue of the *Cardozo Journal of Conflict Resolution*.

Interestingly, in retrospect, one of the motivations for this event was a desire to celebrate the contributions of mediation to our system of justice. In 1984, Professor Owen Fiss described settlement and alternative dispute resolution (“ADR”) generally as “a capitulation to the conditions of mass society” which “should be neither encouraged nor praised.”¹ This Symposium, twenty years later, was envisioned partially to answer Fiss, and to articulate the justice rationale of mediation.

All assumptions are dangerous. The best-laid plans evolve in unexpected ways and reach unforeseen destinations. As you will find, most of the papers do not celebrate justice in mediation, but rather criticize some aspect of mediation and its capacity to deliver justice. Mediation on the ground (in the courts) has proven different from mediation in theory or as practiced in settings where close watch is kept on goals other than settlement. The dissonance between what mediation promised and what is being delivered, particularly in the courts, is described in these articles.

Another motivation for the Symposium was to highlight the importance of justice in all dispute resolution processes. This goal was met, in that all speakers and papers addressed the importance of delivering justice.

Justice is important because if we fail to achieve it, concrete costs follow. In a 1984 article on the goals of civil justice, Professor Baruch Bush laid out a number of goals of civil justice, among them: equitable distribution of society’s resources (including power and money); protection of individual rights; maintenance of public order; the development of human relations; and the perceived le-

* Lela P. Love is Professor of Law and Director of the Kukin Program for Conflict Resolution at Benjamin N. Cardozo School of Law.

¹ Owen M. Fiss, *Against Settlement*, 93 *YALE L. J.* 1073, 1075 (1984).

60 *CARDOZO J. OF CONFLICT RESOLUTION* [Vol. 5:59]

gitimacy and cost effective administration of public institutions.² When these goals (individually or in the aggregate) are not met, costs arise.³ For example:

~If we fail to resolve conflicts and end hostilities between people and between groups and to distribute society's resources in an equitable manner, we incur costs of public disorder and disparity.⁴ We see that most vividly in Iraq, in Israel, and, of course, brought home most visibly here in New York City on September 11, 2001.

~If we fail to promote mutual tolerance, respect and appreciation—that is, social solidarity—as we process disputes, we incur enmity costs, including anxiety, depression, distrust, decreased productivity, unpleasant interactions, and ultimately public disorder costs of police, property and personal damage.⁵

~If our institutions and processes fail in being perceived as legitimate and fair, we incur disaffection costs, such as disengagement, obstruction, and ultimately revolution (though ideally evolution).⁶

Hamlet, who saw his father's murderer take his father's wife and throne, captured the cost of injustice by saying he had "bad dreams" from which he could not escape.⁷ The world has "bad dreams" where injustice runs rampant.

Despite the importance of justice and systems to deliver it, justice is hard to define. In searching for definitions and reflections about justice, there seemed to be universal consensus that justice was important, but near universal lack of any precise formulation of the concept. For example:

~James Madison in 1788 said: "Justice is the end of government. It is the end of civil society."⁸

² See Robert A. Baruch Bush, *Dispute Resolution Alternatives and the Goals of Civil Justice: Jurisdictional Principles for Process Choice*, 1984 WIS. L. REV. 893, 908 (1984).

³ See *id.*

⁴ See *id.* at 936-37.

⁵ See *id.*

⁶ See *id.* at 937-38.

⁷ See William Shakespeare, *The Tragedy of Hamlet Prince of Denmark* (1601), reprinted in WILLIAM SHAKESPEARE: THE COMPLETE WORKS (S. Wells & G. Taylor eds. 1986).

⁸ FEDERALIST NO. 51 (James Madison, sometimes attributed to Alexander Hamilton) (1788), in Jacob E. Cooke, ed., *The Federalist* (Wesleyan 1961).

2004] *PREFACE TO JUSTICE IN MEDIATION* 61

~Thomas Jefferson said several decades later: “I believe . . . that [justice] is innate, that the moral sense is as much a part of our constitution as that of feeling, seeing, or hearing.”⁹

~Daniel Webster echoed Madison: “Justice . . . is the great interest of man on earth. It is the ligament which holds civilized beings and civilized nations together.”¹⁰

~The great judge, Learned Hand, came close to a definition when he said: “Justice, I think, is the tolerable accommodation of the conflicting interests of society. . .”¹¹

~We all owe great thanks to Professor Nancy Welsh for making more concrete the meaning of procedural justice.¹²

While justice is hard to define, mediation itself is also difficult to define. You will find definitions that sound simple. For example:

~Josh Stulberg, in his book *Taking Charge/Managing Conflict*, says: “Mediation is a process whereby a neutral intervener helps people involved in a dispute develop solutions that are acceptable to them. Unlike a judge or an arbitrator, the mediator has no authority to impose a binding decision on the disputants.”¹³

~Carrie Menkel-Meadow in her book on *Mediation* says: “In its simplest and purest form, mediation is a process of facilitated negotiation among two or more parties, assisted by a third-party neutral, to resolve disputes, manage conflict, plan future transactions or reconcile interpersonal relations and improve communication.”¹⁴

But these definitions, and others like them, do not answer the questions our Symposium panelists posed and struggled to answer: what does the mediator do if one party is more powerful than the

⁹ Letter from Thomas Jefferson to John Adams (Oct. 14, 1816), in 2 *THE ADAMS-JEFFERSON LETTERS* 492 (Lester J. Cappon ed., 1959), cited in GARRY WILLS, *INVENTING AMERICA: JEFFERSON’S DECLARATION OF INDEPENDENCE* 204 (1978).

¹⁰ DANIEL WEBSTER, *ON MR. JUSTICE STORY*, 300 (1845), in *FAMILIAR QUOTATIONS* 300 (John Bartlett ed., 10th ed. 1919).

¹¹ Phillip Hamburger, *The Great Judge*, *LIFE*, Nov. 4, 1946, at 122-23 (quoting Judge Learned Hand).

¹² See Nancy A. Welsh, *Making Deals in Court-Connected Mediation: What’s Justice Got To Do With It?*, 79 *WASH. U. L. Q.* 787 (2001); Nancy A. Welsh, *Disputants’ Decision Control in Court-Connected Mediation: A Hollow Promise Without Procedural Justice*, 2002 *J. DISP. RESOL.* 179 (2002).

¹³ JOSEPH B. STULBERG, *TAKING CHARGE / MANAGING CONFLICT* 5 (1987).

¹⁴ CARRIE MENKEL-MEADOW, *Introduction to MEDIATION: THEORY, POLICY AND PRACTICE* xiii (The International Library of Essays in Law & Legal Theory, 2d Series, 2001).

62 *CARDOZO J. OF CONFLICT RESOLUTION* [Vol. 5:59]

other or if one party is endowed with more dominant and accessible cultural myths?¹⁵ Should mediators be concerned about the justness or fairness of mediated outcomes?¹⁶ What if minority groups consistently get less money in mediation?¹⁷ Has mediation undergone an “ugly transformation”¹⁸ and become distorted by its blending with the judicial system? Have mediators become blinded by a quest for settlements, so that “rapid retreat to caucus,” a tendency to incorrectly evaluate cases—or evaluate with minimal information—and manipulative moves to obtain particular settlement structures have become prevalent features of a process reinvented in the civil court context?¹⁹ Is mediation headed towards decadence or even disappearing under “a unified regime of law and mediation”?²⁰ Are “repeat players,” who know mediators’ “tricks” unduly advantaged as contrasted with “one-timers”?²¹ What is the connection between legal norms and justice in a system that defers to whatever norms parties experience as most relevant and powerful? If mediation is primarily a forward-looking process, what about the past and addressing injustices that occurred there?²² If mediation is conducted in private, how can society ensure that “justice” is being done? Has the privacy of mediation permitted the growth of abusive behaviors by mediators and attorneys— behaviors that would not be tolerated in a public forum?²³ Who should be qualified to mediate? What should mediators do to prevent bullying and lying or to promote equality and fairness? Are there some situations that should not be mediated, that should

¹⁵ See Isabelle Gunning, *Diversity Issues in Mediation: Controlling Negative Cultural Myths*, 1995 J. DISP. RESOL. 55, 76 (1995).

¹⁶ This question has been well framed by two classic articles taking different positions. Compare Lawrence Susskind, *Environmental Mediation and the Accountability Problem*, 6 VT. L. REV. 1, 46 (1981) (arguing the mediators should protect the interests of absent or underrepresented third parties and that mediators should ensure that agreements reached are fair, stable and optimal), with Joseph B. Stulberg, *The Theory and Practice of Mediation: A Reply to Professor Susskind*, 6 VT. L. REV. 85, 117 (1981) (arguing that a mediator must be committed to a neutral posture with respect to outcome).

¹⁷ See Isabelle Gunning, *Know Justice, Know Peace: Further Reflections on Justice, Equality and Impartiality in Settlement Oriented and Transformative Mediations*, 5 CARDOZO J. CONFLICT RESOL. 89 (2004).

¹⁸ James Coben, *Gollum, Meet Smeagol: A Schizophrenic Ruminations on Mediator Values Beyond Self-Determination and Neutrality*, 5 CARDOZO J. CONFLICT RESOL. 65 (2004).

¹⁹ See *id.*

²⁰ See Jacqueline M. Nolan-Haley, *The Merger of Law and Mediation: Lessons Learned from Equity Jurisprudence*, _ CARDOZO J. CONFLICT RESOL. _ (forthcoming 2004).

²¹ See Coben, *supra* note 18.

²² See Carrie Menkel-Meadow, *Past and Future in Mediation*, 5 CARDOZO J. CONFLICT RESOL. 99 (2004).

²³ See Nolan-Haley, *supra* note 20.

2004] *PREFACE TO JUSTICE IN MEDIATION* 63

remain public so that public precedents can be crafted? Do mediators generate willingness to settle by trashing the justice system,²⁴ a practice hardly connected with notions of justice? The topics addressed under the theme of justice in mediation are an eclectic range of concerns around these and other issues. The thoughtful Symposium scholars who raise these issues, all of them pioneers in the development of the mediation field, happily try to answer their own questions in the essays that follow.

²⁴ See Nancy A. Welsh, *The Place of Court-Connected Mediation in a Democratic Justice System*, 5 *CARDOZO J. CONFLICT RESOL.* 119 (2004).

