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MUST A MEDIATOR BE NEUTRAL? YOU'D BETTER BELIEVE IT!*

JOSEPH B. STULBERG**

I. INTRODUCTION

Have solution; what's your problem?

If that were the business card of a professional mediator, do not hire her. If that were the card of a skillful consultant, secure her services.

Why does that answer seem straightforward, but yet mediators remain divided about whether a mediator must be neutral with regard to the outcomes that parties embrace?

I am perplexed. In my judgment, if we want to use mediation to help persons resolve conflicts because we believe, centrally, that participating in mediation is, and should be, a justice event, then mediator neutrality is required.

In this Article, I want to advance and defend two claims: a mediator must be neutral because justice demands it; and, empirically, a mediator can, in fact, be neutral in the required way. Each claim has been disparaged by practitioners and scholars. If the critics are correct, then there is no principled basis for distinguishing the mediator's¹

* This title, of course, deliberately plays off the remarkably important article by Professor Ronald Dworkin entitled *Objectivity and Truth: You'd Better Believe It*, 25 PHIL. & PUB. AFF. 87 (1996). While I—and most other mortals—can only aspire to match his standard of excellence in terms of intellectual insight governing a particular topic, I hope that by borrowing his title, I can display a comparable passion both for the topic under review and one's belief about how important it is to get our thinking right about it.

** John W. Bricker Professor of Law, The Ohio State University Moritz College of Law. I wish to thank Professors Andrea K. Schneider, Peter Salem, and Susan Yates for inviting me to participate in their important symposium and to join Professor Lawrence Susskind in revisiting our *Vermont Law Review* exchange. In addition, I would like to thank Theodore Greeley, Editor in Chief, and the editorial staff of the *Marquette Law Review* for their support in bringing this Article to fruition. Finally, I wish to acknowledge publicly my deep admiration and respect for my long-time friend and professional colleague, Professor Susskind; his contributions to our field are stimulating, rich, and sustained, and it is always a pleasure to be in his company.

1. Professor Susskind has stated that he and others such as Professor Howard Raiffa do not refer to the mediator as a “neutral intervener,” but as the “n+1,” where “n” stands for the number of participating stakeholders and “n+1” is the intervener. Lawrence Susskind, Professor, MIT, Remarks at the 30th Anniversary Conference: The Mediator and Public

participation from that of a bully or a philosopher king. And if that is so, then thoughtful citizens should widely criticize government agencies, courts, and other institutions that promote or mandate mediation's use. But, I will argue, if the mediator is neutral, then the mediation process itself constitutes both an important justice event as well as a crucial methodology in a rule-of-law regime for non-violently securing or advancing individual dignity and freedom.

I believe, then, that much is at stake in the debate about mediator neutrality. I recognize this is a complex subject. It invites spirited debate and deserves careful, thorough analysis. I may not do it justice, but I want to try. The danger of such discussions is that comments are often crafted at an abstract level divorced from practical applications. I want to try to avoid that pitfall by proceeding first with an examination of the contexts and challenges in which the question of mediator neutrality arises and then examine why the question about mediator neutrality is of interest.

II. MEDIATION AS A JUSTICE EVENT

I think of mediation as a process for displaying and promoting justice. Certainly in the public domain, we design and advocate its use as a legitimate way of promoting the resolution of controversies among citizens in a political community.

Consider the following civic controversy: church members object to the activity of a striptease club located next door. Its members engage in various protest activities, from lying down in the parking lot to taking pictures of patrons and posting them to a website. The business owner and some of the business's patrons respond by standing in the club parking lot on Sunday mornings before announced worship services carrying large picket signs depicting men and women fornicating; these signs, of course, are easily visible to all parishioners, including children, as they enter their church. The parties agree to resolve their matters through mediation. I believe that they are both looking for—and are entitled to—a process that is fair in form and outcome. They are not

Policy, Vermont Law School (Oct. 12, 2011), *available at* http://www.vermontlaw.edu/academics/dispute_resolution_program.htm; *see also* HOWARD RAIFFA, *THE ART AND SCIENCE OF NEGOTIATION* 23 (1982) (defining a mediator as “an impartial outsider who tries to aid the negotiators in their quest to find a compromise agreement”).

looking simply for a procedure that “will end their problems.”²

This vision of mediation differs from two important, albeit related, ideas. The first idea views mediation as an efficient tool for facilitating agreement and gaining compliance among disputing persons about future-looking plans. The second idea emphasizes that many people use mediating skills and strategies to resolve conflicts, but do not pretend or represent themselves to be a mediator. I want to consider each briefly.

Presume a tenured faculty member is serving as department chair of the psychology department at a small liberal arts college. Two faculty department members are viciously antagonistic toward one another. Neither respects the other’s research skills or publications; each publicly criticizes the other’s teaching skills to other departmental colleagues and students. They refuse to serve together on the same department committees. And they each want to teach a very popular course entitled “The Psychology of Aging,” for which one section per year is offered. Can that department chair effectively mediate the controversy over their teaching assignment?

There are a number of adverse dynamics operating in this situation. Suppose the department chair brings the disputing faculty members into her office and says this: “I have had it with the two of you. Your conduct demoralizes both faculty colleagues and students. Your criticisms of one another’s scholarship, while possible in principle, is done in a remarkably unprofessional manner. Here is how we will handle the teaching assignment: we will rotate. Ms. Alice, you taught it last year so I will assign it to Ms. Susan for this coming year. Ms. Alice, you will get it the following year. I can’t see any other way to resolve this, can you?”

Then Ms. Alice explodes: “That’s crazy. I wrote my Ph.D. dissertation in this area only four years ago; I am the expert on this

2. For if that were all either sought, they could consider hiring an arsonist to engage in conduct that would eliminate the other side. To the challenge that such conduct is illegal, of course that is true. But if one had sufficient power, and was thoughtfully savvy and thought that one could engage in that conduct without getting caught, then, at least in principle, one or both of the parties could consider it. By contrast, those interested in resolving the conflict “fairly” rule out certain approaches from the start. To be less dramatic, of course, all one needs to consider is that one of the parties seeks legal redress for their challenge but in a jurisdiction in which the judges are routinely “bought” by various parties, or where government officials require payments in order to advance the procedure—that is, processes in which justice is obviously undermined or distorted. We do not tolerate such distortions when using mediation, either; using mediation to resolve disputes in a political community is a justice event.

subject. I should teach it both to advance my own research and to serve the students well.” Ms. Susan responds, “You know that my long-time career research has focused on the psychology of adolescent behavior. But after twenty-five years in teaching, I clearly wanted to branch out and look for new things. So I have been examining issues in this area for the past two years. I love it. I bring the depth of my career’s perspective to it. And it is where I plan to do my future scholarship.” The two face each other; silence prevails. Finally, Ms. Alice states, “If you won’t let us offer more than one section once per year, then I guess alternating is the best option.” And Ms. Susan responds, “Guess that’s right.” At which point the department chair says, “Terrific. We have an agreement. Now get out.” The department chair, later that evening, reports to her dean that she has finally—and successfully—mediated the controversy regarding teaching assignments between Ms. Alice and Ms. Susan.

The second scenario involves a parent trying to assist his two young children to resolve their dispute regarding which video game to play on their Nintendo Wii. The father says, “John, David. Stop shouting. Let’s try to work this out. First, I want John to talk and make his proposals; David, let him finish before you talk. Then, David, you will speak and share your ideas and John will not interrupt. After that, we’ll see how we go forward.” After three minutes of conversation, the children reach an agreement on which game they will each play, the sequence of who gets the machine first, and the length of time each can play before turning it over to the other sibling. When the father’s spouse comes home later that evening, he reports to her that “the evening was a bit wild, but I successfully mediated the dispute between the kids about the use of the Wii machine.”

Would we agree that the department chair and the parent engaged in “mediating”? And, if so, would we describe either process as a justice event? More important, if we did not, do we care?

While neither situation is an example of the mediation process, at least in the core central meaning of that phrase, I do not believe that there is any significant harm in describing the department chair’s conduct as a limited version of mediating and saying that the parent used mediating skills in forging agreements reached by his children. Further, I do not believe that in either situation our dominant concern is that the process used to resolve the dispute comports with notions of justice. The department chair wants the controversy quieted—on efficiency grounds, if nothing else. The chorus of okays regarding the teaching schedule, whether imposed or embraced, really is not

important; the chair wants to put the matter behind them and move on; she made it clear the direction the resolution would take, and, in management jargon, obtained some (tepid) buy-in. While this process of problem solving and decision-making might be incorporated and embraced by various business organizations as one tool for handling disputes collaboratively and efficiently, no mediator would celebrate these approaches as being ones consistent with justice considerations.

The same is true for the parent intervention. There are other, more pressing values to consider: a quiet evening; children behaving; and, possibly, everyone getting to sleep at a reasonable hour. We could all understand that this situation may simply not be the time to be concerned about whether this is a fair process and outcome.

All of which is to say that justice is one virtue, but perhaps not the most important one, for various aspects of our lives.³

But neither of these intervener approaches is sufficient to address the dynamics of the civic controversy sketched above. We do not want a city mayor, in the style of the department chair, to admonish parties to behave civilly, nor do we want law enforcement officers, *à la* the parent, to monitor participant conduct. Rather, we want an intervener who is respected by the participants to engage the stakeholders, shape a rich dialogue among them and prod them to explore and take responsibility for developing acceptable ways to create a stable, functioning relationship. In short, we want a mediator to guide the conversation in a manner that insures that values and principles other than the “get this case off my desk” mentality take center stage.

III. WHAT IS THE COST OF THE INTERVENER NOT BEING NEUTRAL?

What does a party to a mediation conference want in her mediator? While I recognize that there are a number of qualities and

3. In neither the department-chair nor the parent example, of course, are we indifferent to the manner in which the matter is resolved. We want there to be a modicum of peace within the department; we want children to be respected and to feel as though the matter was resolved in a non-arbitrary way. But efficiency and other priorities carry more weight than due process concerns. (Frankly, I overstate the matter in the parent example just for purposes of emphasis; I actually believe that one of the most important lessons that parents can teach and model for their children are those values of according respect and dignity to one another in the conduct of challenging conversations—those disputing moments among siblings become occasions for teaching others about fair dealing. But I recognize that not every parenting moment can command that approach.)

characteristics she seeks in the intervener,⁴ I would argue that being neutral is central. If one were skeptical, of course, one might assert that each disputant wants an intervener who will endorse her perspective and proposals, and then persuade the other party to agree to embrace them. But since each individual recognizes that everyone might want that, and that no one will agree to such an intervener because it undercuts her interests to do so, then, minimally, each party seeks someone who will not instantly be against her interests or try to persuade her to relinquish her proposals on some or all matters. That is, each will want the mediator to be neutral—not someone who is simply impartial or objective.

We can test this claim by considering the following standard legal dispute: a landlord brings an eviction action against her tenant for nonpayment of rent. The tenant has refused to pay rent for the past two months. Her defense is that her landlord used white paint when painting her apartment walls rather than the dark blue that the tenant had requested and that, the tenant claims, had been agreed to by the landlord when the parties signed the lease. In most U.S. jurisdictions, the tenant's asserted ground does not constitute a legal basis for nonpayment; a judge would rule in the landlord's favor.

But what if that case were referred to mediation. The standard mediation approach would be to invite the parties to share their perspectives; recount their understandings; explore possible options for advancing respective, if not competing, interests; and assist them in exploring possible settlement terms. Some possible outcomes might include the landlord agreeing to let the tenant buy her desired paint color and paint the apartment interior as she wished in exchange for the landlord having the right to repaint the apartment interior to her desired color—at the tenant's expense—six months prior to the expiration of the lease. And with that understanding and commitment, the landlord might agree to waive her claim for current rent arrears.

All that might be possible. But, what would we say if the mediator

4. Famously, Riskin's original grid is designed as a guide to the possibly perplexed advocate who is seeking assistance in thinking through what skills and traits to look for in selecting a mediator. The suggestions range from intellectual acuity and substantive knowledge about the topic in dispute to possession of process skills. See Leonard L. Riskin, *Understanding Mediators' Orientations, Strategies, and Techniques: A Grid for the Perplexed*, 1 HARV. NEGOT. L. REV. 7 (1996); see also JOSEPH B. STULBERG & LELA P. LOVE, *THE MIDDLE VOICE: MEDIATING CONFLICT SUCCESSFULLY* 28–30 (2009) (articulating sixteen characteristics that a person would want a mediator to possess).

did not explore those possibilities and instead said to the parties, whether in joint session or caucus, “Look. Everyone knows the rules. Tenant, there is no legal basis for your refusing to pay rent. Although the landlord can waive her rights, you must be prepared to pay her the money you owe her. Let’s see if we can work out a payment system that works for you and is acceptable to the landlord.” Why would we be concerned about the mediator acting this way?

First, some would argue that while a mediator can provide legal information to the parties (if qualified by training and experience to do so),⁵ it is not the mediator’s role to do so. Second, and more significantly, we might criticize the mediator for insisting that the tenant recognize that she “has no legal case” and that the tenant should “agree to perform her legal duty.” Why is that problematic?

I believe the only basis for claiming that such a mediator move is objectionable—and should be roundly criticized—is that it vividly displays that the mediator is not neutral with respect to what the outcome should be. Quite the contrary, she believes that the tenant “should do what the law requires.”

But here is the irony. I believe that a mediator in that situation could comfortably and accurately describe her conduct as *impartial*.⁶ Why? Impartiality requires that the intervener apply the relevant rules and guidelines in an identical manner to all persons similarly situated. To the disgruntled tenant who complains that she believes that the mediator is “beating up” on her, the mediator could readily retort that “my comments are nothing against you personally—I would be saying this to any tenant so situated.” And she—the mediator—would be absolutely correct.

To critics who might be worried that the mediator is siding with the elite against the have-nots, all we need to do is alter the fact pattern so that the tenant refuses to pay rent because she is not receiving heat and hot water in her apartment. Those grounds typically do constitute a basis for reducing rental payments, and the mediator could press the landlord to do what the law required by stating, “I am not doing this because I favor the tenant over you. I would say the same to any landlord if I were faced with these facts.”

5. See MODEL STANDARDS OF CONDUCT FOR MEDIATORS standard VI.A.5 (2005).

6. See H.L.A. HART, THE CONCEPT OF LAW 161 (2d ed. 1994) (stating that “there is no absurdity in conceding that an unjust law forbidding the access of coloured persons to the parks has been justly administered”).

So requiring a mediator to be *impartial* does not secure or advance a vision of mediation that inspires confidence that it is an alternative dispute resolution process to the courts. Why? Stated bluntly, the “rule(s)” that the mediator impartially applies may themselves be burdensome, unfair, discriminatory, or on some other basis, ill-founded. Applying them impartially, while better than arbitrarily, *prima facie* diminishes rather than advances substantive justice claims. The mediator who is impartial may be, to borrow a phrase of a different generation, one more person who is part of the problem rather than the solution.⁷

Is this concern for the difference between being neutral and being impartial relevant only for controversies involving presumptively modest financial claims? Not at all. Consider the following examples:

(1) The family mediator insists that the soon-to-be ex-husband provide financial support at a level that meets the amounts set forth in that jurisdiction’s minimum child support guidelines.

(2) The civil-court appointed mediator of a home construction controversy—a roof gone bad—prevents the plaintiff from seeking certain recovery for identifiable items because applicable evidentiary rules would preclude the introduction of supporting testimony at trial.

(3) The mediator selected by the parties to resolve an alleged breach of a non-compete clause in an employment contract insists that whatever settlement terms the parties develop be consistent with the legal requirement that the “geographic range” governing such a non-compete prohibition be reasonable.

In each situation, the mediator acted impartially but not neutrally. In so doing, she undermines core values distinctive to the mediation process. Why is mediator impartiality insufficient to insure a fair outcome?

We want mediation to be a fair process that generates a fair outcome. Deciding what is or is not fair, of course, is controversial.

7. The *Uniform Mediation Act* (UMA), for instance, defines a mediator as “an individual who conducts a mediation,” but then insists that a mediator must disclose any information that may affect her impartiality. See UNIF. MEDIATION ACT § 2(3) & cmt. 3 (2003). While I believe that the UMA is an important, positive contribution to the field in many aspects, I personally regret that it omits the term neutrality from its definition of the mediator’s role. The same comment, regrettably, applies to the *Model Standards of Conduct for Mediators*. See MODEL STANDARDS OF CONDUCT FOR MEDIATORS standard II (requiring that a mediator “conduct a mediation in an impartial manner” but not in a neutral manner).

One way to establish a fair outcome is to define its parameters or terms on grounds *independent of* the procedure used to secure them. In deciding a fair outcome for dividing a cake among two children, for example, we decide that, absent a compelling reason, the presumptively fair division is to provide each child with equally sized slices. The process we might use to secure that goal—“X cuts and Y chooses first”—is designed to promote that goal. In Rawlsian terms, this approach to problem-solving would be described as an instance of “perfect procedural justice,”⁸ for in every iteration the process would produce the desired outcome. If mediation were viewed as a process of perfect procedural justice—that is, one designed and used to help disputing parties secure an outcome that itself is defined and endorsed as desirable on grounds *independent of* mediation—then mediator impartiality, not neutrality, is sufficient. In the examples above, if persons believe that the fair, mediated settlement terms are precisely those which the law mandates, then mediator impartiality is sufficient. But that is not a compelling vision of mediation; that is the picture of a settlement conference.

Of course, we could relax the demanding standard of perfect procedural justice and posit mediation as an instance of “imperfect procedural justice.”⁹ In this latter situation, the desired outcome is still defined and embraced independently of the process—e.g., outcomes mandated by or consistent with the law—but we acknowledge that the mediation process might have other institutional values, such as party autonomy, that permit parties in some instances to reach outcomes that fail that standard.¹⁰ Rawls explicates this notion by citing our criminal

8. See JOHN RAWLS, *A THEORY OF JUSTICE* 85 (1971) (describing characteristic features of “perfect procedural justice”).

9. See *id.* at 85–86 (illustrating the concept of “imperfect procedural justice”).

10. Consider the following case: A nightclub patron sees a famous athlete in the club. The patron approaches the athlete and makes obnoxious, racially derogatory remarks to him. The athlete assaults the patron. The patron, an immigrant who is in the United States illegally, brings a civil action against the athlete for damages. In mediated settlement discussion, the patron’s lawyer indicates that if the defendant proposes to pay the plaintiff \$50,000 in exchange for the patron’s promise not to pursue criminal charges, the proposal would itself be illegal as an instance of extortion. The defendant, if convicted of a felony rather than a misdemeanor, would face certain jail time—and the resulting impairment of his employment status. One possible resolution would be for the defendant to pay an agreed-upon sum and for the plaintiff to agree to leave the country. Without the victim, the prosecutor might file misdemeanor charges along the lines of disturbing the peace and require community service as a penalty. The parties have reached an acceptable resolution, though arguably “all the requirements of law” have not been advanced. I find this mediated outcome

trial process: if our goal is to convict the guilty and let the innocent go free, then we want to design and implement a criminal procedure process to secure this.¹¹ But our criminal court procedures also have other values and goals—e.g., rules protecting the confidentiality of spousal statements—and the application of those rules might, in limited but predictable circumstances, undercut the promotion of the desired goal.

I believe that this approach to mediation—where we insist only that a mediator be impartial when operating with rules that, independently of party agreement, identify the desired outcome—becomes even more toxic when used in settings where those “independent standards” are less visible or more narrowly embraced than something as public as “the law.” The juvenile court mediator who insists that the fourteen-year-old agree to do homework “two hours per evening without interruption by text messages from friends” might be encouraging the teenager to engage in behavior that is, objectively, beneficial for her. But the mediator, in dispensing her own brand of parental, maternalistic justice, is certainly “dissing” that teenager’s dignity. In my judgment, that disrespect has no place in mediation.

Finally, let us consider a mediator’s impartiality, not neutrality, in disputes involving matters that affect the environment, such as the location of a waste facility, the construction of a high-voltage transmission line, or the siting of windmills. The impartial mediator would facilitate conversations to make certain that various EPA rules and guidelines were considered and adopted *because* they were the governing law. This would insure consistency and predictability of negotiated outcomes but perhaps at the cost of party creativity, efficiency, and acceptability.

I must make one important disclaimer. When I insist that mediator impartiality is not sufficient to insure a just process or outcome, I do not *mean* to say that parties, in their spirited discussions or arguments about the controversy and in the development and advocacy of their proposals for resolving it, would not or should not make reference to those standards or claims. Of course they would. In fact, those elements might be decisive to a party’s decision to accept the proposed outcome.

perfectly acceptable and creative. But it suggests that there are other goals or values of the process that, on occasion, undermine the promotion of “generating outcomes mandated by law,” so in that way, mediation would be an example of imperfect procedural justice.

11. See *generally id.* at 85–86.

And the mediator would be acting appropriately, I believe (consistent with a posture of neutrality), if she were to invite some or all of the parties to consider those matters—e.g., “Why do you believe, Mr. Stulberg, that the minimum support guidelines should not govern what you propose to pay your soon-to-be ex-spouse?” These standards are certainly relevant to the parties’ discussion. But mediation, I believe, does not require that they be decisive.

If mediator impartiality is not sufficient to insure a just outcome, how about mediator *objectivity*? Objectivity is clearly an important intellectual trait for a mediator: it is crucial for a mediator to be able to examine and analyze evidence without being influenced by irrelevant factors. A mediator, for instance, who routinely evaluated the credibility of party accounts and proposals through the process of reactive devaluation¹² would be not only ineffective, but also, and more importantly, she would be undermining mediation goals of improving party understanding or promoting constructive problem solving conduct.

But mediator objectivity cannot be a sufficient condition for promoting conflict resolution. Why? A mediator could objectively analyze conditions relevant to influencing or persuading one party to agree to a certain course of action, and then act so as to secure such party compliance. Requiring a mediator to be objective imposes even fewer constraints on her conduct than does the duty of impartiality.

I conclude that neither impartiality nor objectivity require enough mediator discipline to give us confidence in the justice of the process and outcome.

Where do we turn?

IV. MEDIATOR APPROACHES

Let us return to a consideration of what a party values in their mediator. There are two distinctions offered regarding mediator traits that I believe are profoundly wrong and generate undesirable social consequences. The first is that between a “process expert” and a “substantive expert”—in other words, the belief that a mediator can be the first without being the second.¹³ The second distinction, described in

12. Russell Korobkin & Chris Guthrie, *Heuristics and Biases at the Bargaining Table*, 87 MARQ. L. REV. 795, 804–05 (2004).

13. See James R. Antes et al., *Is a Stage Model of Mediation Necessary?*, 16 MEDIATION Q. 287, 288–91 (1999) (describing the mediator as “tour guide, helping the parties get where they want to go”). *But see id.* at 289–90 (acknowledging that a mediator’s process decisions

different ways, is that between a “passive” and an “active” mediator.¹⁴ I believe these accounts are not accurate and undermine our understanding and endorsement of mediation as a justice process.

A. *Process–Substance Dichotomy*

Mediation as we routinely use it today is clearly a dispute resolution *process*. And there are clearly practices and guidelines that shape its procedural dimensions: the questions of who can or cannot participate, what topics can or must be addressed, and what information is public or private are illustrative.

A mediator must be a “process expert”: she must not only know how to implement the operative guidelines of mediating within a particular setting, but also, and more broadly, be conversant about and experienced in what constitutes “good process.” Bringing this expertise to a conversation is a significant contribution and no mediator should become defensive if charged by others as being “all about process.”

But the distinction between process and substantive expertise addresses two different matters, one relating to mediator qualifications and the other to the mediator’s role. The process–substance distinction, initially, highlights the possibility that a person might be thoroughly knowledgeable about the subject matter in dispute—knowing how movie scripts are developed and written can help a mediator appreciate a controversy between competing authors over movie credits for the screenplay—but inexperienced or unskilled at conducting an informative, constructive conversation. Because knowing how to include participants, facilitate information exchanges, probe for priorities, and generate ideas are, in important ways, “process skills,”

can affect the substance of a dispute).

14. Susskind suggests this distinction when concluding that environmental mediators, when fulfilling the responsibilities he sets forth,

were willing to inject themselves into the substance of the disputes. They were not content merely to facilitate and encourage discussion among the parties. In that regard, they were activists. . . . They worked behind the scenes, between meetings and during meetings, to find elements of agreement that could be treated separately, items that could be taded, issues that could be packaged, and ways in which the momentum of the negotiations could be used to pressure holdouts.

Lawrence Susskind, *Environmental Mediation and the Accountability Problem*, 6 VT. L. REV. 1, 39–40 (1981). Riskin’s account of the facilitative and evaluative mediator can be viewed as a different attempt to account for the same phenomenon. See Riskin, *supra* note 4, at 24–35 & fig.3.

not having them presumptively disqualifies someone from mediating.

The second matter that the distinction crystallizes relates to the role of the mediator. If one presumes that the mediation process should be structured to facilitate proposals acceptable to the parties, the potential downside of having a mediator who is a “substantive” expert is that she will cajole, direct, or coerce the parties into accepting those resolutions that the mediator believes (perhaps accurately, given her expertise) are the right, best, or fair thing to do; that, of course, potentially undermines party autonomy.

While I believe that the process–knowledge distinction is conceptually plausible, I find it importantly misleading and, hence, dangerous. To appreciate the danger, let us reconsider the perspective of a party to mediation. What contribution does the mediator make to the conversation if she does not have knowledge about any (or indeed, several) of the matters in or dynamics of dispute? In my judgment, the contribution might not only be minimal—it might be affirmatively harmful. How is that possible?

First, I believe such process intervention would be only minimally effective. If the mediator does not possess some knowledge about a particular area relevant to the controversy, then she is not able to ask questions that might be helpful¹⁵ or to probe the plausibility or desirability of particular party claims.¹⁶ Participating in such a process could be a considerable waste of a party’s time and resources. There are ways, of course, for the mediator to plug this knowledge gap—one ready strategy is to create a mediator team in which at least one member possesses relevant substantive knowledge about significant aspects of the dispute. But to make this move embraces the notion that knowledge as well as process is required.

15. Thereby failing to discharge the mediator’s goal of improving participant understanding of the challenge. *See* MODEL STANDARDS OF CONDUCT FOR MEDIATORS pmbl. (2003) (describing mediation as a process that “serves various purposes, including providing the opportunity for parties to define and clarify issues” and “understand different perspectives”).

16. Thereby failing to discharge the mediator’s task of being an agent of reality. I realize that these tasks are not described as central elements of the mediator’s job in the transformative model of mediation, in the sense that it is the mediator’s task to advance these inquiries when not prompted or endorsed by party request. *See* ROBERT A. BARUCH BUSH & JOSEPH P. FOLGER, *THE PROMISE OF MEDIATION: RESPONDING TO CONFLICT THROUGH EMPOWERMENT AND RECOGNITION* 116–18 (1994). But if one presumes that all parties have invited such intervention, then having—or not having—relevant substantive knowledge about aspects of the controversy becomes applicable.

Second, acting on the proposed distinction—and securing a mediator with only process skills—jeopardizes justice outcomes. I believe the process–knowledge distinction cuts two ways: the danger of a mediator possessing substantive knowledge is that she might try to impose her beliefs about a desirable outcome on unwilling parties; but equally, the danger of having only a process expert is that parties might generate outcomes that are notably uninformed or unfair.

How do we sort this out? The answer is not to jettison the concept of mediator neutrality. Rather, we should embrace the idea that an effective mediator is one who must possess both process and substantive knowledge¹⁷ and then explore how that combination can be consistently marshaled to discharge the mediator’s job.

B. Passive–Active Mediator

What would it mean for someone to be a passive mediator? I find it easier to understand that concept by analyzing its contrast, the activist mediator.

The “activist mediator,” a term often used to describe Susskind’s account of the environmental mediator,¹⁸ characterizes mediator conduct that often includes: (1) “pressing a party” to justify the persuasiveness of its particular claim or the plausibility of its proposal; (2) persistently or aggressively prodding the parties to engage in brainstorming to generate possible settlement terms; (3) suggesting ideas to some or all parties for possible resolution; and (4) controlling the discussion process—deciding, for example, whether a proposal

17. To claim that a mediator should possess both process and substantive knowledge does not mean, of course, that the “substantive knowledge” that a mediator possesses matches the full range of knowledge needs that might arise in a particular dispute. For instance, if someone were to mediate an environmental dispute involving the closing of a nuclear plant, she might possess broad-based knowledge about the political process and dynamics for regulating such environmental matters, but she might possess very little knowledge about the science of nuclear waste disposal. Again, the plausible “fix” for this is to join a person to the mediation team—or to gain the party’s endorsement of providing a neutral expert for themselves or the mediator—in order to facilitate joint understanding, discussion, and problem solving. See generally Lela P. Love & Joseph B. Stulberg, *Practice Guidelines for Co-Mediation: Making Certain that “Two Heads Are Better Than One,”* 13 *MEDIATION Q.* 179 (1996).

18. Susskind’s actual term is “mediator with clout.” Susskind, *supra* note 14, at 35; see also *id.* at 42 (asserting that “[e]ffective environmental mediation may require . . . some [mediators] with political clout”). I later termed this example a “special case of the activist mediator.” Joseph B. Stulberg, *The Theory and Practice of Mediation: A Reply to Professor Susskind*, 6 *VT. L. REV.* 85, 109 (1981).

developed in an individual caucus should be transmitted in a reconvened joint session or in a separate caucus.

Many writers have identified such mediator behavior and endorsed its use. For the most part, Riskin's evaluative mediator is an activist,¹⁹ Alfini's "trashers," "hashers," and "bashers" are activists,²⁰ and Stulberg and Love's BADGER mediator fits this description as well.²¹ If the above account of the activist mediator is accurate, then the most vivid "non-activist" mediator is, presumptively, someone who exhibits some version of Riskin's "facilitative" mediator²² and, most prominently, includes a transformative mediator.²³ But this "sorting" process is mischievous, for it masks the danger of the "passivist-activist" distinction as it relates to justice considerations.

The "facilitative" mediator is often characterized as the mediator who only asks questions.²⁴ She only "helps," and never "urges" or "pushes."²⁵ That mediator approach, understandably, can be labeled "passive." It is easy to understand that the mediator who embraces the process-substantive distinction and who then asserts that she is a "process-only" expert and mediates with a facilitative approach could quickly, and accurately, be labeled a "passive" mediator. That mediator would resist any party request to provide information—"my role is to help all of you talk this through in a cordial manner, not to provide information or make suggestions"—and would refuse to probe or challenge the plausibility or acceptability of particular proposals—"my job is not to tell any of you what to do, it is to create a comfortable conversational climate in which you can discuss any matter that you wish."

19. Riskin, *supra* note 4, at 28.

20. James J. Alfini, *Trashing, Bashing, and Hashing It Out: Is This the End of "Good Mediation"?*, 19 FLA. ST. U. L. REV. 47, 66-73 (1991).

21. STULBERG & LOVE, *supra* note 4, at 45-46.

22. Riskin, *supra* note 4, at 28-29, 32-34.

23. BUSH & FOLGER, *supra* note 16, at 116. I think it is important, however, to qualify this account of transformative mediation. I believe a transformative mediator is "activist" in multiple, significant ways, many of which I believe are congruent with other approaches to mediation. But if I understand the transformative approach accurately, then clearly the transformative mediator is not an activist in the ways described above, *unless it is preceded* by the mediator asking parties a question such as: "Do you think it would be helpful to each of you if I shared with you some approaches to resolving such matters that I have seen work for persons in other settings?" But perhaps even that question is too direct.

24. See, e.g., Riskin, *supra* note 4, at 28.

25. See *id.* at 35 fig.3.

Many of us have observed such passive mediators. In my judgment, there is nothing to recommend that approach. It often generates party frustration and exasperation. But that harsh critique must not be misunderstood.

I certainly believe that a mediator can—and, frankly, must—be “facilitative.” It is the only approach to mediating consistent with promoting party dignity, respect, and autonomous decision-making. I support the notion that evaluative mediation, as it is reportedly practiced, is inconsistent with a robust conception of the mediation process.²⁶

But the danger of these two dichotomies is this: A mediator, when doing her job, must be (1) knowledgeable about both process and at least some aspects of the substance; (2) facilitative; and (3) activist.²⁷ How is it possible to blend these necessary elements and still be neutral with regard to outcomes? We must revisit the process–substance distinction.

V. PROCESS–SUBSTANCE AND THEORIES OF JUSTICE

As both Lawrence Susskind and Bernard Mayer properly note, a mediator must care deeply about process matters. Those elements include answering such questions as: Who should participate? Who can be present and who must participate? Where and when will the meetings occur? What guidelines govern the process of developing or sharing information? What happens if one party displays a significant inability to participate adequately in the process?

Why are these matters important? They are important because we care that the mediation process comports with considerations of justice. At least in the United States, we seem able to generate consensus regarding the basic elements that constitute a due process

26. See Kimberlee K. Kovach & Lela P. Love, “Evaluative” Mediation Is an Oxymoron, 14 ALTERNATIVES TO HIGH COST LITIG. 31, 31–32 (1996). I find unpersuasive—and, often, self-serving—defenses for the evaluative mediator approach, particularly when that defense is lodged in the claim that it is the approach that the parties want. For thoughtful attempts to defend evaluative mediation, see Marjorie Corman Aaron, *Evaluation in Mediation, in MEDIATING LEGAL DISPUTES: EFFECTIVE STRATEGIES FOR LAWYERS AND MEDIATORS* 267, 268 (Dwight Golann ed., 1996); John Bickerman, *Evaluative Mediator Responds*, 14 ALTERNATIVES TO HIGH COST LITIG. 70 (1996); and James H. Stark, *The Ethics of Mediation Evaluation: Some Troublesome Questions and Tentative Proposals, from an Evaluative Lawyer Mediator*, 38 S. TEX. L. REV. 769, 770, 775–79, 798 (1997).

27. See Joseph B. Stulberg, *Facilitative Versus Evaluative Mediator Orientations: Piercing the “Grid” Lock*, 24 FLA. ST. U. L. REV. 985, 996–97 (1997).

conversation.²⁸ But what conception of justice is advanced by “good process”? Here it is helpful to return to Rawls’ distinction noted above.²⁹

Rawls describes three types of procedural justice programs: (1) perfect procedural justice; (2) imperfect procedural justice; and (3) pure procedural justice.³⁰

What distinguishes perfect and imperfect procedural justice from pure procedural justice is that the standards for determining a fair or desired outcome in the first two are independent of the process itself.³¹ By contrast, in pure procedural justice, the standard for determining a fair or desired outcome is embedded within the process itself.³² How are these distinctions relevant to real problems?

For many social activities, we can successfully create a process that systematically advances or secures our independently established and justified goal. A grievance procedure negotiated between union and management representatives that stipulates binding arbitration as its last step is a party-designed process that perfectly promotes the consistent interpretation and application of the substantive terms of the parties’ collective bargaining agreement.

A process of imperfect procedural justice also promotes an independently justified goal. But it has the following feature: it explicitly recognizes that the process may have values that conflict with always securing the stated goal, but for independent reasons, they should be recognized and operate to trump that goal. For example, college sports fans endorse the goal of being able to identify one college football team each year that is the best in the land—hence, deserving of a number-one ranking. But the process used to secure that outcome—

28. When developing the *Model Standards of Conduct for Mediators*, Standard VI.A, Professor Michael Moffitt forcefully contended at the April 2004 public meeting that was discussing the *Model Standards* that the Joint Committee should use the phrase “procedural fairness” rather than “fairness” when delineating the ethical duties of a mediator when conducting a quality mediation process. Many in that audience strongly endorsed his comment. The adopted version (September 2005) contains that language. See MODEL STANDARDS OF CONDUCT FOR MEDIATORS standard VI.A (2005). For a more complete description of Moffitt’s opinions, see Michael L. Moffitt, *The Wrong Model, Again: Why the Devil Is Not in the Details of the New Model Standards of Conduct for Mediators*, DISP. RES. MAG., Spring 2006, at 32.

29. RAWLS, *supra* note 8, at 85–86.

30. *Id.*

31. *Id.*

32. *Id.* at 86.

the Bowl Championship Series (BCS) process—accommodates such other values as league identity and bowl traditions that can operate to trump creating a championship game among the country’s two best teams.

If a mediation advocate were to promote mediation’s use because it generated outcomes that were close to those reached in non-mediated settings (presumptively, court settings) and because mediations were conducted more efficiently, with less financial and emotional cost to the parties, and generated outcomes that gained high compliance, then that advocate views mediation as an instance of perfect procedural justice. Why? Because the cited goals—to generate outcomes close to those reached in a court process efficiently and with less burden on the parties—are criteria for establishing the “justice” of the process and are developed and justified independent of the process itself. Mayer appears to endorse this approach.³³ A mediation proponent could also endorse mediation as an instance of imperfect procedural justice by insisting that such values as party autonomy, improving party relationships, or displaying respect for one’s bargaining counterpart might sometimes operate to result in mediated settlement terms that were less generous than court-imposed outcomes.

By contrast, Susskind importantly and emphatically states, “good process almost always yields a good outcome.”³⁴ That approach appears to embrace Rawls’ sense of mediation being an instance of pure procedural justice.³⁵ Susskind urges that a mediator must pay attention to the following process details before she endorses or signs off on the process: Are the appropriate parties included in the conversation? Does each party have the capacity or skill to capably articulate their interests and examine their options? Are procedures or understandings in place for handling the possibility that the proposed negotiated outcome will harm a non-participant? What will happen if the proposed outcomes overlook the possibility of alternative arrangements that could notably

33. Panel Discussion, *Core Values of Dispute Resolution: Is Neutrality Necessary?*, 95 MARQ. L. REV. 805, 819 (indicating that outcomes in mediation—at least in the divorce area—do not differ notably from those secured through non-mediated outcomes). However, Mayer’s subsequent comments regarding the central need for “constructive engagement” could be read to support an alternative interpretation. *Id.* at 819. I explore that below. *See infra* pp. 851–54.

34. Panel Discussion, *supra* note 33, at 819–20.

35. *See* RAWLS, *supra* note 8, at 88 (describing how, under pure procedural justice, “allotment of [benefits] takes place in accordance with the public system of rules”).

enhance each party's interests and goals?³⁶ For Susskind, if all these matters are successfully addressed, then it appears that we have created a process whose fair outcomes are contained in the process itself. That, in fact, is the approach I enthusiastically endorse.³⁷ But Susskind appears to shy away from that conclusion, so we continue to differ in two ways.

First, when Susskind raised these considerations in his early celebrated piece,³⁸ the inference many drew—particularly when he discussed and endorsed the notion of the mediator with clout³⁹—was that Susskind concluded it was the mediator's duty to protect the unrepresented interests and insure Pareto-optimal outcomes.⁴⁰ If the negotiating parties did not agree to the presence of a representative in the negotiations to protect the interests of an “unborn generation” nor were committed to adopting Pareto-maximum outcomes, then it was the mediator's ethical duty—he was accountable for—to protect those unrepresented interests or secure Pareto-optimality. But in my judgment, those considerations—protecting future generations or Pareto optimality—are more accurately described as independent standards that define a “fair” or “just” outcome. If those goals must be secured by the conduct of parties in the mediated discussions, then mediation in its strongest formulation would be an example of perfect, not pure, procedural justice.

Second, Susskind's more recent account, beginning with his statement that “good process almost always yields a good outcome,”⁴¹ appears to differ from his earlier approach. Susskind thoughtfully advances the following claim: “[W]e need to be prepared to say what we think a good outcome is.”⁴² And, to him, a “good outcome” has the following features: (1) it is viewed as fair by the parties; (2) the process was efficient; (3) the outcome or outcomes are stable; and (4) the

36. See Panel Discussion, *supra* note 33, at 809, 816–17. This list is not meant to be exhaustive. While Susskind at first instance shies away from insisting that all these matters be actually adopted and in place before proceeding (“I only ask questions about these matters”), for reasons discussed below, I do not think that goes far enough.

37. I believe Mayer does as well. See his discussion of “constructive engagement.” *Id.* at 819.

38. See Susskind, *supra* note 14.

39. *Id.* at 30–37.

40. *Id.* at 17. To achieve a Pareto-optimal outcome, a “neutral observer must be convinced that joint net gains have been maximized.” *Id.*

41. Panel Discussion, *supra* note 33, at 816.

42. *Id.* at 816–17.

outcome or outcomes are wise.⁴³

I believe the first three elements are correct. But the fourth feature—the outcome must be “wise”—brings through the back door an external standard for assessing what is “fair” or “right”—and thereby transforms the mediation framework from that of pure procedural justice to one of either perfect or imperfect procedural justice. More importantly, if it is the mediator’s duty (or that for which he can be held accountable) to ensure a ‘wise’ outcome, then a mediator must jettison her commitment to the neutrality of outcomes, for her job is to secure wisdom. For reasons I argued previously, I do not find this vision of an impartial, but non-neutral, mediator consistent with the distinctively democratic values of the mediation process. Where does that leave us?

VI. A JUSTICE FRAMEWORK FOR MEDIATION

Each of us in this field is—properly—concerned about endorsing, promoting, and supporting a dispute resolution process whose outcomes flaunt basic standards of fair treatment, considerations of equality and respect, and the exercise of individual freedom.⁴⁴

We can readily envision hypotheticals that trigger our sense of injustice: the soon-to-be ex-spouse who agrees to financial settlement terms less generous than what the law mandates or the tenant who accepts the landlord’s reimbursement of the contested security deposit ignorant that she was legally entitled to treble damages. Why should we promote “acceptability” or “party autonomy” in mediation if its outcomes significantly deviate from these community norms?⁴⁵

I want to celebrate acceptability for two fundamental reasons: First,

43. *Id.*

44. One can criticize this claim as being myopically “Western”—and individualistic at that—in one’s orientation to human values. That charge, while clearly important, requires an extended response, which I think perfectly possible. All I need or want to highlight by making this comment is that at least for mediation advocates practicing in the United States, if we observed that mediation was being used to help parties forge agreements that systematically denied all citizens access to various employment opportunities, resulting in “mutually acceptable plans” that sustained public school systems that were both racially segregated and allocated significantly disproportionate public economic resources to those of only one race, then we would all be concerned that the “mediation process” was producing outcomes that were not simply “illegal” under current law but also “unfair” or “unjust.” And those claims, which I believe are warranted, would be based on our considered appeals to political liberty and equal treatment.

45. See ELLEN WALDMAN, *MEDIATION ETHICS: CASES AND COMMENTARIES* 26 (2011) (stating that “legal norms can be useful in delineating the minimal set of obligations owed the less powerful by the more powerful”).

the values of mediation support and require persons to treat one another with dignity and respect.⁴⁶ Second, I believe that a well-designed mediation process generates “just” results more consistently and compellingly than do other dispute-resolution procedures. While that may appear to be an audacious claim, I believe it is persuasive. But central to its persuasiveness is that a mediator must be neutral with respect to outcome—without it, the process indeed can be dangerous.

I have argued elsewhere that six features must be part of a mediation process in order for us (à la Susskind and Mayer) to assert that it is a “good” process.⁴⁷ More strongly, I claim that if these six features are present, then the mediation should be considered an example of pure procedural justice and that any outcomes generated by its participants will be just.⁴⁸ In short, “party acceptability” is laudable as a matter of justice.⁴⁹

I set out below a brief description of those standards and a short account of their significance.

(1) *Voluntariness*. Each mediation participant must have the capacity to engage in autonomous decision-making, displaying an ability to choose among two or more possible actions. Persons who lack mental capacity to make rational decisions cannot genuinely participate in a dispute resolution process that predicates decision-making on party autonomy.⁵⁰

(2) *Inalienability of interests*. The mediation process must be such that no person can irrevocably relinquish her ability to enjoy one of her fundamental freedoms throughout the course of a normal life. A person who agrees to be another’s servant for life in exchange for sustained food and shelter should, in a dispute resolution process, be able to

46. This claim is similar to what transformative mediators posit as one of their two main goals: “recognition.” See ROBERT A. BARUCH BUSH AND JOSEPH P. FOLGER, *THE PROMISE OF MEDIATION* 77 (2004) (explaining that the hallmark of a recognition shift is “letting go—however briefly or partially—of one’s focus on self and becoming interested in the perspective of the other party as such, concerned about the situation of the other as a fellow human being, not as an instrument for fulfilling one’s own needs”) But my argument for supporting the notion that the mediation process requires parties to accord dignity and respect to one another is conceptually different. See Joseph B. Stulberg, *Mediation and Justice: What Standards Govern?*, 6 *CARDOZO J. CONFLICT RESOL.* 213, 234–38 (2005).

47. Stulberg, *supra* note 46, at 227–28.

48. *Id.*

49. *Id.* at 227–29.

50. *Id.* at 228–30.

escape that contractual duty of enslavement.⁵¹

(3) *Publicity of outcomes.* In principle, outcomes must be capable of being made public so that the mediation process does not become a vehicle to sustain free-riders.⁵² Settlement terms (deals such as paying people off the books) that are predicated on everyone else complying with rules but not the mediation parties—i.e., freeloaders—should not be possible as a matter of normal practice.⁵³

(4) *Dignity and respect.* In principle, the process must be structured so that persons affected by the outcome can participate in it and everyone can discuss matters that are important to them. This insures that the conversation is conducted in a manner that promotes party dignity and respect. Stated differently, if the rules of the mediation process arbitrarily restrict who can participate or what can be discussed, then there is a significant risk that the discussion is skewed so that matters of fundamental importance and dignity to one party are not addressed.⁵⁴

(5) *Informed decision-making.* While no dispute resolution process can require fully informed decision-making, the process must provide some avenue for persons to have adequate information on which to make their decisions.⁵⁵

(6) *Toleration of conflicting fundamental values.* The mediation process has no purpose if it cannot serve as a forum for disputants who hold profoundly different values to meet and explore resolving and negotiating issues between them.⁵⁶

The stereotype often ascribed to “do-gooder” mediators is that mediators require everyone to be nice and to like one another.

51. *Id.* at 230–33.

52. This claim is consistent with the conventional wisdom—and law in many areas—that mediated conversations and outcomes are confidential. The goal of this standard is to prevent parties from reaching agreements that the parties know to be unlawful and that will be effective only because they will keep matters secret. I do not believe that we would want to endorse a public system for using mediation to resolve disputes if we thought that this could occur on a widespread basis. Of course, private organizations, in considering the use of mediation to resolve intra-organizational matters, might have a different viewpoint on this matter.

53. *Id.* at 233–34.

54. *Id.* at 234–38. This feature does not solve the practical challenge that the power differential between the parties might lead one party to refuse to discuss what the other party wants to examine. That is an important challenge—but not a justice one.

55. *Id.* at 238–40.

56. *Id.* at 240–41.

Nonsense. If the mediation process is structured so that parties with longstanding antagonisms—perhaps grounded in religious, racial, economic, or cultural differences—cannot meet to discuss targeted challenges unless one or more of the parties change their perspective, then that process fails on justice considerations. That is not to approve or condone all values. Rather, it helps highlight what mediated discussions can address. At least some of the major participants in the Occupy Wall Street demonstration⁵⁷ presumptively do not share some of the values of New York City’s elected political leadership. That does not mean one or the other party must change their viewpoint before engaging in mediated dialogue. Or to cite another instance, the residents of the Poweltown neighborhood in Philadelphia, Pennsylvania, did not have to accept the philosophical claims of the members of MOVE—nor MOVE members accept the beliefs of the residents who were viewed as part of “the system”—in order for all of them to participate meaningfully in a mediation process designed to address neighborhood health and safety issues.⁵⁸

I believe that if a mediation process is structured to incorporate each of these dimensions, then the process is fair and the outcomes that the parties develop and embrace will themselves be fair. But that will be true *only if* the mediator is, in principle and in conduct, neutral with regard to outcome.

VII. PROGRAM DESIGN AND MEDIATOR NEUTRALITY

Susskind and Mayer thoughtfully focus on what Mayer describes as matters that are “all about design.”⁵⁹ In fact, Mayer claims that mediators can, “help design [in advance a] structure of the interaction.”⁶⁰ Susskind simply posits that a person retained by some parties to assist them with a controversy could comfortably label herself a mediator—but then she should proceed with her engagement in a way that discharges her duties noted above. I do not believe that any substantive

57. Occupy Wall Street (OWS) is a protest movement that began September 17, 2011, in Zuccotti Park, located in New York City’s Wall Street financial district. The protest movement decries corporate influence in government and wealth inequality. *See About, OCCUPYWALLSTREET*, <http://occupywallst.org/about/> (last visited Mar. 22, 2012).

58. For a breathtaking account of this significant social challenge, see HIZKIAS ASSEFA & PAUL WAHRHAFTIG, *EXTREMIST GROUPS AND CONFLICT RESOLUTION: THE MOVE CRISIS IN PHILADELPHIA* (1988).

59. Panel Discussion, *supra* note 33, at 814–15.

60. *Id.* at 815.

difference rides on this terminological point. What is crucial, however, and I believe applicable to both accounts, is raised by the question, what should the dispute designer or mediator do if the parties insist on proceeding in a way that the designer or mediator believes undesirable? That is, what should the intervener do if, in her mind, she does not believe there is a good process?

Examples abound. Susskind has observed that the framework for resolving labor relations matters differ importantly across cultures.⁶¹ In Paris, France, when transportation workers declare a strike of the Metro system, the intervener might quickly ask leaders of the workers' groups and government agencies whether representatives from the local chamber of commerce or the "Metro riders" organization should also be included in the talks.⁶² Much like an environmental dispute, the rationale for expanded participation is obvious and compelling: businesspersons and Metro-riders (or their representatives) are stakeholders affected by the outcome of the negotiations. As a pragmatic matter, their participation might possibly be constructive to clarifying and resolving the issues, or at least make the implementation of negotiated outcomes less contentious. As a matter of democratic principle, they are entitled to have a voice.

Contrast that approach with the private-sector labor relations' framework operating in the United States.⁶³ The National Basketball Association (NBA) and the NBA Players Association engaged in a lockout that eliminated its traditional pre-season schedule and almost two months of its regular season.⁶⁴ Local businesses tied to the NBA suffered significant economic losses.⁶⁵ Local governments lost tax

61. Lawrence Susskind, *What Gets Lost in Translation*, NEGOTIATION: DECISION-MAKING AND COMM. STRATEGIES THAT DELIVER RESULTS (Harv. Univ., Cambridge, MA), Sept. 1, 2004, at 1, 4-5 (recommending that a mediator, when conducting cross-culture mediations, should research the counterpart's background and experience, enlist cultural advisors, and pay particularly close attention to unfolding negotiation dynamics).

62. For an article discussing a recent strike in Paris, see Nicola Clark, *France: Workers Vote to Extend Strike*, N.Y. TIMES, Oct. 14, 2010, at A21.

63. National Labor Relations Act, 29 U.S.C. §§ 151-169 (2006).

64. The NBA lockout began at midnight on July 1, 2011. Howard Beck, *Stalemate in Labor Talks Forces N.B.A. to Shut Down*, N.Y. TIMES, July 1, 2011, at B9. On November 26, 2011, owners and players reached a tentative agreement to end the lockout, which included starting the season on December 25, 2011. Howard Beck, *N.B.A. Reaches Tentative Deal to Save Season*, N.Y. TIMES, Nov. 27, 2011, at A1. The agreement was ratified on December 8, 2011. Ken Belson, *N.B.A. Owners and Players Make Labor Agreement Official*, N.Y. TIMES, Dec. 9, 2011, at B18.

65. See, e.g., Ken Belson, *In Portland, Where Blazers Reign, Lockout Leaves Void*, N.Y.

revenue.⁶⁶ Fans were disappointed. Potential draftees to the league were in limbo about career opportunities.⁶⁷ If a mediator from the Federal Mediation & Conciliation Service (FMCS) (or a private mediator hired by the parties) suggested to the representatives of the club owners and ballplayers that their collective bargaining sessions expand to include representatives from these stakeholders, I believe their response would have been straightforward and vociferous: “No!” Under the National Labor Relations Act (NLRA) and its amendments, bargaining is restricted to statutorily designated representatives⁶⁸—in this instance, the employer and the representative of the selected employee group. That is whom the FMCS mediator, by statute, works with. Would Mayer—or any other conscientious mediator—agree or continue to serve if he thought that such a process did not provide for “constructive engagement”?⁶⁹

This is a crucial ethical question for a mediator that I believe arises rather routinely in practice. It is the type of question that Mayer correctly raises in his discussion of process design.⁷⁰ Should there be a court-annexed mediation program for resolving matters relating to a marital dissolution when, under the court’s program, the mediator is allowed only forty-five minutes for the mediation? If that is what the court wants to adopt, should Mayer’s planner jettison the process? Should individual mediators refuse to participate in it?

How should we respond to this type of process-design challenge? I believe that different persons might, within a reasonable range, make different judgments about whether she should proceed. We readily understand—and have accepted—how a mediator routinely embraces the labor-relations framework operative in the United States (whether in the private or public sector), thereby excluding all non-statutorily

TIMES, Nov. 6, 2011, at SP5 [hereinafter Belson, *Portland*]; Tom Spousta, *Oklahoma Wallets and Pride Were Hurt*, N.Y. TIMES, Nov. 27, 2011, at SP4 (reporting that “[t]he Oklahoma City chamber of commerce estimated that each of the eight Thunder home dates lost with a shortened 66-game season would cost \$1.3 million”).

66. See, e.g., Belson, *Portland*, *supra* note 65.

67. See, e.g., *NBA Players File Antitrust Lawuits Against League, Games Canceled Through Dec. 15*, CHI. TRIB. (Nov. 15, 2011), http://articles.chicagotribune.com/2011-11-15/news/chi-nba-union-antitrust-complaint-to-be-filed-tuesday-night-20111115_1_nba-lockout-nba-players-antitrust-lawsuits (reporting that Derrick Williams, the second overall draft pick of the 2011 NBA draft, had yet to sign a contract because of the lockout).

68. National Labor Relations Act, 29 U.S.C. § 159(a).

69. Panel Discussion, *supra* note 33, at 820.

70. *Id.* at 814–15.

designated stakeholders from participating in collective bargaining sessions. And we can surely appreciate how other individuals might forcefully criticize that design feature by claiming that it disenfranchises important stakeholders, and, on that basis—on a justice basis—refuse to serve.⁷¹

But what is crucial to note is that if an individual mediator decides to participate, she must still remain neutral with respect to outcome. That is, the design process “flaw” is a flaw of injustice—but even in the flawed system, a neutral mediator can promote mediation’s values of autonomy and respect, at least with regard to those persons participating in it. However, if she discards her neutrality commitment, then she exacerbates the injustice.

How is that so?

VIII. MEDIATOR NEUTRALITY: SUBSTANCE AND PROCESS?

A mediator must be neutral with respect to negotiated outcomes but not neutral with respect to process.⁷² That insight, properly understood, remains valid.⁷³ We can see why this is the case if we analyze Mayer’s distinction between designing a process and conducting a mediation *within* the designed process.⁷⁴

A. “Mediating” (or Consulting) About Process

The negotiating parties invite you to help them resolve their

71. “No taxation without representation” is certainly a historical rallying cry for persons in the United States. See generally Grant Dorfman, Essay, *The Founders’ Legal Case: “No Taxation Without Representation” Versus Taxation No Tyranny*, 44 HOUS. L. REV. 1377 (2008) (providing a historical discussion on the importance of the phrase).

72. See Stulberg, *supra* note 18, at 96 (asserting that a major characteristic of a mediator is that they “must be neutral with regard to outcome”).

73. The challenge arises when the parties agree to create a process that the mediator finds undesirable. Some argue that the mediator must be flexible and honor party self-determination; others cite, for instance, the *Model Standards of Conduct*, particularly Standard VI. See MODEL STANDARDS OF CONDUCT FOR MEDIATORS standard VI (2005) (requiring that a mediator only conduct a mediation “in a manner that promotes . . . procedural fairness”).

74. See Panel Discussion, *supra* note 33, at 813. Mayer noted that “there is room for a lot of variation in how people view their role and responsibility”; consequently, when establishing the process, the mediator will rarely be neutral. *Id.* at 812–13. In contrast, while conducting mediation, the mediator must conduct the meeting from a “neutral stance—in other words, [the mediator] can insure that participants are provided an effective voice and that important issues are not avoided without intentionally trying to benefit one side at the expense of the other.” *Id.* at 813.

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controversy. Presume the conflict involves wolves roaming onto agricultural land, destroying crops. Property owners, in defending their property, start shooting the animals. Various groups, including environmental groups concerned about protecting endangered species as well as People for the Ethical Treatment of Animals (PETA) representatives who are alarmed about such animal treatment, publicly press their viewpoints. The local mayor and the state's governor are widely quoted as deploring the attack on animals but express sympathy for the farmers' needs. The appropriate local, state, and federal government agency personnel are stymied about how to proceed. They contact you—a mediator or consultant—and ask you to help. They propose the following process: (a) the intervener should convene representatives from each of the relevant government agencies at the federal, state, and local levels to discuss appropriate policy guidelines and implementing programs; (b) no other stakeholders should be included in the discussions, since their concerns and aspirations are already represented among the government personnel; and (c) the federal government will pay the entire mediator fee.

How would you respond? Put bluntly, to challenge my thesis, should a mediator be neutral with regard to these matters? My answer: Of course not.

I would make the decision about going forward by analyzing two separate questions, one regarding the proposed participants and the other regarding the payment of mediator fees.

1. Proposed Participants.

I would press each group regarding their claim that they “represent” the interests of the non-participating stakeholders, wanting to learn more about how those concerns and interests would and could be addressed. It may be that, in the end, the nongovernmental stakeholders do not participate in the negotiating sessions, and the participating governmental personnel develop viable ways to elicit and benefit from their engagement, such as conducting public bargaining sessions,⁷⁵ conducting regular press conferences, or creating a website

75. This approach was systematically used in the Kettering Foundation's Negotiated Investment Strategy involving federal, state, and local governments during the late-1970s and 1980s. For a discussion of the Negotiated Investment Strategy, see Lawrence Susskind & Connie Ozawa, *Mediated Negotiation in the Public Sector: The Planner as Mediator*, 4 J. PLAN. EDUC. & RES. 5, 6 (1984).

presence to capture public comments.

But let us presume that all the government representatives refuse to open the conversations to others. They simply say, “We want you to mediate the conversations in the way that we have proposed. If you do not wish to do it, we will find someone else.”

What should one do? In my judgment, the mediator or consultant must decide whether proceeding as proposed operates to exclude other significant stakeholders from having a meaningful voice in a matter that might affect them in some notable, perhaps significant way—and, if it does, whether that raises a due process value that should trump one’s proceeding with the discussion. Different persons will make different judgments, but if my assessment were that my participation would systematically promote coalition building that forecloses other meaningful opportunities for other affected persons to have voice at some point in the process, then I would not proceed.

What is crucial to note in this analysis is that the target of the mediator–consultant’s concern is not the substantive outcome of the controversy. Rather, it is the integrity of the mediation process as constituting a fair, just procedure. In my analysis, I would have concluded that the proposed approach fails to honor the requisite elements of dignity and respect. What the parties are proposing might be a process that develops a political resolution to the challenge but it is not a justice process.

Suppose, though, that a mediator believed that the proposed approach was acceptable. She must still address the question of whether having one party to the mediation pay the entire mediator fee comports with “good process.”

2. Payment of Mediator Fee.

The *Model Standards* provide some, though not conclusive, guidance for answering this question. Standard VIII.B.2 provides, “While a mediator may accept unequal fee payments from the parties, a mediator should not allow such a fee arrangement to adversely impact the mediator’s ability to conduct a mediation in an impartial manner.”⁷⁶ The concern is clear: if one party pays the mediator’s fee, that mediator may manipulate the process to promote an outcome sought by that payor—and that would undermine process integrity. Again, the concern is a

76. MODEL STANDARDS OF CONDUCT FOR MEDIATORS standard VIII.B.2 (2005).

justice concern: not acting impartially undermines the dignity and respect that the mediator or consultant accords relevant stakeholders, and being paid by only one stakeholder might motivate the intervener to press for one particular outcome favored by that group—so neutrality is also jeopardized. A mediator should not be hesitant—or neutral—when rejecting such proposed process guidelines.

B. Mediating Within a Process

I asserted above that *if* a mediator decides to participate in a process that is acknowledged to be flawed from a justice perspective, she must still remain neutral with respect to outcome. If the mediator of a child-custody dispute is allotted only forty-five minutes to conduct the conversation, she still has no warrant for guiding, directing, or pushing the parties to adopt a particular outcome. Similarly, if the mediator of the environmental controversy noted above was concerned that not all stakeholders were adequately represented, it is not her role to shape the negotiated conversation to increase the likelihood that only one set of outcomes would be considered. Why?

We object to such mediator conduct on the grounds that it is not the mediator's job to determine—and then effectively mandate—the “best” outcome for the parties. A mediator behaving in that manner is not, presumptively, what the parties wanted, even in a process that might otherwise be skewed. If the parties wanted a decision-maker, they could create a process to deliver it. But what is central to mediation—I believe its driving value—is that it systematically supports individuals or groups to exercise their freedom and to take responsibility for making decisions regarding how they choose to move forward. It requires engaged participation that leads to outcomes for which each negotiator is accountable. To promote those central elements, the mediator must remain neutral.⁷⁷

Which brings us full circle.

77. One standard defense of this mediator conduct—even if the mediator community were generally appalled at it—is, “Well, all the mediator is doing is suggesting what the parties ought to do—perhaps in very strong language. But the parties are always free to reject his advice; they can always—and only—agree on what they find acceptable. If they don't want it, fine, but proposing it might get them to consider another option that works for them.” The problem with this retort, of course, is that it defends almost any conduct—with the claim that parties can always say no.

IX. CONCLUSION

We promote mediation's use because we view it as a fundamental, central procedure for resolving controversies in a democratic society. We extol it as a process that requires meaningful citizen participation. It requires each participant to take responsibility both for enhancing one another's understanding of the situation and for developing acceptable outcomes. It not only celebrates but also requires each person—not someone else—to make a decision for herself as to how the matter should be resolved.

That is why we cherish mediation. But if the mediator wants to convert that process into a conversation in which people listen to—and abide by—what the intervener promotes, we have lost. A mediator must be neutral because justice demands it.