

2000

Faithful

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Recommended Citation

Gary L. Gill-Austern, *Faithful*, 2000 J. Disp. Resol. (2000)

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Faithful

Gary L. Gill-Austern*

Lastly, when I have a difficult subject before me — when I find the road narrow, and can see no other way of teaching a well established truth except by pleasing one intelligent man and displeasing ten thousand fools — I prefer to address myself to the one man, and to take no notice whatever of the condemnation of the multitude; I prefer to extricate that intelligent man from his embarrassment and show him the cause of his perplexity, so that he may attain perfection and be at peace.

Moses Maimonides
*The Guide for the Perplexed*¹

I. INTRODUCTION

The term “facilitative mediation” reminds me of the term “Old Testament.” As we Jews from time to time have reminded Christians, the Jewish people call their canon the *Tanakh*, or, in English, the Hebrew Scriptures. That the same thirty-nine books — Genesis, Exodus, and so on — are labeled “Old Testament” by others indicates that another (later) religious community believes that an event occurred that requires what came before to be interpreted through the prism of an intervening event or reality. For Christians, this is expressed in the New Testament. Returning, then, to the current discussion, it takes a partisan of “evaluative mediation” to call what I practice — mediation — something different.

As a practitioner and proponent of mediation, I am not even sure whether I am prepared to consider myself a “facilitative mediator” or a “transformative mediator.”² I will only confess to not being an “evaluative mediator.” In addition, I find myself struggling with assertions in the literature regarding the existence within mediation of a dichotomy (whether true or false),³ a continuum,⁴ and a grid.⁵ How did

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1. See MOSES MAIMONIDES, *THE GUIDE FOR THE PERPLEXED* 9 (M. Friedländer, trans., Dover Publications 2d ed. 1956) (1904). See also Leonard L. Riskin, *Mediation and Lawyers*, 43 OHIO ST. L.J. 29, 43 (1982).

2. See *infra* text accompanying note 78.

3. See Jeffrey W. Stempel, *Beyond Formalism and False Dichotomies: The Need for Institutionalizing a Flexible Concept of the Mediator's Role*, 24 FLA. ST. U. L. REV. 949 (1997).

4. See Leonard L. Riskin, *Understanding Mediators' Orientations, Strategies and Techniques: A Grid for the Perplexed*, 1 HARV. NEGOT. L. REV. 7, 22 (1996); Stempel, *supra* note 3, at 969; Jeffrey W. Stempel, *The Inevitability of the Eclectic: Liberating ADR from Ideology*, 2000 J. DISP. RESOL. 247, 248.

5. See Riskin, *supra* note 4.

something I consider simple⁶ — disarmingly simple — become overgrown⁶ with so many layers, conceptualizations, regulations, mechanics, rules, and (most dishearteningly) concern for consumer preferences?⁷ How did something infused with immediacy and attentiveness to the moment become so encrusted and manipulated that its practitioners fear acting in keeping with that spirit?⁸ Perhaps the great reification monster has been reawakened. Once upon a time, threatened by the gnostic's assertions concerning the "magic of mediation" — a perspective I found convincing and honoring of the promise and hope of mediation — the monster belched black smoke until an explanation of the "logic" behind the magic of mediation appeared to satiate its appetite for the rational, orderly and predictable.⁹ I had hoped this would have sufficed. Apparently, it has not. What has intervened?

II. PERSONAL BACKGROUND

There are preliminary questions to answer first. Why do I care about this question? What are the sources of my strong personal feelings for mediation? What is mediation?

I am forty-eight years old. I entered law school in 1990 and have been practicing environmental law at a large Boston firm since 1993. Before law school, I worked for Electronic Data Systems for 9 years, first as a trainee, then as a systems engineer, and ultimately as a systems manager. From high school graduation in 1969 until 1980, my life was religious studies, whether as an undergraduate major, or as a rabbinical student (including a year in Jerusalem that was marked by the Yom Kippur War), or as a graduate student in philosophy of religion in Cambridge and Berkeley.

During the years of my "first career" in religious studies, I lived according to the Socratic maxim: the unexamined life is not worth living. As the downhill pace to thirty accelerated, and the professional path remained veiled and perpetually asymptotic (and the birth of the first of my three sons neared), I found myself

6. See Albie M. Davis, *What Makes a Good Mediator? Ask a Middle School Student*, 10 NEGOT. J. 87, 88 (1994); Albie M. Davis, *The Logic Behind the Magic of Mediation*, 5 NEGOT. J. 17, 20 (1989); Albie M. Davis & Howard Gadlin, *Mediators Gain Trust the Old-Fashioned Way – We Earn It!*, 4 NEGOT. J. 55, 58 (1988); Robert D. Benjamin, *Mediation as a Subversive Activity*, (visited Dec. 23, 2000) <<http://www.mediate.com/articles/subvert.cfm>>.

7. See Stempel, *Inevitability*, *supra* note 4, at 246, 265 n. 70, 267-69. I distinguish between parties in a mediation and consumers.

8. Carrie Menkel-Meadow quotes the words of "one wise elder" in support of her resistance to any premature codification of ethical and regulatory controls on ADR for fear that they "will rigidify and limit ADR's potential." The elder wrote: "I know that mediation requires some formal rules, but I hope they are few. Too many and we will lose the essence." Carrie Menkel-Meadow, *When Dispute Resolution Begets Disputes of Its Own: Conflicts Among Dispute Professionals*, 44 UCLA L. REV. 1871, 1897 (1997).

9. See Davis, *Logic*, *supra* note 6, at 18. Davis explains that she "chose to examine the logic behind the magic of mediation not to spoil the magic, but to preserve it. If we recognize why mediation works, we will be unlikely to settle for less than those conditions and states of mind necessary for mediation to succeed." *Id.* (Of course, the great reification monster was unaware of this!).

confronted by the maxim's converse: the unlived life is not worth examining. Systems work — my "second career" — got me over the hump. It provided income and, more importantly, work of a tangible nature. Software problems — distinguished from existential or theological quandaries — could be fixed. The large IBM mainframes I worked on even managed to satisfy my irrepressible and lingering intellectual inquiry by providing a "core dump" of the "inner essence" of the computer as the primary analytic tool for the resolution of a system problem!

The "third career" began in 1990 with the explicit event of beginning law school, but, to be honest, it really marked an implicit "throwing the hat in" with the conventional. Though my partner and I placed nationally in the American Bar Association ("ABA") client counseling competition during our first year, suggesting perhaps that I was not a model of conventional lawyering potential, I held to the student's defined path. But, in the spring of 1992, during the last half of my second year in law school, I enrolled in a mediation class. The conventional was quickly relativized.

The mediation class was the first time in two years of studying appellate cases and disputes forever cast in an adversarial model that I sensed the search for the fuller context, the human dimension, with its complexities and contradictions. Rather than stripping away what was not legally relevant, or packaging it so that substance was subsumed by procedure, here was a process committed to expanding context. I found that mediation offered parties and their advocates the possibility of searching out and resting in that third point that lies closer to the truth than their mutually exclusive definitions of right and wrong, or their mutually exclusive demarcations of who is in the right and who is in the wrong.

Also, I detected in the role of the mediator — distinguished from that of the attorney — less artifice and more potential for manifesting in the public sphere those aspects of our humanity that touch a higher good: communication, receptivity, forgiveness, and reconciliation. The mediator models these attributes and in so doing invites their awakening in the parties. To the extent that this occurs, mediation is fundamentally disarming: resolution is realized in the letting go, that is, in the letting go of arguments, justifications, narrations of histories of animosity and betrayal; in the letting go of entrenched demands for compensation; and in the letting go of the false belief that we can ever be made completely right. Agreements are mysteriously birthed in the silent moments that infuse and surround the experience of people meeting each other genuinely. Where communication has occurred and trust has grown, an enabling spirit of disarmament is engendered that brings parties to decision.

With that foundation, I embarked on the journey of and — for the entire third year of law school — stayed the course of the apprentice. In taking such a road I felt that I was returning to law's own roots, roots which had withered over the prior 100 years as the university model had overtaken the once sacred notion that lawyering

was learned as it was lived.¹⁰ The apprenticeship had two components: to “do” mediation in a supervised setting, and to “sit at the feet” of skilled practitioners.

At the end of the apprenticeship year, which coincided with law school graduation, I had an abundance of experiences and relationships informing the answer to the underlying question: where to — law or mediation? I realized that my belief that law and its fair and just administration were our society’s primary and best means to order our common life had been reaffirmed. Law, I knew, would be present for the long haul. Closer to home, law could be trusted to put food on the family table. In contrast, mediation is inspired by providence and occurs as a spontaneous gift to its participants. It operates in and its vitality grows from and thrives in the grassroots; in short, it is of the “bottom-up.” In some instances it makes possible resolutions, but more generally and simply, it serves to weed and prune the pathways toward resolution. While the practice of law permits entrepreneurialism and relies on the predictable, mediation demands a giving of oneself (service) and invites trust in the unknown.

Finally, I came to believe that mediation has unlimited promise to energize the static and moisten the parched terrain of all of our social systems, legal or otherwise. I wanted to keep alive that spirit, both “out there” in the community as well as in myself. I opted, therefore, for law as profession and source of income, and mediation as service of the heart. There was no firm commitment to refuse paid work as a mediator; nor, on the other hand, did I have any long-term mediation practice business plan.¹¹

10. Perhaps the law and our society would be less litigious were practitioners required to apprentice in the day-to-day. Lawyers so trained might seek solutions from the milieu in which the parties and they operate, solutions which are more likely to acknowledge the partial truths in which we live and carry out our activities. But what we have is law populated by graduates of skills schools who think that to be genuine practitioners of the trade they have to make immediate use of their arsenal of law school techniques and tactics.

Albie Davis captured this sense of the inadequacy of legal education in 1993 in a talk she gave to celebrate the dedication of a new building at the Franklin Pierce Law School. In her speech, she recounted a recent (fictional) dream about the graduation in 2001 of the first class of Franklin Pierce’s new Democracy Corps. Underscoring a search for new teaching and learning methods, the dream envisioned that

[t]he Democracy Corps would operate on a new metaphor. Attorneys in the Corps would no longer be knights with lances, ready to do battle. Instead, they would be educators. They would be legal healers with diagnostic skills. They would possess a range of responses to conflict from preventive to curative. They would work among the people shoulder to shoulder building or rebuilding democracy from the ground up. They would help the average citizen understand the dynamic interrelationship between law and democracy.

Albie Davis, *The Franklin Pierce Law School Democracy Corps, A Talk Celebrating the Dedication of the Robert H. Rines Building*, (Nov. 13, 1993) (unpublished manuscript on file with author).

Finally, the ethic of the Democracy Corps “was to understand the past and present, but to question the given and to experiment with new ways of doing and thinking.” *Id.*

11. Linda Singer, one of the field’s original generation of practitioners, contributes her “pioneer’s perspective” to the discussion in the current edition of *Dispute Resolution Magazine* on “Gazing Into the Future of Dispute Resolution.” Looking backward, she notes that among the changes in the field over the past 25 years, there is greater commercialization. She comments that “[a]s with the legal profession, some dispute resolution practices are being run more like the businesses they have become. Advertisements and marketing seminars no longer are the rare exception. For those of us for whom the

III. A BRIEF UNSYSTEMATICS OF MEDIATION

Over history, certain theologians (for example, Moses Maimonides and Thomas Aquinas) have taken on the challenge of producing a systematic theology, an effort to summarize the essential beliefs or doctrines of a religion, with a view to relating those traditions to the religion's present-day setting. Maimonides produced the *Mishneh Torah*; Aquinas, the *Summa Theologica*. Certain others, such as my teacher, Abraham Joshua Heschel, have produced written works that are decidedly unsystematic.¹²

Heschel, the scion of a Hasidic rabbinic dynasty, was born in Poland in the first decade of the twentieth century. He crossed a deep divide when, as a young man, he chose to study philosophy in Germany. With the rise of the Nazis to power, he escaped to England and then moved to the United States to teach at the Reform movement's seminary in Cincinnati. He was there for five years before spending the remainder of his life in New York City at the Jewish Theological Seminary, the center of the Conservative movement. He died in 1972.

Abraham Heschel carried the past, looked to the future, but most of all lived in the present. His paramount commitment was not systematical. Rather, he sought access and relationship to the tradition for "present-day" persons. Confronted by what he saw as the "modern spiritual crisis," understanding that ideological or "orthodox" assertions would not overcome the alienation and the loss of religious, social and cultural attachments in modern life, he desperately sought *alternative* means to address the crisis. He sought to evoke, intimate, suggest, allude — to stimulate the imaginations of moderns, knowing that the formulaic was without capacity. His books used all available means to reach out and "grab" people in their hearts and souls — poetry, prayer, theology, exhortations to political action, recounting and interpretation of biblical stories and biblical history, biography, and more. He crossed boundaries to teach at a Protestant seminary; he marched with Martin Luther King, Jr. in Selma; he co-founded Clergy and Laity Against the War in Vietnam.

Whether or not his temperament would have allowed him to do the work of systematics, or live only in the familiar, traditional world, he was compelled to search for and stay with the unique voice to guide the soul's journey to participation in the evolving tradition. He lived in the *alternative* to enliven the tradition, as the tradition and the present-day setting were no longer engaged in dialogue. That which was old had to be made fresh again, as if it had never before been told or heard. Otherwise, the tradition would be a home for the uninspired faithful or a topic of study, but not a lived reality.

profession began as a calling, this is a difficult adjustment." Linda R. Singer, *Future Looks Bright, But Challenges Include Retaining Our Core Values*, DISP. RESOL. MAG., Spring 2000, at 26, 28. Among my hopes is that the first generation will not have to carry the torch alone.

12. Of Heschel, it has been said that he wrote ideas on little pieces of paper, and when his jacket pocket bulged uncomfortably, he wrote a book!

The distinction between systematics and “unsystematics”¹³ has varying import depending on the subject matter, the audience, the time, the general context, and the message the author wants to deliver. For me, it is very relevant to the present discussion. It should be no surprise that as someone who finds contemporary law school education alienated from the very milieu in which those it trains will practice,¹⁴ I cannot endorse the reduction of the mediation dynamic to a set of behaviors, skills or activities, or procedural stages that deprive it of its vitality and essence.¹⁵ Perhaps we must engage in such discourse — categorization, delineations, taxonomies, and the like — but first, we need mediators who are distrustful of words alone, who know the limits of learning the process through lecture or reading, which observation of only a handful of mediations would suggest in and of itself. Otherwise, we will harm the process as there will be no one left who carries a memory of what it “really” is.¹⁶

What mattered to Heschel and what is at stake in the present discussion regarding mediation is the living and being of the *alternative* as a way to enliven and transform the tradition. The one must be in dialectical tension with the other, for only something radical and sustained can be effective. Thus, the spirit that breathes in and through and gives existence to the *alternative* is betrayed by the conversion

13. At the most basic level, the neologism “unsystematics” references any engagement that is not systematic. On another level, it points to efforts much like Heschel’s which aspire to describe, intimate or sketch the essential, and which simultaneously recognize the inherent inadequacy of any medium — whether word, art, music, dance or other form of human expression — to perform that task.

14. See *supra* note 10 and accompanying text.

15. Deborah and Jonathan Kolb, commenting on the 1993 *Interim Guidelines for Selecting Mediators*, and the topic of the training and education of mediators, compare mediation with psychiatry. They regard both disciplines as “interpersonal process[es] which require inquiry, understanding of complex motivations and relationships, the handling of intense feelings and hardened attitudes, and creativity.” They then criticize the *Interim Guidelines* for being built on a mechanistic view that reduces the practice of mediation to a defined set of behavioral activities. They turn their focus, therefore, away from the objective of deriving guidelines to select competent mediators and towards an emphasis on training. They recommend a training model akin to that used to train psychiatrists, one based on experience and supervision.

This message is expressed most persuasively through metaphor. The *Interim Guidelines*, they believe, are akin to a factory’s quality control mechanisms, which seek a “streamlined process that makes use of quantifiable and preset standards,” and leads to a “[q]uality control inspection [designed to] assure[] a uniformity of output.” In contrast, supervision is similar to gardening, where “[t]here is a certain unpredictability to the process,” and not everything is under the gardener’s control. Deborah M. Kolb & Jonathan E. Kolb, *All the Mediators in the Garden*, 9 NEGOT. J. 335, 336-38 (1993). If horticulture were a greater part of my past, this section might have been entitled, *A Selection of Flowers From the Mediation Garden*.

16. I am reminded of Judaism’s understanding of four levels of textual interpretation. The levels are: *Peshat* — literal meaning; *Remez* — allegorical meaning; *Derash* — moral or homiletic meaning; and *Sod* — mystical meaning. Not all students reach *Sod* or *Derash* or even *Remez*. A pedagogy, however, that teaches *Peshat* without an awareness of the other three levels is empty, for it is the awareness of partiality that precludes the *Peshat* student from thinking that she knows the secrets of the tradition. It teaches the student humility.

Thus, if for the uninitiated mediator we must speak of openings, collecting information, defining issues, generating and exploring options for settlement, and so on, it is only for the purpose of anchoring the novice and setting her or him on course. A law degree (or any degree, for that matter) and 30 hours training does not a mediator make.

of the *alternative* into more of the same reified mass of the tradition.¹⁷ The injury is degrees of magnitude greater when that which has the quality of an “awakening” is stifled before taking full breath.

What are the radical elements of mediation?

A. *Specificity*

Mediation is grounded in specificity — specific persons (parties and mediator), specific problems, specific histories, and specific place and time.¹⁸ Thus, when we discuss “respect” in the context of mediation, it is each person’s respect for every person at the table — party toward other party, mediator toward each party, party toward self, as well as every person’s respect for the process.¹⁹ When we talk about “trust” in mediation, the same web is invoked. Each individual toward each individual; each and every one unique. It is also trust in the very process taking place around the table at specific moments in time.²⁰

This is one of mediation’s gifts — its readiness to assume nothing from the past and to insist on participation in its fullness by all persons, including the mediator, “there and then.” This rules out feared abuses of the process, for example, power imbalances. I acknowledge that this will not always work in practice. This is not about perfection, however. It is about having a standard, something that establishes the normative.

It is often said that there is not a “single model” of mediation that works in all situations.²¹ This type of statement lends itself to ready misinterpretation. While

17. Observers in Minnesota note that institutionalization of ADR in the courts has done little to alter or “enlighten” the state’s bar.

It is worrisome, however, that so few attorneys seem to value increased client satisfaction, increased client control of the outcome, and improved party relationships. If these potential benefits do not find their places on the lawyers’ philosophical map, it is *likely that the mediation model will continue to adapt to fit within the traditional legal culture and will look more and more like the traditional settlement conference mode.*

Barbara McAdoo & Nancy Welsh, *Does ADR Really Have A Place on the Lawyer’s Philosophical Map?*, 18 HAMLIN J. PUB. L. & POL’Y 376, 392 (1997) (emphasis added).

An observer in Texas notes that “it appears that mediators’ practices may be declining due to the perception that mediation is only another pre-trial procedure to assist traditional distributive bargaining and, as such, adds little value to lawyer-lawyer adversarial negotiation.” See Kimberlee K. Kovach & Lela P. Love, *Mapping Mediation: The Risks of Riskin’s Grid*, 3 HARV. NEGOT. L. REV. 71, 89 n.102 (1998).

18. See Riskin, *supra* note 1, at 34 (“But in mediation — as distinguished from adjudication and, usually, arbitration — the ultimate authority resides with the disputants. The conflict is seen as unique and therefore less subject to solution by application of some general principle. The case is neither to be governed by a precedent nor to set one.”).

19. The term “party” as used here includes attorneys or any other representative or agent of a party.

20. See Davis & Gadlin, *supra* note 6, at 55 (stating that there are four components of trust in mediation: trust in the mediator, trust in the mediation process, trust in one’s own ability to negotiate, and trust in the other party).

21. See John Lande, *How Will Lawyering and Mediation Practices Transform Each Other?*, 24 FLA. ST. U. L. REV. 839, 845 (1997); Riskin, *supra* note 4, at 8-13; Richard C. Reuben, *The Lawyer Turns Peacemaker*, A.B.A. J., Aug. 1996, at 55, 60 (“There is a lot of diversity of approach in the field, and

every mediation looks different due to its "specifics," it does not make mediation — the process — fungible, *i.e.*, a different process for each situation. In other words, the "no single model" mantra does not justify the purported evaluative/facilitative dichotomy. The process is flexible and adapts to the situation (to the specifics) but there is no change to the fundamentals of the process.

B. Freedom

Mediation involves us in the amelioration of conflict through the exercise of that which ought to be and rarely is: autonomy (voluntariness), consciousness (self-determination), activity (informed consent), and containment of harm (confidentiality).²²

Participation in mediation is threatening. It is the threat of being in charge of one's life; the threat of considering the possibility of being fully conscious — fully conscious of breaches that cannot be repaired, harms that one has committed and likely will continue to perpetrate, recognition of what "is" and what cannot be massaged or cosmetically covered up. Mediation is a call to genuineness. We touch it, we live in it occasionally at best, oftentimes reluctantly, but having touched it, there is never regret. That parties and their lawyers want evaluation underscores the threat that participation in mediation presents to people.²³ It is a tough act, this idea of being an adult.

For mediation to continue to be an alternative to the adjudicatory, it must be chosen. The nature of the choice making must be as fully autonomous as is possible to imagine for human beings. It is not merely a utilitarian choice; optimally, it is a vote by the self, of the self, for the self.

C. Invitation

Mediation invites its participants to walk to and dwell at the table. The invitation is ongoing; it is extended to those who choose it at entry point and at each moment they remain at the table. Invitation is needed because mediation asks its participants to dwell, at least in part, in the unknown. No one — particularly

one of the things we're beginning to see is that there is not a single model that works in all situations." (quoting James Boskey)).

22. See *infra* note 73.

23. Mary Parker Follett understood that it is more difficult for people to repair than to perpetuate a harm or wrong.

We have thought of peace as the passive and war as the active way of living. The opposite is true. War is not the most strenuous life. It is a kind of rest-cure compared to the task of reconciling our differences From war to peace is not from the strenuous to the easy existence; it is from the futile to the effective, from the stagnant to the active, from the destructive to the creative way of life We may be angry and fight, we may feel kindly and want peace — it is all about the same. The world will be regenerated by the people who rise above both these passive ways and heroically seek, by whatever hardship, by whatever toil, the methods by which people can agree.

Albie M. Davis, *An Interview With Mary Parker Follett*, 5 NEGOT. J. 223, 231 (1989).

attorneys, who sell to clients the comfort of their experience with the predictable — is comfortable in the unknown. Yet, those who choose mediation do so because they sense the safe container it offers to move in and around where they might be uncomfortable. We know, viscerally, that here is a unique opportunity.

Human fragility and vulnerability do not risk exposure in family matters only. They are present in commercial, high-dollar disputes. Those who say otherwise, have insulated themselves from one of creation's givens. Consider that the most often repeated phrase in the Bible is: "Be not afraid!"²⁴ Would-be participants are unlikely to benefit from mediation if the vulnerable aspect of their existence is not on the line.²⁵

An evaluative perspective does away with invitation. It offers docketing — the abstracting of issues and the processing of cases, one after the other. This is no alternative to the adjudicatory system. Docketing leaves us with nothing different, no alternative, no new learning, no change to the lawyer's philosophical map.²⁶

D. Meeting

What is the locus of resolution? Where does it occur?²⁷ I cannot think of any more appropriate way to speak of the terrain or landscape on which a mediation occurs — and, therefore, where resolutions occur — than Martin Buber's philosophy of dialogue.²⁸ Buber tells us that human beings have a twofold attitude to the world.²⁹ The individual, the "I," exists in relationships characterized as *I-It* and *I-*

24. "Be not afraid" appears in the Bible (Hebrew Scriptures and New Testament) in exact form 26 times: *Deuteronomy* 20:1; *Joshua* 1:9, 11:6; *1 Samuel* 28:13; *2 Kings* 1:15, 19:6; *2 Chronicles* 20:15, 32:7; *Proverbs* 3:25; *Isaiah* 10:24, 37:6, 40:9; *Jeremiah* 1:8, 10:5, 42:11; *Ezekiel* 2:6; *Joel* 2:22; *Matthew* 14:27, 17:7, 28:10; *Mark* 5:36, 6:50; *Luke* 12:4; *John* 6:20; *Acts* 18:9; *1 Peter* 3:14. It also appears in inexact form, for example, "thou shalt not be afraid," an additional 28 times: *Deuteronomy* 1:17, 1:29, 7:18, 18:22, 31:6; *Nehemiah* 4:14, 6:9; *Job* 33:7; *Psalms* 3:6, 49:16, 56:11, 91:5, 112:7, 112:8; *Proverbs* 3:24; *Isaiah* 8:12, 12:2, 31:4, 44:8, 51:7; *Jeremiah* 30:10, 39:17, 46:27; *Amos* 3:6; *Zephaniah* 3:13; *John* 14:27; *Romans* 13:3, 13:4.

25. This is not to say that there might not be use for the services of a former-judge type or an "outcome expert" such as an experienced litigator. In which case, our market-driven economy will no doubt respond with an abundance of evaluators to choose from.

26. See Riskin, *supra* note 1, at 43-48. See also *supra* note 17.

27. This is *not* a suggestion that research is needed. There simply are irreducible dimensions to our lives as spiritual beings. The suggestion that there is a "locus" to resolution is already an inelegant anthropomorphism. I do not disparage the social sciences, and believe they have an important role in the field, in particular with institutionalized programs. However, I hold close to my heart the years in Berkeley studying with Robert Bellah, the country's foremost sociologist of religion, and remember his perpetual exasperation with his "positivist" colleagues who would reduce everything to what the empirical data established. Data is important, but devoid of the normative.

There is value to science, hard or social, but it should not claim nor be accorded hegemony over those aspects of life that carry dimensions of irreducible mystery. Some things can be broken down, dissected and "understood." Other things do not harm, indeed bring life, to the extent we participate in their sacred possibilities. For some people, these endeavors can live side-by-side. By and large, however, success in maintaining a commitment to the sacred is isolated to one's personal life. God forbid we should seek or expect our business lives to include the possibility; God forbid we should discuss it in a law review article.

28. See MARTIN BUBER, *I AND THOU* (1958).

29. *Id.* at 3.

Thou.³⁰ The *I-It* describes our relations with nature and people in the everyday; it is where we dwell most of the time.³¹ In the *I-It*, the I sees the subjects of its perception as “other” and available for its utilitarian needs.³² In this relationship, the “I” is primary, if not “all.”³³ In contrast, the *I-Thou* describes a relation of mutuality, where neither I is primary.³⁴ In some sense, therefore, the I in the *I-Thou* is different from the I in the *I-It*.³⁵ In the *I-Thou*, each I enters the “between” to meet the other, the *Thou*.³⁶ The place of meeting — the *between* — is where the I and the *Thou* engage in dialogue.³⁷

The locus of resolution, then, is the *between*. Those who acknowledge and respond to the invitation to mediation come to the table, which functions, therefore, as the place of meeting. It is the place which awakens and births possibilities; it engenders the freedom to make possible what previously did not exist and could not even be conceived. (This helps us understand the significance in “mediator speak” of the terms “come to the table” and “at the table.”)

There is no *I-Thou* without the *I-It*; there is no *I-Thou* that exists always, in every place, in every moment. So, too, those who come to mediation need to know that they can make the *I-It* into something more, even if the more requires — or precisely because it requires — ongoing rebirth and regeneration and recommitment. Mediation offers a tangible means to aspire to our God-given best.

Mediation requires a readiness to respond to the invitation to meet the other in the *between*, an unknown terrain. In addition, it requires a readiness to meet one’s “adversary” at that very place — the adversary being both the other party(ies) *and* oneself. Resolution does not exist “in” either party. In truth, to the extent it occupies space, it lies in the *between*, the place of meeting.

E. Presence

Mediation works because of presence. Presence is what infuses the invitation with genuineness. Presence is what, in the end, moves participants past their fears or moves them in spite of it. What is it? Presence is that quality of human action and behavior that addresses the moment, that does what is appropriate; that quality of service that is so alive as to be grace-filled and which transforms its agent into a harbinger of that which heals; that quality of being that loses itself as it meets the other.

30. *Id.* at 3-4.

31. *Id.* at 38.

32. *Id.*

33. *Id.* at 37-72.

34. *Id.* at 9.

35. *Id.* at 3.

36. *Id.* at 11-13.

37. *Id.*

The mediator, by being present, encourages the parties to be present to each other.³⁸ Presence, however, is not a mediator's birthright. No lecture, book learning or role playing translates automatically into presence. Mediators, as participants in our common humanity, also walk into the room with fear, particularly fear of failure.³⁹ Such fear is engendered through self-consciousness. Its nature is to shut down instinct, making presence an unapproachable aspiration. Fear presents the profound challenge of the process itself. A good mediator will not have lost the fear, but through experience will have come to trust the process, to know that the chaos at the table shall not be necessarily transcendent and triumphant.⁴⁰ An evaluative approach validates a way for a mediator to avoid stepping forward, to avoid the risk of performance; it is a way to confer hegemony upon fear. The evaluative practitioner falls back on the familiar, the predictable, the comfortable.

F. Paradox

The mediator's role is complex, even paradoxical. A mediator must be remarkably and uniquely present — a full participant. At the same time, and more fundamentally, the mediator must be present in a manner that embodies an understanding that she or he has no significance at all to the dispute and its resolution. A statement by the midwife who participated in the birth of our third son gets right to the heart of this paradox of "ego-less presence." Reflecting on her role in our family's momentous experience, she said that while "doctors *deliver* babies, I *catch* them."⁴¹

In a time when our discussions regarding mediation appear to center on the mediator — credentialing, qualifications, ethics, professionalization, unauthorized practice of law, marketing, etc. — we must return our focus to the process and the implicit and requisite *humility* of the practitioner. The mediator must function within a paradox: how to be central and matter not at all.⁴²

38. See also Joseph P. Folger & Robert A. Baruch Bush, *Transformative Mediation and Third-Party Intervention: Ten Hallmarks of a Transformative Approach to Practice*, 13 MEDIATION Q., Summer 1996, at 263, 273 (stating that the mediator remains closely focused on the here and now, on what is going on "in the room").

39. There is an implicit tension between marketing and service. It is not easy for a mediator, having advertised his or her competencies, strengths, and perhaps "record," to bring a demeanor or cast an image — especially in our Madison Avenue/Hollywood dominated culture — that is other than "I make it happen."

40. See Davis & Gadlin, *supra* note 6, at 58 ("[W]e must admit that the mediation process, as typically practiced, has a simple beauty and logic of its own as well as some forgiveness for mediator error."). See also Folger & Bush, *supra* note 38, at 272 (stating that mediator is comfortable with ambiguity and recognizes that clarity emerges from confusion).

41. See Davis, *Logic*, *supra* note 6, at 17 (beginning an exquisite description of what makes mediation work by seeing her daughter's — not the doctor's — recent delivery of a baby daughter as an analogy for good mediation).

42. See Reuben, *supra* note 21, at 57 (quoting mediator Gary Friedman as he explains why experienced lawyers who try mediation often find the difference in orientation awkward and frustrating: "Attorneys accustomed to seizing power in law practice must learn to *give it away* to the parties in a mediation," he says.) (emphasis added); see also Davis, *Logic*, *supra* note 6, at 19 ("James Laue has spoken of a mediator's 'ego container, an imaginary box to constrain one's self-importance.' I support

IV. MEDIATION – LIBERATED?

In one way, the quote from Maimonides that opens this essay stands in the prophetic tradition. Maimonides shares with the prophets an indifference to popular culture (“the multitude”). Though Maimonides’ stature is virtually unparalleled in Judaism, the fact is that he stood more in the Aristotelean tradition than the prophetic. I turn to the prophetic voice at this point, however, due to Professor Stempel’s use of the word “liberate” in the title of his essay, a word choice I found intriguing. Both dictionaries I consulted told me that “liberate” means to set free, to release from restraint or bondage, to set at liberty.⁴³ In neither did I find what I was looking for: an explanation of what the liberated entity was now free to be or become, or free to return to. For example, Judaism teaches that when God liberated the Jewish people from Egypt, they gained more than freedom from slavery. They were set free to worship God in keeping with the traditions of the patriarchs and matriarchs, who had preceded them many generations before, and of whom they told stories. They also were set free to return to the land of their forefathers and foremothers. Indeed, with the benefit of hindsight, we know that they were set free to reach an agreement — a covenant — with God at Mount Sinai, an event that called the people of Israel into being.

Prophets yearn for the liberation of those to whom they preach. They call back members of a community who have strayed from constituting events, who fail to retell stories of the people’s history, who have confused their identity and, therefore, their purpose and direction with those of others — back to those very things they have let go of or lost, that are the source of their freedom.⁴⁴ Prophets have little tolerance for contingencies of the moment, be they political or economic realities, personal tragedies, or any factor that might interfere with taking the action they believe God requires.

I am unable to understand the word “liberate” without the benefit of a simultaneous response to the question: Liberated — to what end? Though the dictionaries are silent on this aspect, suggesting it is not a compulsory component of the concept, I had hoped Professor Stempel would describe what liberated mediation — shorn of the facilitative ideology — was serving, what its roots were, and what norms it looked to for guidance, direction, and purpose. I wanted to understand why liberated mediation would fare any better in its milieu than did countries in eastern Europe which, when liberated of communist ideology, found their repressed historical hatreds reawakened while their value-laden traditions remained in a state of slumber.

his concept. Our attitude toward ourselves is critical. Who’s providing the service for whom?”).

43. MERRIAM-WEBSTER’S COLLEGIATE DICTIONARY 670 (10th ed. 1993). THE AMERICAN HERITAGE DICTIONARY 395 (New Dell ed. 1987).

44. For Heschel, freedom is not self-assertion, but response to a demand. See ABRAHAM J. HESCHEL, 1 THE PROPHETS xv (1969). Therefore, “[i]t is not a world devoid of meaning that evokes the prophet’s consternation, but a world deaf to meaning.” *Id.* at xiii.

Liberated mediation, presumably eclectic mediation, has no memory at all. Where there is no memory, the eclectic might as well be anything. There is no anchor.⁴⁵ "Eclectic" means "selecting what appears to be best in various doctrines, methods or styles[;] composed of elements drawn from various sources."⁴⁶ What informs the selection process? the blending of the diverse elements? the application of the mix in particular settings and situations? "Eclectic" is a fancy word for the descriptive. It is a comfort to the market, in particular its lawyer-driven component that wants mediation — because of its good name (no doubt, the benefit of its vision of a real *alternative*) — to look like the familiar.⁴⁷ I struggle to understand why there is such acceptance of the descriptive, but so little caring for and stretching towards the vision of the *alternative*.⁴⁸

Yet, we should be aware that long before this external challenge and even without other challenges, mediation faced and will continue to face challenges from within. In 1981, Joseph Stulberg commented that "while the use of mediation has expanded, a common understanding as to what constitutes mediation has weakened."⁴⁹ It is important, he stated, to "identify and clarify the principles and dynamics which together constitute mediation as a dispute settlement process."⁵⁰ In other words, something built on a foundation of spirit and enthusiasm always runs the risk of reification and of losing touch with its source of inspiration, whether or not externally challenged.

45. See *infra* note 59 and accompanying text.

46. MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY, *supra* note 43, at 365.

47. Eclectic mediation, as described by Professor Stempel, is strikingly narrow, selective and lawyer oriented. Amidst the overwhelming breadth and diversity of options, the "eclectic" model he suggests — "evaluation and facilitation are two ends of a continuum or two regions of a circle" — barely exists in two dimensions. Stempel, *Inevitability*, *supra* note 4 at 248. Robust eclecticism ought not to be constrained by characterizing all disputes as "legal." There are multiple other meaning systems that have a lot to say about disputes, their resolution, and the parties disputing and resolving them — cultural, psychological, interpersonal, social, historical, and ethnic, to name only a few. I can envision such a variety of resources bundled together as a vibrant three-dimensional web, offering parties an amazing variety of expertise ready to assist them with their decision making.

48. See Reuben, *supra* note 21, at 55 ("Mediation is the sleeping giant of ADR because it is a *totally different* process than trial and arbitration adjudication." (quoting Frank Sander)) (emphasis added).

49. See Joseph B. Stulberg, *The Theory and Practice of Mediation: A Reply to Professor Suskind*, 6 VT. L. REV. 85, 85 (1981).

50. *Id.* at 85-86.

V. MEMORY, NOT IDEOLOGY

*In memory is the secret of redemption.*Baal Shem Tov⁵¹

As best as I can tell, Leonard Riskin's Grid,⁵² though not the first discussion of the "types" or "forms" of mediation, focused the discussion in which we now participate by virtue of the comprehensive and well-organized overview of the mediation field that accompanied the graphic (and I would think on the basis of respect for him and his work).⁵³ Riskin claimed to want "to facilitate discussions and to help clarify arguments by providing a system for categorizing and understanding approaches to mediation."⁵⁴ He hoped this would help overcome the "confusion between the "is" and the "ought."⁵⁵

Riskin claims to have put to the side the question of what mediation "ought to be" in order to inquire exclusively regarding: what types of mediation exist now?⁵⁶ Though this appears to be a tip of the hat to the normative, the courtesy is quickly exposed as superficial. Riskin aligns with the Wittgensteinian view that "usage determines meaning."⁵⁷ He explains: "It is too late for commentators or mediation organizations to tell practitioners who are widely recognized as mediators that they are not, in the same sense that it is too late for the Pizza Association of Naples, Italy to tell Domino's that its product is not the genuine article."⁵⁸ With the brush of an instrumentalist pen, Riskin has welcomed everything under the reach of the now artificially over-extended mediation umbrella. Nothing lies outside.⁵⁹

51. Reb Israel, son of Eliezer, the Baal Shem Tov, "Master of the Good Name," (ca. 1690-1760), is generally regarded as the founder of the Hasidic movement in Judaism.

52. The Grid was first published in 1994, and later comprehensively reworked. See Leonard L. Riskin, *Mediator Orientations, Strategies and Techniques*, 12 ALTERNATIVES TO THE HIGH COST OF LITIG. 111 (1994). See also Riskin, *supra* note 4.

53. See Kovach & Love, *supra* note 17, at 72; Lande, *supra* note 21, at 842.

54. See Riskin, *supra* note 4, at 13.

55. See Riskin, *supra* note 4, at 9.

56. See Riskin, *supra* note 4, at 13.

57. See Riskin, *supra* note 4, at 13.

58. See Riskin, *supra* note 4, at 13.

59. See Joseph B. Stulberg, *Facilitative Versus Evaluative Mediator Orientation: Piercing the "Grid"* Lock, 24 FLA. ST. U. L. REV. 985, 992 (1997). I quote at length Stulberg's precise and accurate critique:

The general structure of this criticism, then, is that by letting a thousand flowers bloom in the name of mediation, *the grid embraces whatever values a particular orientation espouses*. Since all orientations are "mediation," no commanding, independent analytical framework for evaluating mediator performance emerges. *By necessity, we are constrained to evaluating the conduct from the frame of reference of the quadrant within which one finds oneself. That evaluation reduces everything to a matter of efficiency, not propriety.* Riskin, on pain of contradiction, must be wedded to this analytical consequence. For if he were to begin to offer some goals and values (for example, that mediation is consensual and participatory) as being distinctive of the mediation process, thus indicating standards against which one can evaluate mediator conduct, then the gate is opened to ask why those values, but not others, were included. *Since the grid has no way in principle of foreclosing any values from being acceptable, it relinquishes all claims to establishing a*

God help us if we do not care about whether a frozen pizza from America's plastic kitchens precludes Italians from sitting at a table to share a meal that may carry historical, social, familial, and communal meanings. I neither impute nor deny any special nutritional value to pizza, but let us recognize that not all food nourishes equally. I do not want to participate in feeding fast food to the public, when organic food is so readily available.⁶⁰ (Not to mention, generally less costly!) Our field needs to hold on to memory, values, principle, and the historical experience of normative practice.⁶¹

Others⁶² have noted the irony that the creator of the Grid is the same person who in 1982, in the early hours of mediation's public appearance, boldly posted a sign warning lawyers that mediation was fundamentally — indeed, paradigmatically — different than the practice of law.⁶³ Riskin's *Mediation and Lawyers* was inspirational for me as a law student. It affirmed the compatibility of law and mediation for me (having come to law school guided more by the mediator's than the lawyer's philosophical map), and simultaneously envisioned mediation's potential to transform society, lawyers and the practice of law.⁶⁴ Alas, the Grid, which unfortunately assumed that the styles of individual mediators translated into different "types" of mediation,⁶⁵ points to the importation of mediation onto the lawyer's philosophical map.⁶⁶ Potential has been transformed into cooptation.

* * *

noninstrumental foundation on which to critique mediator conduct. (emphasis added).

60. See Kovach & Love, *supra* note 17, at 75-76 (reporting that while it may be too late to save pizza, French regulators appear to have acted timely to clarify the requirements for a "real" boulangerie or bakery).

61. See Menkel-Meadow, *supra* note 8, at 1887 ("These definitional differences matter because, while they may begin as behavioral or technique differences in how ADR is practiced, they derive from different philosophies of ADR and its purposes, implicating very important ethical concerns.").

62. See Kovach & Love, *supra* note 17, at 110.

63. See Riskin, *supra* note 1, at 44 ("These assumptions [of the lawyer's philosophical map], plainly, are polar opposites of those which underlie mediation: (1) that all parties can benefit through a creative solution to which each agrees; and (2) that the situation is unique and therefore not to be governed by any general principle except to the extent that the parties accept it.").

64. See Riskin, *supra* note 1, at 57-58 ("The spread of mediation could do much to improve the quality of life in our society, not only because of the savings it brings, but because it fosters interaction among people and empowers them to control their own lives The provision of good quality mediation-cum-legal services could help lawyers, the bar, and the law schools fulfill the strong impulses — frequently shaded on the lawyer's philosophical map — to make law more responsive to the needs of individuals and society.").

65. Had the Grid held on to the notion of one type of mediation, articulated in many styles, it would have been possible to apply to each style a set of standards. As Stulberg's critique makes clear, with each style equating to a separate type of mediation, each can be evaluated on its own terms, no other. See *supra* note 59.

66. See Kovach & Love, *supra* note 17, at 110.

No great change in political or economic life has ever taken place without a recollection of the past Changes in religious and moral thought also begin with the remembrance of something superficially forgotten, yet real in a transcendent or social mind.

The revelation of God is not a possession but an event which happens over and over again when we remember the illuminating center of our history.

H. Richard Niebuhr
*The Meaning of Revelation*⁶⁷

We are accustomed to hope and promise fading. Yet, their departure need not always be inexorable. Memory recalls earlier moments, when possibility was vibrant and illuminating, thereby recalling it to life in the present. When many engage in remembering the same thing, its radiance and presence is exponentially greater. Niebuhr tells us that memory is — must be — an ongoing effort; it must be recalled over and over again by those who wish to remain attached to it.

A. Origins

When we look for the origins of the modern ADR movement, especially mediation, we find two orientations. The first sees the co-existence of two strands at its beginnings, generally characterized as access or quality on the one, and efficiency or quantity on the other.⁶⁸ There seems to be general acknowledgment of the central role the 1976 Pound Conference had in advancing ADR, especially the efficiency side. Some emphasize, however, the primacy — chronological as well as a matter of personal preference — of the access/qualitative side.⁶⁹

67. See H. RICHARD NIEBUHR, *THE MEANING OF REVELATION* 4, 129 (1974).

68. See Carrie Menkel-Meadow, *Pursuing Settlement in an Adversary Culture: A Tale of Innovation Co-Opted or "The Law of ADR,"* 19 FLA. ST. L. REV. 1, 6 (1991) (qualitative-justice and quantitative-efficiency); Singer, *supra* note 11, at 26 (access and efficiency); Jeffrey W. Stempel, *Reflections on Judicial ADR and the Multi-Door Courthouse at Twenty: Fait Accompli, Failed Overture, or Fledgling Adulthood?*, 11 OHIO ST. J. ON DISP. RESOL. 297, 309-324 (1996) (efficiency and decreasing confidence in adjudication).

69. See Singer, *supra* note 11, at 26 ("Over time we began to understand that people involved in a full range of disputes were more satisfied with a process that permitted them to take an active role in the resolution of their disputes. It also became clear that mediation in particular had the potential of preserving relationships and producing better outcomes than adjudication, outcomes that could produce joint gains and be tailored to the particular needs of the parties.")

Although efficiency has become the most prominent concern, I believe the 'quality of justice' proponents actually came first in very recent history. In the 1960s, as part of several other social movements advocating more democratic participation in our various social institutions, a variety of groups urged that dispute resolution should more fully involve the participants in disputes. This would allow individuals to make their own decisions about what should happen to them. Thus, a model of community empowerment, party participation, and access to justice was championed by those concerned with substantive justice and democratic process.

The second orientation does not see such complexity and presents a singular explanation of mediation's beginnings.⁷⁰ That explanation is typically consistent with the description of mediation offered by Lon Fuller in his 1971 article on mediation (which preceded the Pound Conference by five years):

[T]he central quality of mediation is its capacity to reorient the parties towards each other, not by imposing rules on them, but by helping them to achieve a new and shared perception to their relationship, a perception that will redirect their attitude and dispositions toward one another. This quality of mediation becomes most visible when the proper function of the mediator turns out to be, not that of inducing the parties to accept formal rules for the governance of their future relations, but that of helping them to free themselves from the encumbrance of rules and accepting, instead, a relationship of mutual respect, trust and understanding that will enable them to meet shared contingencies without the aid of formal prescriptions laid down in advance [I]t should be remembered that the primary function of the mediator . . . is not to propose rules to the parties and to secure their acceptance of them, but to induce the mutual trust and understanding that will enable the parties to work out their own rules.⁷¹

Fuller is quoted at length for reasons that are obvious. This seminal expression concerning mediation, from the pen of one of the country's premier legal scholars as he neared the end of a long career steeped in traditional substantive and procedural jurisprudence, is unequivocally in the "facilitative" tradition. There is no place for evaluation in this statement.

Menkel-Meadow, *supra* note 68, at 6.

70. See ROBERT A. BARUCH BUSH & JOSEPH P. FOLGER, *THE PROMISE OF MEDIATION: RESPONDING TO CONFLICT THROUGH EMPOWERMENT AND RECOGNITION* 1 (1994) (stating that, in the 1960s, attention was focused on mediation from two very different directions – "potential for responding to urban conflict and its flash points" and "potential for building community resources alongside the formal justice system"); Kovach & Love, *supra* note 17, at 89 ("[M]ediation had as its core a simple idea – one that radically distinguished it from adjudication. In mediation, the parties themselves controlled the outcome of the dispute."); Benjamin, *supra* note 6 ("Mediation was originally conceived and borne out of the circumstantial necessity to give disputing parties a way around being intruded upon by courts, lawyers or other professionals who otherwise presumed to know better for them and their children what they should do.").

See also Albie M. Davis, *Community Mediation in Massachusetts*, 19 (Jan. 1986), Salem, Mass. Administrative Office of the District Court (explaining the 1975 origins of Dorchester's Urban Court Program, the first community mediation program in Massachusetts: "The Urban Court Program was patterned after that of the Institute for Mediation and Conflict Resolution (IMCR) of New York City, which was founded in the late sixties to address community conflicts. IMCR represented a conscious experiment in joining the dispute resolution skills of labor mediators with recently learned lessons about community-building [T]he IMCR staff demonstrated that community residents could be trained as mediators to handle community-based conflicts.").

71. See Lon Fuller, *Mediation – Its Forms and Functions*, 44 S. CAL. L. REV. 305, 325-26 (1971).

B. A Recent Example of the Exercise of Memory

I currently serve on the Society of Professionals in Dispute Resolution's ("SPIDR") Unauthorized Practice of Law ("UPL") Task Force. Last spring, at a weekend retreat, we agreed to engage the topic on a process-by-process basis. At the inception of the discussion on mediation, we wanted, first, to establish what the authorized practice of mediation was before tackling the UPL question.⁷² We agreed, therefore, to begin with a definition of mediation.⁷³

In taking this step, the Task Force chose to walk in footsteps already taken by members of SPIDR who previously engaged the question. This was no fabrication *ex nihilo*, no radical or ideological step by "forces of good" to defeat "forces of evil." We sought roots, precedent — plainly, the guidance of our teachers, colleagues, and predecessors. The Task Force endeavored to participate in a temporal continuum which looks to the past and to the future. The *Model Standards*, approved by SPIDR, the American Arbitration Association and the ABA, not surprisingly, references its place in an even fuller historical context:

•••

The model standards of conduct for mediators are intended to perform three major functions: to serve as a guide for the conduct of mediators; to inform the mediating parties; and to promote public confidence in

72. See John W. Cooley, *Shifting Paradigms: The Unauthorized Practice of Law Or the Authorized Practice of ADR*, DISP. RESOL. J. Aug.-Oct. 2000, at 72. Jack Cooley co-chairs SPIDR's UPL Task Force.

73. The working definition agreed to at that time is as follows:

Mediation is a party-driven process in which disputants seek a neutral third-person to assist them in the resolution of their difference(s). Mediation is built on the principles of voluntariness, informed consent, confidentiality and self-determination, which are to be understood in the broadest manner possible. These principles mean that the mediator assists the parties in clarifying and defining issues, identifying and exploring alternatives and options, and articulating resolution (if any). In those situations where the parties determine that they require substantive area or outcome expertise to assist them in their participation in the mediation, the mediator and the parties will craft the process to ensure that the parties have the opportunity to obtain such professional services from those not at the mediation table as a prerequisite to their further participation in the mediation.

As stated in Section VI of the *Model Standards of Conduct for Mediators*: "A mediator should refrain from providing professional advice. Where appropriate, a mediator should recommend that parties seek outside professional advice, or consider resolving their dispute through arbitration, counseling, neutral evaluation, or other processes."

Other relevant provisions from the *Model Standards of Conduct for Mediators* are:

Section I: Self-determination is the fundamental principle of mediation. It requires that the mediation process rely upon the ability of the parties to reach a voluntary, uncoerced agreement. . . . The primary role of the mediator is to facilitate a voluntary resolution of a dispute It is good practice for a mediator to make the parties aware of the importance of consulting other professionals.

Section VI: The primary purpose of a mediator is to facilitate the parties' voluntary agreement. This role differs substantially from other professional-client relationships. Mixing the role of a mediator and the role of a professional advising a client is problematic, and mediators must strive to distinguish between the roles.

STANDARDS OF CONDUCT FOR MEDIATORS, reprinted in 1995 J. DISP. RESOL. 122-28.

mediation as a process for resolving disputes. *The standards draw on existing codes of conduct for mediators and take into account issues and problems that have surfaced in mediation practice.*⁷⁴

The *Model Standards* exclude evaluation in mediation. Standard I (Self-Determination: A Mediator Shall Recognize that Mediation is Based on the Principle of Self-Determination by the Parties) urges mediators to refer parties to consult with other professionals.⁷⁵ Standard VI (Quality of the Process: A Mediator shall Conduct the Mediation Fairly, Diligently, and in a Manner Consistent with the Principle of Self-Determination by the Parties) precludes advice giving by a mediator.⁷⁶

C. A Second Recent Example of the Exercise of Memory

The lead article providing an overview and introduction to the balance of the articles on mediation in the most recent *Dispute Resolution Magazine* is written by the Honorable Dorothy W. Nelson, a judge on the Ninth United States Circuit Court of Appeals.⁷⁷ I call attention to what she has to say in two of the article's subsections. Under "A more holistic approach," Judge Nelson writes:

While I agree that problem solving is superior to dispute resolving in concept, we should not lose sight of the *enormous potential of transformative mediation*. In problem-solving mediation, the most basic objective is to improve the parties' situation from what it was before. In transformative mediation, however, the objective is defined as improving the parties themselves, to reconnect people to their own inner wisdom

74. *Id.* (emphasis added).

75. *See id.* Standard I, which states in relevant part:

Self-determination is the fundamental principle of mediation. It requires that the mediation process rely upon the ability of the parties to reach a voluntary, uncoerced agreement. Any party may withdraw from mediation at any time."

The mediator may provide information about the process, raise issues, and help parties explore options. *The primary role of the mediator is to facilitate a voluntary resolution of a dispute.* Parties shall be given the opportunity to consider all proposed options.

A mediator cannot personally ensure that each party has made a fully informed choice to reach a particular agreement, but is a *good practice for the mediator to make the parties aware of the importance of consulting other professionals, where appropriate, to help them make informed decisions.* (emphasis added).

76. *See id.* Standard VI, which states in relevant part:

The primary purpose of a mediator is to facilitate the parties' voluntary agreement. This role differs substantially from other professional-client relationships. Mixing the role of a mediator and the role of a professional advising a client is problematic, and mediators must strive to distinguish between the roles. *A mediator should, therefore, refrain from providing professional advice. Where appropriate, a mediator should recommend that parties seek outside professional advice, or consider resolving their dispute through arbitration, counseling, neutral evaluation, or other processes.* (emphasis added).

77. *See* Honorable Dorothy W. Nelson, ADR in the 21st Century: Opportunities and Challenges, 6 DISP. RESOL. MAG., Spring 2000, at 3.

and common sense, to help parties to recognize and exploit the opportunities for moral growth inherently presented by conflict. A transformative practice rests upon an emerging relational vision of human nature and society contrasted with the prevailing individualistic vision that often underlies a problem-solving orientation. *It is a holistic approach to resolving conflict, as opposed to a technocratic approach.*⁷⁸

Under "Emerging professionalism," Judge Nelson writes:

Another challenge is the issue of professionalism and what constitutes credible education of professionals *There is a growing problem with training large numbers of lawyers and non-lawyers in skills and processes, who approach the field as entrepreneurs in a new industry. It is my observation that concepts such as "pure" mediation may in this century become less significant than a range of approaches that are woven into society and "practiced" by people who are not "professionals." The real question is how professionals will respond if conflict resolution becomes a part of everything rather than something separate.*⁷⁹

One has to ask: what is the source of such thoughts, articulated in such a fashion by such a person, appearing in such a publication, at this time? One can only answer: memory, happening over and over again; not ideology.⁸⁰

78. *Id.* at 4. (emphasis added).

79. *Id.* (emphasis added).

80. Judge Nelson's comments do not appear to indicate that she favors evaluative mediation, nor do they appear to suggest that she believes that the ultimate goal of mediation or any other ADR technique is the efficient and just resolution of controversy. Memories leading to such comments tell us that the following statements from Professor Stempel's essay may not be the final word: "Courts and commentators have shown increasing favor toward some evaluative or advising component of mediation." See Stempel, *Inevitability*, *supra* note 4, at 250. "At its extreme, the 'mediation is nonevaluative' mantra becomes an end in itself and loses sight of the ultimate goal of mediation or any other ADR technique: the efficient and just resolution of controversy." *Id.* at 255.

VI. THE GOOD BUREAUCRACY⁸¹

Here is the best I can do to explain Professor Stempel's appetite to condemn "facilitative orthodoxy," assuming *arguendo* its existence, while condoning "evaluative imperialism."⁸² The answer: mandatory mediation.

If the courts force parties to mediate and force the mediator to blithely facilitate unfair case resolutions, the system becomes an active wrongdoer. To minimize the chance of these occurrences, court-ordered mediation must clearly enable mediators to adopt styles that not only encourage resolution, but also prevent unfairness. In addition, courts should take steps to reduce the chances of unfair mediated outcomes by ensuring that the mediators to whom cases are referred are not so inflexibly committed to either pure facilitation or pure evaluation.⁸³

Judicial coercion (sanctioned), however, is only the first half of the critique. It must be merged with the second half, which is the inadequacy of the statutory and regulatory scheme governing mediation, in particular the administrative failure to read out of (or in to?) such authorities the flexibility that Professor Stempel believes appropriate. In other words, he supports mandatory mediation as a desirable efficiency for our legal system.⁸⁴ He just wants the tools to "do it right."⁸⁵

81. See Sharon Press, *Institutionalization: Savior or Saboteur of Mediation?*, 24 FLA. ST. U. L. REV. 903, 916 (1997). Press, Director of the Florida Dispute Resolution Center, is responsible for the theme of this section of the essay. In a very honest reflection on ADR developments in Florida, in which she has played no small part, Press reveals her concerns "about the ultimate effect that additional rules will have on the mediation process, *i.e.*, what will happen when a flexible process, like mediation, is incorporated into the traditional court process. Which process changes?" In her essay, she reviews some of the developments during the prior ten years, including the tremendous growth in the number of mediators.

In its infancy, the program had few enough people that Press could interact "with individuals on a one-to-one basis." This contrasts significantly with a database with thousands of names ten years later. Press confesses to no longer knowing everyone personally. At this point, she delivers the punch line. Though she no longer knows everyone personally –

It has been my commitment, however, to maintain a "good" bureaucracy – if an individual calls, we will explain the policy or procedure and the rationale for it rather than just say, "That's the policy, period." It has been my commitment to run the DRC using all of the positive lessons that I have learned from being trained and serving as a mediator.

Then, and finally, she notes the shadow on the other side of her and her program's sunlight:

Will the next generation bring that same commitment? As the office grows in numbers (a necessary outgrowth of increased institutionalization), will everyone be able to answer all of the questions that arise? When the rules become so numerous, will the answer increasingly be, "That's what the rule says – we have no flexibility in this area?"

82. See Stempel, *supra* note 4, at 254-56.

83. See Stempel, *supra* note 3, at 973.

84. See Stempel, *supra* note 68, at 365-66.

85. One ought always to aspire to "doing things right." What is not clear to me is what has gone wrong. Professor Stempel's essay under discussion in this Symposium, as well as his 1997 essay, *Beyond Formalism*, offer examples of theoretical harms, as well as hypotheticals addressed by the Florida Mediator Qualifications Advisory Panel. See Stempel, *supra* note 3, at 954-64 (divorce mediation, landlord-tenant dispute, personal injury tort action, Pol Pot and Mother Theresa mediation;

I believe this is a misguided criticism reflecting shortcomings in understanding mediation, the values of the mediation community and the administrative structure needed to operate a mediation service in keeping with the spirit of the process of mediation. Such shortcomings generate unrealistic expectations. Mediation is being asked to transform administrative, bureaucratic institutions, rather than work at transforming persons. Mediation is a fragile process, rooted in the possibilities that may be birthed where there is *meeting*. It is not a tool of social and/or legal salvation. The issue is not what the Florida Rules do or fail to do;⁸⁶ the issue is what they *cannot* do.

Rules can be promulgated and modified, iteratively if necessary. In the end, however, their implementation occurs in the specificity of the next mediation. At which point, control from the top is gone. Only if application of a rule has been preceded by use of all the tools that support the practice of mediation; among them training, supervision, appropriate matching of parties and neutral, with such activity performed by skilled and committed persons, is there any hope of success.

A. Rules

As Menkel-Meadow has pointed out, it is ironic "that the courts are moving into a period of rigid rule making to structure the very processes that were designed to transform the judicial system into one more flexible and responsive to the needs of its constituents."⁸⁷ I struggle to understand why anyone would want to consider implementing mediation within our court system as a means of generating efficiencies. The debates that must be engaged in, the constituencies that have to be enfranchised and sold on the idea, the educational outreach efforts (to citizens, lawyers, court personnel, judges, and many others), the bureaucratic structures that have to be dealt with, all of these have to be engaged and accommodated and, in some way, transformed.⁸⁸

and Advisory Panel opinion 95-002); Stempel, *supra* note 4, at 255 & nn.48-50 (divorce mediation; landlord-tenant dispute; personal injury tort action; and Advisory Panel opinions 95-002, 95-005A, and 95-005C). The systemic injustices that appear to be only potential at this point might spark more concern were there an abundance, or even several, examples from real life.

86. See Stempel, *supra* note 3, at 960.

87. See Menkel-Meadow, *supra* note 68, at 45.

88. Such considerations are mundane in contrast to the questions Robert Benjamin raises regarding our society's preoccupation with law, rules and regulation. It is part of a myth of rationality, he explains, which can lead to an over-reliance on the rules which could lead to a loss of autonomy. Mediation, as a means for individuals to exercise their freedom, "is inherently at odds with the established order." Benjamin concludes that

the chance of mediation's survival as a viable mode of conflict management may be better if it is allowed to remain a subversive activity. If mediation continues to be co-opted and assimilated into the traditional legal system, and forced on people, whether intended or not, for the right reasons or not, then the essential purposes and usefulness of the process may be lost.

See Benjamin, *supra* note 6.

To the extent we institutionalize mediation, it should be limited to the creation of high level uniform standards regarding what constitutes mediation. There should not be detailed regulations imposed from the top down; norms in mediation must be rooted and draw their strength from the bottom up. At the same time, there should be extraordinary efforts to create and nurture resources in the courts. Mediation initiatives should not be implemented on a system-wide basis; they should be done at a deliberate pace and incrementally. Those courts and communities that have demonstrated a solid orientation to mediation, and that have a record of collaboration between court employees and mediators should serve as laboratories for pilot projects. In this way, there is hope of creating and sustaining the good bureaucracy.

B. Education

The good bureaucracy must implement education programs for the public, public officials, educators, law enforcement personnel, the judiciary, school children, and interacting professions (among them attorneys). The good bureaucracy must put flesh on the outreach landscape and must be at the heart of correcting abuses in mediation practice. This will engender the public's trust.

C. Training

So many of Professor Stempel's concerns strike me as appropriate, but due to bad mediation practice. The good bureaucracy's highest priority should be training. There is only so much rules can do. A religious body may require its adherents to hold faithfully to a creed. Still, that body engages in teaching, preaching, community building, prayer — all sorts of mechanisms that seek to make the creed alive and vital, embedded in daily practice. Students attend classes; we, however, rely on experience to teach different and important lessons to reinforce the classroom learning. As an example, law schools have had great success with clinical programs. The good bureaucracy will implement apprenticeships, peer review, supervision, continuing education, and training standards.

D. Imagination

Professor Stempel's mediation world exists exclusively on the facilitative-evaluative continuum.⁸⁹ This, however, is not a great, broad thing. It is bounded by limited opposites that do not begin to reference or encompass or intimate the breadth, complexity, integrity or humanity of the enterprise. These partially-constructed and constrained polarities reflect the limited imaginations of practitioners in search of market share rather than the limitless opportunities of a process/engagement that seeks — within the confines of human activity — to throw off all artificial, heteronomous constraints. The good bureaucracy requires active imagination.

E. Leadership

We cannot sustain our field without leaders and mentors. The most difficult task the pioneers in any new adventure carry is the need to inspire the next generation and the next and so on. In this way, we ensure that seeds of memory are planted for future recall. Florida's good bureaucracy is no doubt due to inspiring leadership from the top that treats mediation as alive, vital and breathing and, ultimately, entrusted to the care of persons at the grassroots.

F. It Takes a Village

I work in a community mediation center where the efforts of the director and case coordinators is inextricably tied to my work as a mediator. They screen cases, parties, situations, determine appropriateness, match the parties and the problem with the mediators, and provide guidance and advice — community! — during a mediation. Granted, these are extraordinarily competent, sensitive and committed folk, not easy to replicate, but should we expect less from our courts? Why is such a degree of qualifications, staffed on a shoe-string, not-for-profit budget, unavailable in our courts? We let our system of justice off much too easily! Mediation is for, of and by community. This is what gives it its normativity.

VII. FAITHFULNESS

It can be fatiguing to dwell in the struggle to find places for the vision, to make a bit more incarnated in the here and now that which always seems to lie in the far-distant future — unreachable. The idea of the *mediation garden*⁹⁰ comes to mind as I consider the guidance of H. Richard Niebuhr. In correspondence published in several editions of *The Christian Century* between H. Richard and his brother,

⁸⁹. See Stempel, *supra* note 47.

⁹⁰. See Kolb, *supra* note 15.

Reinhold Niebuhr, he wrote, "Our task is not that of building utopias but that of eliminating weeds and tilling the soil so that the kingdom of God can grow. Our method is not one of striving for perfection or acting perfectly, but of clearing the road by repentance and forgiveness."⁹¹

Our task, for those of us in the field,⁹² includes the following: to let mediation be mediation, recognizing that not everything can fit under its umbrella; to practice with humility; to be of service above all; to trust and follow one's instincts in the face of commercial pressures; to keep the promise;⁹³ and to attend to and care for the essential spirit of mediation.

* * *

In the current *Harvard Divinity Bulletin*, Francis Schüssler Fiorenza, Stillman Professor of Roman Catholic Theological Studies at Harvard Divinity School, discusses the meaning of idolatry in contemporary discussion.⁹⁴ He asks: "How is idolatry possible or meaningful in [a] world in which everything is rationalized?"⁹⁵ He responds: "[T]he crucial question is not whether idolatry has a compelling meaning, but whether and how the belief in God can have a compelling meaning. What should be compelling is not the fear of idolatry, but rather the need for sacraments of the divine presence What is needed is the enabling and the empowerment of the religious imagination."⁹⁶

Thus, in the end, I seek not to smash the evaluative idols and idolaters but to lift up the diminishing voice of the fragile spirit of mediation. Whether and to what degree we can go back is debatable. What is at stake, however, is whether there will be anything worth going forward with. If the spirit that has enthused so many, including the first generation, thousands of volunteer community mediators, and many others, does not have a prominent place — as, for example, the guiding light

91. See H. Richard Niebuhr, *A Communication: The Only Way Into the Kingdom of God*, 49 THE CHRISTIAN CENTURY 447 (1932).

92. Practitioners involved in the 1980s with the development of SPIDR's Ethical Standards of Professional Responsibility and the work of the first Commission on Qualifications are virtually unanimous in referring to the "field" in which they practice (rather than "profession"). While some might see in this confirmation of the evolution in the thinking of ADR practitioners (increasing focus on professionalism), I find it instructive and a source of guidance for those in the field. There is a line drawn between experience, training, background, history and substance on the one hand, and self-promotion on the other hand. See *Qualifying Neutrals: The Basic Principles*, DISP. RESOL. F. (May 1989); *SPIDR's Ethical Standards of Professional Conduct: Six Leading Practitioners Discuss Their Meaning*, DISP. RESOL. F. (Mar. 1987).

93. See Kovach & Love, *supra* note 17, at 108-10.

94. See Francis Schüssler Fiorenza & Hilary Putnam, *From Darkness to Light? Two Reconsiderations of the Concept of Idolatry*, 29 HARV. DIV. BULL. 20 (2000).

95. *Id.* Weber used the term "rationalization" to describe modern society. For Schüssler Fiorenza, rationality "leaves little room, except within individual private subjectivity, for the question of the locus for the affirmation of God or even of idols." *Id.*

96. *Id.*

or wise elder — at the table, how long can it be before there will be nothing to attend, nothing to protect, nothing to pass on?

May It Be So

I close with a prayer I wrote a few years ago — a mediator's prayer — which seeks to intimate the gift of that which is only ever potentially available but in that mere possibility, suggests more than we could ever ask for. Can we be other than faithful?

*O Holy One of Blessing, Your Presence fills creation —
 day and night, man and woman, oceans and deserts, mountains and valleys,
 sun and moon, light and dark, clarity and mist, whole and partial,
 wounding and healing, despair and ecstasy.
 It has been said, for everything there is a season.*

*You hear my words; you understand the meditations of my heart.
 May it be that the sounds of others' hearts — full of hopes and fears —
 may be heard at, on, in, above, below and all around this table.
 And may it be that those who venture forth in word
 receive in appropriate measure the visceral assurance they have been heard,
 so they are emboldened to venture forth again — and again.*

*In this dance of offering and receiving, mouth and ear, utterance and capture,
 we need to remember that through word you created the universe.*

*Now, the room — this space, at this moment — all is ordinary.
 Moments in time, each discrete, follow one after the other.
 Later, we will all go home and the ordinary will return as we go to sleep,
 wake up and return to the daily schedules.
 But soon, when the table is surrounded by human life,
 the space will be transformed, and time will open to a new dimension.
 Sometimes I think it stands still.*

*In this standing still, sometimes we sense our fullness and our given limitations.
 We sit here — at the table — wishing to reach across the gaps and experience
 genuineness.*

*We do; we also need to recognize that we cannot dwell here all the time.
 The taste remains and comes back.*

*Presence, who is most present,
may I and my co-mediator be true companions,
perhaps shepherds,
so that this time may be a returning to that place you first made —
called Earth, called All, called Home.*

