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Client Counseling, Mediation, and Alternative Narratives of Dispute Resolution

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CLIENT COUNSELING, MEDIATION, AND ALTERNATIVE NARRATIVES OF DISPUTE RESOLUTION

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This article examines how litigation and mediation have distinct narrative structures and what these narratives say about counseling clients about mediation. In the narrative of litigation, parties struggle against one another in order to convince a decision maker of the truth of "what happened." This struggle is about more than designating liability; it is about enabling the decision-maker to restore social order and vindicate morality. In contrast, the narrative of mediation does not call upon the mediator to designate "truth" or "right" and "wrong." Rather, the mediator acts to enable parties to overcome and transform conflict through collaboration. In the mediation narrative, parties do not struggle against one another, but all mediation participants – including the mediator herself – struggle collaboratively to overcome and transform conflict. A challenge for counseling clients about mediation is that the litigation narrative reflects deeply-held cultural norms about conflict resolution. This article argues that lawyers must confront and dislodge this underlying narrative of litigation in order to engage clients in a meaningful inquiry about mediation. The article concludes with concrete suggestions—a "toolkit"—for engaging clients in this kind of narrative reframing of their disputes.

The wind was flapping a temple flag, and two monks were having an argument about it. One said the flag was moving, the other that the wind was moving; and they could come to no agreement on the matter. They argued back and forth. Eno the Patriarch said, "It is not that the wind is moving; it is not that the flag is moving; it is that your honorable minds are moving.[1]

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[1] Platform Sutra, *quoted in* TIMOTHY FERRIS, COMING OF AGE IN THE MILKY WAY 15 (1988).

I. INTRODUCTION

What a dispute *is* – its relevant facts and plausible resolutions – is contingent upon whether a dispute will be litigated or mediated. This notion – an idea that this article will elaborate in detail[2] – generates extraordinary opportunities for lawyers to enrich how they and their clients approach dispute resolution. This opportunity, however, will be squandered if lawyers merely recast mediation in adversarial terms.[3] Rather, lawyers need to rethink what they do and how they do it in light of how mediation creates and resolves disputes in ways that are utterly alien to the norms of advocacy.

This is no easy task. The core activity that has defined what it means to be a lawyer in popular imagination for centuries is the trial.[4] Trials are such a fixture in the cultural and legal landscape that it is easy to overlook how trials embody a very specific view of the world. Any trial – criminal, tort, contract – is a *contest* about which party's story reflects the "truth" about "what happened." Given that two inconsistent truths cannot exist simultaneously,[5] establishing the "truth" of one party's story necessarily disproves the "truth" of an adversary's story. Participants in contests also believe passionately that they are right and that others are wrong, often to the extent that they are morally right and others are morally wrong. Effective lawyers generate this passion (whether real or feigned) and seek to win the contest by convincing a decision-maker not only that a client's story is "true," but that this story embodies the triumph of right over wrong.[6] Moreover,

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[2] *See infra* text accompanying notes 34-110.

[3] To a certain extent, such recasting has already occurred in certain forms or "styles" of mediation. For a discussion of this process, see *infra* text accompanying notes 65, 111-16.

[4] Carol Clover, *Law and the Order of Popular Culture*, *in* LAW IN THE DOMAINS OF CULTURE 97 (Austin Sarat & Thomas R. Kearns eds., 1998).

[5] This assumption is a standard piece of folk wisdom that figures prominently in everyday interpretations of how the world works. MARK JOHNSON, MORAL IMAGINATION: IMPLICATIONS OF COGNITIVE SCIENCE FOR ETHICS 7-8 (1993) (describing an aspect of "The Moral Law Folk Theory" as "[t]here must be one and only one correct conceptualization for any situation"). In adjudication, the same notions are usually understood through an assumption that "truth is a matter of accuracy, a matter of reflecting an objective, external reality." Milner S. Ball, *Wrong Experiment, Wrong Result: An Appreciatively Critical Response to Schwartz*, 1983 AM. B. FOUND. RES. J. 565, 569-71 (1983). These ideas are formally embodied in three principles of logic ultimately derived from Aristotle: "the law of identity," which holds that "*A* equals *A*"; "the law of noncontradiction," through which "no statement can be both true and false"; and "the law of the excluded middle," through which "any statement is either true or false; thus, *A* or *B*, and not *A* and *B*." Kaiping Peng & Richard E. Nisbett, *Culture, Dialectics, and Reasoning about Contradiction*, 54 AM. PSYCHOL. 741, 744 (1999).

[6] A "contest" also describes other types of discourse that are culturally pervasive: politics, debates in the academy, morning news shows, talk shows, domestic disputes. Carrie Menkel-Meadow, *The Trouble with the Adversary System in a Postmodern, Multicul-*

while trials are only the culmination of the litigation process and to an increasing extent rarely happen at all,[7] the set of assumptions underlying trial practice inform virtually everything else that advocates do. Developing, supporting, and proving a story determine how advocates perform client interviewing, discovery, motion practice, negotiation.[8]

These ideas are so basic as to approach banality. Their very banality, however, masks how trials are not things of nature but contingent, culturally defined events. The world need not be put together this way. Indeed, to an increasing extent, the world of dispute resolution is *not* put together this way. The reason is the rapid growth of mediation[9] – a process built upon profoundly different premises than litigation.[10] While the growth of mediation has spawned an enormous multiplicity of practices performed under its name,[11] many forms of mediation are not a contest of one party against another, nor presume that one "story" has an exclusive claim to "truth," nor claim that getting to "what happened" should furnish the basis upon which to resolve disputes. Instead, mediation is pragmatism in action: mediators facilitate the resolution of differences through strategies that have the potential to facilitate the resolution of differences. Very often such a resolution entails the *recognition* of an adversary's perspective, not its obliteration as false.[12]

This article examines these issues through the lens of narrative theory. My central thesis is that litigation and mediation each embody a narrative that shapes, orders, and controls the meaning of the "dispute" at issue. I first explore recent advances in narrative theory and demonstrate how litigation and mediation entail a process that can be described narratively and how this process profoundly influences what

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tural World, 38 WM. & MARY L. REV. 5, 11 (1996).

[7] David M. Trubek, Austin Sarat, William L.F. Felstiner, Hebert M. Kritzer & Joel B. Grossman, *The Costs of Ordinary Litigation*, 31 U.C.L.A. L. REV. 72, 89 (1993) (noting that trials are "rare" and most cases resolve through settlement); Kent D. Syverud, *ADR and the Decline of the American Civil Jury*, 44 U.C.L.A. L. REV. 1935 (1997). *See also* Hope Viner Sanborn, *The Vanishing Trial*, 88 A.B.A. J. 24 (2002).

[8] The role of "contest" extends to legal education. The first-year curriculum – the best gauge there is of the conventional wisdom of what "thinking like a lawyer" means – has not changed much in 125 years. The operative procedure is that of a contest: majority and dissenting opinions are contested, students contest the efficacy of different rules, the teacher contests the understanding of students. *See, e.g.,* Derek Bok, *A Flawed System of Law Practice and Law Teaching*, 33 J. LEGAL EDUC. 570, 582 (1983) (describing "the familiar tilt in the law curriculum toward preparing students for legal contest").

[9] *See infra* text accompanying notes 52-63.

[10] *See infra* text accompanying notes 72-91.

[11] *See infra* text accompanying notes 57-68. My discussion of mediation adheres to the traditional conception that has been identified as "facilitative" in recent literature. *See infra* text accompanying note 65. Unless noted otherwise, subsequent references to "mediation" refer to this model of mediation practice.

[12] *See infra* text accompanying notes 76-81.

stories are told within that process. The article then explores the practical application of these ideas when lawyers counsel clients. Given that a lawyer can generate insights about what a dispute is or can be by describing different ways that a dispute can be resolved, the narratives of litigation and mediation enable clients to better understand that litigation is a *choice*, and not always the most prudent choice, in resolving disputes.

By comparing narratives in litigation and mediation in this manner, I am not suggesting that lawyers should view mediation as superior to litigation in some essentialist sense. This is far too reductive, and many students of conflict resolution going back to Lon Fuller have rejected such an all or nothing approach.[13] Moreover, in some instances mediation can be not only inappropriate, but affirmatively damaging.[14] Rather, my approach – like those of others – draws upon what is probably the central insight of American pragmatism: "ideas . . . are tools – like forks and knives and microchips – that people devise to cope with the world in which they find themselves."[15] For my purposes, the knives and forks and microchips are processes to resolve controversy. The "people" doing the devising are the attorney and client collaborating through counseling. The challenge as I see it, then, is not merely to educate law students[16] and practitioners[17] about mediation or to create an ethical obligation to counsel clients about alternative forms of dispute resolution,[18] but, rather, to examine the

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[13] For an excellent summary of how the intellectual originators of ADR theory – including Fuller, Soia Mentschikoff, and the legal process theorists Henry Hart and Albert Sacks - approached these questions, see Carrie Menkel-Meadow, *Mothers and Fathers of Invention: The Intellectual Founders of ADR*, 16 OHIO ST. J. ON DISP. RESOL. 1 (2000).

[14] *See infra* text accompanying notes 121-22.

[15] LOUIS MENAND, THE METAPHYSICAL CLUB xi (2001). In the context of dispute resolution theory, this idea is also often called "fitting the forum to the fuss." Menkel-Meadow, *supra* note 13, at 25.

[16] Terri Durrett & Marc Tittlebaum, *Report of the Working Group on the Proposed Ethical Duty to Recommend Alternative Dispute Resolution*, 41 S. TEX. L. REV. 65, 68 (1999); Lea B. Vaughn, *Integrating Alternative Dispute Resolution (ADR) into the Curriculum at the University of Washington School of Law: A Report and Reflections*, 50 FLA. L. REV. 679 (1998).

[17] Suzanne J. Schmitz, *Giving Meaning to the Second Generation of ADR Education: Attorneys' Duty To Learn About ADR and What They Must Learn*, 1999 J. DISP. RESOL. 29.

[18] Some commentators have argued that ethics rules should mandate attorneys to advise clients of the availability of ADR. *See, e.g.*, Robert F. Cochran, *ADR, the ABA, and Client Control: A Proposal that the Model Rules Require Lawyers to Present ADR Options to Clients*, 41 S. TEX. L. REV. 183 (1999); Carol VanAuken-Haight & Pamela Chapman Einslen, *Attorney Duty to Inform Clients of ADR?*, 72 MICH. B.J. 1038 (1993). New language adopted as one of the "Ethics 2000" amendments to the Model Rules of Professional Conduct move in this direction. MODEL RULES PROF'L CONDUCT R. 2.1 cmt. (2002) ("when a matter is likely to involve litigation, it may be necessary . . . to inform the client of forms of dispute resolution that might constitute reasonable alternatives to litigation").

nuts and bolts of how to counsel clients about choices for dispute resolution – the tools for describing the tools.

With this challenge in mind, the article concludes by proposing strategies for how lawyers can and should counsel clients about mediation. By embracing narrative possibilities in constructing disputes, such "mediation-talk" generates opportunities for lawyers to enrich a client's sense of what a dispute is or could be which, in turn, empowers clients to make informed choices about which dispute resolution process can best promote client values and goals.

II. THE GUIDE FOR THE INVESTIGATION: NARRATIVE THEORY

This Section will summarize the role that ideas about narrative have played in legal theory and current thinking about how narrative relates to cognition. It goes on to describe what a narrative is – a definition that will form the basis for my succeeding analysis of the narratives of Litigation and Mediation.

A. The Uses of Narrative

Much has been written and debated about the usefulness of ideas about narrative to understanding judging and lawyering,[19] and, very recently, to how mediators can mediate effectively as well.[20] Without entering into the details of these debates, narrative theory, at a minimum, can powerfully describe adjudication and dispute resolution generally. Scholars have used narrative to explain how judges and juries determine "the facts of the case,"[21] how lawyers persuade decision-makers of the merits of their clients' cause,[22] and how judges

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Some have also argued that the failure to advise clients about alternatives to litigation should constitute legal malpractice. Robert F. Cochran, *Legal Representation and the Next Steps Toward Client Control: Attorney Malpractice for the Failure to Allow the Client to Control Negotiation and Pursue Alternatives to Litigation*, 47 WASH. & LEE L. REV. 819 (1990).

[19] A particularly influential and important work on narrative and the law is Robert Cover, *The Supreme Court, 1982 Term – Foreward: Nomos and Narrative*, 97 HARV. L. REV. 4 (1983). The extension of narrative as a method of legal scholarship has attracted particular attention. *See* Daniel A. Farber & Suzanna Sherry, *Telling Stories Out of School: An Essay on Legal Narratives*, 45 STAN. L. REV. 807 (1993).

[20] *See* JOHN WINSLADE & GERALD MONK, NARRATIVE MEDIATION: A NEW APPROACH TO CONFLICT RESOLUTION (2001). While providing valuable insights into mediation techniques through the lens of stories disputants tell in mediation, this work neither addresses attorney-client counseling nor mediation and litigation narratives at the definitional level that is the focus of this article. *See infra* text accompanying notes 33-110.

[21] *See, e.g.*, Nancy Pennington & Reid Hastie, *A Cognitive Theory of Juror Decision Making: The Story Model*, 13 CARDOZO L. REV. 519 (1991).

[22] Richard K. Sherwin, *The Narrative Construction of Legal Reality*, 18 VT. L. REV. 681 (1994); Anthony G. Amsterdam, *Thurgood Marshall's Image of the Blue-Eyed Child in Brown*, 68 N.Y.U. L. REV. 226 (1993).

construct persuasive opinions.[23]

Among the many insights developed in this literature is how misleading it is to conceive of legal analysis strictly in terms of logic and rationality.[24] To take one example, the judicial system tends to assume that jurors – chosen with an eye to having an "open mind" – assess the weight and credibility of individual pieces of testimonial and physical evidence at trial. This process ultimately produces (so the assumption goes) "findings of fact" driven by evidence and untainted by the outside world. However, as the theoretical and empirical work of Nancy Pennington and Reid Hastie demonstrate, "jurors impose a narrative story organization on trial information."[25] Pennington and Hastie make two critical points: 1) jurors interpret evidence in the context of stories they construct, and 2) these stories are the products of "experience and beliefs in the social world" that exist independently of what happens at trial.[26] Lest this conclusion be dismissed as merely confirming the oft-maligned "irrationality" of how jurors decide cases, scholars have persuasively shown how judges – including judges of the United States Supreme Court – reach decisions in exactly the same way.[27]

The underlying message here is not that jurors and judges are doing their work badly; the message is that this is the only way that jurors and judges can do their work at all. To make the point more explicitly, "stories are not just recipes for stringing together a set of 'hard facts'" but rather "stories *construct* the facts that comprise them."[28] What Pennington and Hastie argue that jurors do is what we all do.[29]

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[23] ANTHONY G. AMSTERDAM & JEROME BRUNER, MINDING THE LAW 143-164 (2000). While ostensibly drawing upon pure reason – or at least the subspecies of pure reason called "legal reasoning" – the persuasive power of judicial opinions can be viewed as arising from their subtle evocation of mythic stock stories and rhetorical devices that carry within them embedded cultural norms. *See, e.g.*, Peggy Cooper Davis, *The Proverbial Woman*, 48 REC. ASS'N B. CITY N.Y. 7 (1993).

[24] *See, e.g.*, Steven L. Winter, *The Cognitive Dimension of the Agon between Legal Power and Narrative Meaning*, 87 MICH. L. REV. 2225, 2228 (1989) ("[t]he attraction of narrative is that it corresponds more closely to the manner in which the human mind makes sense of experience than does the conventional, abstracted rhetoric of law"). This use of narrative is part of a larger, ongoing assault on the legitimacy of standard legal analysis – an assault that is both traced in and exemplified by PIERRE SCHLAG, THE ENCHANTMENT OF REASON (1998).

[25] *See, e.g.*, Pennington & Hastie, supra note 21, at 521.

[26] *Id.* at 525.

[27] *See generally* Amsterdam, *supra* note 22; AMSTERDAM & BRUNER, *supra* note 23; Davis, *supra* note 23.

[28] AMSTERDAM & BRUNER, *supra* note 23, at 111 (emphasis in original). *See also* Jerome Bruner, *The Narrative Construction of Reality*, 18 CRITICAL INQUIRY 1, 4 (1991).

[29] Indeed, to a perhaps surprising degree, the process of narrative construction begins even when children are just beginning to acquire language skills. *See* NARRATIVES FROM

While the purposes and origins of narrative are unsettled and complex questions, one function of narrative is particularly significant for purposes of this article. Narrative is a primary mechanism through which we explain breaches, violations, or deviations from a norm.[30] Such events are tales told by storytellers (that is, all of us) every day: difficulties at work or at home, newspaper or magazine "stories," things that go awry in life or things that go especially well. Going to the grocery store and buying what you need is not a story; going to the grocery store and getting into an argument about a price, or waiting on the checkout line for two hours, or witnessing the arrest of a shoplifter, or forgetting to bring an umbrella in a downpour, or getting a spectacularly good buy on an item, are stories potentially worth telling. All involve experiences that deviate however modestly from the usual and the expected.[31] Of course, stories may be far more than anecdotes about shopping. Stories can and do tell of national or religious origins or strivings, or of history, or of the arc of one's own life.[32]

B. The "Austere Definition" of Narrative

If humans employ stories to describe experience and "reality" and stories, in turn, constitute experience and "reality," narrative structure becomes a question well worth investigating. While defining the universal attributes of narrative is far from settled (assuming, of course, that it can ever be truly settled), I will adopt what Anthony Amsterdam and Jerome Bruner have called the "Austere Definition" of narrative. The Austere Definition embodies what is largely uncontroversial in current thinking on narrative. While some would argue that narrative is more than this, it is difficult to argue that it is less. Here is the Austere Definition:

> A narrative . . . needs a *cast of human-like characters*, beings capable of *willing their own actions, forming intentions, holding beliefs, having feelings*. It also needs a *plot* with a beginning, a middle, and an end, in which particular characters are involved in particular events. The unfolding of the plot requires (implicitly or explicitly): (1) an initial *steady state* grounded in the legitimate ordinariness of

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THE CRIB (Katherine Nelson ed., 1989); JUDY DUNN, THE BEGINNINGS OF SOCIAL UNDERSTANDING (1988).

30 Bruner, *supra* note 28, at 11.

31 Jerome Bruner has characterized this aspect of narrative as embodying "canonicity and breach": "to be worth telling, a tale must be about how an implicit canonical script has been breached, violated, or deviated from in a manner to do violence to . . . the 'legitimacy' of the canonical script." Bruner, *supra* note 28, at 11.

32 *See* Louis O. Mink, *Narrative Form as a Cognitive Instrument*, *in* THE WRITING OF HISTORY: LITERARY FORM AND HISTORICAL UNDERSTANDING 129-149 (Robert H. Canary & Henry Kozicki, eds. 1978); Hayden White, *The Value of Narrativity in the Representation of Reality*, 7 CRITICAL INQUIRY 5 (1980).

things
(2) that gets disrupted by a *Trouble* consisting of circumstances attributable to human agency or susceptible to change by human intervention,
(3) in turn evoking *efforts* at redress or transformation, which succeed or fail,
(4) so that the old steady state is *restored* or a new *(transformed)* steady state is created,
(5) and the story concludes by drawing the then-and-there of the tale that has been told into the here-and-now of the telling through some *coda* – say, for example, Aesop's characteristic *moral of the story*.[33]

While austere, among the fascinating dimensions of this definition is that it contains several disjunctive "or" statements. These include *Trouble* "attributable to human agency *or* susceptible to change by human intervention," *Efforts* at "redress *or* transformation," and a steady state that is ultimately either "restored" *or* "transformed." More on these crucial forks in the road shortly.

With these basic insights of narrative theory in mind, we can now turn to the contexts of litigation and mediation to help build a fresh view of the meaning of conflict and conflict resolution.

III. THE STORY OF LITIGATION

So what is the Story of Litigation? One way of approaching this question is to conceive of litigation as itself a mechanism for story completion. Each litigant arrives with an unfinished, inconsistent story, and the job of a judge or jury is to finish telling the story the "right" way. The mechanics of this process, however, only hint at the *type* of story parties seek to prove in litigation. At this level, participants in litigation draw from a deeper or "meta-narrative" about each party's struggle to vindicate good over evil.

A. The Stories of Litigation

Let's start as narrative itself starts, with the *Steady State* and the *Trouble* that upsets the *Steady State*: The world is in order. People are acting towards each other as they should, or at least no one is straying too far from the norm. And then . . . something happens. One party[34] claims that another party did something to generate disorder, to make the world out of joint. In other words, *Trouble* dis-

[33] AMSTERDAM & BRUNER, *supra* note 23, at 113-14 (emphasis in original).

[34] For purposes of clarity, I will assume a two party dispute in this discussion. Needless to say, litigation often involves multiple parties as co-defendants, co-plaintiffs, or parties in third-party practice. Such additional parties may generate additional narratives as against individual parties.

rupts the *Steady State*. In a breach of contract case, the parties enter into a contract (*Steady State*) and then one party breaches the contract (*Trouble*). In a tort case, plaintiff is walking on the sidewalk (*Steady State*) and then slips and falls (*Trouble*), or plaintiff is having a beer (*Steady State*) and then defendant slugs plaintiff (*Trouble*). In a criminal case, a bank is doing what banks ordinarily do (*Steady State*) and then is held up by a defendant armed with a gun (*Trouble*). The defendant claims either that: 1) nothing happened, and an attempt to demonstrate otherwise is itself an example of disorder and thus of *Trouble*, and/or 2) something did happen to generate disorder, but it was the other party that did it.

So who is right and who is wrong, or, to put it in terms of the Austere Definition, who is the real source of *Trouble*? The assumption that one party is right and one party is wrong is not open to question; litigation is based on a shared norm among all participants (litigants, judge, jury) that only one of the litigants is right about "what happened." Since there is only one true source of *Trouble*, parties expend *Efforts* to demonstrate to the finder of fact that their story is the "right" one.[35] These *Efforts* are subsumed within the procedures of litigation itself. Parties are successful in their *Efforts* to the extent the judge (or jury) decides that the origins of *Trouble* are as a party claims. Thus, the end result of successful *Efforts* is that a judge or jury *Restores* the *Steady State* by granting relief to the party whose version of *Trouble* is the right one.

To recapitulate, parties first come to litigation with divergent versions of *Trouble*. The court's job is to finish the story the "right" way so that a party's story makes sense. A bare bones representation of this narrative scheme would be as follows:

Joe's Story

Steady State [already happened]: Dave and I were talking.
Trouble [already happened]: Dave punched me.
Efforts [is happening]: I am showing and will show that Dave owes me money for my injuries.
Restoration of Steady State [should happen]: Dave pays me money.
Coda [should happen]: Justice is done.

Dave's Story

Steady State [already happened]: Joe and I were talking.
Trouble [already happened]: Joe swung his arm to punch me. As a

[35] A leading text on trial advocacy describes developing a theory of the case as an "ongoing process of developing logical, consistent positions on disputed facts and integrating them harmoniously with the undisputed facts to create a persuasive story of what really happened." THOMAS A. MAUET, TRIAL TECHNIQUES 508 (6th ed. 2002).

reflex, I hit him.
Efforts [is happening]: I am showing and will show that this case must be dismissed.
Restoration of Steady State [should happen]: This case is dismissed.
Coda [should happen]: Justice is done.

Once the litigation is concluded, the "true" plot of the story can now be told completely and definitively. Either Joe's right, or Dave's right, or some combination thereof is right. Such a story – its fuzziness and indeterminacy stripped away – is familiar to every first-year law student, for this is almost invariably the narrative told in judicial opinions:[36]

Steady State: Facts of Case.
Trouble: Facts of Case.
Efforts: Procedural History.
Restoration/Transformation of Steady State: Decision of court/entry of judgment.
Coda: Justice is done.[37]

Even this brief tour highlights an important dimension of litigation. The engine that drives litigation is a kind of anxiety about story completion. "Facts" need to be "found." The goal of an advocate is to persuade the decision-maker that the advocate's story is the right one, and if the advocate's story is the right one, then the "ending" – that is, the *Restoration* or *Transformation* of the *Steady State* – flows from it.[38] In this sense, the *Efforts* are a contest about who caused the *Trouble*, and "finding" who did determines what the proper *Restoration* should be. For example, a plaintiff in a tort case seeks to convince the decision-maker that the *Trouble* was due to defendant's negligence. If it is, the rest of the story *must* be a judgment by the judge or jury in favor of plaintiff in order to return plaintiff to the *Steady State* before the *Trouble* began. End of story. Another ending – entry of judgment in favor of the defendant – would feel hollow and wrong in light of this decision-maker's understanding of the *Steady*

[36] I have argued elsewhere that this retelling necessarily distorts the narrative indeterminacy that is the hallmark of contested litigation prior to the rendering of a judicial decision. Robert Rubinson, *The Polyphonic Courtroom: Expanding the Possibilities of Judicial Discourse*, 101 DICK. L. REV. 3, 4 (1996).

[37] The final component – the *Coda* – reaffirms the power of law to restore the moral and, by extension, social order. While on occasion explicitly referred to in judicial opinions, the *Coda* is most frequently implied.

[38] This point recalls Ronald Dworkin's notion that lines of precedent constitute a continuing story. RONALD DWORKIN, LAW'S EMPIRE 228-32 (1986). My concern, however, is not with appellate or even judicial decision-making per se, but with how the narrative of litigation influences the resolution of conflict.

State and *Trouble*. Unless, of course, you view the *Trouble* as not being caused by defendant's negligence and the *Trouble* as the commencement of meritless litigation by the Plaintiff: in that case, entry of judgment in favor of the defendant would seem to be the natural ending.[39]

B. The Story of Litigation as Morality Tale

The competing stories at issue in litigation tend to have common elements. Recall the disjunctive elements in the Austere Definition.[40] The first disjunctive element relates to the nature of the *Trouble* – that it consists "of circumstances attributable to human agency or susceptible to change by human intervention." In litigation, the crux of virtually all claims is that the *Trouble* for which redress is sought *must* be attributable to a human agent.[41] Otherwise the whole point of litigation – in civil cases, the ordering of one or more parties to do or give something for the benefit of one or more parties, or, in criminal cases, the imposition of a penalty – would be meaningless.

Moreover, and this is critical, the premise of a claim in litigation is that circumstances are virtually always attributable to a *morally corrupted* human agency. Acts that constitute contested facts in litigation – commission of an intentional or unintentional tort, violation of a statute with corresponding civil or criminal penalties, breaching a contract – are almost invariably framed as *moral* failings.[42] Things do not

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[39] It has been noted that sensitivity to this aspect of narrative – its ability to foreclose the possibility of alternative endings – is the hallmark of effective advocacy. *See* Sara Cobb & Janet Rifkin, *Neutrality as a Discursive Practice: The Construction and Transformation of Narratives in Community Mediation*, 11 STUD. L. POL. & SOC. 69, 72 (1991); AMSTERDAM & BRUNER, *supra* note 23, at 133.

[40] *See supra* text accompanying note 33.

[41] The exceptions – no fault divorce, no fault automobile insurance – are remarkable in that they are so few and their adoption was enormously difficult and controversial because they are so discordant with the "story" I am describing. *See, e.g.*, PHILIP B. HEYMANN & LANCE LIEBMAN, THE SOCIAL RESPONSIBILITY OF LAWYERS: CASE STUDIES 309-335 (1988) (describing the legislative hurdles facing proponents of no fault automobile insurance).

[42] Empirical evidence also suggests that litigants themselves associate litigation – as opposed to more informal means of dispute resolution – in moral terms. *See* Sally Engle Merry & Susan S. Silbey, *What Do Plaintiffs Want?: Reexamining the Concept of Dispute*, 9 JUST. SYS. J. 151, 172 (1984) (in conducting an ethnographic study of three small American neighborhoods, authors found that when "[w]hen people do bring interpersonal disputes to court, they tend to be . . . problems in which the moral values at stake appear sufficiently important to outweigh the condemnation" associated with commencing litigation). It is interesting to note that there are powerful public policy reasons to avoid this explicitly "moral" discourse in divorce, Worker's Compensation, and automobile accident litigation - the rare areas of law that are explicitly "no fault." *See, e.g.*, HEYMANN & LIEBMAN, supra note 41, at 310-312 (1988) (discussing the expense, volume, and imprecision of personal injury cases involving automobiles and the trend towards "no-fault" cases); Jane C. Murphy, *Rules, Responsibility and Commitment to Children: The New Language of Morality in*

happen situationally, or circumstantially, or because of divergent perspectives and experiences on seemingly "identical" events.[43]

This moral dimension ups the ante of the rest of the story. The *Efforts* at redress now take on the gravity of a moral crusade, with the court (judge, jury or both) cast as the hero empowered to restore moral order to the world. As a result, the *Restoration* of the *Steady State* takes on the seriousness of righting a moral universe that is out of joint due to the immoral acts of another party. And, of course, it is almost inevitable that a party defending against a claim of moral culpability will fight back in kind by labeling the other party as a morally culpable agent who is asserting a meritless claim, or, in a standard strategy in civil litigation, has engaged in independently wrongful acts that are set forth in counterclaims.[44] The decision-maker, now an actor in the drama, must vindicate goodness by identifying and rewarding the "good" party and condemning and punishing the "bad" party.[45] Each side struggles to generate intense emotional responses

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Family Law, 60 UNIV. PITT. L. REV. 1111, 1154 (1999) (describing how divorce in the "fault era" involved rampant "collusion and perjury"). Of course, even these areas are, in many respects, hardly purely "no fault." HEYMANN & LIEBMAN, *supra* note 41, at 313; Murphy, *supra* note 41, at 1154-1203 (describing the "new moral discourse" of family law).

[43] A powerful psychological force – usually called the "prime" or "fundamental attribution error" – is also at work here. This tendency encourages people "to attribute their own actions to situational factors . . . and the actions of others to stable personality traits." Paul Brest & Linda Krieger, *On Teaching Professional Judgment*, 69 WASH. L. REV. 526, 548 (1994); Lee Ross, *The Intuitive Psychologist and His Shortcomings, in* 10 ADVANCES IN EXPERIMENTAL SOCIAL PSYCHOLOGY 174, 184 (Leonard Berkowitz ed., 1977). *See also* AMSTERDAM & BRUNER, *supra* note 23, at 39 ("[h]umans seem to find it easy and natural to categorize people's actions as intentional; they have much more difficulty seeing people's behaviors as, say, circumstantially or structurally determined"). What makes this "error" particularly troubling is social science research demonstrating that traits associated with good morals – such as honesty – are acutely sensitive to context. For example, in a pioneering series of studies, Hugh Hartshorne and M.A. May found that while many schoolchildren cheat on school exams when given the opportunity to do so, there was not a group of "cheaters" who consistently cheated; rather, some students cheated under certain circumstances (for example, depending on what was being tested or where the test was administered) while others cheated under other circumstances. Hugh Hartshorne & Mark May, *Studies in the Organization of Character*, READINGS IN CHILD DEVELOPMENT 190 (H. Munisinger ed., 1971).

[44] *See* William L.F. Felstiner, Richard L. Abel & Austin Sarat, *The Emergence and Transformation of Disputes: Naming, Blaming, Claiming . . .*, 15 L. & SOC. REV. 631, 641 (1980-1981) ("litigation . . . may intensify the disputant's moral judgment and focus blame"). Criminal practice contains its own version of fighting morality with morality: while the essence of prosecution (and of the criminal law generally) is invariably that the accused is immoral, a standard defense is that prosecutors and/or law enforcement are corrupt, engaging in a cover-up, incompetent, overreaching, etc. My point here is not whether such stories are true or not, but that the adversarial system by its nature generates this mode of discourse.

[45] Such a contest reflects deeply held cultural norms that create a binary universe: there is "us" – the good – and "the other" – the bad, with the distinction being framed in religious or moral terms. Such a story "draws the battle lines between 'the sons of light' and

on the part of our decision-maker/hero so that the hero will do the right thing: empathy for the victim and outrage, anger, resentment at the moral failings of the wrongdoer.[46]

Given these qualities, the story of litigation assumes the fervor of a religious crusade. The "zealousness" so often extolled in litigation tends to create a binary moral universe in which one's client has moral integrity and the opposing party does not. Indeed, it is no accident that the word "zealous" itself arose in a religious context.[47] Interestingly, the judge – the presiding authority empowered to vindicate morality – in many ways acts as a kind of divinity, or at least a representative of a divine-like higher power, meting out judgments in accordance with a moral ledger. There is linguistic evidence for this – particularly the "prayer for relief" that concludes a complaint in civil litigation – but it also manifests itself physically: the priest-like robes worn by judges, the elevated bench set off from the earthly world below. There is also something otherworldly in the studied detachment that is the conventional *sine qua non* of effective judging.[48]

Finally, the vindications of morality issued by judges – and the stories they tell about them – reflect the moral foundation of law. In Amsterdam and Bruner's phrase, stories in adjudication "relate the Grand and Timeless Principles of a *corpus juris* to the current particularities of . . . cases."[49] In other words, stories in litigation carry far more freight than just sorting parties into good and bad; their telling reaffirms and instantiates "law" in concrete particulars, thereby vindicating the culturally defined norms represented by "law." Indeed, the very grandness and timelessness of "law" means that it can only manifest itself in particulars.[50] These stories are thus the only way we have

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the 'sons of darkness.'" AMSTERDAM & BRUNER, *supra* note 23, at 83-84, *quoting* ELAINE PAGELS, THE ORIGIN OF SATAN 105 (1995).

[46] An interesting tension exists in this aspect of *Efforts* in litigation. It should come as no surprise that "[t]he experiences that lead people to litigate are often highly emotional." Jean R. Sternlight, *Lawyers' Representation of Clients in Mediation: Using Economics and Psychology to Structure Advocacy in a Nonadversarial Setting*, 14 OHIO ST. J. DISP. RESOL. 269, 303 (1999). While clients may be frustrated at their inability to "vent" these emotions, effective advocacy often involves eliciting such emotions on the part of the decision-maker. At the same time, it is at the core of our conception of "law" that it has nothing to do with emotion, and everything to do with the rational application of legal principles to facts. This disconnect raises important inconsistencies between how adjudication actually works – usually through a carefully calibrated appeal to emotion – and how we say it should work – a "blind," rational application of facts to law.

[47] *See* WEBSTER'S NINTH NEW COLLEGIATE DICTIONARY 1370 (1988) (the "zealots" were "a fanatical sect arising in Judea during the first century A.D."). The word retains its religious overtones through the phrase a "religious zealot."

[48] Rubinson, *supra* note 36, at 31.

[49] AMSTERDAM & BRUNER, *supra* note 23, at 141.

[50] This notion plays out in many standard principles of adjudication and jurisprudence, from the requirement that jurisdiction be limited to an actual "case" or "controversy" (*see*

to get at what "law" is – a process that strongly evokes the descriptions of divine happenings on earth so central to religious scripture.

Litigation therefore presupposes that a corrupted moral agent has disrupted an ordered, moral universe. The decision-maker/hero must intervene to right these wrongs. Such a meta-narrative profoundly influences the stories told in litigation. It determines where a story begins and ends, identifies which facts are relevant in a general and evidentiary sense, suggests what remedies are appropriate or inappropriate, and generates particular emotional responses on the part of the parties and on the part of decision-makers.

In the end, litigation is about who is good and who is not and what to do about it. This moral vision is the foundation of what a case *is* in litigation.

IV. The Story of Mediation

The story of litigation has been so thoroughly internalized by litigants, judges, and lawyers alike that it operates below the level of consciousness. That is why it has not been necessary to describe what litigation is; everybody – lawyers and non-lawyers alike – knows what it is. The purpose of the preceding discussion, therefore, was to examine a process that is usually taken for granted in an unfamiliar way – an attempt to, in other words, make the familiar strange.[51]

In contrast, for a culture steeped in litigation, the risk in approaching mediation is in underestimating its strangeness. In its more sophisticated forms, mediation is bizarre indeed: it proceeds from fundamentally different premises as to what resolving disputes is about and, even more fundamentally, as to what a dispute is. Or, to put it in terms of my analysis thus far, it tells a different story.

Before getting to this story, however, mediation's relative unfamiliarity warrants some discussion of what it is and the contexts in which it is practiced.

A. The Basics of Mediation

The very success of mediation has spawned a growing diversity of proceedings that carry that label. This is an interesting trend in and of itself. Given how the adversary system often acts, as Carrie Menkel-Meadow has put it, "like a great whale" that "seems to swallow up any

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Lea Brilmayer, *The Jurisprudence of Article III: Perspectives on the "Case" or "Controversy" Requirement*, 93 Harv. L. Rev. 297 (1979)) to the unfolding of the "common law" through the adjudication of specific cases.

[51] The significance of "making the familiar strange" is an important theme in Amsterdam & Bruner, *supra* note 23, at 4, and a goal to which I will return in discussing counseling clients about mediation. *See infra* text accompanying notes 143-69.

effort to modify or transform it,"[52] "Mediation" is sometimes seen as a subspecies of litigation – glorified settlement conferences in which a "mediator" will advise parties what a case is "worth" or what a "fair" resolution would be.[53] Moreover, legislation has attempted to "mandate" mediation[54] or empower a mediator to "recommend" a proper resolution to a judge,[55] both of which are fundamentally inconsistent with the essence of mediation.[56] Depending on the particulars (and this is no modest caveat – particulars can indeed be crucial), such forms can blend into – or at least towards – a more adversarial process.

Moreover, mediation is practiced in a dizzying variety of controversies – divorce, disputes between or within business organizations,[57] community disputes,[58] disputes concerning the environment,[59] conflicts between students at schools,[60] criminal matters (usually called "victim-offender mediation"),[61] international disputes,[62] virtually any

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[52] Carrie Menkel-Meadow, *The Trouble with the Adversary System in a Postmodern Multicultural World*, 38 WM. & MARY L. REV. 5, 40 (1996).

[53] *See infra* text accompanying note 65.

[54] *See* Trina Grillo, *The Mediation Alternative: Process Dangers for Women*, 1991 YALE L. J. 1545, 1547 (1991) (collecting authorities). Some have argued that these provisions are advisable and consistent with the principles of mediation so long as they mandate only the *process* of mediation, not a particular result, while others argue that "mandated mediation" is an oxymoron in that a foundation of mediation is that it be a voluntary process. *Id.* at 1581-1585. For a discussion of the voluntariness of mediation, *see infra* text accompanying notes 72-75.

[55] A primary example is California, which enables local jurisdictions to permit mediators to "submit a recommendation to the court as to the custody of or visitation with a child." CAL. FAM. CODE § 3183(a). Such provisions have generated substantial criticism. *See* Grillo, *supra* note 54, at 1588.

[56] *See infra* text accompanying notes 82, 92-110.

[57] *See* CATHY A. COSTANTINO & CHRISTINA SICKLES MERCHANT, DESIGNING CONFLICT MANAGEMENT SYSTEMS: A GUIDE TO CREATING PRODUCTIVE AND HEALTHY ORGANIZATIONS (1996) (detailing the uses of ADR and mediation for conflicts within organizations).

[58] *See, e.g*, THE POSSIBILITY OF POPULAR JUSTICE: A CASE STUDY OF COMMUNITY MEDIATION IN THE UNITED STATES (Sally Engle Merry & Neil Milner eds., 1995); Cobb & Rifkin, *supra* note 39.

[59] Lawrence Susskind, *Environmental Mediation and the Accountability Problem*, 6 VT. L. REV. 1 (1981).

[60] William S. Haft & Elaine R. Weiss, *Peer Mediation in Schools: Expectations and Evaluations*, 3 HARV. NEGOT. L. REV. 213 (1998); Kelly Rozmus, *Peer Mediation Programs in Schools: Resolving Classroom Conflict But Raising Ethical Concerns?*, 26 J.L. & EDUC. 69 (1997).

[61] Mark William Bakker, *Repairing the Breach and Reconciling the Discordant: Mediation in the Criminal Justice System*, 72 N.C. L. REV. 1479 (1994); Jennifer Gerarda Brown, *The Use of Mediation to Resolve Criminal Cases: A Procedural Critique*, 43 EMORY L.J. 1247 (1994).

[62] Judd Epstein, *The Use of Comparative Law in Commercial International Arbitration and Commercial Mediation*, 75 TUL. L. REV. 913 (2001).

dispute that is or could be the subject of a lawsuit[63] - that discussions of mediation often assume that "mediation" happens to have the characteristics of the form of mediation with which the people doing the discussing are familiar.[64] Scholars themselves are also hardly uniform in their views: even within the last decade, debates have erupted over the efficacy of newly categorized "models" of or "approaches" to mediation, such as "facilitative" versus "evaluative" mediation[65] and

[63] For a review of the preceding and other applications of mediation, *see* KIMBERLEE K. KOVACH, MEDIATION: PRINCIPLES AND PRACTICE 339-357 (2d ed. 2000).

[64] For example, the subject matter area that has generated the most debate about the appropriateness of mediation – family law – is in many respects unique in its aggregation of intense emotional, political, and social stakes for participants. Other types of frequently mediated disputes may present a very different set of circumstances, and the resulting mediation can therefore be quite different. Nevertheless, critiques of mediation grounded in the particular circumstances at play in family law disputes are extended more generally to mediation as a whole. *See generally* Grillo, *supra* note 54.

[65] Leonard Riskin first articulated this distinction. Leonard L. Riskin, *Understanding Mediator Orientations, Strategies and Techniques,* 12 ALTERNATIVES TO HIGH COST LITIG. 111 (1994); Leonard L. Riskin, *Understanding Mediators' Orientations, Strategies, and Techniques: A Grid for the Perplexed*, 1 HARV. NEGOT. L. REV. 7 (1996). As its name implies, "facilitative" mediation focuses exclusively on facilitating communication between the parties. Facilitative mediators do not independently suggest solutions, offer no assessment of the strength of a parties' positions or "case," and do not predict what will happen if parties fail to reach a mediated settlement. In contrast, an evaluative mediator may suggest and argue in favor of certain solutions, may assess the strength of a parties' legal or non-legal position, and may predict what will happen if parties do not reach a mediated settlement. It should be noted that the spectrum of control manifested by mediators is sometimes expressed under different nomenclature in the literature. *See, e.g.*, Edwin H. Greenebaum, *On Teaching Mediation*, 1999 J. DISP. RESOL. 115, 130 (arguing that mediators "control the substance and process of parties' negotiations" across a spectrum "from facilitator, to consultant, to advisor, to guardian"). Moreover, Riskin himself has recently offered revisions to his enormously influential categories. Leonard L. Riskin, *Decisionmaking in Mediation: The New Old Grid and the New New Grid System*, 79 NOTRE DAME L. REV. 1, 30 (2003) (proposing the substitution of the terms "directive" and "elicitive" for "evaluative" and "facilitative").

In any event, categorizing mediators as "facilitative" or "evaluative" has generated extensive academic debates about which approach is best. *See, e.g.*, Carrie Menkel-Meadow, *When Dispute Resolution Begets Disputes of Its Own: Conflicts Among Dispute Professionals*, 44 U.C.L.A. L. REV. 1871, 1887 (1997); Joseph B. Stulberg, *Facilitative Versus Evaluative Mediator Orientations: Piercing the "Grid" Lock*, 24 FLA. ST. U.L. REV. 985 (1997). Other commentators argue (in my view accurately) that the distinction has been overblown and that virtually all mediations likely contain elements of both approaches, albeit with different degrees of emphasis. *See, e.g.*, Jacqueline M. Nolan-Haley, *Lawyers, Non-Lawyers and Mediation: Rethinking the Professional Monopoly from a Problem-Solving Perspective*, 7 HARV. NEGOT. L. REV. 235, 276-280 (2002) (arguing that all mediations contains explicit or implicit "evaluation" by the mediator). That said, an extreme "evaluative approach" does tend to adopt the norms of the adversary system, which, in turn, renders this approach largely if not fully consistent with how the adversary system shapes and resolves conflict. Not surprisingly, "evaluative mediation" resonates well with conventional modes of lawyering and, as a result, lawyers tend to choose and prefer an evaluative approach on the part of mediators. J. Brad Reich, *Attorney v. Client: Creating a Mechanism to Address Competing Process Interests in Lawyer-Driven Mediation*, 26 S. ILL. U.L.J. 183, 188-192 (2002). In contrast, what is called "facilitative mediation" tends to create

"transformative" versus "transactional" mediation.[66] Moreover, given the flexibility and openness inherent in the mediation process, the tone and flavor of mediation is particularly subject to the personality, skills, philosophy, and sophistication of a particular mediator. Indeed, depending on the jurisdiction and the type of mediation, a given mediator may or may not be a lawyer[67] or may not even have any specialized training in mediation at all.[68]

Even with this diversity of opinion about mediation,[69] there remains a measure of consensus among commentators at least about what mediation should be, particularly at the narrative level at which I wish to approach it. A leading mediation text offers a representative – albeit not a particularly evocative – example:

> [M]ediation is generally defined as the intervention in a negotiation or a conflict of an acceptable third party who has limited or no authoritative decision-making power but who assists the involved parties in voluntarily reaching a mutually acceptable settlement of

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different narratives and different disputes. To the extent these categories represent meaningful distinctions, my references to mediation assume a "facilitative" approach.

[66] *See* ROBERT A. BARUCH BUSH & JOSEPH P. FOLGER, THE PROMISE OF MEDIATION: RESPONDING TO CONFLICT THROUGH EMPOWERMENT AND RECOGNITION (1994). Proponents of "transformative mediation" argue that mediation has classically been concerned with the resolution of a particular conflict or "transaction." This focus on "settlement" – a vestige of adjudication – constrains what mediation can achieve. The goal of transformative mediation is both different and more ambitious: instead of focusing on settling a particular dispute, transformative mediation seeks to transform the quality of future interactions among the parties themselves. Thus, "[s]uccess is measured, in transformative mediation, not by settlement but by party shifts toward strength, responsiveness and constructive interaction." Robert A. Baruch Bush, *Handling Workplace Conflict: Why Transformative Mediation?*, 18 HOFSTRA LAB. & EMP. L.J. 367, 369-70 (2001). Put another way, transformative mediation uses specific disputes as a means to engender broader change in how the parties interact.

[67] Nolan-Haley, *supra* note 65, at 254-56 . As lawyers have become increasingly involved in mediation, the issue of whether mediators need to be lawyers has generated "[t]ensions between legal and non-legal professionals who practice mediation." *Id.* at 256.

[68] This diversity of qualifications exists even in the jurisdictions that mandate divorce mediation. *See* Craig A. McEwan, Nancy H. Rogers & Richard J. Maiman, *Bring in the Lawyers: Challenging the Dominant Approaches to Ensuring Fairness in Divorce Mediation*, 79 MINN. L. REV. 1317, 1396-97 (1995) (collecting "mediator qualifications" in "jurisdictions with regulated mandatory mediation"). Nevertheless, the continuing growth of mediation has led more states to require some measure of certification for mediators. Nolan-Haley, *supra* note 65, at 244 n.34 (collecting recent efforts to require licensing of mediators).

[69] The same diversity also applies to litigation. Litigation itself is extraordinarily diverse, ranging from a criminal jury trial (a sort of baseline paradigm of "zealous advocacy") to commercial litigation, matters primarily involving poor defendants (landlord-tenant and consumer debt collection matters in particular) that are usually litigated in separate "high volume" fora, administrative proceedings of numerous varieties, etc. This fundamental diversity is only rarely recognized in descriptions of the adversary system. For an exception, see Barbara Bezdek, *Silence in the Court: Participation and Subordination of Poor Tenants' Voices in Legal Process*, 20 HOFSTRA L. REV. 533 (1992).

> issues in dispute. In addition to addressing substantive issues, mediation may also establish or strengthen relationships of trust and respect between parties or terminate relationships in a manner that minimizes costs and psychological harm.[70]

A more succinct definition, found widely in the literature, is that mediation is "facilitated negotiation."[71]

Neither definition expresses how radically different mediation can be from litigation. Rather than attempt some sort of systematic point by point procedural comparison – a futile exercise given that the two processes do not have parallel points to compare – I will attempt to dig deeper by describing six conceptual differences between litigation and mediation.

1. Actors and Owners

Once litigation is commenced, parties are actors compelled by force of law to act within a system: this is most obvious in criminal cases, where criminal defendants obviously cannot unilaterally "opt out" of a case, but it is also true in civil litigation, where one party can compel the participation of another party or risk entry of a default judgment. Moreover, all litigation operates in the shadow of a simple fact: a court can impose its judgments by force on parties – a force that Robert Cover famously characterized as a state-sponsored resort to "violence."[72]

In contrast, mediation is a voluntary process.[73] While this picture has been clouded by the rise of "court-referred" and "court-ordered" mediation and enforceable "agreements to mediate,"[74] a preeminent – if not the greatest – value in mediation is "the principle of self-determination"[75] through which parties "own" the process. The ultimate way to "own" a process is to have power to decide whether to engage

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[70] CHRISTOPHER W. MOORE, THE MEDIATION PROCESS: PRACTICAL STRATEGIES FOR RESOLVING CONFLICT 15 (2d ed. 1998).

[71] *See, e.g.*, KOVACH, *supra* note 63, at 23.

[72] Robert Cover, *Violence and the Word*, 95 YALE L.J. 1601, 1601 (1986). As Cover put it, "[l]egal interpretation takes place in a field of pain and death . . . A judge articulates her understanding of a text, and as a result, somebody loses his freedom, his property, his children, even his life." *Id.*

[73] KOVACH, *supra* note 63, at 24.

[74] There are inevitable tensions when the adversary system – with its discourse of orders and compulsions – starts to "refer matters to" and "enforce" a "voluntary" process like mediation. For an excellent overview of these tensions, *see* James J. Alfini & Catherine G. McCabe, *Mediating in the Shadow of the Courts: A Survey of the Emerging Case Law*, 54 ARK. L. REV. 171 (2001). *See also* Sarah Rudolph Cole, *Managerial Litigants? The Overlooked Problem of Party Autonomy in Dispute Resolution*, 51 HASTINGS L. J. 1199 (2000) (examining the tension between courts and litigants who wish a court to validate non-judicial forms of dispute resolution).

[75] Joint Code for Mediators, I, *reprinted in* KOVACH, *supra* note 63, at 376.

in it or not. Put another way, mediation must sell itself to parties because the parties can walk away without buying.

2. *Perspectives*

As I have already described, litigation is consumed with determining "what happened" in order to determine liability.[76] Judges and juries decide "what happened" and sort liability (or penalties) accordingly.

In contrast, mediation rejects the idea that "what happened" is a unitary or stable "truth" to be found "out there." Instead, a primary – if not the primary – thrust of mediation is that conflict resolution entails some recognition on the part of disputants that "what happened" is informed by perspective. Literature on mediation is rife with this idea: a critical component of mediation is that parties "begin to acknowledge another view of the situation,"[77] or "[t]he challenge for mediation is to somehow lead people to a situation where they can, at the very least, allow two contending perceptions to coexist,"[78] or to "enable each person to see the other as the victim, and in the process, build a new moral framework."[79] This is, of course, no easy task for almost by definition, parties to a dispute "hear completely different music and have no appreciation for another view."[80]

To encourage parties to move beyond their perspective, some mediators ask parties to "restate the opposing view" as a means to promote their understanding of the other side's perspective.[81] This alone highlights the utterly different dispute resolution universe inhabited by mediation: it is impossible to imagine such a mechanism having any meaning – let alone usefulness – in the context of litigation.

3. *Rights and Wrongs in Mediation*

Given the importance of "perspective" in mediation, the very notion of "judgment" is alien to mediation, as are notions of "fault" and even "responsibility." Issuing "judgments" (both in its legal and non-

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[76] *See supra* text accompanying note 35.

[77] KOVACH, *supra* note 63, at 140.

[78] Alan C. Tidwell, *Not Effective Communication but Effective Persuasion*, 12 MEDIATION Q. 4, 5 (1995). For an especially vivid demonstration of how a skilled mediator can accomplish this, see Sara Cobb, *Creating Sacred Space: Toward A Second-Generation Dispute Resolution Practice*, 28 FORDHAM L.J. 1017, 1024-1027 (2001).

[79] Cobb, supra note 78, at 1031.

[80] KOVACH, *supra* note 63, at 160.

[81] *Id.* An affirmative restating of another perspective – sometimes called "considering the opposite" in the literature of social psychology – has been shown to assist people in recognizing the validity of alternative perspectives. *See* Rubinson, *supra* note 36, at 32-34 (1996). I discuss this technique at greater length *infra* text accompanying notes 162-69.

legal sense) and finding "fault" or "responsibility" impede mediation because mediators want parties to be the authors of their own mediation. A morality tale which identifies one party as "moral" necessarily brands the other party as not, and the "immoral" party is not likely to "own" a process that produces such a result.[82]

4. *"Time" in Mediation*

Litigation looks backward in time: it seeks to resolve disputes through historical reconstruction of past events. In contrast, mediation focuses on what needs to be done to resolve disputes in light of present and future interests.[83] This is not to say that history – or at least perspectives on history – does not have its place in mediation: indeed, history in mediation might offer clues about how to resolve controversy in the here and now, or parties might require validation of their perspective on history – and the catharsis that describing that history might bring – as necessary before meaningful progress can be made towards resolving controversy.[84] Nevertheless, the past in mediation is typically not the foundation for resolving conflict.[85]

Put another way, the present moment embodies the lifeblood of mediation because the here and now contains the different needs that people have and the ways that these needs can be satisfied by comple-

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[82] As one commentator notes, an "impediment to problem solving is the reluctance of the parties to share responsibility for a dispute, let alone its resolution. The most common reaction is an attempt to allocate blame. The mediator must get the parties to recognize that mediation is a problem solving process which uses collaboration, and that each person must share the responsibility for the process." KOVACH, *supra* note 63, at 163. Or, to put this in more narrative terms, a morality tale necessarily closes off other tales in which moral roles are reversed or the "morality" is subject to perspective. *See* Cobb & Rifkin, *supra* note 39, at 72 (a story "is effective as a story *because* it closes off the possibility of multiple interpretations") (emphasis in original); AMSTERDAM & BRUNER, *supra* note 23, at 133 ("certain narratives drive to certain endings and not others").

[83] Cobb & Rifkin, *supra* note 39, at 71 ("[t]he mediators interest in the story is not in the past but in the present and the future; thus the story is an instrument through which mediators may shift attention from retrospective positions and accounts to prospective stories, effectively disconnecting the problem from its history, from its roots").

[84] Dealing forthrightly and constructively with a party's emotions in light of the history of a dispute is viewed as a fundamental skill that successful mediators should have. *See, e.g.*, MOORE, *supra* note 70, at 162-69; KOVACH, *supra* note 63, at 48-49. Indeed, an unreflective focus only on the future might lead mediators to discount the past or, worse, view it as "irrelevant" with extraordinarily damaging results to parties for whom the past provides context and meaning. Grillo, *supra* note 54, at 1563-64.

[85] It is interesting to note how this aspect of mediation plays out in debates about the efficacy of the adversary system. One strain in the critical literature on the adversary system doubts the ability of adversarial proceedings to "ascertain truth." *See, e.g.*, I.P. CALLISON, COURTS OF INJUSTICE 569-71 (1956) (arguing against proposition that "our contentious system has great merit as a means of getting at the truth"). Mediation, however, sidesteps this issue and rather implicitly questions whether it is necessary (or possible) to get at "truth" in order to resolve disputes.

menting – or at least not impinging – on the needs of others.[86] People might want services, goods, apologies, jobs, arrangements among the parties or among others, an opportunity to "tell my side of the story." Mediation seeks to accommodate what people want or need *now* to resolve a controversy.

5. *Narrowing and Expanding*

Litigation seeks to "narrow issues" – and thereby the contested narrative – through a panoply of procedural and substantive mechanisms: responsive pleadings, motions to dismiss, pretrial orders, the requirement of relevance.[87] Indeed, a critical quality of legal rules themselves is to narrow which "facts" have meaning in the contest and which do not. Legal rules identify which circumstances are relevant and establish temporal frames to define wrongdoing: a tort, a breach of contract, a crime – all delineate what and when factual circumstances are meaningful to the resolution of controversy in litigation.[88]

In contrast, rather than narrowing issues, the mediation process tends to embrace openness in dialogue. Such openness encourages parties to discuss and disclose anything that would facilitate the resolution of controversy. The idea is that the more circumstances and possibilities are shared by the parties to mediation, the greater the chances that the parties, with the assistance of the mediator, can find creative ways to resolve disputes.[89]

6. *Ex Parte in Spades: The "Private Caucus"*

Judges are prohibited in most instances in from engaging in *ex parte* communications.[90] This is a function of the ostensible "neutral-

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[86] This is related to the idea underlying "non-zero sum" solutions and the distinction between "positions" and "interests" that are a major component in literature on negotiation. *See* Carrie Menkel-Meadow, *Toward Another View of Legal Negotiation: The Structure of Problem Solving*, 31 U.C.L.A. L. REV. 754 (1984); ROGER FISHER & WILLIAM URY, GETTING TO YES: NEGOTIATING AGREEMENT WITHOUT GIVING IN 40-55 (2d ed. 1991).

[87] Carrie Menkel-Meadow has argued persuasively that this narrowing process begins even as lawyers fit client stories into legal categories prior to the commencement of litigation. Carrie Menkel-Meadow, *The Transformation of Disputes By Lawyers: What the Dispute Paradigm Does and Does Not Tell Us*, 1985 J. DISP. RESOL. 25, 31-34 (1985).

[88] Robert Rubinson, *Attorney Fact-Finding, Ethical Decision-Making and the Methodology of Law*, 45 ST. LOUIS UNIV. L.J. 1185, 1217-1218 (2001).

[89] This aspect of mediation resonates with literature on problem solving generally, which holds that problem solvers are most effective when they generate as many plausible solutions to a problem as possible before evaluating the effectiveness of each. *See, e.g.*, Greenebaum, *supra* note 65, at 123.

[90] *See* ABA Code of Judicial Conduct Canon 3B(7) ("A judge shall not initiate, permit, or consider ex parte communications, or consider other communications made to the judge outside the presence of the parties concerning a pending or impending proceeding").

ity" and "detachment" of judges: since judges have to determine facts, rights, and liabilities, they must be protected from the persuasive power of a lone advocate not subject to a response.

In contrast, what in litigation is called "ex parte communications" is an integral and accepted part of mediation. The term of art for these types of communications is "private caucus." Private caucuses enable mediators to meet in private with one party, and thus without the impediment of the other side chilling the communication.[91] Given that the job of the mediator is to facilitate parties in resolving their disputes, these caucuses can be extraordinarily useful, for, among other reasons, the telling of a story in the presence of a party who is predisposed to debate virtually every point of it inhibits the teller from being more open about doubts and possible ways to resolve a dispute.

B. The Non-Story of Mediation

Despite the profound differences between how judges and mediators go about resolving disputes, *parties* to mediation often approach mediation with morality tales in hand. As two commentators on mediation have put it, "all parties struggle to describe themselves as victims; according to the logic of their stories, they are *not* responsible for the set of events that leads to the problem or conflict."[92] As in litigation, each party holds the other party morally culpable and responsible for harm, and thus justice and morality require that the wrongdoer be held to account.

Nevertheless, while the competing narratives that litigants and parties to mediation carry around in their heads prior to entering each process are similar and sometimes identical, litigation and mediation fundamentally diverge in what they do with them. Litigation, as we have seen, confirms and intensifies the good versus evil contours of litigants' stories, with decision-makers in litigation invited into the story as agents of moral vindication. Mediation is utterly different. Parties to mediation might arrive with contradictory versions of *Steady State* to *Trouble*, hankering for vindication of the moral corruption of the other party. And then . . . nothing happens. Or at least nothing happens for a while. Mediators need not and should not choose a true *Trouble* or assume the role of agent of moral vindication. The existence of multiple versions of "what happened" in mediation – with the inconsistent moral "truths" implied by such a

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[91] For a discussion of the uses of the private caucus in the context of mediation, *see* MOORE, *supra* note 70, at 319-26; KOVACH, *supra* note 63, at 164-65.

[92] Cobb & Rifkin, *supra* note 39, at 75 (emphasis in original); WINSLADE & MONK, *supra* note 20, at 7.

divergence – does not generate the anxiety for story completion so characteristic of litigation.

In narrative terms, then, mediation at this level has no story, or at least no great need to generate *a* story. Mediators are not anxious to "find" the "truth" of what happened, but approach dueling narratives with an understanding that dueling narratives are, by definition, what constitute conflict before mediation seeks to resolve it. While parties might – and often do – expend great *Efforts* to convince the mediator that they are right, mediators hope to defuse those *Efforts* in order to encourage parties to focus their attention elsewhere.

Mediators decline the role of hero in another sense as well. A mediator's "power," at least among more sophisticated mediators, derives pragmatically from results and movement generated by the mediation itself. The mediator herself may or may not be responsible for this: if parties are moving towards resolution through some process and dialogue of their own devising with minimal or no intervention on the part of the mediator, then this is a fine mediation indeed.[93]

So what does a mediator do? The mediator proceeds in whatever fashion works to facilitate a resolution of the parties' dispute. "Whatever works" includes an array of possible strategies: retelling each party's version of the *Steady State* to *Trouble* transition in a way that is meaningful (and acceptable) to the participants,[94] enabling participants to see "truth" in different stories about that transition,[95] marginalizing the *Trouble* and the different stories about it in favor of a fresh focus on how participants could construct a new *Steady State* decoupled from the past,[96] and so on. None of these are necessarily exclusive and may be (and often are) used in combination.

C. Mediation as a Story of Collaborative Striving To Resolve Conflict

All of this is not to say that mediation does not embody what I have previously called a "meta-narrative" with elements described by the Austere Definition of Narrative. It does. Not surprisingly, this

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93 This is not to say that a multitude of complications may not come into play, such as instances where there is a power differential among the parties or where one party is "hiding" information from the other party. Some of these complications relate to when mediation is appropriate, and some relate the role attorneys play in the mediation process. *See infra* text accompanying notes 121-22.

94 Cobb & Rifkin, *supra* note 39, at 86 (1991) (describing how mediators can "[w]eave two narratives together to construct positive discursive positions for all disputants"). For an approach to mediation that explicitly draws upon the possibilities of deconstructing and the reconstructing disputants' narratives, *see generally* WINSLADE & MONK, *supra* note 20.

95 *See supra* notes 76-81 and accompanying text.

96 *See supra* notes 83-86 and accompanying text.

narrative profoundly differs from that of litigation. The engine that drives litigation's morality tale is that conflict resolution is a contest between parties, one of whom necessarily represents good and the other necessarily represents bad.[97] As a result, litigation seeks to designate who has committed moral transgressions by breaching legal norms (or, from the perspective of the defendant, who wrongfully accuses others of having done so).[98]

The Story of Mediation subverts these norms by transforming this familiar morality tale into a story of collaboration. This subversion begins through how mediation conceives of conflict itself. Implicit in the Story of Litigation is that conflict represents a breach of the norms of conduct, thereby ripping the social fabric in some way large or small.[99] In contrast, in mediation, conflict *is* a norm of conduct, a necessary byproduct of humans having distinct experiences and personalities and needs. Conflict is thus not necessarily a disruption of the moral order, and, indeed, can sometimes be productive.[100]

Mediation's normalization of conflict, however, cannot eliminate what appears to be a deep-seated human need to understand experience in terms of struggles and strivings. Humans have great difficulty perceiving events as generated by causes beyond our control – what Amsterdam and Bruner evocatively describe as an inability to see events as "One Damn Thing After Another."[101] We must instead "shape them into strivings and adversities, contests and rewards, vanquishings and setbacks."[102] The meta-narrative of litigation maps these "strivings" and "vanquishings" onto the struggle of one party against another and enlists the aid of the court to vindicate justice on behalf of the wronged party. In contrast, the meta-narrative of mediation seeks to map these "strivings" and "vanquishings" onto a collaborative struggle to resolve conflict. This narrative casts all participants as players in a process – collaboration – that is focused on reaching the common goal of successfully resolving or transforming a dispute.[103] This story has moral entailments because collaboration is ac-

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97 AMSTERDAM & BRUNER, *supra* note 23, at 39.

98 *See supra* text accompanying notes 42-46.

99 *See supra* text accompanying note 34.

100 One leading commentator, for example, notes that "conflict can be an exciting and inspiring experience." KOVACH, *supra* note 63, at 3. A substantial literature on conflict resolution at the organizational level tends to view conflict as an inevitable byproduct of human interactions that must be dealt systematically and forthrightly. *See, e.g.*, CATHY A. COSTANTINO & CHRISTINA SICKLES MERCHANT, DESIGNING CONFLICT MANAGEMENT SYSTEMS: A GUIDE TO CREATING PRODUCTIVE AND HEALTHY ORGANIZATIONS 4 (1996) ("conflict is an organizational fact of life, neither good nor bad").

101 AMSTERDAM & BRUNER, *supra* note 23, at 31.

102 *Id.*

103 This difference in stories can also be framed purposively. The goal of litigation is to

cepted as a social and moral good. Unlike litigation, however, this story does not generate a binary moral universe that divides the good from the bad, but, rather, a universe that values collaborative striving to achieve common ground and resolution.

This story places mediators in a role that is very different from the role played by decision-makers in litigation. Rather than being heroes of moral vindication to whom wronged parties appeal for justice, mediators promote and model collaborative striving to overcome conflict. This plays out in many accepted techniques in mediation. Mediators, for example, often seek "commitment" from participants to the process of mediation, although mediators are careful not to extend this commitment to a commitment to agree.[104] This commitment to process is a proxy for a commitment to collaborate to seek to resolve conflict, thus incrementally moving participants away from contested litigation and towards collaborative problem solving. Similarly, mediators often "reframe" participants' statements in order to emphasize "common ground."[105] This is also an effort to move parties away from a morally charged contest and into collaboration. Finally, mediators encourage and model collaboration through a positive message of optimism and progress towards resolution, even when (or, perhaps, especially when) impasse appears likely.[106]

Moreover, mediation approaches the narrative movement from *Efforts* to *Restoration of Steady State* in a very different way than litigation.[107] Whether the *Steady State* is *Restored* or *Transformed* constitutes what I have earlier characterized as a "fork in the road" in the Austere Definition of Narrative.[108] The very language through which litigants seek redress of grievances – to "be made whole," "to pay your debt society" (with its implication that payment of the debt would return the ledger to balance), even the word "remedy" – implies *Restoration*. In contrast, mediation tends to reject *Restoration* as a state to which the parties (and society as whole) should or even can return. Rather, mediation seeks *Transformation* on the part of all disputants so that conflict is resolved.[109] It does so by embracing the

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win, and that means defeating the other party. The goal of mediation is to resolve conflicts, and that means overcoming whatever impediments there are to achieving resolution.

104 *See, e.g.*, KOVACH, *supra* note 63, at 85; Tidwell, *supra* note 78, at 11.

105 *See*, Tidwell, *supra* note 78, at 11-12.

106 Kimberlee Kovach, for example, suggests that mediators do the following when mediation faces impasse: "Use words of encouragement. If any progress at all has been made, acknowledge and positively reinforce it. This can go a long way in motivating further movement." KOVACH, *supra* note 63, at 166

107 *See supra* text accompanying notes 44-46.

108 *See supra* text accompanying note 33.

109 This aspect of mediation goes back to Lon Fuller – a central and early scholar of mediation – who noted that "the central quality of mediation [is] its capacity to reorient

notion that perceptions of the world (including perceptions of the actions of others) are unstable, thus enabling parties to appreciate alternative perspectives as a way to promote resolution of conflict.[110] Mediation, therefore, does embody a plot that adheres to the narrative movement described by the Austere Definition, albeit in ways that are utterly alien to the morality tale of the story of litigation. The story of mediation can be characterized as follows:

Steady State: Whatever Each Party Views as Pre-Conflict
Trouble: Whatever Each Party Views as Constituting Conflict
Efforts: Collaborative Striving To Overcome Conflict as Modeled and Promoted by Mediator
Transformation of Steady State: A New Relationship Among Parties
Coda: Moving On

V. CLIENT COUNSELING AND CONFLICT

So litigation and mediation create distinctive factual and moral worlds, and these worlds can be described narratively. What does this mean for lawyers practicing in the field? If, as I have described, the Story of Litigation and the Story of Mediation create different worlds, "explaining" mediation in a meaningful way is a profound challenge that requires subtlety and creativity. Lawyers and legal educators, as practitioners and teachers of client counseling, should confront the challenge head on. Approaching litigation and mediation in narrative terms offers great promise in meeting this challenge. However, it also poses challenges to more traditional conceptions of the role of lawyers in mediation and in counseling clients about mediation.

A. Lawyers and Mediation

Practitioners of mediation have historically had an uneasy relationship with the practicing bar. Many view lawyers as conflict-inten-

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the parties toward each other, not by imposing rules on them, but by helping them to achieve a new and shared perception of their relationship, a perception that will redirect their attitudes and dispositions toward one another." Lon Fuller, *Mediation – Its Forms and Functions*, 44 S. CAL. L. REV. 305, 325 (1971). *See also* WINSLADE & MONK, *supra* note 20, at 26 (describing stance of mediator as "coauthor" in helping disputants reconstitute their dispute).

My use of the term "*Transformation*" should not be confused with the specific approach to mediation called "transformative mediation." *See supra* note 66. That said, the narrative understanding of "*Transformation*" is largely consistent with "transformative mediation," although theorists and practitioners of transformative mediation hold that mediation should focus not on resolution of a particular conflict, but transformation of parties' interactions with each other. *Id.*

[110] This post-modern note in mediation theory and practice has become more explicit in recent years. *See, e.g.*, WINSLADE & MONK, *supra* note 20, at 3.

sifiers due to training, temperament, and financial self-interest.[111] Indeed, the very rise of mediation may in part be attributable to its promise of moving lawyers to the margins and offering parties a direct voice in resolving their own controversies. As a result, lawyers are viewed in some quarters as at best necessary evils in mediation.[112] Some state statutes go further and empower mediators to ban lawyers from mediation sessions.[113] Moreover, to the extent lawyers in recent years increasingly participate in mediation,[114] the type of mediation favored or assumed to be "mediation" by lawyers – so-called "evaluative mediation"[115] – tends to strip mediation of its more distinctive characteristics. What often remains is something very familiar: an adversarial hearing that adheres to the story of litigation and that, while perhaps resolving conflict, does not differ in a meaningful way from litigation.[116]

Even so, growing numbers of commentators both in and out of the world of mediation view lawyers as potentially constructive forces for promoting the resolution of conflict. Robert J. Gilson and Robert H. Mnookin, for example, drawing on game theory, see a corps of attorneys who adopt a "cooperative" stance as having "the potential for damping rather than exacerbating the conflictual character of litigation."[117] In a different but related vein, Carrie Menkel-Meadow

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111 For a discussion of many lawyers' ignorance or antipathy towards mediation due to "how lawyers look at the world, the economics and structure of contemporary law practice, and the lack of training in mediation," *see* Leonard Riskin, *Mediation and Lawyers*, 43 OHIO ST. L.J. 29, 57-59 (1982). *See also* Sternlight, *supra* note 46, at 315 (describing how lawyers' "economic incentives" and "psychological makeups" may inhibit a negotiated or mediated settlement).

112 *See* KOVACH, *supra* note 63, at 98-99; Sternlight, *supra* note 46, at 269 ("[m]any believe that lawyers' adversarial methods and mindsets are inherently inconsistent with mediation").

113 *See, e.g.*, CAL. FAM. CODE § 4351.5(e) (2002) ("[t]he mediator shall have the authority to exclude counsel from participation in the mediation proceedings where, in the discretion of the mediator, exclusion of counsel is deemed by the mediator to be appropriate or necessary"). *See also* KAN. STAT. ANN. § 23-603(a)(6) (providing that only parties may attend certain family mediation sessions).

114 *See* Sternlight, *supra* note 46, at 277-278 (citing statistics about and describing how attorneys "are . . . accompanying their clients to many mediations").

115 *See supra* text accompanying note 65.

116 *See* Nolan-Haley, *supra* note 65, at 252 (discussing how lawyer's involvement in mediation "has given rise to charges that they are making ADR more adversarial and legalistic"). Some evidence suggests that this is so because lawyers tend to assume that "they 'know it all' about mediation" without the necessary background and training – an assumption that leads these lawyers to adopt a conventional adversarial stance within the mediation process. *See* Susan W. Harrell, *Why Lawyers Attend Mediation Sessions*, 12 MEDIATION Q. 369, 372 (1995).

117 Robert J. Gilson & Robert H. Mnookin, *Disputing through Agents: Cooperation and Conflict between Lawyers in Litigation*, 94 COLUM. L. REV. 509, 510-12 (1994). Gilson and Mnookin, citing the matrimonial bar in San Francisco, argue that this is in fact the case in some contexts. *Id.*

and others hope to replace the prevailing lawyer-as-zealous-advocate paradigm with the notion that effective lawyers are problem solvers.[118] Lawyers as problem solvers bear little resemblance to traditional advocates; they perceive "cases" as embodying a set of needs and interests that might be resolved (or not) depending on the choice of dispute resolution process.[119]

Lawyers can indeed play a crucial role in counseling clients about and appearing with clients in mediation.[120] Lawyers, for example, can help neutralize "power imbalances" between parties that mediation can recapitulate or exacerbate[121] and can protect clients from the sub-

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[118] *See, e.g.*, Carrie J. Menkel-Meadow, *When Winning Isn't Everything: The Lawyer as Problem-Solver*, 28 HOFSTRA L. REV. 905 (2000); Carrie Menkel-Meadow, *The Lawyer as Problem Solver and Third-Party Neutral: Creativity and Non-Partisanship in Lawyering*, 72 TEMPLE L. REV. 785 (1999); Nolan-Haley, *supra* note 65, at 246-249; Paul Brest, *The Responsibility of Law Schools: Educating Lawyers as Counselors and Problem Solvers*, 58 L. & CONTEMP. PROBS. 5 (1995). Some law school casebooks also explicitly adopt this perspective. *See, e.g.*, LEONARD L. RISKIN & JAMES E. WESTBROOK, DISPUTE RESOLUTION AND LAWYERS (2d ed. 1997).

Another line of critique is framed in terms of how lawyers need to take into account the impact that their clients' actions might have on third parties in order to vindicate other values. The two preeminent theorists in this line are William H. Simon, who draws upon "justice" as a value that sometimes trumps client autonomy, and David Luban, who draws upon "common morality" as a key value. *See* WILLIAM H. SIMON, THE PRACTICE OF JUSTICE: A THEORY OF LAWYERS' ETHICS (1998); DAVID LUBAN, LAWYERS AND JUSTICE: AN ETHICAL STUDY (1988). *See also* Rubinson, *supra* note 88, at 1195-1200 (summarizing and contrasting the views of Simon and Luban). A recent colloquium examined these issues in detail. Colloquium, *What Does It Mean To Practice Law "In the Interests of Justice" in the Twenty-First Century?*, 70 FORDHAM L. REV. 1543 (2002).

[119] For an excellent summary of problem-solving lawyering and the literature surrounding it, *see* Nolan-Haley, *supra* note 65, at 247-249.

[120] Despite the obvious significance of such a role for attorneys, it is striking how little has been written on this topic. For two thoughtful exceptions, *see* Sternlight, *supra* note 46, at 275-291(summarizing existing literature on the meaning of advocacy in mediation); McEwan, et al, *supra* note 68. Moreover, there is even less literature on how attorneys should go about counseling clients about the nature of mediation – a primary concern of this Article.

[121] The problem of power differentials among parties to mediation has been the subject of vigorous debate, particularly when the disadvantaged parties are women or minorities. *See, e.g.*, Grillo, *supra* note 54; Lisa G. Lerman, *Mediation of Wife Abuse Cases: The Adverse Impact of Informal Dispute Resolution on Women*, 7 HARV. WOMEN'S L.J. 57 (1984); Penelope Eileen Bryan, *Reclaiming Professionalism: The Lawyer's Role in Divorce Mediation*, 28 FAM. L.Q. 177 (1994); Connie J.A. Beck & Bruce D. Sales, *A Critical Reappraisal of Divorce Mediation Research and Policy*, 6 PSYCHOL. PUB. POL'Y & L. 989 (2000); Richard Delgado et al., *Fairness and Formality: Minimizing the Risk of Prejudice in Alternative Dispute Resolution*, 1985 WIS. L. REV. 1359, 1387-91. *But see* Carrie Menkel-Meadow, *Portia in a Different Voice: Speculations on a Women's Lawyering Process*, 1 BERKELEY WOMEN'S L.J. 39 (1985) (arguing that in some instances mediation is more suitable for "female needs" than litigation). A core problem is that one of the great virtues of mediation – its flexibility and lack of external constraints imposed by legal rules or court-imposed judgments – can also be its greatest weakness: a recourse to rights and rules has long been a path to empowerment, and a process free of such constraints may subtly or not so subtly recapitulate the subordination of already subordinated parties. *See* Grillo, *supra*

tle or not so subtle coercion "bad" mediators can exercise.[122] Lawyers, however, must confront an initial challenge before getting to these issues: how can clients even consider or think about mediation when the morality tale they have in their heads is something mediation hopes to transform?

B. Dislodging the Litigation Narrative

Given that litigation and mediation embody different narratives and thereby generate different disputes,[123] there seems to be a straightforward way for lawyers to encourage clients to understand and consider a mediation alternative. Lawyers can advise a client about how different modes of dispute resolution generate different disputes, describe different dispute resolution processes that might be available, and present how a dispute might look when filtered through the processes of each.

But it is not that easy. Clients typically come to a lawyer's office

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note 54, at 1557-58; Delgado et al., *supra*, at 1391-99; Owen Fiss, *Against Settlement*, 100 YALE L.J. 1073, 1078 (1984) (arguing how a court-rendered judgment "lessen[s] the impact of distributional inequalities"). Lawyers can diminish this concern by enhancing the ability of clients to make meaningful choices about whether to pursue mediation and to equalize power in the mediation itself. *See, e.g.*, Sternlight, *supra* note 46, at 274 (1999) (while in some situations an "attorney should frequently stop herself from dominating the mediation," in others "the attorney must be active and assertive to ensure that her client is not coerced by the opposing party"); Penelope Eileen Bryan, *Reclaiming Professionalism: The Lawyer's Role in Divorce Mediation*, 28 FAM. L.Q. 177, 192 (1994) (arguing for strong advocacy by lawyers for clients who are likely to be at risk in mediation); Susan W. Harrell, *Why Attorneys Attend Mediation Sessions*, 12 MEDIATION Q. 369, 371 (1995) (some Florida lawyers who attended family law mediation described their presence as helping to protect clients "from themselves," "from the opposing parties," and "from the opposing attorneys"). *See also* McEwan et. al, *supra* note 68, at 1319 (arguing that lawyers have a constructive role to play in family mediation).

122 In a stunning perversion of the collaborative spirit that mediation hopes to foster, mediators have coerced parties into entering agreements by labeling them as "uncooperative" unless they do so. *See, e.g.*, Grillo, *supra* note 54, at 1603 (arguing that mediation that "sells itself" as a relational mode of dispute resolution can be "disastrous" when it in fact acts coercively); Bryan, *supra* note 121. While such instances do not mean that we should condemn mediation because there are bad mediators just as we do not condemn surgery because there are bad surgeons, it is still troubling that bad mediators can cause so much damage through a process that is, by definition, largely private, confidential and not subject to external review. As a result, a greater understanding on the part of clients about what mediation *should* or *can* be – an understanding that lawyers in counseling sessions are in a wonderful position to promote – may empower clients to recognize bad mediation when they see it. For a rare instance when an alleged "bad mediator" was actually subjected to judicial scrutiny, albeit unsuccessfully, see Allen v. Leal, 27 F. Supp.2d 945 (S.D. Tex. 1998) (court declined to hear plaintiffs' attempt to repudiate settlement agreement reached in mediation; plaintiffs contended that mediator coerced settlement by threatening that they "would be responsible for paying all attorneys' fees and costs if [they] did not agree to settle and that they would be 'financially ruined'").

123 As one commentator has succinctly put it, "[h]ow the dispute is conceived is influenced by how the story is told." Greenebaum, *supra* note 65, at 121.

with litigation narratives in place.[124] These narratives run deep. After all, it is extraordinarily difficult to deconstruct one's own experience, for it seems transparent to us that what we have experienced is what is.[125] As a result, to most disputants, the binary moral universe of the litigation narrative is *the* universe, with the goods and evils and rights and wrongs arrayed as they *are*. Yet in order to make room for the mediation alternative, lawyers must dislodge this narrative, or at least encourage clients to consider the possibility of alternatives.[126]

One way of understanding how lawyers can do so is to consider the fluid nature of conflict. A "dispute" or "controversy" is not a unitary, static "thing," but rather an assemblage of competing stories, motivations, and interests. Disputes are dynamic, ever-changing phenomena.[127] They undergo transformations: "individuals define and redefine their perceptions of experience and the nature of their grievances in response to the communications, behavior, and expectations of a range of people, including opponents, agents, authority figures, companions, and intimates."[128]

As this process unfolds, lawyers inevitably shape disputants' perceptions of a controversy in a multitude of ways,[129] including the moral dimension of disputes and the attribution of responsibility.[130]

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[124] *See* WINSLADE & MONK, *supra* note 20, at 7 (describing how disputants prior to mediation adhere to an "externalizing, blaming description" of other disputants); J. Brad Reich, *Attorney v. Client: Creating a Mechanism to Address Competing Process Interests in Lawyer-Driven Mediation*, 26 S. ILL. U. L.J. 183, 189-192 (2002) (examining studies demonstrating that clients "rarely" or "never" requested the use of ADR).

[125] As two leading social psychologists have put it, "people fail to recognize the degree to which their interpretations of the situation are just that – constructions and inferences rather than faithful reflections of some objective and invariant reality." LEE ROSS & RICHARD E. NISBETT, THE PERSON AND THE SITUATION: PERSPECTIVES OF SOCIAL PSYCHOLOGY 85 (1991).

[126] In keeping with the stranger than fiction flavor of much modern physics, there is an established hypothesis that there really are "multiple universes." *See* TIMOTHY FERRIS, THE WHOLE SHEBANG 260-63 (1998).

[127] *See* Lynn Mather & Barbara Yngvesson, *Language, Audience, and the Transformation of Disputes*, 15 L. & SOC. REV. 775, 776 (1980-1981) ("a dispute is not a static event which simply 'happens, but . . . the structure of disputes, quarrels, and offenses includes *changes or transformations* over time") (emphasis in original). This conception of "dispute" resonates with ideas usually associated with "social constructivism" about the fluid and unstable nature of "reality" in general. *See, e.g.*, WINSLADE & MONK, *supra* note 20, at 38.

[128] Felstiner, et al., *supra* note 44, at 638.

[129] *Id.* at 641. Felstiner et al. describe how attributing moral responsibility shifts as a dispute unfolds over time: "[A]ttibutions themselves are not fixed. As moral coloration is modified by new information, logic, insight, or experience, attributions are changed, and they alter the participants' understanding of their experience . . . Some processes, such as counseling, may drain the dispute of moral content and diffuse responsibility for problems: others, like direct confrontation or litigation, may intensify the disputant's moral judgment and focus blame." *Id.*

[130] For a scrupulous and detailed description of the complexity of how meaning is made

Indeed, attorneys appear at critical junctures in the life of a controversy. In an influential article, William L.F. Felstiner, Richard L. Abel, and Austin Sarat argue that disputes proceed through a series of dynamic stages they call "naming, blaming, and claiming."[131] After an "injurious experience" is perceived and "named," the experience may be transformed into a grievance – a "blaming" - "when a person attributes an injury to the fault of another individual or social entity."[132] The grievance may then be transformed into a "claim" when someone with a grievance "voices it to the person or entity believed to be responsible and asks for some remedy."[133] The final stage – a transformation from "claim" to "dispute" – occurs when a claim is explicitly or implicitly rejected.[134] All of these stages are themselves unstable and open to reinterpretation by those who are experiencing them. Lawyers usually enter the scene at the "claiming" or "disputing" stage just when a disputant is poised (or forced) to turn to a more formalized process of dispute resolution.

This model does not require or assume a particular process through which disputes should be resolved. Nevertheless, given the cultural norms of litigation and the stories told within those norms, most disputants conceptualize their naming, blaming, claiming, and disputing through the story of litigation. As Felstiner, Abel and Sarat put it, "institutional patterns restrict the options open to disputants" who wish to pursue a "claim,"[135] and the "normal" way to resolve disputes has long been litigation.

"Institutional patterns," however, are not set in stone. Indeed, in the twenty odd years since the appearance of the Felstiner, Abel and Sarat article, the growth of mediation has generated new options for dispute resolution. Lawyers, as the cultural actors with prime responsibility for enacting ways of "claiming" and "disputing," are especially well positioned to encourage clients to consider fresh "patterns" of dispute resolution such as mediation. While no doubt an enormous challenge, experience suggests that this is not an impossible one. The very fact that mediation can and does work with some frequency despite the force of the litigation narrative demonstrates that lawyers

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in attorney-client interactions, *see* William L.F. Felstiner & Austin Sarat, *Enactments of Power: Negotiating Reality and Responsibility in Lawyer-Client Interactions*, 77 CORNELL L. REV. 1447 (1992).

131 Felstiner, et al., *supra* note 44. For a recent elaboration by Austin Sarat of these ideas in the context of popular culture, *see* Austin Sarat, *Exploring the Hidden Domains of Civil Justice: "Naming, Blaming, and Claiming" in Popular Culture*, 50 DEPAUL L. REV. 425 (2000).

132 Felstiner, et al., *supra* note 44, at 635.

133 *Id.*

134 *Id.* at 636.

135 *Id.* at 636.

have at least a chance to dislodge the "truth" of the litigation frame when interacting with clients.

A number of factors favor client receptivity to mediation even prior to client counseling. First, conceptions of conflict tend to be fluid and subject to reinterpretation. There is thus tension between the persistence and rigidity of the litigation narrative and the continuing instability and reinterpretation of our experience.[136] Tension in this context, however, is not necessarily a bad thing; lawyers can build upon the instability of conflict in order to encourage clients to reinterpret conflict in terms of alternative narratives. Second, the unsavory dimensions of litigation – its almost inevitable expense, delay, acrimony, and uncertainty, among other things – are commonplaces in popular culture and act as a powerful incentive to embrace alternatives. Moreover, lawyers are, by definition, situated apart from clients' circumstances. This added distance enables a lawyer to see a client's perspective as a perspective, with other perspectives and stories potentially in play.[137]

C. *What About Client-Centered Lawyering?*

Before considering more specifically how lawyers can engage in

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[136] This idea recalls the work of Mikhail Bakhtin, who wrote that language emdobies both "centrifugal" and "centripetal" forces that tend to pull in opoposite directions: centripetal forces, originating in political and cultural influences, unify meaning, while centrifugal forces, originating in "the plurality of experience," decentralize and destabilize meaning. M.M. BAKHTIN, THE DIALOGIC IMAGINATION 271-72 (Michael Holquist ed. & Caryl Emerson & Michael Holquist trans. 1981).

[137] The perspective I am proposing is that of an anti-formalist – a stance that holds that there is not *a* reality, but interpretations about reality that can in turn be reinterpreted, put together, and taken apart in lots of different ways. For a provocative vision of anti-formalism and its consequences, *see* STANLEY FISH, DOING WHAT COMES NATURALLY: CHANGE, RHETORIC, AND THE PRACTICE OF THEORY IN LITERARY AND LEGAL STUDIES 1-33 (1989). It should be noted that in a sense, good lawyers are already anti-formalists. In a classic study of Chicago lawyers conducted some thirty years ago, practitioners identified "understanding the viewpoints of others" as a primary skill in the practice of law. FRANCES KAHN ZEMANS & VICTOR G. ROSENBLUM, THE MAKING OF A PUBLIC PROFESSION 125 (1981). Indeed, it is commonplace that astute lawyers consider the perspectives of adversaries to prepare for direct and cross-examination and to construct theories of the case. Similarly, effective negotiators examine events from the perspective of adversaries in order to anticipate their stance in the negotiation. *See, e.g.*, ROBERT M. BASTRESS & JOSEPH D. HARBAUGH, INTERVIEWING, COUNSELING AND NEGOTIATION: SKILLS FOR EFFECTIVE REPRESENTATION 407 (1990) (describing the importance of determining what "opponents mean when they describe historical facts, assert legal positions, or comment on other matters important to the negotiation"); HARRY T. EDWARDS & JAMES J. WHITE, THE LAWYER AS NEGOTIATOR 112 (1977) (describing how "[i]n every negotiation a principal responsibility of the negotiator is to find his opponents' settling point"). Nevertheless, lawyers have classically employed these techniques in order to construct an effective story within the litigation narrative, not as a means to dislodge the litigation narrative in order to open space for alternative narratives of dispute resolution.

the types of client counseling that I am suggesting, one question is worth addressing: How does counseling clients about mediation fit in with "client-centered" lawyering and counseling?[138] A classic client-centered, non-interventionist approach holds that a lawyer's job is to "translate" a client's grievance in all of its complexity into language and strategies appropriate to legal process.[139] This conception, quite rightly in my view, encourages lawyers to approach clients as autonomous agents embodying a complex web of legal and non-legal concerns, not merely a set of legal issues or interests.[140]

Problems arise, however, when a client-centered view assumes that clients come into lawyer's offices with preferences, opinions, and, most importantly for our purposes, narratives fixed. Such a view suggests that in order to respect and vindicate a client's autonomy, a lawyer must take a client as she is and preserve at all costs a client's preexisting sense of goals and conceptions of "what happened." This vastly simplifies the complexity, dynamism, and instability of the meaning-making process.[141]

In fact, dislodging the litigation narrative is precisely what effective client-centered counseling has long been understood to be: an opportunity for lawyers to "expose clients to alternatives and consequences" in resolving a matter and "provide an opportunity to evaluate options and consequences."[142] This process is a wonderfully effective means to explore whether mediation might be appropriate for a particular dispute, for client counseling, like mediation, embraces the here and now of the unique situation facing a unique client.

Dislodging the litigation narrative does not mean that clients should cede autonomy to lawyers, or that lawyers manipulate clients to come around to what lawyers perceive to be a more positive view of

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138 The first and most influential treatment of client-centered lawyering is DAVID BINDER & SUSAN C. PRICE, LEGAL INTERVIEWING AND COUNSELING: A CLIENT-CENTERED APPROACH (1977). A more recent revision of this work is DAVID A. BINDER, PAUL BERGMAN & SUSAN C. PRICE, LAWYERS AS COUNSELORS: A CLIENT-CENTERED APPROACH (1991).

139 *See, e.g.*, Clark D. Cunningham, *The Lawyer as Translator, Representation as Text: Towards an Ethnography of Legal Discourse*, 77 CORNELL L. REV. 1298 (1992); Christopher P. Gilkerson, *Poverty Law Narratives: The Critical Practice and Theory of Receiving and Translating Client Stories*, 43 HASTINGS L. J. 861 (1992).

140 *See, e.g.*, Marcy Strauss, *Toward a Revised Model of Attorney-Client Relationship: The Argument for Autonomy*, 65 N.C. L. REV. 315 (1986); BINDER ET AL., *supra* note 138, at 261.

141 I explore this point at greater length in Robert Rubinson, *Constructions of Client Competence and Theories of Practice*, 31 ARIZ. ST. L.J. 121, 148-59 (1999). For other critiques and reappraisals of conceptions of client-centered lawyering, *see* Robert D. Dinerstein, *Client-Centered Counseling: Reappraisal and Refinement*, 32 ARIZ. L. REV. 501 (1990).

142 BINDER ET AL., *supra* note 138, at 272-80 (1991).

dispute resolution. Rather, a lawyer's job is to explode the myth of a thing called a "dispute" that gets resolved through a thing called "litigation." This enables clients to exercise a meaningful choice about whether mediation is appropriate, thus vindicating client autonomy at its deepest level.

VI. MEDIATION-TALK IN CLIENT COUNSELING: A PROPOSED TOOLKIT

To restate the challenge: virtually all clients have long internalized what trials look like (or at least what trials on television and in film look like) and what effective advocacy in that setting should be. As a result, a client is likely to conceptualize a case as a morality tale in which the client is right and adversaries are wrong, and conceive of her lawyer as a "zealous advocate" who will "fight" (the metaphor is telling) so that a client's cause will prevail. From this perspective, mediation-talk might seem "soft" or demonstrate a lack of commitment to the justice or truth of a client's cause.[143] Some general description or definition of mediation – such as the one I quoted earlier[144] – will likely fail in assisting a client in understanding what mediation is, let alone engage a client in what mediation can do.

Thus, while the pursuit of mediation might well be in a client's interest for a host of reasons, many clients will at least initially view mediation – and lawyers who talk about the potential of mediation – with skepticism. If clients are to make informed decisions about pursuing mediation and to participate meaningfully in mediation itself, clients must understand the process at as deep a level as possible. The following represents a toolkit from which lawyers can choose in order to make this happen.

A. Holding Conflict at a Distance: "Managing Controversy"

Litigation has been entrenched in popular imagination for so long that it has taken on the status of being a thing of nature. Its status as *the* way to resolve disputes is beyond question: shouts of "I'm going to take this court!" have meat and meaning, while "I'm going to take this to mediation!" sounds at best offbeat.

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[143] *See* Sternlight, *supra* note 46, at 320 ("[c]lients typically hire attorneys with the idea that they will be their 'gladiators,' who will attempt to convince the world of the virtue of the clients' position"); Marguerite Millhauser, *The Unspoken Resistance to Alternative Dispute Resolution*, 3 NEGOT. J. 29, 31 (1987) ("most clients, when it comes to their own matters, relish the concept of 'lawyer as hired gun'"). The specific expectations that clients have of lawyers also means that techniques employed by mediators to dislodge existing client narratives in mediation are not necessarily effective or applicable in an attorney-client relationship.

[144] *See supra* text accompanying note 70.

Nevertheless, trends that I have identified in this article – the rise of the story of mediation and conceiving a lawyer as "problem-solver"[145] to take the two most prominent examples, although there are others[146] – have begun ever so slowly to break through the monopoly that litigation advocacy has had on how lawyers and, by extension, of how clients view the world. These trends tend to normalize conflict by stripping away its right-wrong, religious-moral cast, thereby transforming conflict into a more natural and tractable phenomenon.

This holds a lesson for counseling clients about mediation. Instead of merely assuming the familiar role of "zealous advocate," lawyers can speak in explicit terms of a lawyer-client collaboration "to manage controversy."[147] This approach is perhaps both most helpful and most counterintuitive when litigation appears to be the obvious, natural, and perhaps only course available to the client. Assume, for example, a commercial client who is outraged at the poor performance of another company with whom it had contracted to provide computer software and hardware. A template for a "managing controversy" approach would be as follows:

> I hear how frustrated you've been and continue to be, and how you feel that you and your company have been taken advantage of. I also understand how much money your business has lost as a result of the failure of Computer Consultants to perform under the con-

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145 *See supra* text accompanying notes 118-19.

146 One example is "therapeutic jurisprudence," the task of which a leading commentator defines as "to identify – and ultimately to examine empirically – relationships between legal arrangements and therapeutic outcomes" as a means to pursue law reform. David B. Wexler, *Putting Mental Health into Mental Health Law: Therapeutic Jurisprudence, in* ESSAYS IN THERAPEUTIC JURISPRUDENCE 8 (David B. Wexler & Bruce J. Winick eds. 1991). *See also* Barbara A. Babb, *An Interdisciplinary Approach to Family Law Jurisprudence: Application of an Ecological and Therapeutic Perspective*, 72 IND. L. J. 775 (1997). For connections between therapeutic jurisprudence and forms of mediation, *see* Gary Paquin & Linda Harvey, *Therapeutic Jurisprudence, Transformative Mediation and Narrative Mediation: A Natural Connection*, 3 FLA. COASTAL L.J. 167 (2002). Another approach is called "preventive law," the purpose of which is to explore ways lawyers can help clients avoid future conflicts. *See, e.g.*, ROBERT M. HARDAWAY, PREVENTIVE LAWYERING xl (1997) (preventive lawyering "deals with a published case as a kind of failure, representing an unfortunate breakdown in the system in which parties or lawyers failed to anticipate possible conflict and take preventive measures"). In yet another related trend, some lawyers are recognizing how taking a more holistic view of clients generates more effective representation and more satisfied clients. *See, e.g.*,. David E. Rovella, *The Best Defense . . .*, NAT'L L. J. Jan. 31, 2000, at A1 (describing indigent criminal defense attorneys who practice "holistic advocacy"); Steven Keeva, *The Nicest Tough Firm Around*, A.B.A. J., May 1999, at 60 (describing personal injury firm in Michigan that has adopted a "holistic approach" to the needs of its clients).

147 The formulation "conflict management" is often used in the literature on constructing mechanisms within organizations to deal with conflict. *See, e.g.*, COSTANTINO & MERCHANT, *supra* note 57.

> tract, and how you think that your company will continue to lose money due to the problems with the computers. You've also asked me about suing Computer Consultants for damages, which is, you've told me, the option that you see as available and one that you'd like to discuss more.
>
> In thinking about what you can do, let's talk about ways to try to manage this situation in a way that best meets your goals. You've already mentioned litigation, something that certainly is an option. Another possibility to think about is mediation. Do you know anything about mediation?

Note that there is no dramatic shift here, no lightening bolts or surging violins. The lawyer does not – nor should – directly attack or contradict the Story of Litigation that has plainly informed the narrative that the client has already shared. To the contrary, through conventional techniques of "active listening" well-established in the interviewing and counseling literature,[148] the lawyer "reflects back" the client's moral and emotional universe while, at the same time, not passing judgment on whether this universe is right or wrong, justified or unjustified.

What the lawyer here and in succeeding interactions might do, however, is to begin the process of promoting a sense of disputes as constructions. The notion of conflict management does this by embodying a distancing rhetoric: the act of managing conflict is necessarily separate from the conflict itself. This opens up space between the representation and the controversy – a space that offers room to examine options and the stories that might be generated through these options – with greater clarity than might be otherwise possible.[149] Such a space does not exist when lawyer and client unreflectively assume that litigation – or even settlement within the adversarial process – is what the representation is about.

Another virtue of this technique is that it serves as a kind of way station before the much riskier and problematic step of collaborating with an opposing party to resolve conflict. As attorney and client hold "controversy" up for examination, the role of the opposing party might shift from villain to something far less morally charged, say "an element of the controversy to be managed." With pragmatism ascendant and the attorney modeling the value of collaboration, the next step – understanding the potential value of mediation as a collabora-

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148 *See, e.g.*, BINDER, ET AL, *supra* note 138, at 52-68. Interestingly, "active listening" is also a standard technique employed by mediators. *See, e.g.*, MOORE, *supra* note 70, at 165-66.

149 The technique and goals that I sketch here resonates with a strategy called "externalizing conversation" that can be profitably employed by mediators as well. WINSLADE & MONK, *supra* note 20, at 143-47.

tion among all participants to resolve conflict – requires far less of a leap than it otherwise would.

The "managing controversy" mode may therefore subtly shift a client's conception of conflict away from the usual and the accepted. This may reverberate in many directions, from altering the contours of the attorney-client relationship to shifting a client's sense of the conflict at issue are and how it may be resolved.

B. The Cultural Norms Reflected in the Story of Mediation

Some have observed an odd dynamic whereby cultural imperatives tend to be mutually contradictory: for every impulse to "love thy neighbor" there is another impulse to "stand up for your own," for every political impulse towards "compromise" and "bipartisanship" there is another impulse towards "principle" and "fighting for what you believe is right."[150]

Despite the prevalence of the litigation morality tale, it is, of course, not the only tale people tell about the world. Certainly the distinctive characteristics of the Story of Litigation – its construction of a binary moral universe, its certainty of one truth and one true understanding of justice, its appeal to a higher power to vindicate morality and truth – all reflect deeply embedded cultural norms.[151] That said, so does the Story of Mediation: its embrace of the subjectivity of experience ("there are two sides to every story"; "beauty is in the eye of the beholder"), of the creativity of collaboration ("two heads are better than one"), of the moral goodness and value of collaboration and cooperation when struggling to overcome a common enemy ("one for all and all for one";[152] if "we don't hang together we shall all surely

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[150] AMSTERDAM & BRUNER, *supra* note 23, at 229. At least in terms of the Austere Definition of Narrative, what I am here calling "impulses" often structure experience in narrative terms.

[151] The reason why the story of litigation is so culturally resonant is a large and complex question beyond the scope of this Article. Some speculation on its origins: While positivism might be rare in the academy, popular Western culture tends to conceive of truth as truth and justice as justice. In addition, as a philosophical and perhaps psychological matter, the narratives that engage us most almost invariably involve human agents doing the right or wrong thing. There appears to be some sort of deep-seated human need in this: embracing the significance of circumstance or happenstance in causing events appears at best "soft" or at worst "scary," perhaps because it questions the role that "responsibility" plays in events, or the degree to which humans can control events. The so-called "prime attribution error" that I discussed earlier is an empirically demonstrated manifestation of this tendency. *See supra* note 43. Finally, as I also alluded to earlier, an appeal to a higher authority for justice and the vindication of morality reflects an important dimension of the Judeo-Christian tradition.

[152] This is, of course, the cry of Alexandre Dumas' Three Musketeers, but the phrase has become a commonplace of popular culture.

hang separately"[153]) all resonate with dimensions of the cultural landscape that are alive and meaningful.

As a result, while clients might not be used to approaching dispute resolution in terms of the Story of Mediation, this is more an artifact of the current norms of dispute resolution than of the norms of experience more generally. The cultural resonance of the Story of Mediation is therefore fertile ground for lawyers to till in client counseling. Lawyers can call to mind these norms by appropriating folk wisdom when describing the mediation process, by describing mediation processes that lawyers have experienced or observed that call to mind norms reflected by the Story of Mediation, and by asking clients about experiences that they might have had that reflect these norms.

C. Telling the Story of Mediation

A primary thrust of my approach thus far has been the central role that narrative plays in structuring our experience[154] and, more particularly, the central role that narrative plays in structuring disputes.[155] The Story of Mediation and examples of stories that are told within the Story of Mediation therefore hold great explanatory power. In contrast, descriptions that are too analytic or dryly definitional[156] have scant power to evoke the potential of mediation.

There are many ways to use narrative as a means to explain mediation. One approach builds upon the narrative structure of mediation and litigation that I have already described.[157] A lawyer's first challenge would be to defamiliarize the Story of Litigation by making this "natural," unremarkable process strange.[158] This can be done in narrative terms. Discourses on narrative theory are not necessary. For example, a lawyer can explain that litigation is a process through which parties seek to convince a decision-maker that they are factually and morally right.[159] This process generates a contest or struggle between parties in which there are designated winners and losers. In contrast, mediation promotes a process through which all participants – parties, lawyers, mediator – struggle not against one another, but to

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153 The remark is usually ascribed to Benjamin Franklin at the signing of the Declaration of Independence, although this may be apocryphal. RONALD W. CLARK, BENJAMIN FRANKLIN: A BIOGRAPHY 286 (1983). Whatever its historical grounding, this phrase has long passed into an oft-repeated piece of folk wisdom.

154 *See supra* text accompanying notes 19-32.

155 *See supra* text accompanying notes 33-110.

156 *See supra* text accompanying notes 70-71.

157 *See supra* text accompanying notes 33-110.

158 *See* AMSTERDAM & BRUNER, *supra* note 23, at 4.

159 *See supra* text accompanying notes 34-50.

collaborate to resolve conflict.[160] The distinctive aspects of mediation that I described earlier – mediation's focus on a client's "ownership" of the process, its focus on the present and future interests and circumstances rather than solely on "what happened," its breaking down of a unitary perspective, its open-ended expansiveness, its pragmatism – would further highlight how stories generated within mediation differ from the stories generated within litigation.

Perhaps a crucial complement to this technique is to share "war stories" with clients. As lawyers gain experience in mediation or even as attorneys new to mediation read and learn more about it, the telling of actual stories of mediation (with, of course, the appropriate preservation of confidentiality) brings the Story of Mediation to life in a real and compelling way.

D. The Vocabulary of Mediation

Words matter. While the law is full of jargon, much of the standard language of litigation has long infiltrated everyday discourse: "claims," "defends," "defenses," "argues," "positions," "rights." Even the procedural vocabulary peculiar to litigation is everywhere: "testify," "evidence," "relevance," "ruling," "judgment." These words are suffused with the procedures and narrative entailments of litigation.

The norms of mediation imply a different vocabulary: "interests," "goals," "resolutions," "facilitation," "cooperation," "collaboration," "perspectives." By avoiding the vocabulary of litigation – or even explicitly telling clients what this vocabulary is and what the vocabulary of mediation tends to be – a lawyer would be assisting a client in understanding mediation more thoroughly. Moreover, self-conscious adoption of these words when counseling clients may begin to generate a different set of "relevant facts" and, thus, a different "dispute," for these words implicate the story of mediation.[161]

The use of these words is not merely an exercise in "softening" or, more colloquially, to make "touchy-feely" the process of dispute resolution. Indeed, a subtext of some critics of mediation – typically those with legal training – is that mediation is somehow less logical, rigorous or creative than litigation. Very much to the contrary, however, mediation can be and often is an extraordinarily creative enterprise on the part of the mediator *and* participating lawyers and parties. While the degree of creativity required in mediation extends beyond the scope of this article, a primary point of my discussion thus

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160 *See supra* text accompanying notes 97-110.

161 As Winslade and Monk put it from the perspective of mediators conceptualizing mediation, "we can think of the talk we create in mediation as actually constructing experience." WINSLADE & MONK, *supra* note 20, at 39.

far – the importance of reconceptualizing disputes in terms of both the Story of Mediation and the Story of Litigation – constitutes no mean feat of intellectual legerdemain. The adoption of the vocabulary of mediation, therefore, represents a challenge for both lawyer and client that when identified explicitly as such can make it all the more appealing to the client.

E. Considering the Opposite

I have already alluded to how an accepted mediation technique is to encourage parties to consider the other side's perspective.[162] Some mediators do this by assigning written "homework" through which one party generates a list of items that would "support" the other side's perspective,[163] or by "asking each party to restate the opposing view before they put forth their response, position, or statement."[164]

This technique builds upon a rich social science literature that has validated a process called "considering the opposite" or "counterexplanation."[165] The basic idea underlying this strategy is that humans assimilate information in line with what they already believe – a tendency social psychologists call "confirmation bias."[166] In the context of disputes, this means that a party will likely assimilate information relating to the dispute in a way that is consistent with that party's position, or, to adopt the perspective of narrative theory, a party will interpret information in a way that is consistent with that party's story. Information that is plainly incongruent and thus cannot be assimilated into the "true" story of "what happened" tends to be dismissed as distorted, false or irrelevant. Considering the opposite combats this tendency by encouraging an active consideration of opposite perspectives by constructing justifications for that perspective. The key here is that the consideration must be *active*: merely "listening" – even in good faith – to another side does not work because information will

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162 *See supra* text accompanying notes 76-81.

163 Elisa T. Deener, A Mediation Tale: A Reading from the Contextual Legal Criticism Perspective (unpublished article) (on file with author).

164 KOVACH, *supra* note 63, at 140.

165 *See, e.g.*, Charles G. Lord, Mrak R. Lepper, & Elizabeth Preston, *Considering the Opposite: A Corrective Strategy for Social Judgment*, 47 J. PERSONALITY & SOC. PSYCHOL. 1231 (1984); Edward R. Hirt & Keith D. Markman, *Multiple Explanation: A Consider the Alternative Strategy for Debiasing Judgments*, 69 J. PERSONALITY & SOC. PSYCHOL. 1069 (1995); Craig A. Anderson & Elizabeth S. Sechler, *Effects of Counterexplanation on the Development and Use of Social Theories*, 50 J. PERSONALITY & SOC. PSYCHOL. 24 (1986); Asher Koriat et al., *Reasons for Confidence*, 6 J. EXPERIMENTAL PSYCHOL. HUM. LEARNING & MEMORY 107 (1980). For a general discussion description of this technique in another context, see Rubinson, supra note 36, at 32-34.

166 Anthony G. Greenwald, *The Totalitarian Ego: Fabrication and Revision of Personal History*, 35 AM. PSYCHOLOGIST 603, 606 (1980).

still either be assimilated into the "true story" or discarded if this is not possible. Exhortations to be "as objective and unbiased as possible" do not work for the same reason.[167]

Given that "considering the opposite" tends to achieve greater openness to alternative perspectives, lawyers might consider a similar "homework assignment" for clients. While at first blush this might seem preposterous or paternalistic, it is accepted practice – indeed, it is often good lawyering – for lawyers to ask clients to find documents, witnesses, or perform other tasks related to representation or to undertake mock cross-examinations to prepare a witness.[168] The process of considering the opposite might well produce an intuitive understanding of the constructed nature of disputes by highlighting an alternative narrative of a dispute.

Needless to say, this is the riskiest, most dangerous tool in the kit, albeit one with perhaps the greatest potential of all. It might be well to only employ this after using other tools first, and only with clients lawyers predict will be receptive to it. In any event, it would be preposterous to simply suggest this to a client without an explanation. Clients might well suspect that an attorney is being disloyal, or not fully fighting for the transparent justice of the client's cause.[169] Nevertheless, it seems to me perfectly acceptable to openly disclose to the client the purpose of the exercise and the legal and psychological basis for it, and to propose – albeit with discretion and a sense of how well it might be received – that it might generate for the lawyer and client creative and potentially effective means to manage the client's conflict.

CONCLUSION

Disputes are extraordinarily complex events whose stories can be told and retold in a multitude of ways. In the past, lawyers have embraced this idea within the context of litigation. With the rise of mediation, however, the norms of litigation and the stories these norms generate are no longer the only ones in play. To the contrary, it is now clear that the nature of a dispute – what a dispute fundamentally *is* – is contingent upon how lawyers describe alternative modes of dispute resolution to clients and which mode or modes lawyers and clients ultimately choose to employ.

Mediation therefore is far more than an "alternative" to litiga-

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167 *See, e.g.*, Lord et al., *supra* note 165, at 1233-37.

168 *See, e.g.*, THOMAS A. MAUET, PRETRIAL 51 (6th ed. 2002)

169 Of course, such complications are inherent whenever attorneys – as they often must – seek to deflate client expectations or explore inconsistencies about a case. *See, e.g.*, Sternlight, *supra* note 46, at 320-321; BASTRESS & HARBAUGH, *supra* note 137, at 273-282.

tion: it is a new way of telling stories about the world. These new stories are worth telling or at least exploring, and lawyers who meet the challenges of doing so enrich and expand the means through which both lawyers and clients resolve disputes.