

Parallel Justice: Creating Causes of Action for Mandatory Mediation

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Abstract:

The American common law system should adopt court-connected mandatory mediation as a parallel system of justice for some cases that are currently not justiciable, such as wrongs caused by constitutionally protected behavior. As evidence that such a system is practical, this Article describes systemic and ethical parallels between court-connected mediation and the rise of the equity courts in medieval England, demonstrating that there are no insurmountable practical objections to the creation of „mediation-only” causes of action. The Article then explores the constitutional concerns surrounding the idea of „mandatory mediation-only” causes of action, using constitutional hate speech and invasion of privacy cases to test the validity of these concerns.



Rezumat:

Sistemul american de drept comun ar trebui să adopte medierea obligatorie într-un sistem de instanțe conectate ca un sistem paralel de justiție, pentru unele cauze care nu pot fi deferite justiției, cum ar fi greșelile cauzate de comportamentul protejat constituțional. Ca dovadă că un astfel de sistem este practic, acest articol trasează paralele sistematice și etice între medierea din cadrul unor instanțe conectate și răspândirea instanțelor de echitate în Anglia medievală, demonstrându-se că nu există obiecții practice insurmontabile la crearea de acțiuni care să fie supuse exclusiv medierii. Articolul explorează apoi preocupările constituționale legate de ideea de acțiuni supuse „medierii exclusive”, folosind discursul constituțional de ură și invazia de cazuri de confidențialitate, pentru a testa validitatea acestor preocupări.

Keywords: mandatory mediation, equity courts, alternative methods of dispute resolution, court-integrated ADR systems

Introduction

At its edges, the common law tradition is broken and inadequate to respond to human suffering that nevertheless cries out for justice. Judges sometimes struggle to name visible injustices and to acknowledge that they

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cannot provide a remedy because a claim is non-justiciable.³¹⁰ This does not have to be so. The steady growth of court-annexed mediation³¹¹ and the development of the restorative justice movement³¹² have created an opening to provide a measure of justice to victims of nonjusticiable cases. Court-annexed mediation can honor the policies that prevent courts from pronouncing judgment in these cases while offering the victims the remedy of an encounter with their wrongdoers. At least some justice is possible through mediation, which has evolved from a private, consensual undertaking disconnected from legal process to become a fully integrated part of our civil judicial system.³¹³ Similarly, restorative justice has taken a respected place as a viable alternative to retributive justice in criminal court.³¹⁴

Indeed, proposals for legal system reform using alternative methods of dispute resolution continue to dare the American legal system to diversify its approaches to conflict. Harvard Law School ADR expert Frank Sander has argued that we should diversify the types of conflict resolution processes available „at the courthouse door” to manage currently recognized causes of action.³¹⁵ In his vision, a panoply of dispute resolution opportunities - including counseling, mediation, negotiation, and litigation itself - should be available to potential litigants as an integrated part of any justice system.³¹⁶ In fact, ADR practice has confirmed that alternatives to traditional litigation can be valuable assets for any judicial system, whether litigants entering the courthouse door are directed to an appropriate process or public adjudication

³¹⁰ See, e.g., *Triplett v. St. Amour*, 507 N.W.2d 194, 200 (Mich. 1993) (quoting *Columbia Cas. Co. v. Klettke*, 244 N.W. 162 (Mich. 1932)) (rejecting a cause of action for fraud in inducing a tort settlement, and noting that “[t]his rule seems harsh, for often a party will lose valuable rights because of the perjury of his adversary. However, public policy seems to demand that there be an end to litigation... [T]he wrong in such case, is of course a most grievous one, and no doubt the legislature and the courts would be glad to redress it if a rule could be devised that would remedy the evil without producing mischiefs far worse than the evil to be remedied.”); see also *Keane v. State*, 166A.410.413 (Md. 1933) (rejecting a writ of *coram nobis* for a man convicted on the basis of mistaken eyewitness testimony and noting that “[i]t is unfortunate that there is no complete and adequate remedy for such a wrong as that of which the petitioner complains, but this court cannot create a remedy where none exists, since its function is to discover and apply existing law and not to make new law”).

³¹¹ For a description of the advent of court-annexed or court-connected mediation, see Bobbi McAdoo & Nancy A. Welsh, *Look Before You Leap and Keep on Looking: Lessons from the Institutionalization of Court-Connected Mediation*, 5 Nev. L.J. 399 (2005).

³¹² For a description of the basic principles and practices of restorative justice, see Howard Zehr,

The Little Book of Restorative Justice (2002) (hereinafter *Little Book*).

³¹³ See McAdoo & Welsh, *supra* note 2, at 400 (“There can be little doubt that court-connected mediation has been successful in achieving widespread institutionalization in the nation’s courts.”).

³¹⁴ See, e.g., Mary Ellen Reimund, *The Law and Restorative Justice: Friend or Foe? A Systemic Look at the Legal Issues in Restorative Justice*, 53 *DRAKE L. REV.* 667, 668-69 (2005) (noting that “[v]ictim-offender mediation, family group conferencing, sentencing circles, and reparative boards” can be found throughout the U.S. judicial system and that there has been an “upsurge” in such programs).

³¹⁵ See McAdoo & Welsh, *supra* note 2, at 402-04 (describing Sander’s introduction of the idea at a conference to commemorate the Pound lectures in St. Paul and the task force recommendations that resulted from it); see also *A Dialogue Between Professors Frank Sander and Mariana Hernandez Crespo: Exploring the Evolution of the Multi-door Courthouse*, 5 *ST. THOMAS L.J.* 665, 670 (2008) (noting that the multi-door courthouse idea “is to look at different forms of dispute resolution... and see whether we could work out some kind of taxonomy of which disputes ought to go where, and which doors are appropriate for which disputes”).

³¹⁶ See McAdoo & Welsh, *supra* note 2, at 402.

is pre-empted through privately arranged arbitration, negotiation, or mediation before a conflict ever reaches the courthouse.³¹⁷

Expanding on this vision, I argue that American lawmakers should make use of court-integrated ADR systems by recognizing new substantive causes of action remediable solely by mandatory mediation and similar restorative practices, such as sentencing circles and family group conferencing.³¹⁸ Many injustices currently go without remedy because there is no recognized cause of action for that harm, a plaintiff cannot meet an element of a recognized cause of action, or there is a defense to the claim, such as a constitutional bar. Even if a court cannot properly impose involuntary sanctions, such as criminal punishment, civil damages, or injunctive relief, these harms can be recognized

through „mediation-only” causes of action. These actions would enable judges to order mandatory court-annexed mediation or similar restorative practices. Creating mediation-only causes of action offers the promise of healing victims’ injuries and transforming their relationships with wrongdoers while avoiding traditional objections to the use of court coercion to redress or prevent behavior that clearly offends community morals.

Part I describes how such a system might procedurally work, using a few examples of constitutional problems that demonstrate the inadequacy of common law justice in a system of individual rights. In Part II, I argue that the creation of a separate track or legal system for currently non-justiciable causes of action is not as radical as it may first appear; there are instructive parallels between the equity court system that emerged out of

³¹⁷ Currently, ADR is available for voluntary dispute resolution through private mediators, but in many states it is also available to parties who can state a legally cognizable claim in court, such as a petition for divorce or personal injury claim, who may be offered or even ordered to attempt mediation or another form of ADR before a court will consider their claims. See, e.g., Sharon B. Press, *Institutionalization: Savior or Saboteur of Mediation?*, 24 FLA. ST. U. L. REV. 903, 905-06 (1997) (noting that “[t]he President of the United States routinely deploys mediators to assist with international crises, ballplayers routinely seek arbitration to resolve contract disputes, and students nationwide, some as young as elementary school age, participate in peer mediation programs”); see also Lela Love & Joseph B. Stulberg, *The Uses of Mediation*, in *The Negotiator’s Fieldbook* 573, 574 (Andrea Kupfer Schneider & Christopher Honeyman eds., 2006) (noting the use of mediation in controversies from the Internet, on the street, or schools to cases filed in court).

³¹⁸ Sentencing circles are offered to willing defendants and victims as alternatives to judicial sentence adjudication. Kay Pranis et al., *Peacemaking Circles: From Crime to Community* 21 (2003). In a typical circle, the defendant, his representatives, a prosecutor, sometimes the judge, sometimes family of defendant or victim, other professionals, and members of the community may be called to talk about the offense and its impact

on both its direct victim and the community at large. The circle also tries to identify alternatives to incarceration that will better repair the harm to the victim (viewed as more than damages or other legal harm) while holding the offender accountable for his wrongdoing but still restoring his ties to the community. For an example, see *id.* at 15-16, 21-22. Family group conferencing, which is widely used in New Zealand, brings the family of a juvenile (usually) together with criminal justice professionals and community members to understand the relationship between the offense and the family system and enlists families in responses that will permanently alter the dynamics that led a juvenile into crime. See Allison Morris & Gabrielle Maxwell, *Restorative Justice in New Zealand: Family Group Conferences as a Case Study*, 1998 West. Criminology Rev. 1, 3-4 (1998), available at <http://wcr.sonoma.edu/v1n1/morris.html> (last visited Oct. 19, 2013). For an example, see Pranis et al., *supra*, at 22. For a discussion of the history of restorative justice, see Anthony J. Nocella II, *An Overview of the History and Theory of Transformative Justice*, 6 Peace & Conflict Rev. 1, 3-5 (2011), available at <http://www.review.upeace.org/pdf.cfm?articulo=124&ejemplar=23> (last visited Oct. 19, 2013); see also Howard Vogel, *The Restorative Justice Wager: The Promise and Hope of a Value-based Dialogue Driven Approach to Conflict Resolution for Social Healing*, 8 Cardozo J. Conflict Resol. 565, 568-70 (2007).

the common law and court-annexed mediation practices that suggest the viability and value of this project. Part III considers standard objections to the use of mandatory mediation, a concept that seems incoherent in light of the birth of mediation as a voluntary process.

Part IV describes how a system might be designed to identify cases appropriate for mandatory mediation only. Finally, Part V briefly explores how these causes of action might be framed in constitutional cases and considers whether such new causes of action will defeat substantive and procedural values that have made such claims nonjusticiable. It is fair to test the proposal for mediation-only claims against existing constitutional rights cases because these cases are perhaps my proposal's most difficult challenge. Allowing such claims potentially implicates critical democratic values embedded in our protection of speech and the press.

Although I will use constitutional cases to test this proposal, it is not meant to be limited to cases with constitutional difficulties. As one potential application, states may find a mediation-only pathway helpful to respond to injuries sounding in tort where it is difficult to establish some

The rise of the modern ADR movement has posed a prophetic challenge to the common law courts for their repeated failure to achieve either justice or peace in many cases, or to free themselves from the restrictions of limited remedies.

elements of a cause of action. For example, the mediation pathway might be used where causation is difficult to establish in mass tort cases; where it is hard to measure damages because the plaintiff has no material or physical injury; and even cases where standard equitable remedies, like injunctions, will not serve to redress the wrongdoing.³¹⁹ Causes of action remediable only through mandatory mediation would be valuable in states that have been reluctant, on public policy grounds, to recognize causes of action for wrongs as various as publication of private facts and false light privacy torts, breach of the covenant of good faith and fair dealing in employment, workplace and cyberspace bullying, or even intentional infliction of emotional distress claims against lawyers.³²⁰

³¹⁹ For example, causation problems have bedeviled plaintiffs exposed to toxic waste torts. See, e.g., Ora Fred Harris, *Toxic Tort Litigation and the Causation Element: Is there Any Hope of Reconciliation?*, 40 Sw. L.J. 909, 944-46 (1986). The tort of negligent infliction of emotional distress is often compensated with damages in only the most egregious cases. Adam J. Kolber, *The Experiential Future of the Law*, 60 Emory L.J. 585, 622 (2011) (noting requirements in some jurisdictions that victims suffer physical injury or be within a "zone of danger" to recover for this tort).

³²⁰ See, e.g., Anita L. Allen, *Privacy Torts: Unreliable Remedies for LGBT Plaintiffs*, 98 CAL. L. REV. 1711, 1720-21, 1761-62 (2010) (describing some states' reluctance to extend privacy torts to include publication of private facts or false light cases and noting other cases where courts were reluctant to find outrageous conduct for IIED cases); James J. Brudney, *Reluctance and*

Remorse: The Covenant of Good Faith and Fair Dealing in American Employment Law, 32 Comp. Lab. L. & Pol'y J., 773, 773-74 (2011) (discussing reluctance of states to provide causes of action for violation of the covenant of good faith and fair dealing in at-will employment situations); Alex B. Long, *Lawyers Intentionally Inflicting Emotional Distress*, 42 Seton Hall L.J. 55 (2012) (discussing courts' reluctance to permit IIED claims against lawyers); Robert J. Tepper & Craig G. Whit, *Workplace Harassment in the Academic Environment*, 56 St. Louis U. L.J. 8 (2011) (noting courts' reluctance to recognize causes of action for workplace bullying). *But see* Geoffrey Rapp, *Defense Against Outrage and the Perils of Parasitic Torts*, 45 Ga. L. Rev. 107, 138-42 (2010) (noting the expansion of courts' use of negligent infliction of emotional distress, including the elimination of the significant physical injury requirement).

I. Re-imagining the Course of Constitutional Litigation

To explore the potential value of mediation-only causes of action, consider two difficult cases where the common law, constrained by constitutional values, failed to provide any real justice to injured victims. One is nearly forty years old - the American Nazi proposal to march through Skokie Illinois - and one is relatively recent - the Westboro Baptist Church picket of the funeral of Lance Corporal James Snyder.³²¹

In 1977, a small band of neo-Nazis proposed to march in Skokie,³²² a town where Holocaust victims who immigrated to America thought they would be safe.³²³ The proposed march was announced with a poster depicting a figure with a hand around his throat and the words, „We are Coming” and „Smash the Jew System.”³²⁴ For the Nazis, this planned march was in part a taunt to Chicago officials who had stymied previous plans to protest the

racial integration of Marquette Park by requiring a \$250,000 parade bond to march in Chicago.³²⁵ For as many as 7,000 survivors of the Nazi camps who had found refuge in Skokie, however, the sight of Nazi uniforms brought back unspeakable memories: roaming gangs of Lithuanians beating Jews to death with iron bats or stuffing water-hoses into their mouths to drown them,³²⁶ as well as Jews burned to death, raped, tortured, and murdered in Lithuanian prisons by guards.³²⁷ Nazi leader Frank Collin's hateful words recalled „[d]eath in a most horrible form, not only death to be shot in a moment to be killed but death after torture.”³²⁸ Citing the First Amendment, the lower federal courts refused to enjoin Collin from marching in Skokie.³²⁹

In the second difficult case, in 2006, the United States Supreme Court refused to uphold a damages award made to the family of a maligned dead Marine in *Snyder v. Phelps*.³³⁰ Albert Snyder lost

³²¹ In *National Socialist Party of America v. Village of Skokie*, 432 U.S. 43 (1977), the National Socialist Party of America challenged an injunction issued by a Cook County, Illinois court prohibiting them from marching through the town of Skokie, a town inhabited by scores of Holocaust victims, while wearing Nazi uniforms or showing swastikas. An account of this case is provided in Philippa Strum, *When the Nazis Came to Skokie: Freedom for Speech We Hate 1* (1999). The story of *Snyder v. Phelps*, 131 S. Ct. 1207 (2011), a lawsuit by the father of a dead Iraqi veteran against the church that picketed his funeral, is provided by Joseph Russomanno, *„Freedom for the Thought that We Hate”: Why Westboro Had to Win*, 17 *Comm. L. & Pol’y* 133 (2012).

³²² See Geoffrey Stone, *Remembering the Nazis in Skokie*, *Huffington Post* (Apr. 19, 2009, 3:33 PM), http://www.huffingtonpost.com/geoffrey-r-stone/remembering-the-nazis-in_b_188739.html.

³²³ Strum, *supra* note 12, at 1 (describing the survivors' belief that, as American citizens, they should have the right “to live peacefully and safely, dealing as best they could with their unspeakable memories of families brutally separated, of forced labor and starvation, and of those who are forced into the gas chambers to die”).

³²⁴ *Id.* at 18, 98 (describing posters bearing Jewish caricatures and a poster of three rabbis involved in a ritual murder of a Christian).

³²⁵ See *id.* at 5-6 (noting that local Caucasians blamed Jewish landlords for renting to African Americans in Marquette Park); *id.* at 14-15 (noting that Collin may have been particularly upset because his office was in Marquette Park). In Collin's view, African-American and Jewish-American Chicagoans were linked. In addition to the help that Jewish landlords provided in desegregating parts of Chicago, the Nazis thought that Jews were involved in a Federal Reserve and Communist conspiracy to take over economic power in the United States, which was thwarting his organization's goals of returning African Americans to Africa. *Id.* at 13-14.

³²⁶ *Id.* at 10.

³²⁷ *Id.* Strum notes that the Lithuanians termed this rape/torture/murder practice as “going to peel potatoes.” *Id.* Perhaps the most searing memory was of the “Children's Action” that tore children under eleven or twelve from their parents, threw them “into vans like packages,” and destroyed everyone. *Id.* at 12.

³²⁸ *Id.* at 98.

³²⁹ *Id.*

³³⁰ *Snyder v. Phelps*, 131 S. Ct. 1207 (2011).

his twenty-year-old son, Marine Lance Corporal Matthew Snyder, in Iraq.³³¹ Matthew's funeral was one of many military funerals picketed by Reverend Phelps and members of the Westboro Baptist Church (WBC).³³² The WBC claims that soldier deaths in Afghanistan and Iraq are God's punishment for the moral sins of American society and government attempts to silence their preaching.³³³ Accordingly, the WBC's members protested „outside of the [Snyders'] church on the day of Matthew's funeral, holding signs reading, among other things, 'Thank God for Dead Soldiers,' 'God Hates Fags,' and 'You're Going to Hell.'³³⁴ At times, WBC protesters were only 200 to 300 feet from the funeral procession as it passed.³³⁵ The Catholic school across the street closed its blinds so schoolchildren would not have to face the protesters and press.³³⁶ More painfully, the WBC posted a lengthy poem lambasting Lance Corporal Snyder and his family. The poem claimed that his parents „raised him for the devil” and stated that Matthew's parents „RIPPED that body apart and taught Matthew to defy his Creator, to divorce, and to commit adultery.”³³⁷ They claimed that God killed Matthew so the WBC could preach God's word of

vengeance.³³⁸ Mr. Snyder vomited after seeing this smear on the WBC website. In the wake of the funeral, his diabetes was exacerbated; sinking into further depression, he stated that he could never think about the funeral without pain.³³⁹ Yet, the U.S. Supreme Court rejected Snyder's claims for defamation, intrusion on seclusion, and intentional infliction of emotional distress that had resulted in a jury verdict of over ten million dollars.³⁴⁰

These constitutional stories are perhaps more anguishing than most. However, they underscore the constitutional conclusion that the fear, anguish, and anger that these victims have suffered are an acceptable price for a robust democracy.

What alternatives might have been available to Sol Goldstein, one of the Holocaust survivors who confronted the Nazis in Skokie, or Albert Snyder, Matthew's father, if the common law recognized a mediation-only process for the harms caused to them? A common pathway to court-annexed mediation starts with a regular complaint and then includes sometimes an answer, perhaps some discovery, and then referral to court-annexed mediation processes.³⁴¹ If these processes fail, the mediation ends and the case continues.³⁴² The mediation

³³¹ Ethan Fishman, *To Secure These Rights: The Supreme Court and Snyder v. Phelps*, 24 St. Thomas L. Rev. 101, 101-02 (2011).

³³² *Id.* at 102 (noting that the church has picketed hundreds of funerals in the past twenty years).

³³³ The announcement that the Westboro Baptist Church (WBC) would picket the funeral at “St. John's Catholic dog kennel” stated, “Killed by IED - like the IED America Bombed WBC with in a terroristic effort to silence our anti-gay Gospel preaching by violence.” Brief for Petitioner, at 4, *Snyder v. Phelps*, 131 S. Ct. 1207 (2011) (No. 09-751), 2010 U.S. S. Ct. Briefs LEXIS 505, at 9. Fred Phelps, Sr., by contrast, admitted that he was picketing funerals as revenge against all Marines because some of them assaulted him three years previously. *Id.* at 6. His own expert admitted that the WBC signs were “personal” to the Snyder family

and interfered with the family's grieving process, thus contributing to Mr. Snyder's depression. *Id.* at 6.

³³⁴ *Id.* at 2.

³³⁵ *Snyder*, 131 S. Ct. at 1213 (also noting that the picketing occurred 1,000 feet from the location of the funeral).

³³⁶ Brief for Petitioner, *supra* note 24, at 5.

³³⁷ *Id.* at 7-8.

³³⁸ *See id.* at 8.

³³⁹ *Id.*

³⁴⁰ *Snyder*, 131 S. Ct. at 1214, 1219-21.

³⁴¹ Barbara McAdoo & Nancy Welsh, *Court-Connected General Civil ADR Programs: Aiming for Institutionalization, Efficient Resolution and the Experience of Justice*, in *ADR Handbook for Judges* 1, 18-19 (2004) (describing the timing of ADR processes, which can occur from early in the case to after discovery is completed).

³⁴² *Id.* at 1306-07.

referral often occurs early in the case, but in many cases, parties are not precluded from filing additional pleadings or obtaining some discovery before the case is either settled or returned to the district court.³⁴³

In a mediation-only system, cases like Mr. Snyder's and Mr. Goldstein's might initially be managed like standard litigation. That is, a plaintiff would first plead a cognizable cause of action sounding only in mediation, and a judicial decision-maker would determine that the elements of this cause of action appear to make out a case for mandatory mediation referral. The defendant Westboro Baptist Church or Nazi Party could argue, as they can in the current system through motions to dismiss and motions for summary judgment, that the case on its face does not meet the elements for mandatory referral. A judicial officer would rule on that motion, finding either that the plaintiff has not pleaded a cause of action eligible for mandatory mediation or that the case should proceed to mediation. Such motions could be decided by existing trial judges or law-trained referees, or, in the alternative, judicial administrators could rule on jurisdictional objections, followed by an appeal to a trial-level judge. Many small

claims or conciliation courts use a similar appeals system.³⁴⁴ Additionally, jurisdictions considering a mediation-only pathway might opt to keep mediation complaints out of public records, thereby encouraging defendants to continue in the process. This is a common practice among parties that use mediation.³⁴⁵

Although a court-annexed mediation-only cause of action would thus initially resemble a traditional lawsuit, the pathway after this point would look quite different. Plaintiffs and defendants would not be entitled to utilize current discovery vehicles, such as depositions and interrogatories, to build their cases prior to mediation. Rather, information-gathering from the opponent would occur just as it does in current mediation practice - the parties and others who may participate in the mediation would tell their stories and voluntarily disclose any factual information they chose as part of the process of bringing their own perspectives and needs to light.³⁴⁶

Though this process might seem frustrating or even unfair to lawyers used to being able to compel factual information from their adversaries in order to estimate the likelihood of success at trial, transformative mediation is not primarily concerned with either determining with

³⁴³ See Bobbi McAdoo et al., *Institutionalization: What Do Empirical Studies Tell us about Court Mediation?*, *Disp. Resol. Mag.*, Winter 2003, at 9 (noting that cases are more likely to settle if mediation occurs early in the litigation, though, in some cases, giving lawyers information about the case through discovery and allowing some motions to be decided helps cases to settle). See generally Jack M. Sabatino, *ADR as "Litigation Lite": Procedural and Evidentiary Norms Embedded within Alternative Dispute Resolution*, 47 *EMORY L.J.* 1289, 1324-37 (1998) (discussing application of evidentiary rules to ADR process information exchanges).

³⁴⁴ For a description of the small claims process and its appeal system in California, see, e.g., Bruce

Zucker & Monica Her, *The People's Court Examined: A Legal and Empirical Analysis of the Small Claims Court System*, 37 *U.S.F. L. REV.* 315, 325-31 (2003).

³⁴⁵ See Sabatino, *supra* note 34, at 1334-35 (discussing confidentiality agreements used in mediation).

³⁴⁶ See Am. Bar Ass'n, Section on Dispute Resolution, *Beyond the Myths: Get the Facts about Dispute Resolution* 6 (2007). For a description of the control that mediation promises participants over their ability to communicate, see Nancy A. Welsh, *The Thinning Vision of Self-Determination in Court-Connected Mediation: The Inevitable Price of Institutionalization?*, 6 *Harv. Necot. L. Rev.* 1, 18-19 (2001).

scientific precision what actually happened or coming to an objective judgment about either the wrongdoer or the wrong.³⁴⁷ Instead, it is primarily centered on repairing the relationship, using truth-telling and moral evaluation as useful methods toward reconciliation or rapprochement, but not as ultimate goals.³⁴⁸

To be sure, the creation of a parallel dispute resolution system, managing its own defined causes of action through its own processes, might seem a bold, even unnecessary move in a society already overtaxed with government regulation and drop-of-a-hat litigation. However, the modern American legal system leaves too many injustices lingering without a remedy to justify dismissing the promise of such a system without a thorough investigation. Of course, this Article cannot investigate every concern about such a significant innovation at length. Rather, its goal is to initiate a public discussion on whether this is a valuable way forward for the American justice system and how such a system might be implemented.

II. Seeking a Model for Court-Connected Mediation: The Rise of the Equity Courts

There are enough similarities between the rise of the equity courts and the advent of court-annexed mediation to suggest that a mediation-only parallel system can be successful without further exacerbating existing structural difficulties. Like modern mediation, the equity courts evolved from the inability of the common law courts to deliver justice in all cases, to fully name which cases should be justiciable, and to consistently find an appropriately just remedy.³⁴⁹

Scholars have located the first uses of equity in several different ancient and medieval legal systems. Some historians credit the English for the first systemic use of equity and place the beginning of that system in the thirteenth or fourteenth century.³⁵⁰ Others claim that equity has more ancient roots in Roman and German legal systems.³⁵¹ The use of equity in England is known to have preceded the Norman kings,³⁵² suggesting that even ancients understood the fissures between the rule of law and justice. Still other scholars trace equity to its ecclesiastical

³⁴⁷ See Michael Palmer, *The Magic of Mediation*, 22 *Vt. B.J. & L. Dig.* 18, 19 (1996).

³⁴⁸ See Welsh, *supra* note 37, at 18-20 (describing relational transformative possibilities of mediation).

³⁴⁹ See *infra* notes 50-55 and accompanying text.

³⁵⁰ See George Goldsmith, *The Doctrine and Practice of Equity* 6-7 (6th ed. 1871). Goldsmith identifies the reign of Edward I (1239-1307) as the formative period of equity jurisdiction. This book describes a key moment in the development of equity that resulted from the assignment in the Statute of Westminster the Second of the power to the masters of chancery to issue writs after they had decided that the complainant had no remedy at law. However, Goldsmith argued that equitable jurisdiction as such was developed much later. *Id.* at 6-7. Story argues that the jurisdiction of chancery was fully operational by the time Richard II reigned (1367-1400). Joseph Story, *Commentaries on*

Equity Jurisprudence 29 (W.E. Grigsby ed., 1884) (2006) (hereinafter *Story, Equity Jurisprudence*).

³⁵¹ See, e.g., Elliot H. Goodwin, *The Equity of the King's Court before the Reign of Edward the First* 10-12 (1899) (discussing the claim that equity comes from the Roman *aequitas*, but noting the limited power of the Roman praetor to ignore positive law and arguing for its roots in Teutonic and Carolingian processes); see also Goldsmith, *supra* note 41, at 3 (discussing the Roman office of praetor, which judged "according to equity and conscience, where a rigid adherence to the strict letter of the law would work a hardship or injustice," though Goldsmith notes that Rome did not have separate court systems); *id.* at xvii (citing Thomas Lord Ellesmere, *Certain Observations Concerning the Office of the Lord Chancellor* 2 (1651)).

³⁵² GOODWIN, *supra* note 42, at 12 - 13 (noting the existence of equitable jurisdiction in Anglo-Saxon England as well as by Norman dukes before the Norman conquest).

roots, centered in theological and philosophical attempts to justify „a departure from formal rights owing to moral or other considerations.”³⁵³ Indeed, Lord Chancellor Cowper argued that „equity is no part of the law, but a moral virtue which qualifies, moderates, and reforms the rigour, hardness, and edge of the law, and is a universal truth.”³⁵⁴

English barrister George Goldsmith summarizes equity as „in accordance with the principles of natural and universal justice,” as „softening the asperities, supplying the deficiencies, guiding and assisting the administration of positive law, and offering redress where, from its nature, that law could give none.”³⁵⁵ Although the parallels are inexact, what is known about the rise of equity permits a comparison of the ways in which court-connected mediation can perform a comparable systemic and ethical role.

A. Equity and Mediation: A Systemic Comparison

Equity and mediation are essentially powers reserved by the sovereign in the

common law system. In both equity and mediation, the sovereign retains the power to permit disputants to seek justice in a different way. Like mediation, equity power, once held largely as ministerial, evolved to become a significant source of legal authority to achieve justice. Furthermore, substantive and procedural rules in the equity courts became increasingly complex and certain, just as procedural rules have become in mediation.³⁵⁶ As a system priding itself on the ability to be flexible and to consider context and persons in the delivery of justice, equity still had to contend with the criticism that it was pregnant with abusive power because it could subvert rule of law values, such as the uniform application of the law, certainty, and predictability.³⁵⁷ However, the system of equity found ways to balance this potentially all-embracing power by restricting its own jurisdiction.³⁵⁸

As I will discuss at more length, the concern that mediation might overtake and damage common law values if mediation becomes a parallel system of

³⁵³ See Alastair Hudson, *Equity 8c Trusts* 6-7, 11 (6th ed. 2009) (quoting Georg Wilhelm Friedrich Hegel, *Philosophy of Right* 142 (T.M. Knox trans., Oxford Univ. Press 1952) (1821)) (describing the origin of the equity courts as a mixture of ecclesiastical and precedential law and noting the Greek roots of the idea); see also Ralph E. Kurtz, *A Short Treatise on The Right of a Court of Equity to Direct Acts Beyond Its Jurisdiction* 26-27 (1917) (noting Pollock and Maitland's argument that the chancery had its roots in the early English church and that the „chancellor, as keeper of the conscience of the people, could enforce his decrees by threats upon the religious life” of litigants); Goldsmith, *supra* note 41, at xiv, xvi, 7-8, 13 (noting that the Roman office of chancellor passed to the Roman Church, which adopted the office of chancellor to be the principal judge of a bishop's consistory, and that, until the right of Edgar, the chancellor was a clergyman because of his literacy); Story, *Equity Jurisprudence*, *supra* note 41, at 11 (noting that equity pleadings were likely borrowed from both civil and canon law. He also argues that the ecclesiastical lawyers welcomed the adoption of Roman civil law because of their interest in strengthening their power over the laity).

³⁵⁴ *Lord Dudley v. Lady Dudley*, (1705) 24 Eng. Rep. 118 (Ch.), per Lord Cowper, LC.

³⁵⁵ Goldsmith, *supra* note 41, at 2; see also *id.* at 18 (equity filled defects in the common law “by introducing a *jus honorarium*” and taking cases “where no remedy, or an inadequate remedy, was provided by law” (quoting George Spence, 1 *The Equitable Jurisdiction of the Court of Chancery* 324 (Lea & Blanchard 1846))); see *J.J. Park, What Are Courts of Equity* 17 (1832) (arguing with Joseph Story that the equity court has jurisdiction where there is no “plain, adequate and complete remedy” at law, e.g., the remedy must not be “doubtful and obscure.” It must not “fall short of what the party is entitled to,” and it “must reach the whole mischief, and secure the whole right of the party, now and for the future.”); Story, *Equity Jurisprudence*, *supra* note 41, at 7.

³⁵⁶ See *infra* notes 72-79 and accompanying text.

³⁵⁷ See *infra* notes 72-79 and accompanying text.

³⁵⁸ See *infra* notes 81-85 and accompanying text.

justice echoes the concerns once expressed about equity. However, court-annexed mediation stands in a much different position vis-a-vis common law authority and embodies both practices and values that guard against concerns that it might subvert fundamental common law values and procedures.

Even though equity is now considered an adjunct to law, it is important to recall that it was once the opposite. The common law was understood to be a delegated power of the King, who reserved all other powers of doing justice to himself, including the power to overrule the judges.³⁵⁹ During the reign of Henry II, when localized, discretionary justice began to develop into a law that was „common” to the kingdom, the King reserved the right to overrule the developing „rule of law” system for any reasons he saw fit.³⁶⁰ William Holdsworth’s discussion of the creation of the King’s courts suggests that, although the King’s justice was not always just - it could be dispensed arbitrarily to favor his friends and harm his enemies³⁶¹ - its partiality was no different from the preferential

treatment shown by his delegated jurists in the early years of the common law system.³⁶² In fact, the King’s justice was apparently the „least worst” form of justice available, if lack of bias toward one’s friends and prejudice against one’s enemies³⁶³ are the measure of a fair judicial system. Furthermore, there is at least some evidence that part of the role of equity was to alleviate the harshness of the law in cases where poverty made strict exercise of the law unjust.³⁶⁴

Moreover, there have always been philosophical reasons for the sovereign to retain the ultimate power to rule and overrule appointed judges. As with any law that becomes „common” and attempts to enforce uniform obligations and protections for all after centuries of ad hoc justice, the English common law could not fully resolve the ancient difficulties attending legal systems that aspire to both justice and the rule of law. How can a law be fairly applied to two persons who stand in somewhat different situations? What must be done when formal justice and formal equality fail to call forth an equitable result?³⁶⁵ What is the duty of

³⁵⁹ Goldsmith, *supra* note 41, at 22 (describing Henry II’s reservation of legal power “as the fountain of justice and equity”); Goodwin, *supra* note 42, at 18, 23 (noting that by the time of Edward I, the King swore an oath to be the source of both justice and equity and functioned as the court of last appeal, delegating the power to do justice while reserving the right to do “ordinary justice” himself); 1 William Holdsworth, *A History of English Law* 194-95 (Methuen & Co. 6th ed. 1938) (1903) (noting that the King had significant control over what business would come before the court). *But see* Goodwin, *supra* note 42, at 55-56 (noting that by 1305, petitioners are requesting equity against the King from Parliament, although many of those petitions are referred to the King’s administrators, such as chancery, with the directive that they should do justice, or the petitioners are being sent to seek common law remedies). This development, Goodwin argues, is the first reference to the equity jurisdiction of the chancery, though other accounts do not connect the chancellor with this period. *Id.* at 57.

³⁶⁰ *See* Hudson, *supra* note 44, at 15 (noting Henry II’s preservation of the right to petition the King even after creation of a common law for the entire realm to be administered by the King’s Bench courts).

³⁶¹ *Id.* at 32-33, 35-36 (noting that, before Henry II’s reforms, the King’s justice was obtained by payment, and his protection of the weak against the powerful was exercised arbitrarily for those who could pay for the privilege).

³⁶² 1 Holdsworth, *supra* note 50, at 194-95. *But see* Goodwin, *supra* note 42, at 21, 24 (noting that the King often used his power to interfere and alter either procedure or judgment arbitrarily but suggesting that some of that abuse was kept in check by protests from members of the House of Commons, e.g., about the overuse of pardons).

³⁶³ 1 Holdsworth, *supra* note 50, at 194-95.

³⁶⁴ Goodwin, *supra* note 42, at 31 - 32 (noting that fines imposed by the pipe rolls were sometimes remitted or reduced in case of poverty and that pardons were given in some cases for paupers who owed fines).

the sovereign when „the strictest right is the greatest wrong’ (*summum jus summa injuria*)” and when litigants insist on standing on the law even when they are aware that their assertion of right will cause injury to others?³⁶⁶ Even in early times, the need to ensure against the oppression of court officers was noted.³⁶⁷

On first glance, the notion that justice ultimately comes from the sovereign who retains the right to achieve it, and not from the sovereign’s authorized procedures or officials, may not seem to find any obvious parallel in the modern mediation movement. Nor might court-connected mediation seem to resemble equity as the stroke of true justice the sovereign decrees, a stroke that up-ends and disrupts the pedestrian and flawed justice offered by the institutional rule of law.

Yet, from a broader perspective, the institutions of mediation and restorative justice essentially argue that the true power for resolving disputes and transforming conflict into understanding and cooperation lies in the people themselves, both those in conflict and those who constitute the community around them. In this way, mediation practice does not simply lie in the shadows of court justice as a poor, efficient cousin of the true power, the common law. Rather, it is the other way around. Individuals and their communities, retaining the right to resolve disputes, have provided limited authorization to the court systems and the

common law to carry out these tasks. It is the people, individually and collectively, who reserve the power to do the justice that the modern common law courts cannot achieve through alternative means, no matter how much these processes may subvert common law processes and remedies. That is, people may choose the courts’ justice, or they may recognize that true justice cannot be done in the courts and seek to exercise their original jurisdiction over their conflicts through mediation and other ADR processes.

Equity and mediation have also developed similarly. Both began as ad hoc informal processes and became more formal and powerful systems of dispute resolution. According to Blackstone, the English system of equity evolved through the slow ascription of Roman and ecclesiastical judicial powers to what were essentially ministerial offices of secretaries and scribes until these became stronger, and eventually the office of chancellor became very powerful.³⁶⁸

In the same way, mediation has slowly evolved from an infrequently used, privatized dispute system into a procedural „referral option” for frustrated litigants, and finally into an office of legal power that has become part of the common law judge’s arsenal of state control, at least in those jurisdictions that have adopted court-annexed

³⁶⁵ See Hudson, *supra* note 44, at 6-7, 11 (discussing the difficulty of creating rules without treating individuals in some cases unjustly and noting Aristotle’s similar argument for why equity is superior justice).

³⁶⁶ Immanuel Kant, *The Science of Right* 5 (W. Hastie trans., 2001) (1790). In *The Tricky Word: Richard Weisberg on The Merchant of Venice*, 23 *L. & Literature* 71, 79 (2011), Geoffrey Hartman refers to Kant’s maxim *summum jus summa injuria* as showing that “law, as a limiting action, may itself come upon a limit, or have to be limited as it

approaches, or even as it is infected by, the violence or violation it seeks to curb.”)

³⁶⁷ Goodwin, *supra* note 42, at 15

³⁶⁸ See Goldsmith, *supra* note 41, at xiv (noting that the name “chancellor” meant scribe or secretary in the Roman courts, though the office later assumed both judicial and supervisory powers); 1 Holdsworth, *supra* note 50, at 395 (noting that the Chancery was essentially a secretariat under the Norman and Angevin Kings, and the chancellor essentially served as a prime minister for the Curia Regis, the governing entity).

mediation.³⁶⁹ More colorfully, it is arguable that mediation has found its voice, not as a poor but worthy cousin of the common law courts, but as a „right hand” of the courts, the entrance to and exit from which courts significantly control.

Historically, the sophistication and elaboration of rules in the system of equity has increased as it has evolved, a trajectory that finds some parallels in court-annexed mediation. Equity developed from a somewhat happenstance series of informal pleas to the King’s justice³⁷⁰ into a sophisticated dispute system in the High Court of Chancery, requiring appropriate pleadings and sporting dual jurisdictions by overlapping with the common law system.³⁷¹ In England, until the merger of the equity and common law courts in 1873,³⁷² cases in the ordinary jurisdiction of the equity courts were resolved through common and statutory law, while those in its extraordinary jurisdiction were

resolved according to the developed rules and maxims of equity.³⁷³ Similarly, ADR theoreticians and practitioners, particularly in court-annexed and court-enforced mediation, have focused on a sophisticated refinement of mediation processes, including the innovation of remedies, as well as the development of ethical rules and parameters around the enforcement of mediation agreements.³⁷⁴ Indeed, there is now such a robust „law of mediation” that the recently published treatise on mediation law by Professor James Coben and his co-authors ran through three volumes and 3,600 pages.³⁷⁵

One difference between the equity courts and court-annexed mediation is that equity courts have developed a substantive dimension. The equity court has been described both as a „reservoir of general principles” to achieve fairness and as a „code of technical substantive rules of law.”³⁷⁶ Court-annexed mediation

³⁶⁹ See, e.g., Welsh, *supra* note 37, at 64-68 (describing ways in which judges are involved in coercing settlement in court-annexed mediation cases).

³⁷⁰ See, e.g., Goodwin, *supra* note 42, at 15-16, 18 (describing the change to a system of justice where a litigant must first go to the ordinary courts before applying to the King, while preserving the right to apply to the King).

³⁷¹ Goldsmith, *supra* note 41, at 30-34 (showing the development of equity jurisdiction and the ways that equity and common law competed and ultimately settled on their competing jurisdiction).

³⁷² Hudson, *supra* note 44, at 17 (stating that the two systems were separate until the year of 1873).

³⁷³ See Goldsmith, *supra* note 41, at 1-2 (discussing the development and ultimate purpose of equity). *But see* Goodwin, *supra* note 42, at 59-60 (noting that at the time of Henry V, the chancellor had only extraordinary jurisdiction). The “ordinary” jurisdiction of the equity courts extends to those cases where the common law rules are applied, and the “extraordinary” jurisdiction extends to cases where equitable rules are applied. See, e.g., John Downey Works, *Courts and Their Jurisdiction: A Treatise on the Jurisdiction of the Courts of the Present Day, How Such Jurisdiction is Conferred,*

and the Means of Acquiring and Losing it 25 (2nd ed. 1897).

³⁷⁴ See, e.g., Fran L. Tetunic, *Florida Mediation Case Law: Two Decades of Maturation*, 28 *Nova L. Rev.* 87, 90-111 (2003) (describing Florida’s extensive creation of rules of practice and ethics for mediations); A.B.A., *Am. Arb. Ass’n. & Ass’n. for Conflict Resol., Model Standards of Conduct for Mediators* (2005), http://www.americanbar.org/content/dam/aba/migrated/2011_build/dispute_resolution/model_standards_conduct_april2007.authcheckdam.pdf (last visited Sept. 30, 2013).

³⁷⁵ Hudson, *supra* note 44, at 6 (noting that equity can be understood as the means to ensure that strict application of the law did not result in unfairness, as a collection of substantive principles developed by equity courts to judge people’s consciences, or as a set of procedural rules and forms developed by the Chancery courts); *see also* Park, *supra* note 46, at 11-12 (claiming that equity has gone beyond “discretionary interference, wherever the law was harsh or silent,” to have rules that are “fixed laws in themselves, sometimes supplying, sometimes controlling... the institutions of common and statute law”).

³⁷⁶ See James R. Coben et al., *Mediation: Law, Policy & Practice* (2012-2013 Trial Practice Series).

should follow a similar trajectory into creating substantive legal rules that give rise to mediation-only causes of action. Legislatures and courts should create a „substantive law” of claims referable to mandatory mediation, even if they are not justiciable in court. That menu of cases should include traditional legal disputes that have proven amenable to more efficient resolution through ADR, such as commercial disputes, and cases, such as divorce, where process dynamics of mediation are essential to preserving important ongoing relationships. However, perhaps most importantly, that menu should include cases that should be, but are not currently, „actionable,” in which mandatory mediation could be ordered by the courts even where no other legal remedy was available. Whether the „law of mediation” will develop substantive values and principles in the same way as equity has developed its maxims remains to be seen, but this is a development that should be welcomed, not stifled.

B. Avoiding Equity’s Stumbles

One concern that mediation advocates may have about using the equity courts

as a model for the development of a viable court-annexed mediation system stems from the fact that equity courts became a rigid system that adopted (and arguably exacerbated some of) the flaws of the common law courts.³⁷⁷ This is a development most mediation advocates would find disappointing.³⁷⁸ On the other side, those proposing caution in the expansion of mediation, particularly the use of mandatory mediation, have emphasized its failure to be beholden to the values of the rule of law and the protections of the current system of adjudication, including the protection that lawyers provide to clients.³⁷⁹ As the most prominent example, mediation theorists and women’s advocates have argued for years over whether justice is possible in a mediation setting where one party has abused his power over the other.³⁸⁰

These conflicting challenges raise the question whether any system designed to bring justice outside of the constraints of a rule of law regime must and should be cabined lest it abuse its power. Yet, imposing typical rule of law constraints on new systems to cabin that power can

³⁷⁷ See Joseph Story, Commentaries on Equity pleadings, and the Incidents thereof 10 (1857) (hereinafter Story, *Equity Pleadings*) (describing equity as “a science of great complexity” requiring “great talents to master in all its various distinctions and subtle contrivances”).

³⁷⁸ See, e.g., Yishai Boyarin, *Court-Connected ADR - A Time of Crisis, A Time of Change*, 95 Marq. L. Rev. 993, 1002 (2012) (noting intention of mediation proponents to create a voluntary and informal process designed to empower parties to explore the resolution of their disputes on their own terms rather than within the existing adversarial and legally rigid formal process); Peter N. Thompson, *Enforcing Rights Generated in Court-Connected Mediation - Tension Between the Aspirations of a Private Facilitative Process and the Reality of Public Adversarial justice*, 19 Ohio St. J. on Disp. Resol. 509, 513, 550 (2004) (noting that the mediation community has successfully advocated ADR “in order to maximize individual choice, creativity, flexibility, and of course, finality” and that it is “odd” when mediators argue for “bright-line, legalistic rules

to remedy problems created in a process heralded because of its focus on self-determination”).

³⁷⁹ Robert Rubinson, *A Theory of Access to justice*, 29 J. Legal Prof. 89, 146-47 (2005) (noting the critique that court proceedings protect party equality of status by incorporating attorney representation that “maintains distance between the parties” and rules of procedure and legal rights); see also Lemer v. Laufer, 819 A.2d 471, 482 (2003) (noting the clash between mediation values and values of adversarial proceedings “by parties represented by fully independent and empowered attorneys” who seek to vindicate “established rights and duties” under law).

³⁸⁰ See, e.g., Boyarin, *supra* note 69, at 1010 (noting risk of coercion when mediation is used, “such as when particular types of domestic violence are involved”); Am. Bar Ass’n, Section on Dispute Resolution, *supra* note 37, at 11 (describing dispute about use of mediation in domestic violence situations); Robert A. Baruch Bush & Joseph P. Folger, *The Promise of Mediation; Responding to Conflict through Empowerment and recognition* 22-23 (1994).

easily lead to the very difficulties that gave rise to the need for equity courts.

Some legal historians have argued that equity's development of rigid forms of pleadings and processes, which narrowed the types of conflicts the system could consider, eventually swept away the values that equity brought to the table, such as flexibility and fairness.³⁸¹ In English lawyer James Humphreys's words, equity became simply a rival to the common law; it became Positive Law, acting and bound by fixed rules „[that had] long lost its original character of discretionary interference, wherever the law was harsh or silent.... [I]ts rules have become fixed laws in themselves, sometimes supplying, sometimes controlling, as occasion or accident may have directed, the institutions of common and statute law.”³⁸²

Others argue that the normative debate over the place of equity - whether it should continue to utilize „judicial discretion and natural law”³⁸³ or whether it should „embrac[e] a more formal and 'legal' conception of equity based on strict procedural rules and stare decisis”³⁸⁴ - continued well past the adoption of

formalities in the equity courts.³⁸⁵ For example, Professor Kroger argues that these debates continued into the eighteenth century in the United States.³⁸⁶ To be sure, the early Marshall Court first veered in the direction of rigid substantive rules and formal principles like the English system of equity.³⁸⁷ Kroger argues, though, that under Justice Marshall, the Court restored the traditional, moral understanding of equity in its early nineteenth century jurisprudence, using language such as „justice,” „equity,” and „honor,” previously abandoned by the Court, to explain its decisions.³⁸⁸

These concerns about the increasingly rigid and complicated processes of equity may be correct, but in some senses, the reality that the ultimate power, such as was exercised by equity, must be somewhat cabined in any system founded on the rule of law dictates some formalization of any system calling itself legal. Common law lawyers have expressed these concerns about equity throughout its history.³⁸⁹ John Selden claimed „equity is a Roguish thing: for Law we have a measure, know what to trust to; Equity is according to the Conscience

³⁸¹ See, e.g., Hudson, *supra* note 44, at 19 (describing different causes of action and remedies between common law and equity); John R. Kroger, *Supreme Court Equity, 1789-1835, and the History of American Judging*, 34 Hous. L. Rev. 1425, 1438 (1998) (quoting William Blackstone, *Commentaries on the Laws of England* 822-24 (1877) (describing equity as “a labored connected system, governed by established rules, and bound down by precedents,” and calling for a merger of law and equity so the rules were the same, lest they “cease to be courts of justice”).

³⁸² Park, *supra* note 46, at 11-12 (quoting James Humphreys, *Observations on the Actual State of English Laws of Real Property* 198 (2d ed. 1827)).

³⁸³ Kroger, *supra* note 72, at 1433-34 (noting the traditionalist view that natural law was the proper source of rules, that precedents were not important because equity was a universal truth, and that equity was unbridled justice).

³⁸⁴ *Id.* at 1436-37 (describing the eighteenth century move of the English chancellors to “legalize”

equity by standardizing procedure and adopting stare decisis in place of discretionary and natural law-based adjudication”).

³⁸⁵ See *id.* at 1433.

³⁸⁶ *Id.* at 1430-31.

³⁸⁷ *Id.* at 1447 (arguing that the early Marshall court, from 1801 to 1820, adopted a “modern or Blackstonian [equity jurisprudence], typified by strict application of stare decisis, formal procedure, and strict construction of legal texts” as well as the “triumph of notions of judicial duty over concerns about substantive justice”).

³⁸⁸ *Id.* at 1459, 1461 (discussing the abandonment of these concepts in the early period and arguing that during the later Marshall Court years, 1820 to 1835, equitable discretion “made a startling comeback” to join precedent as an important source of rules, including “highly subjective concepts like ‘the spirit’ of laws, ‘the sanction of public policy,’ ‘conscience,’ ‘the equity of the case’... ‘gross injustice,’ [and] ‘moral obligation’”).

³⁸⁹ See *id.* at 1436.

of him that is Chancellor, and as that is larger or narrower, so is Equity.”³⁹⁰ Equity poses chaotic possibilities if it has the absolute power to overrule law in those unforeseen and uncharted circumstances where justice demands it. Otherwise, the modern movement to the rule of law would be drowned in the sea of exceptions that equity might ostensibly give in recognition of the unique contexts that each set of litigants presents before the decision maker.

In point of historical fact, the parallel system of equity and its potential for abusing power and upending the predictability of the common law ended up being cabined in two ways. First, equity was treated as a last resort for justice and only used when the application of the law „shocked the conscience.”³⁹¹ Merely inadvertent injustices served up by the common law courts had to be accepted by those in conflict as the price of the rule of law.³⁹² Second, the law of equity developed its own forms and causes of action so that the nature of the conflict

ultimately limited the equity court’s jurisdiction. For instance, trusts went to equity courts while real property disputes went to the law courts or to the „ordinary,” common law-governed jurisdiction of Chancery.³⁹³

The potentially vast power of the mediation movement has been cabined by a different set of constraints. First, mediation has been treated as an „annexation” to the court system rather than a parallel and potentially more powerful challenger. In theory, a court-ordered mediation can subvert both substantive rules of law and legal processes if the parties agree to the change. Occasionally in practice,³⁹⁴ however, at least some courts seem to believe that they have a retained power to overturn any mediation agreements that are strongly inconsistent with outcomes the law would provide.³⁹⁵ Thus, the showdown between the equity courts and the common law courts, which was „won” by equity, is not likely to occur between the common law and mandatory mediation in the near future.

³⁹⁰ *Id.* (quoting John Selden, *The Table Talk of John Selden* 148-49 (3rd ed. 1860)); see also Hudson, *supra* note 44, at 8 (noting that “certainty is the hallmark of every effective legal system, but it is also true to say that chaos and complexity are the common characteristic of every problem which confronts such a legal system”).

³⁹¹ See, e.g., Hudson, *supra* note 44, at 13 (noting that equity did not ensure that no loss was suffered but rather that ordinary people would not be harmed by fraud, undue influence, etc.); Joseph R. Long, *Equitable Jurisdiction to Protect Personal Rights*, 33 *Yale L.J.* 115 (1923) (noting that equity was limited in granting relief for a pure mistake of law and that it did not enforce personal rights where no property rights were involved); cf. Story, *Equity Jurisprudence*, *supra* note 41, at 2-3 (noting that earlier English and American laws’ use of equity did not address all wrongs, leaving diem instead to the conscience of the parties).

³⁹² See, e.g., Story, *Equity Jurisprudence*, *supra* note 41, at 3, 5, 437 (1884) (specifically noting that an injunctive remedy in a partnership case will only be given for “studied delay and omissions”).

³⁹³ See, e.g., Harold Potter, *An Introduction to*

the History of Equity and its Courts 18 (describing the substantive cases that gave jurisdiction in the Court of Chancery before the mid-seventeenth century); Story, *Equity Pleadings*, *supra* note 68, at 266 (noting the equity courts’ exclusive jurisdiction over some trusts); Story, *Equity Jurisprudence*, *supra* note 41, at 5-6 (describing the different causes of action and remedies available); cf. Goldsmith, *supra* note 41, at xviii (noting the assignment of jurisdiction to equity of bankruptcies and the persons and estates of mentally incompetent persons).

³⁹⁴ See McAadoo & Welsh, *supra* note 2, at 412-16 (discussing judicial perceptions of mediations that do not achieve results expected under law).

³⁹⁵ See Peter Robinson, *Centuries of Contract Common Law Can’t Be All Wrong: Why the UMA’s Exception to Mediation Confidentiality in Enforcement Proceedings Should be Embraced and Broadened*, 2003 *J. Disp. Res.* 135, 156-57 (discussing cases where mediation agreements have been overturned on public policy grounds, such as violation of the law, ends contrary to the public good, or the surrender of important legal rights).

Second, the most widely utilized ADR processes are consensual. Even if a court may order parties into mediation, it may not order that the mediation be successfully concluded or arrive at a particular result,³⁹⁶ though it may signal to mediators and parties that the court has a preference for a certain outcome.³⁹⁷ Thus, the required willingness of the parties to utilize mediation processes and consent to their result has, to a large extent, constrained any inappropriate power-grab by the mediation movement over the parties who use mediation. In the legal system, power tends to be more balanced among the parties if each bears the costs of failure as well as the promise of success. In traditional litigation, the plaintiff bears a good share of the upfront costs (sometimes deterring him from pursuing a remedy) as compared with the defendant or adjudicator. By contrast, in a fixed-fee mediation, the plaintiff may split mediation costs with the defendant, giving both the incentive to proceed to a just and shared outcome, and the mediator has every incentive to help them do so.³⁹⁸

Third, the values of the mediation movement work to correct the tendency of mediation professionals to reallocate

legal power from the courts to themselves.³⁹⁹ The mediation movement was founded to be an alternative to court processes, and the values of autonomy, consent, and collaboration that it embraces⁴⁰⁰ make it less likely to become a rival to the existing court systems for their legal authority. To be sure, mediation theorists like Joseph Folger and Robert Bush have argued that mediators who focus primarily on settlement may be tempted to hijack mediations from the parties by pressuring them to accept agreements that will close cases or mimic likely court decisions.⁴⁰¹ However, even accepting that this problem may occur, the dispersal of legal power among the many available mediators, in addition to party choice of mediators, suggests that the mediation industry will not consolidate enough power to pose a significant political threat to the common law courts.

Fourth, although the research suggests that mediation generally saves litigants money in the long run, at least if they are willing to consider a reasonable settlement,⁴⁰² the use of mediation is somewhat constrained by its visible out-of-pocket costs, since litigants pay

³⁹⁶ See McAdoo & Welsh, *supra* note 2, at 408 (describing the mandatory consideration rule in Minnesota and how the rule does not mandate an outcome or mediation at all); Am. Bar Ass'n, Section on Dispute Resolution, *supra* note 37, at 4 (noting that mediation permits self-determination rather than judge or jury-imposed solutions).

³⁹⁷ See McAdoo & Welsh, *supra* note 2, at 408.

³⁹⁸ See, e.g., Andrew K. Niebler, *Getting the Most Out of Mediation: Toward a Theory of Optimal Compensation for Mediators*, 4 Harv. Negot. L. Rev. 167, 184 (1999) (noting that once mediation parties have paid the fee, they will "rationally devote their full attention and energy to healing their differences," and the mediator "can ensure that the healing process works to the maximum advantage of the parties, albeit within the economic constraints imposed by the mediator's opportunity costs").

³⁹⁹ See, e.g., Welsh, *supra* note 37, at 94

(describing Florida's rules mandating that mediators not coerce a settlement).

⁴⁰⁰ See McAdoo & Welsh, *supra* note 2, at 401-03 (discussing proposals at the Pound conference on which cases should be referred to mediation).

⁴⁰¹ See Bush & Folger, *supra* note 71, at 22-23 (noting the control and "broad strategic power" mediators have over discussions between the parties and the mediation as a whole).

⁴⁰² See, e.g., Am. Bar Ass'n, Section on Dispute Resolution, *supra* note 37, at 7 (noting the low-cost expense of mediation as an alternative to litigation); Bobbi McAdoo, *A Report to the Minnesota Supreme Court: The Impact of Rule 114 on Civil Litigation Practice in Minnesota*, 25 Hamline L. Rev. 401, 405 (noting that lawyers chose mediation because of cost-savings but questioning the extent of savings).

mediator feels⁴⁰³. A litigant who brings a lawyer may pay both for the lawyer's time and the mediator's. By contrast, the actual costs of a seemingly free public justice system (except for the filing fee) may not be as visible to litigants until late in many conflicts, perhaps because of their optimism about succeeding in court. The upfront cost in mediation may obviate the likelihood that litigants would willingly flock to mediation in the numbers required to pose a challenge to the legal preeminence of the common law courts.

Finally, there has historically been some selection in the subject matter for cases using mediation, not dissimilar to the subject matter limitations that found their way into equity jurisdiction.⁴⁰⁴ Although some jurisdictions have mandated mediation in a wide variety of civil cases,⁴⁰⁵ most mandatory court-annexed mediation has been limited to a few subject areas, such as family law or commercial disputes.⁴⁰⁶ In this way, mediation has become a door in the courthouse for subject-specific disputes in the same way that the equity courts became the door for suits involving trusts, specific kinds of real property transactions, and so forth.⁴⁰⁷

C. Equity and Mediation: Ethical Commonalities

Equity and mediation share important ethical dimensions that suggest that mandatory mediation or a related restorative process may be an appropriate substitute for cases involving demonstrated injustice that cannot be adjudicated in a traditional court system for constitutional or other reasons. As noted, one parallel can be found in the function that both equity and mediation serve with respect to their rival, the common law courts. These two systems of justice also share some ethical commitments that bolster the case for a parallel mandatory mediation system of justice. Even though court-annexed mediation has become institutionalized authority, there is a deliberate and necessary tension between mediation as practiced in recent years in the United States and the common law court system, not unlike that attending the battles for ascendancy between the law and equity courts.⁴⁰⁸

Although both struggles certainly have involved some economic and political aspects,⁴⁰⁹ there is a moral, and even

⁴⁰³ But see Bobbi McAdoo, *A Mediation Tune-Up for the State Court Appellate Machine*, 2010 J. Dispute Res. 327, 363-64 (2010) (noting there have been mixed results in increasing the rate of settlement in cases in which no fees were charged); see also Wayne D. Brazil, *Should Court-Sponsored ADR Survive?* 21 Ohio St. J. on Disp. Resol. 241, 252-53, 263 (2006) (noting that private litigants pay substantial fees up to \$10,000 a day, which suggests to mediators that their goal is to "get a deal," and that Brazil urges court-connected mediation to be offered free or at a reduced cost).

⁴⁰⁴ On the limitations on equitable subject matter jurisdiction, see *supra* notes 82-84 and accompanying text.

⁴⁰⁵ See, e.g., Bobbi McAdoo, *All Rise, The Court is in Session: What Judges Say about Court-Ordered Mediation*, 22 Ohio St. J. on Disp. Res. 377, 387 (2007) (noting that mediation is "a routinely expected step for most civil litigation"); see

also Nancy Welsh, *supra* note 37, at 23 (noting early court experiments with mediation in small claims, custody and visitation, and finally in contract, personal injury, and employment cases).

⁴⁰⁶ See Nancy Welsh, *Making Deals in Court-Connected Mediation: What's Justice Got to Do with It*, 79 Wash. U. L. Q. 787, 798 n.59, 809 (2001) (noting early use of mediation for family and neighborhood disputes and citing a study showing that more than two-thirds of mediated cases involved personal injury and contract disputes).

⁴⁰⁷ CJ. Thomas E. Scrutton, *The Influence of the Roman Law on the law of England 156-59* (discussing Chancery jurisdiction over uses and trusts, mortgage redemption, the law of infants, and mentally ill persons).

⁴⁰⁸ For a discussion of the struggle between the equity and common law courts, see Potter, *supra* note 84, at 4-5, 11-15.

⁴⁰⁹ See *id.*

ideological, aspect to the tension between law and equity or mediation as well. Historically, the common law and equity courts challenged the other as a moral force and criticized the other to check its abuse.⁴¹⁰ In equity's challenge to the common law, the image of the chancellor as the „keeper of the king's conscience“⁴¹¹ was used because even the sovereign, from whom all justice flows, may be tempted to respond unjustly to friends and enemies.⁴¹² He may even be tempted to demand payment for justice.⁴¹³ Thus, it is the chancellor's responsibility to challenge the sovereign to regain his moral footings and do justice to the poor and powerless who cannot win the King's favor or the court's ear with money or influence.⁴¹⁴ As Cowper put it, equity will: assist the law where it is defective and weak in the constitution... and defends the law from crafty evasions, delusions, and new subtleties, invested and contrived to evade and delude the law... this is the office of equity, to support and protect the common law from shifts and crafty

contrivances against the justice of the law.⁴¹⁵

Similarly, the rise of the modern ADR movement has posed a prophetic challenge to the common law courts for their repeated failure to achieve either justice or peace in many cases, or to free themselves from the restrictions of limited remedies. Perhaps the most poignant illustration of that challenge has been the flowering of mediation to manage the difficult journey of divorce. In these legal proceedings, commonly tempestuous and cruel, the common law courts infamously and frequently have failed to achieve equitable outcomes for families⁴¹⁶ or to assist divorcing couples through fierce conflict⁴¹⁷ into truly cooperative future relationships. Court-annexed mediation has offered a moral critique of both the law and procedure of divorce and granted some temporary respite to divorcing couples while divorce law slowly undergoes revision to accommodate modern family formation and dissolution.⁴¹⁸

⁴¹⁰ See, e.g., Goodwin, *supra* note 42, at 15 (noting that from Anglo-Saxon times, the King was perceived as “the guardian of justice and equity as against the ignorance and oppression of the presiding officers of the public courts” caused in part by the strictness of the law or the influence of one of the parties); Hudson, *supra* note 44, at 10 (discussing how the Courts of Equity were often the “courts of conscience” with the Lord Chancellor being described as the “keeper of monarch's conscience”).

⁴¹¹ Goldsmith, *supra* note 41, at 22 (describing the chancellor as the King's primary chaplain, confessor, and person who knows the King's will better than anyone and who serves as “die keeper of the king's conscience”); see also *id.* at 23 (describing the chancellor as “the mouth, the ear, the eye, and the very heart of the prince” (quoting Thomas Lord Ellesmere, *Certaine Observations Concerning the Office of the Lord Chancellor* 21 (1651))).

⁴¹² See Hudson, *supra* note 44, at 32-33, 35-36.

⁴¹³ See Goodwin, *supra* note 42, at 33-34 (“[T]he king's justice was mainly exercised for the money it brought in to the royal treasury.”).

⁴¹⁴ See A. H. Marsh, *History of the Court of Chancery and the Rise and Development of the*

Doctrines of Equity 47 - 48 (1890) (describing equity as “the refuge of the poor and afflicted... the altar and sanctuary for such as against the right of rich men and the countenance of great men, cannot maintain the goodness of their cause and the truth of their title” (quoting Thomas Lord Ellesmere, *Certaine Observations Concerning the Office of the Lord Chancellor* 21 (1651))).

⁴¹⁵ Hudson, *supra* note 44, at 14 (quoting Lord Dudley v. Lady Dudley, (1705) 24 Eng. Rep. 118 (Ch.), per Lord Cowper, LC).

⁴¹⁶ See, e.g., Penelope Bryan, “*Collaborative Divorce?: Meaningful Reform or Another Quick Fix?*,” 5 Psychol. Pub. Pol'y & L. 1001, 1005-10 (1999) (describing inequities of divorce on women and children).

⁴¹⁷ See, e.g., Yelena Ayrapetova, *HB 004: Mandatory Divorce Mediation Program Passed in Utah*, 7 J. L. & Fam. Stud. 417 (2005) (describing “increasing court costs, delay, and escalation of conflict” that come with divorce litigation).

⁴¹⁸ For a discussion of a range of reform alternatives being considered, see Lynn War-die, *Divorce Reform at the Turn of the Millennium: Certainties and Possibilities*, 33 Fam. L.Q. 783, 790 (1999).

Conversely, law has played an important role in challenging equity, as well as mediation. The image of justice as a blind goddess, dispensing favors to the powerful and powerless, favored and disfavored alike, has resonance in the tension between the common law courts and both equity and the ADR movement. In equity, the battle is captured in the dispute between Lord Coke (for the law) and Lord Ellesmere (for equity) during the reign of James I.⁴¹⁹ Coke invoked the right of Parliament to make and enforce the rule of law, arguing that equity could not interfere with a legal ruling consistent with Parliamentary law.⁴²⁰ Ellesmere claimed that when, because of the „hard conscience of the party,” one litigant insisted on his legal rights, the equity courts could enjoin him from enforcing the judgment.⁴²¹ Although Ellesmere’s views eventually gained the upper hand,⁴²² the common law’s critique of the equity courts for corrupt practices and dilatory justice⁴²³

eventually curbed the jurisdiction of the chancellor.⁴²⁴

In the development of court-annexed mediation practices, a somewhat different dynamic has occurred. Although mediation set-dements have not gained the same authority to overrule the common law that Lord Bacon succeeded in providing the equity courts,⁴²⁵ they largely have become enforceable by law. That is true even when the parties have created a settlement not obtainable at the common law, or even one that countermands a result that the common law likely might have ordered.⁴²⁶ Indeed, mediation is regularly praised for identifying creative solutions that provide more justice „in fact” to the parties than the limited remedies of the law may be made to give.⁴²⁷ Conversely, the law has challenged mediation by identifying mediation provisions that are so unjust or violative of public policy that they should not be enforced by the courts, such as

⁴¹⁹ See Kurtz, *supra* note 44, at 26.

⁴²⁰ More specifically, Coke claimed that when equity issued an injunction interfering with a lawful decision, the party disobeying the injunction could not be imprisoned for violating it. 1 Holdsworth, *supra* note 50, at 461, 463.

⁴²¹ See Hudson, *supra* note 44, at 462.

⁴²² David W. Raack, *A History of Injunctions in England Before 1700*, 61 *Ind. L.J.* 539, 565-86 (1986) (describing the 1616-17 case in which the King upheld Lord Ellesmere’s equitable intervention to block enforcement of a common law judgment and dismissed Lord Coke’s indictment of Ellesmere and others for violation of the statute of Praemunire and describing the growth of equity after that conflict).

⁴²³ Holdsworth discusses a number of corrupt practices in the Chancery facilitated by life appointments. 1 Holdsworth, *supra* note 50, at 424-25. Staff members were paid by fees from the business done and positions in the Chancery were sold or given to friends. *Id.* Deputies concealed and kept some of the fees they received or sought bribes. Lawsuits in equity often lasted many more years than common law actions, up to twenty years, unless money was paid to expedite diem. *Id.* at 426. Staff made money by copying documents as

required by court practice, and many of the chancellors were incompetent to settle what the procedures of the courts should be. *Id.* at 426-28. With such significant discretion and little supervision, abuses in the use of the equity court’s lavish discretion abounded. *Id.*; see also Potter, *supra* note 84, at 19-20 (discussing the abuses of equity officials and inadequacy of their staff until Lord Eldon’s chancellorship).

⁴²⁴ For a brief history of this development, see Philip Hamburger, *Law and Judicial Duty* 124 (2008); cf. Potter, *supra* note 84, at 19-20.

⁴²⁵ For a history of the outcome of this conflict between the equity and law judges, see Raack, *supra* note 113, at 574-83 (1986); see also 1 Holdsworth, *supra* note 50, at 464.

⁴²⁶ For example, in Illinois during the 1980s, maintenance could not be awarded to a divorcing spouse if said spouse had enough property and income “to satisfy his or her reasonable needs.” Miles Beerman & Howard London, *Rehabilitative Maintenance in Illinois* 75 111. B.J. 658 (1987). However, such an award could be agreed upon in a mediation.

⁴²⁷ See, e.g., Rebecca Golbert, *The Global Dimension of the Current Economic Crisis and the Benefits of Alternative Dispute Resolution*, 11 *Nev. L.J.* 502, 509 (2001).

failure of divorce mediations to award adequate child support.⁴²⁸ In this way, mediation has challenged the adequacy of the law, and law has been available to check putatively abusive practices that occur in mediation settings, whether procedural or substantive.

Beyond this mutual checking dynamic between the common law and equity/mediation, there are some similarities between the two systems' ethical values governing the process and outcomes of conflict resolution. Historians of equity have attempted to describe the animating principles that informed the law of equity as a „form of natural justice.”⁴²⁹ As practiced, however, the interpersonal dynamic in equity is quite different than in the common law. Although equity is routinely described as a response coming from „the conscience of the King,”⁴³⁰ equity has performed a role distinct from the particular religious understanding that was employed by the Lord Chancellors in these early years.⁴³¹ The scholastics, following Aristotle and Aquinas, understood the conscience as something within the intellectual or rational part of

man's nature, a „remnant of [his] original uncorrupted nature.”⁴³² In their terms, the *synteresis* of the King's conscience held the moral precepts that guide human wellbeing,⁴³³ most commonly stated as the principle that we must do good, and not harm, to others. The workings of practical reasoning, or the *syneidesis*, helped the King or his chancellor to use those premises to make a moral judgment on actions of the litigants before him and to determine how his power should be employed to do justice.⁴³⁴ As so understood, the conscience would instruct the King about the fair result he was morally bound to deliver, even though an uncaring or stubborn monarch could dissent from the conscience in favor of evil.⁴³⁵

That said, equity in the early days evidenced a complex dynamic sounding more in Emmanuel Levinas's profound description of ethical reality than the abstract reasoning in the medieval world described as „conscience.”⁴³⁶ The dynamic of early equity is interpersonal and asymmetrical, not abstract and logical.⁴³⁷ For Levinas, the „moment of

⁴²⁸ See, e.g., James R. Coben & Peter N. Thompson, *Disputing Irony: A Systematic Look at Litigation About Mediation*, 11 Harv. Negot. L. Rev. 80-87 (2006) (discussing cases in which mediation agreements were not enforced because of fraud, duress, undue influence, mistake, or unconscionability).

⁴²⁹ See Goldsmith, *supra* note 41, at 2 (describing equity as a system of natural justice based on the principles underlying its creation); see also Hudson, *supra* note 44, at 6 (arguing the same point as Goldsmith and referring to equity as “a form of natural justice”).

⁴³⁰ See Goldsmith, *supra* note 41, at 10.

⁴³¹ *Id.* (noting the religious understanding of the idea that equity courts were the keepers of the King's or Queen's conscience, employed by the bishops who served as chancellors).

⁴³² See Michael Baylor, *Action and Person: Conscience in Late Scholasticism and the Young Luther* 47-49, 130-31 (1977). Holdsworth suggests that this was the prevailing understanding of the nature of conscience, as evidenced in St. Germain's dialogue between a doctor of canon law and student

of the common law. William Holdsworth, *Essays in Law and History* 190-91 (A. L. Goodhart & H.G. Hanbury eds., 1995).

⁴³³ Baylor, *supra* note 123, at 131-32, 134-35; see also Charles E. Curran, *Conscience in the Light of the Catholic Moral Tradition*, in *Conscience* 6-7, 25-27 (Charles Curran ed., 2004) (discussing *synderesis* as human awareness of personal responsibility and *syneidesis* as the effort to make judgments).

⁴³⁴ Baylor, *supra* note 123, at 131.

⁴³⁵ *Id.*

⁴³⁶ See generally Emmanuel Levinas, *Totality and Infinity: An Essay on Exteriority* (1969).

⁴³⁷ Indeed, one of the key maxims of equity is that equity acts *in personam* and not *in rem*. Kurtz, *supra* note 44, at 28; Hudson, *supra* note 44, at 8. Kurtz suggests that this rule comes from the fact that the chancellor adopted the ecclesiastical court model, and these courts had no jurisdiction over property, but only religious punishments such as excommunication. Kurtz, *supra* note 44, at 30-31. *But see* Long, *supra* note 82, at 115 (arguing that equity had not sufficiently protected personal rights).

conscience” is not the moment when the monarch deductively applies moral principles „found in nature,” using his conscience to solve a specific problem placed before him. Rather, the „moment of conscience” is that every-moment when the Other stands over us in his need and his infinity, demanding our response.⁴³⁸ In Levinas’s words, „Conscience welcomes the Other. To welcome the Other is to put in question my freedom.”⁴³⁹ For Levinas, it is the face of the Other that forces justice by calling me to responsibility to that Other; it is that call that makes reasoning about justice possible, rather than reason that makes the Other and his situation intelligible to the decision-maker through deduction.⁴⁴⁰

Likewise, in equity, it is the call of those in front of the King and the demand they make for justice in their vulnerability before him that he cannot resist. He appears to stand over them. In fact, in calling out to his conscience, they stand over him. For Levinas, it is this reality of conscience that throws aside the moral reasoning of the common law resembling the interplay of *synteresis* and *syneidesis*. Equity overcomes law because of the face-to-face interaction and the demand of the Other that the King cannot stifle, cabin, or resist.

Since the key ingredients of equity are interpersonal and asymmetrical, the key maxims of equity are arguably nonsensical from a common law perspective in much the same way that

mediation, particularly transformative mediation,⁴⁴¹ is nonsensical from a common law perspective. Both processes up-end the deductive and inductive, logical, and analogical speculations of the common law about justice. Examining just a few of equity’s core maxims gives some sense of how radical equity truly is. Among the most famous equitable maxims are „he who seeks equity must do equity” and „he who comes to equity must come with clean hands.”⁴⁴² Like mediation, both of these maxims expand the legal understanding of a conflict from its narrow focus on delineating a right in one party, which is breached by violation of a concomitant duty in another. Rather, conflict as understood by both equity and transformative mediation embraces the entire situation of the parties and their circles of relationship⁴⁴³ with a more global vision of right, demand, and need than the common law is prepared to recognize.

In both equity and mediation, the relationship between the conflicting parties is the paramount claim that calls for a litigant’s response, not the act of violation or even the damage done. The equity court insists that a rights-holder must embrace and respond ethically to the need and situation of his neighbor before he asks the equity court to do the same for him.⁴⁴⁴ Mediation often similarly insists that each party hear the other side’s story before the parties move to

⁴³⁸ Levinas, *supra* note 127, at 83. See Goldsmith, *supra* note 41, at 26 (describing the equity jurisdiction as originating in cases of oppression where the rank or position of the wrongdoer was an obstacle to getting justice in ordinary courts, whereas the Privy Council took up the cause of the poor “for God and in work of charity”).

⁴³⁹ *Id.* at 84-85.

⁴⁴⁰ *Id.* at 201-04.

⁴⁴¹ For general discussions of the differences between transformative and other styles of mediation, see generally Bush & Folger, *supra* note 71, at 15 - 32.

⁴⁴² Hudson, *supra* note 44, at 24, 26-27.

⁴⁴³ *Id.* at 26-27 (noting the fact “that a claimant will not receive the court’s support unless she has acted entirely fairly herself”).

⁴⁴⁴ *Id.* (noting that no remedy will issue unless the claimant has acted equitably).

identifying concerns or options for resolution.⁴⁴⁵ Indeed, in transformative mediation, the parties are required to be physically present because it is the encounter of each with the other that makes transformation possible.⁴⁴⁶

To describe this critical aspect of mediation concretely, Bush and Folger have identified two key dynamics in successful transformative mediations. First, the subject moves from being fearful, confused, and feeling „vulnerable and out of control” to being empowered.⁴⁴⁷ She understands what matters to her, what her options are, and that she has choices about what to do, which she deliberately makes after a full assessment of her situation and her opponent's.⁴⁴⁸ However, in transformative mediation, a second dynamic reminiscent of Levinas's face-to-face encounter occurs: if the mediation is successful, each party recognizes that he can understand and reflect upon the situation of the other and not just his own.⁴⁴⁹ Each party gains the capacity to care about seeing his opponent's perspective and acknowledging it, making accommodations in his position when possible to

respond to the opponent's need.⁴⁵⁰ As restorative justice planner Kay Pranis has argued, this encounter may be essential to change since „[f]ew can recover from trauma, take risks, or develop new behavior patterns without caring, supportive relationships.”⁴⁵¹

Two other maxims provide examples of the similar ethical perspectives of equity and mediation: „equity looks to the intent rather than to the form” and „equity imputes an intention to fulfill an obligation.”⁴⁵² These maxims suggest that the equity courts will not just make an empirical inquiry into what the actual intentions of previously engaged parties were with respect to the transaction that has birthed a conflict. Rather, the equity court will implicitly assume (like a legal fiction) that the parties mean in good faith to do what they bound themselves morally to do, even if that same outward form and the circumstances of the conflict do not seem to substantiate an actual good faith willingness to keep faith with the other party.⁴⁵³ Although these maxims can be seen as logical syllogisms, a more faithful way to understand them is as equity's call to the conscience to actually look at the

⁴⁴⁵ See Jessica Stepp, *How Does the Mediation Process Work?*, Mediate.com (Feb. 2003), <http://www.mediate.com/articles/steppj.cfm> (“After the opening statement, the mediator will give each side the opportunity to tell their story uninterrupted. Most often, the person who requested the mediation session will go first. The statement is not necessarily a recital of the facts, but it is to give the parties an opportunity to frame issues in their own mind, and to give the mediator more information on the emotional state of each party.”).

⁴⁴⁶ See Bush & Folger, *supra* note 71, at 81-85 (discussing the way in which transformative mediation works through the objectives and outcomes desired by mediation); see also McAdoo et al., *supra* note 34, at 10 (noting that litigants who are not present during mediation regard the process as less fair than those who are, though the allocation of responsibility between lawyer and client does not affect client views about fairness).

⁴⁴⁷ Bush & Folger, *supra* note 71, at 85; see

also Pranis et al., *supra* note 9, at 48 - 49 (noting how conflict can cause deep fissures and hurtful strategies).

⁴⁴⁸ Bush & Folger, *supra* note 71, at 90 (describing recognition in mediation).

⁴⁴⁹ *Id.* at 90-91 (describing the process of giving recognition in thought).

⁴⁵⁰ *Id.* at 91-92.

⁴⁵¹ Pranis et al., *supra* note 9, at 170.

⁴⁵² Hudson, *supra* note 44, at 24.

⁴⁵³ *Id.* at 13, 28 (noting that the courts would require the defendant to act in good conscience, either to refrain from exercising a right or giving a right to the plaintiff, and that the courts would give effect to the substance, not the surface of a transaction, and the assumption that a person bound by an obligation will carry it out). Hudson also notes the related principle that “equity looks on as done that which ought to have been done.” *Id.* at 28.

need of the Other and Her call for just treatment, and even Her refusal to take „no” for an answer to this call.⁴⁵⁴

In transformative mediation processes, mediation similarly aims for a deeper justice than the common law can give. Transformative mediation assumes that individual responses to conflict can be transformed from self-interested, fearful attempts to gain resources or power at the expense of the other person into genuine experiences of mutual understanding and affirmation.⁴⁵⁵ Transformative mediation assumes that when the immediate threat of the conflict is stripped away by story-telling, which paradoxically empowers through the vulnerability of the story,⁴⁵⁶ the parties will rediscover their innate desire to do justice to and for the other, rather than to stand on their legal rights.⁴⁵⁷ Even when circumstances do not permit a party in transformative mediation to accommodate the other party’s needs, the mediation process is designed to produce respectful acknowledgement both of the dignity of the opponent and the difficulties he has encountered that have contributed to creating the conflict being mediated.⁴⁵⁸

A survey of the practices of equity and mediation reveals other similarities. The first similarity is what both systems claim as their „flexibility,” which might also be described as „creativity.”⁴⁵⁹ Neither, at least in theory, is bound to rigid rules or solutions. Both permit the decision-maker - which in the case of mediation is the parties - to craft a solution that either permits both parties to protect their interests or balances and accommodates them in creative ways that the law has not been able to offer.⁴⁶⁰

Second, both equity and mediation, at least in its transformative version, attempt not only retroactive but also forward-looking relief, although in very different ways. The primary momentum of the common law is backward looking. Civil causes of action attempt to establish past rights or wrongdoing and award money to compensate for any breach of rights. In a similar way, criminal actions at the common law have a retributive focus. The purpose of criminal sanctions is law-regulated revenge, or, in some theories, righting a lost balance by punishing the criminal in appropriate proportion to the crime he has committed.⁴⁶¹

⁴⁵⁴ One can find parallels to Levinas’s view of the relationship between the oppressor and the one who calls to him in need in the equity authors’ focus on the oppressor’s lack of conscience toward the one who calls to him in need. For example, Holdsworth describes Lord Ellesmere’s argument that when a judgment has been obtained at law by “oppression, wrong and a hard conscience,” Earl of Oxford’s Case, (1615) 21 Eng. Rep. 485 (Ch.) 487, the chancellor will set it aside, not because of a legal defect, “but for the hard conscience of the party.” 1 Holdsworth, *supra* note 50, at 462 (quoting *Earl of Oxford’s Case*, 21 Eng. Rep. at 487).

⁴⁵⁵ Bush and Folger, *supra* note 71, at 89-90.

⁴⁵⁶ See, e.g., Amy Cohen, *Debating the Globalization of U.S. Mediation: Politics, Power, and Practice in Nepal*, 11 Harv. Negot. L. Rev. 295, 343 (2006) (“[I]t is precisely this (arguably modest) process of speaking - of making interior representations on behalf of one’s self in public and cognizable terms - that female participants here collectively find empowering.”)

⁴⁵⁷ Bush and Folger, *supra* note 71, at 90-91.

⁴⁵⁸ *Id.* at 91.

⁴⁵⁹ See Hudson, *supra* note 44, at 8 (arguing for

the importance of flexibility in equity so that the law can keep up with social developments); Bush and Folger, *supra* note 71, at 16 (describing the “satisfaction story” of mediation as including flexibility that “can... produce creative, ‘win-win’ outcomes that reach beyond formal rights to solve problems and satisfy parties’ genuine needs in a particular situation”).

⁴⁶⁰ See Hudson, *supra* note 44, at 5 (“Equity is the means by which a system of law balances out the need for certainty... with the need to achieve fair results in individual circumstances.”); Bush and Folger, *supra* note 71, at 16 (describing “win-win” solutions that meet parties’ needs).

⁴⁶¹ See Park, *supra* note 46, at 24 (arguing that equity courts have administrative, declaratory, and protective jurisprudence, while law courts are “principally courts of *resolutive* and *retributive* jurisprudence”); see also Vogel, *supra* note 9, at 566 (“[R]estorative justice shares with retributive justice the concern with making right the wrong that has been done, but restorative justice takes a broader and deeper approach because there is much more involved in crime and wrongdoing than law breaking.”).

In equity, by contrast, the declarative judgment and the injunction - the most important remedies available - attempt to govern the relationship of the litigants in the present and the future.⁴⁶² Similarly, the focus of transformative mediation is present and future-oriented. The primary focus of transformative mediation is not on identifying appropriate financial compensation for lost harm, but on empowering a litigant to understand her situation and goals and to choose a solution that speaks to those goals⁴⁶³ while also helping her to reach out to her opponent in understanding and to accommodate the opponent's needs.⁴⁶⁴ The hope of transformative mediation is that, going forward, each person will have gained the compassion and willingness to make her opponent's concerns part of her own.⁴⁶⁵

In this way, the forward-looking impetus of transformative mediation is distinct from that in equity. Equity declares that one litigant has the right and the other has the duty. It enforces compliance with that declaration through contempt of court if an injunction is not followed or further litigation if declaratory relief is ignored. Transformative mediation, by contrast, relies on the insight and willingness of the parties to comply with their own promises and to follow through on the compassion and respect achieved in the mediation with caring actions toward the other party.⁴⁶⁶

III. Imagining Mediation of Currently Non-Justiciable Disputes: Two Dilemmas

⁴⁶² See, e.g., Story, *Equity Jurisprudence*, *supra* note 41, at 573 (noting that equity is generally "preventative and protective, rather than restorative" and "seeks to prevent a meditated wrong more often than to redress an injury already done").

⁴⁶³ Bush and Folger, *supra* note 71, at 100-01.

⁴⁶⁴ *Id.* at 91.

⁴⁶⁵ See *id.* at 29, 89 (Transformative mediation

Before discussing how court-annexed mediation or similar practices might work in traditionally non-justiciable disputes, it is worth considering whether there is any value in adding to the plethora of causes of action currently remediable in court. To answer that question, one might contemplate two of the most significant obstacles to requiring mediation in very difficult conflicts, such as ones this Article began with - the Nazis' proposed march into Skokie and the Westboro Baptist Church's insistence on picketing military funerals - cases in which the values and world views of those in conflict may seem incommensurable.⁴⁶⁷

One potential obstacle is the difficulty of forcing a wrongdoer into mediation. Given that mediation, particularly transformative mediation, requires that any resolution be voluntary, mandatory mediation may be doomed from the start if one or both of those entering it is coerced to be there. We might also see a major obstacle in causing someone like Frank Collin, the organizer of the Nazi march, to have a change of heart. These obstacles cause us to wonder whether mediation, especially mandatory mediation, is certain to fail.

In practice, mediation holds out the promise of transformation, even if it is mandatory, and the hope that someone like Frank Collin can change. Perhaps this is because any mediation offers a valuable opportunity for self-determination that the common law courts and other social institutions do not. Self-determination, in which mutual consent plays an important role, has been a core

aims at creating "a world in which people are not just better off, but better: more human and humane" and where parties "voluntarily choose to become more open, attentive, sympathetic, and responsive to the situation of the other party...").

⁴⁶⁶ *Id.* at 91, 93.

⁴⁶⁷ See *supra* notes 12-31 and accompanying text.

value of the mediation movement from the outset.⁴⁶⁸ Originally, of course, mediation was imagined as an entirely consensual portal of justice. Parties could not be forced into the mediation process, nor could a settlement be obtained without their voluntary and informed consent.⁴⁶⁹ Indeed, perhaps the core value of mediation is the willingness of the parties to participate throughout the process. In the mediation paradigm, parties can exit at any time if they are unhappy with the progress of the mediation.⁴⁷⁰ Moreover, because of its consensual nature, mediation has been utilized to adjudicate claims that might not be justiciable absent the parties' agreement, such as neighborhood disputes.⁴⁷¹

Nevertheless, many courts have eliminated the voluntariness of entrance

into court-annexed mediation by requiring at least some attempt to mediate, although these courts have not eliminated the requirement that any settlement be voluntary.⁴⁷² In practice, court-annexed mediation programs vary in the extent to which an unwilling party must participate. In some programs, attorneys are only required to consider mediation or discuss it with their clients, though the court may overrule their report that mediation will not be helpful in resolving the dispute.⁴⁷³ In others, clients are required to attend a first mediation meeting,⁴⁷⁴ and in still others, there is some notion that they must mediate in good faith or suffer potential economic consequences when they return to court.⁴⁷⁵ Although the concept of mandatory mediation may at first blush appear to be an oxymoron, success rates

⁴⁶⁸ See Welsh, *supra* note 37, at 3 - 4 (describing self-determination as "the fundamental principle of mediation," which includes active and direct participation in communication and negotiation, control of substantive norms in the process, creating settlement options, and controlling the decision whether to settle); see also Dorcas Quek, *Mandatory Mediation: An Oxymoron? Examining the Feasibility of Implementing a Court-Mandated Mediation Program*, 11 *Car-dojo J. Conflict Resol.* 479, 484 (2010).

⁴⁶⁹ See Welsh, *supra* note 37, at 17-18.

⁴⁷⁰ *Id.*

⁴⁷¹ See, for example, the disputes handled by the Resolutions Northwest Neighborhood Mediation Program in Portland, Oregon, which handles problems such as noise, pets, and property maintenance, as well as litigable disputes such as nuisances and boundary disputes. *Neighborhood Mediation Program*, Resolutions Northwest, http://www.resolutionsnorthwest.org/neighborhood_mediation_program (last visited Nov. 7, 2013).

⁴⁷² See McAdoo & Welsh, *supra* note 2, at 404 (describing mandatory court-annexed mediation); Quek, *supra* note 159, at 484 (describing the controversy over whether mandatory mediation is a temporary expedient or no longer needed because of the growth of ADR).

⁴⁷³ McAdoo et al, *supra* note 34, at 8; see, e.g., McAdoo & Welsh, *supra* note 2, at 407-08; see also Quek, *supra* note 159, at 485-86 (noting Professor Sander's view that mandatory mediation "is not an oxymoron" because there is a distinction between being coerced to enter the process and being coerced within the process, while other authors point

out that mandatory mediation only requires parties to try to settle, and they have access to litigation if they fail).

⁴⁷⁴ Quek, *supra* note 159, at 488 - 90. Quek describes systems which automatically refer some or may refer some cases at the judge's discretion with no sanctions if the parties object (Central London County Court pilot); systems in which a court may require a court appearance (Queensland) or orientation session (Virginia) before the parties decide whether to mediate; and systems which refer all cases, but permit an exemption through court motion (Ontario). *Id.* Quek also notes that some Australian states may refer parties to mandatory mediation. *Id.*

⁴⁷⁵ *Id.* at 489 (describing the U.K. system in which the court may take account of unreasonable conduct in refusing to mediate in determining costs assessed against the party and may mandate mediation before a client is entitled to a Legal Aid lawyer). In perhaps an interesting parallel to the requirement that mediation parties appear but not resolve their differences, Justice Story notes that in some of the earliest requests for equity relief, the plaintiff merely asked the chancellor to tell the defendant to appear or to be examined, without any other relief being sought. Story, *Equity Pleadings*, *supra* note 68, at 9-10, 15-16. Story argues that interrogatories were later included in the bill, or complaint, with the goal to "sift more thoroughly the conscience of the defendant as to these facts." *Id.* at 9-10. He divided bills in equity into those praying for relief (based on a right, interpleaders, or certiorari) and those not praying for relief (to perpetuate witness testimony and discovery.). *Id.* at 15-16.

for these mediations seem to mimic the success rates for voluntary court-annexed or private mediation.⁴⁷⁶ Some studies have reported that parties forced into mediation are less satisfied with the process if their mediations fail, in part because of the seemingly duplicate cost of pursuing mediation and then going to court, where they wanted to be in the first place.⁴⁷⁷ However, for those who succeed, the fact that the proceeding was initially involuntary is not viewed as an unacceptable violation of rights or a breach of the litigants' autonomy.⁴⁷⁸

What might account for this seemingly incongruous result? Perhaps it is because, as mandatory court-annexed mediation becomes part of the regular process for adjudicating conflicts, litigants and their lawyers have come to accept the fact that mediation is part of the process they must undergo to achieve a result, much like distasteful aspects of litigation, such as pleadings and discovery. Fighting against or complaining about the inevitable may be seen as a waste of time and energy that would be better spent trying to achieve one's objective in mediation. Second, mediation studies show high success and satisfaction rates.⁴⁷⁹ As the public and the bar become familiar with these studies, even those who initially dismissed

mediation as a waste of time may come to have faith in mediation as a more successful and less expensive route for dispute resolution.⁴⁸⁰

Third, since remedy options are limited in common law courts, those forced into mandatory mediation may believe that they have a higher chance of getting what they really want because they have more control over the process than if they must deal with the wild cards of judicial interpretation.⁴⁸¹ Perhaps because they are risk-averse, litigants might prefer an outcome that they can say „no” to rather than rolling the dice with an unknown judge or jury. Perhaps they believe that in a direct encounter with the other party they will have more influence in getting his assent; in court, their influence over the other party may be dissipated by judicial interference.⁴⁸² As suggested earlier, this concern has troubled advocates for victims of domestic abuse⁴⁸³ and resulted in both political pushback and, in some cases, statutory exceptions to mediation requirements for such victims.⁴⁸⁴ However, this opportunity for better remedies is a potential asset in gaining the cooperation of parties in court-ordered mediations.

Finally, mediation is advertised as a „kinder, gentler” approach to dispute resolution.⁴⁸⁵ Parties report satisfaction

⁴⁷⁶ McAdoo et al., *supra* note 34, at 9 (noting that satisfaction rates do not vary by case type).

⁴⁷⁷ Cf. Quek, *supra* note 159, at 482, 486.

⁴⁷⁸ See McAdoo & Welsh, *supra* note 2, at 422-23 (noting that parties perceive mediations as fair or are satisfied with them).

⁴⁷⁹ McAdoo et al., *supra* note 34, at 8 (noting the high success and satisfaction rates with mandatory mediation).

⁴⁸⁰ For an example of this attempt to create public awareness about the success of mediation, see Am. Bar Ass'n, Section on Dispute Resolution, *supra* note 37, at 5.

⁴⁸¹ See Welsh, *supra* note 37, at 8, 17 (noting that mediation was assumed to permit parties to control substantive norms of their conflict, processes

of participation, options for settlement, and the final decision); *infra* note 178.

⁴⁸² If true, advocates' concerns that mediation exacerbates an imbalance of power may be well-placed. See *supra* note 71; *infra* notes 174-75 and accompanying text.

⁴⁸³ See, e.g., Bush & Folger, *supra* note 71, at 22-23 (describing the “oppression story” whereby mediation has magnified power imbalances).

⁴⁸⁴ See, e.g., Alison E. Gerencser, *Family Mediation: Screening for Domestic Abuse*, 23 Fla. St. U. L. Rev. 43, 55-56 (1995) (describing varieties of exemptions for spouses suffering from domestic abuse).

⁴⁸⁵ See Richard Calkins, *Mediation: The Gentler Way*, 41 San Diego L. Rev. 277, 279-80 (1996).

with their ability to participate more directly in the process.⁴⁸⁶ For the many individuals who hate conflict, as well as those who are concerned about the spillover effects of conflict on children, family, and friends, the prospect of a less damaging way to achieve closure may be attractive. The value of peace and continued good relationships with the other party may be worth giving up the possibility of a greater financial gain through the courts. None of the available evidence to this point suggests that, if legislators or courts develop new causes of action that can only be pursued through mediation, requiring a claimed wrongdoer to present himself for mediation will automatically result in failure of the mediation process.

The next legitimate concern is whether introducing new causes of action that are only subjects of mediation will be a waste of time because the defendants in these causes of action will never have the incentive to settle when they know the plaintiffs cannot turn to the courts to obtain justice. In fact, it may be that many of those who agree to settlements in mandated mediations do so only because they believe that they will fare worse in court or that the entire process will be so

expensive that they are better off finishing the dispute in mediation.⁴⁸⁷

However, there may be other incentives for cooperation for those haled into a public mediation-only system of justice besides the threat of a lawsuit. From a self-interested point of view, public reputation is an important concern that causes some defendants to settle lawsuits before they are filed.⁴⁸⁸ Indeed, plaintiffs' attorneys often give corporate defendants the opportunity to negotiate a settlement before filing in order to avoid reputational harm.⁴⁸⁹ In these situations, mandatory mediation prior to more public litigation may be a welcome relief to prospective defendants, particularly for those who deem themselves innocent.

Still, other defendants may be unaware that their actions have injured others, or they may not understand the magnitude of the injuries they caused. Once they are apprised of these facts through mediation, they might be willing to sit down and talk with their victims about what happened or to offer redress. That response is less likely to occur if they have been served with a traditional lawsuit and been advised that their willingness to talk or cooperate might be used against them.⁴⁹⁰ Similarly, some mediation

⁴⁸⁶ See Quek, *supra* note 159, at 482 (noting party endorsement of mediation because of their ability to tell their story and contribute to the outcome).

⁴⁸⁷ Alona M. Gottfried, *Mediation vs Litigation: Choosing Your Own Outcome*, Arizona Mediation (July 17, 2011), <http://azmediator.com/mediation-vs-litigation-choosing-your-own-outcome/> ("Judges and juries make mistakes or may simply not agree with your position.... When you are leaving your fate in the hands of others, you are gambling with some of the most important decisions in your life. In order to get to the point of letting someone else decide, you will likely have to spend a lot of time and money and energy first. Litigation is not free or quickly resolved... If you think the other party is unreasonable, having a public (not confidential) battle is not the best choice. In mediation, the mediator helps both parties become reasonable and reach an acceptable agreement in a confidential and comfortable environment.").

⁴⁸⁸ William S. Kleinman, Note, *Who is Suing You? John Doe Plaintiffs in the Federal Courts*, 61 Tex. L. Rev. 547, 555 (1982) (noting potential damage to defendants' reputation in cases like sex or race discrimination, antitrust violations, or civil fraud as reasons for settling even frivolous lawsuits).

⁴⁸⁹ Mijha Butcher, *Using Mediation to Remedy Civil Rights Violations when the Defendant is Not an Intentional Perpetrator: The Problems of Unconscious Disparate Treatment and Unjustified Disparate Impacts*, 24 Hamline J. Pub. L. & Pol'y 225, 267 (2003) (describing companies' use of mediation in employment disputes to avoid reputational harm).

⁴⁹⁰ See, e.g., Donna L. Pavlick, *Admission and Apology: The Horse and Carriage of the 21st Century*, 18 Ohio St. J. on Disp. Resol. 829, 859-60 (2003) (describing how defendants avoid apologies except in mediation because of the possible admission of liability in litigation).

defendants may feel obliged to fight litigation on principle or because of the broader ramifications in subsequent cases. There are many cases of this type, such as newspapers that fight libel lawsuits in order to preserve their First Amendment rights in future cases and organizations that refuse to settle environmental lawsuits or employment claims because of the possibility that other plaintiffs will follow. Despite their principled stand, these defendants may nonetheless be willing to sit down with those they have harmed, give them a chance to tell their stories, and talk about what the defendants might voluntarily do to ameliorate the harms they have caused.

Finally, some defendants will want to tell their side of the story and come to some kind of conciliation or reconciliation with injured parties, even if they are not willing to acknowledge wrongdoing or make monetary recompense. It is therefore good to keep in mind that the chief purpose of mediation is not necessarily to reach either a monetary or other kind of settlement that will mimic what a plaintiff might have achieved in court. As transformative advocates have argued, something more is at stake in resolution of many conflicts than simply moving money from the harming party to the harmed party.⁴⁹¹ Instead, mediation may offer the chance for recognition and even reconciliation, particularly in disputes where the most critical harm is to the relationship between people.⁴⁹² In

fact, settlement in the sense of economic closure is almost beside the point in transformative mediation,⁴⁹³ and its advocates will argue that mediation can be successful even if it does not come to closure on the specific legal cause that brought the parties into mediation.⁴⁹⁴

To see the value in creating a parallel mediation system, lawmakers will have to embrace the assumptions of transformative mediation regarding the nature of human conflict and the willingness of most individuals to try to resolve it. Transformative mediation assumes that most individuals in conflict are willing to act in good faith to achieve a just outcome for all parties as long as they can be helped to take a step back from their own sense of threat that occurs in conflict, to understand their own and others' situations, and to tap that reservoir of good faith.⁴⁹⁵ The events and circumstances that led up to the conflict instead cause them to respond as fearful individuals do - by reducing their vision of the circumstances to include and interpret the facts to match a self-interested understanding of the situation and to justify their demands (or refusal to meet others' demands).⁴⁹⁶

In a somewhat similar vein, the restorative justice movement describes conflict that results in victimization as follows: sometimes wrongdoers do not have the moral or emotional imagination to understand the nature and depth of injury they have caused their victims and cannot tap into their deepest selves to

⁴⁹¹ See Bush & Folger, *supra* note 71, at 68-70 (describing limitations of problem-solving mediation).

⁴⁹² See *id.* at 96-97 (describing opportunity for recognition and distinguishing it from reconciliation, which may or may not occur); see also Vogel, *supra* note 9, at 565 ("[D]eep within every human heart there is a restorative impulse to seek social healing that is taking form in the world through the practices of restorative justice.").

⁴⁹³ See, e.g., Pavlick, *supra* note 181, at 859-60

(discussing how settlement-driven mediators may subvert values of transformative mediation).

⁴⁹⁴ See Bush & Folger, *supra* note 71, at 94-95 (describing successes of transformative mediation while attempting to define what "success" means when discussing transformative mediation).

⁴⁹⁵ See *id.* at 89 (describing the transition from threat to responsiveness).

⁴⁹⁶ See *id.* (describing the initial reaction of an individual to conflict and the necessary development of his or her perspective as a goal of mediation).

acknowledge that wrongdoing.⁴⁹⁷ Restorative justice utilizes processes like victim-offender mediation and restorative circles to help the wrongdoer understand precisely how he has harmed the direct victim and members of the community who have suffered indirect consequences of his actions.⁴⁹⁸

In other words, restorative justice processes require the offender to acknowledge that he bears responsibility for the wrong that was done.⁴⁹⁹ Thus, at least some restorative justice advocates embrace a slightly darker vision about human nature than advocates of transformative mediation; restorative justice can admit the possibility that human beings are not necessarily well intentioned and still hold out examples of wrongdoers who have had a change of heart.⁵⁰⁰ Restorative justice encourages offenders to acknowledge not only the harm they have caused but also that they have committed a wrongful act. This is a difficult transition for most human beings who are wont to justify the harm they have caused as deserved, accidental, or otherwise not their fault.⁵⁰¹

Restorative justice processes also aim to move the offender to a genuine desire to repair that harm,⁵⁰² much like transformative justice moves litigants to

embrace the concerns of their adversaries as something that they are also responsible for alleviating, if possible.⁵⁰³ Finally, victims, offenders, and any members of the community involved in restorative processes work together to find solutions that will both remediate the victim's harm and restore the offender to full ethical membership in his community, which may require the community to help remediate the offender's situation as well.⁵⁰⁴

The Skokie and the Snyder cases present difficult tests of whether transformative mediation or similar restorative practices might actually work because a change of heart seems so impossible given the vastly different world-views of the opposing sides. Although there is not enough information on Frank Collin, head of the Illinois Nazi Party, to fully predict his behavior, there are narrative touch points in his life that might have been utilized by a skillful mediator to help him understand and acknowledge the plight of the Holocaust victims who were emotionally traumatized by the proposed march into Skokie. Collin's father was a Holocaust survivor, a fact ironically acknowledged by historians of this case,⁵⁰⁵ but one that

⁴⁹⁷ See Little Book, *supra* note 3, at 16; Howard Zehr, *Changing Lenses* 40-41 (1990) (hereinafter *Changing Lenses*) (noting how prison encourages offenders to construct rationales for their offenses, try to divert blame from themselves, and insulate themselves from victims).

⁴⁹⁸ See Pranis et al., *supra* note 9, at 34-45 (describing the core values of restorative justice).

⁴⁹⁹ See Vogel, *supra* note 9, at 573 (detailing the six "guiding questions of restorative justice"); Pranis et al., *supra* note 9, at 165-67.

⁵⁰⁰ See, e.g., *Changing Lenses*, *supra* note 188, at 180-84, 207-10 (describing realistic acceptance of offender violence and place for punishment but demonstrating power of restorative justice with serious offenders).

⁵⁰¹ *Id.* at 197.

⁵⁰² *Id.* at 207 (discussing how some sex offenders come to write letters of apology to their victims).

⁵⁰³ See Vogel, *supra* note 9, at 566 ("Restorative

justice acknowledges the *damaged relationships*, as well as the injuries sustained by the victims, that result from any wrongdoing and focuses on *healing* for all those involved, including communities and offenders.").

⁵⁰⁴ See, e.g., Pranis et al., *supra* note *, at 10-14; Vogel, *supra* note 9, at 566 ("[T]ransformative possibilities for moving from the burden of past wrongdoing into the promise of a new future in which new relationships are forged so that all life might flourish.")

⁵⁰⁵ Strum, *supra* note 12, at 4. Collin's given name was Frank Cohn, and his father Max had been in Dachau for three months. When Max Cohn reached the United States, he changed his name to Collin and married an American Catholic. *Id.* Frank Collin was later thrown out of his previous affiliation, the National Socialist White People's Party, when they discovered he had Jewish ancestry. *Id.* at 5.

does not seem to have been the subject of any transformative conversation between him and members of the Skokie community. Moreover, Collin's family members were disgusted by his behavior.⁵⁰⁶ Their involvement in a restorative process and their acknowledgement of issues that may have caused him to seek affirmation from the Nazi party do not seem to have been explored through the litigation, nor is it likely that such concerns would have been explored in a traditional process. No one appears to have challenged him on the seemingly impulsive nature of his decision to march in Skokie after his requests to march in Chicago - which targeted African Americans whom his party claimed were causing destruction in the city - were stymied by Chicago officials.⁵⁰⁷ Here again, had Skokie or Chicago city officials involved him or his followers in a mediation or restorative process, it might have been possible to grant Collin the publicity he sought without publicly traumatizing Skokie residents with the thought of a march through their hometown.⁵⁰⁸

On the other side, mandatory mediation might have empowered the

Skokie residents who heard that the Nazis were going to march in their town.⁵⁰⁹ Instead, some tried to avoid confronting their past,⁵¹⁰ while others were „in almost a catatonic state - petrified - shaking - crying... trembling at the thought of 'those swastikas and brown shirts and boots and Nazi insignia.'”⁵¹¹ Still others were enraged to the point of possible violence against the Nazis.⁵¹² Mandatory mediation might have allowed these victims to join other victims who saw this conflict as an opportunity to tell the story of this tragedy to the larger community and to help government officials understand why this march might be so painful for those whom the Nazis rounded up, imprisoned, and tortured.⁵¹³

Similarly, although it may be difficult to imagine that members of the Westboro Baptist Church would cease and desist in their activities, it is hard to know how they might have responded if they were forced to encounter the living Albert Snyder, hear the real story of his son's life and death, and hear his pain. Like Frank Collin,⁵¹⁴ WBC has painted itself as a victim, as the target of government attempts to suppress its speech because of its claimed „prophetic” character.⁵¹⁵ A

⁵⁰⁶ *Id.* at 4-5 (noting that Frank's family thought his Nazism was “incomprehensible and offensive” and that his family “completely disapproved of his Nazi activities”).

⁵⁰⁷ *Id.* at 16-18 (describing the politics around the bond requirements in Chicago and suburbs where Collin asked to march).

⁵⁰⁸ Of course, perhaps none of this would have worked. While Collin eventually repudiated his neo-Nazi beliefs in favor of a pre-Columbian mythology, it is more likely that his convictions for sexual activity with children severed his relationship with the party, which may indicate something about his possibility for a change of heart. *Id.* at 14.

⁵⁰⁹ See *id.* at 59-60 (describing the response of survivors at a meeting announcing that the Nazis were not coming).

⁵¹⁰ *Id.* at 8, 20.

⁵¹¹ *Id.* at 59-60 (describing a community meeting after the trial court issued an injunction against the Skokie march).

⁵¹² *Id.* at 52-53 (detailing testimony from Frank Richter of the Synagogue Council of Skokie).

⁵¹³ *Id.* at 20-21 (noting that some survivors felt guilt that they had not resisted enough during the Holocaust and had an obligation to atone by taking action against the proposed assault on their community).

⁵¹⁴ *Id.* at 14 (discussing Collin's view that Jews had inordinate financial and legal power in the United States and his calls for whites to gain that power back).

⁵¹⁵ See, e.g., *America Persecutes the Saints of God*, God Hates America (Mar 26, 2008), <http://www.godhatestheworld.com/america/index.html> (“15 years ago, in a conspiracy between members of the police, media, city government, and a crooked lawyer/judge/strip joint owner/bloody jew, America sought to silence WBC by beating her members bloody on the sidewalks outside the Vintage Restaurant in Topeka. Every day since (not most every day, not every day except bad weather, not most days, but EVERY DAY), WBC has stood on those same sidewalks to remind you of your crimes and hatred, and that God will avenge our blood, which cries to him from that ground (Gen 4:10).”).

forced encounter with a real person damaged by their activities might turn the hearts of some members of that church away from their own paranoia and denial to consider the harm they are causing others.

Litigation does not generally serve the same purpose. Due to the public, isolated, and occasionally dangerous position that a named victim in such cases occupies, in addition to the strong likelihood that the law will fail victims, the common law system requires extraordinary courage from individuals who serve as named plaintiffs in these cases. In the Skokie case, the litigation process failed to offer most Holocaust victims the opportunity or encouragement to speak in a safe space about their trauma and their fears of a recurrence.⁵¹⁶ In Snyder, the Supreme Court's constitutional protection for speech left Albert Snyder without remedy for a terrible harm. By not offering a safer, less public opportunity to confront those who were about to harm them, both Snyder and the Holocaust victims were deprived of the opportunity to describe their experiences through telling their stories both to those who wanted to harm them and to the community. This

experience may have allowed them to gain a sense of empowerment.

Through transformative mediation or restorative processes, even if the Skokie Nazis had been recalcitrant, the affected residents could have named their experiences and fears and identified what they needed in order to reassure themselves that the wrongs they suffered would not occur again. They also may have been able to seek support from a wider community in shielding themselves from some of the harm that they individually experienced. In other cities where anti-Semitic acts have occurred, non-Jewish citizens have stepped up to show solidarity with Jews and to let them know that they would not be singled out and taken away, like many Jews were taken in Nazi Germany. For example, some have burned Chanukah candles in their homes and worn yellow stars in public.⁵¹⁷ Others have gathered in public places to show their support after attacks on synagogues.⁵¹⁸ Indeed, a more robust community restorative process might have led the African Americans of Chicago and the Jewish Americans of Skokie to form stronger bonds,

⁵¹⁶ Although the trial judge, Judge Wosik, who had seen first-hand the horrors of the Nazis, ignored the First Amendment arguments in support of the Nazis, he hardly gave the City of Skokie the opportunity to present its entire case. Strum, *supra* note 12, at 54-56. The Illinois Appellate Court attempted to give "half a loaf" by permitting the march but forbidding the display of the swastika. *Id.* at 76 - 78; see also Vogel, *supra* note 9, at 565 (noting that restorative justice offers the promise of a "safe place" [where] we are able to take action through dialogue to build community so that all life might flourish").

⁵¹⁷ See Patrick Sauer, *A Holiday Story of Community Solidarity Revisited: Mont. Townsfolk Unite Against Anti-Semitism*, Huffington Post (Dec. 16, 2010, 1:04 PM), http://www.huf-fingtonpost.com/patrick-sauer/the-townsfolk-of-billings_b_793871.html (describing Billings' citizens show of paper menorahs in their windows after anti-Semitic violence); Rone Tempest, *80,000 March in Paris to Protest Anti-Semitic Acts*, LA. Times (May 15,

1990), http://articles.latimes.com/1990-05-15/news/mn-160_1le-pen (describing French marchers wearing yellow stars to protest synagogue burning).

⁵¹⁸ See, e.g., John Ensslin, *Bergen County Community Leaders Rally for Solidarity After Anti-Semitic Incidents*, northjersey.com (Feb. 1, 2012, 10:40 PM), http://www.northjersey.com/news/bergen/Jewish_and_African_American_community_leaders_rally_for_solidarity_after_anti_Semitic_incidents.html (describing prayer vigil organized by the NAACP after a Molotov cocktail was thrown at a Jewish synagogue in Bergen County, New York); Jake New, *Chabad House Menorah Lighting Symbolizes Perseverance, Support*, Ind. Daily Student (Dec. 6, 2010, 12:55 AM), <http://www.idsnews.com/news/story.aspx?id=78889> (describing a menorah lighting ceremony at Indiana University held to support the local Jewish community after recent destruction of Hebrew texts and other anti-Semitic acts).

recognizing that they were both targeted by Collin.

In Snyder's case, requiring the WBC to enter mediation might have resulted in other church and military support groups coming together to support the Snyders. It may have further galvanized the kinds of cordons around military funerals that sprang up in the wake of the WBC's activity to protect grieving family members from observing hateful slurs.⁵¹⁹ Thus, in the worst case, even if the defendants were unmoved, the victims would still have had the opportunity to become empowered and seek creative solutions with others to ameliorate the harms they suffered.

Almost none of these possible outcomes are offered as a standard opportunity in traditional litigation, though occasionally they occur because of the wisdom of the attorneys, the judge, or the parties themselves. In litigation, parties are discouraged from telling their whole stories in context because judges require litigants to identify particular concrete facts upon which relief can be granted and limit testimony to the relevant cause of action.

In Skokie, those Jews who did step up as litigants struggled to describe a justiciable harm for the courts to focus on, such as physical injury or economic loss,⁵²⁰ even though their symbolic and psychological harm was clear to most observers and much worse for many than any tangible injury.⁵²¹ Indeed, especially in a constitutional case, some „state interests,” which are really attempts to

protect private parties, may appear less consequential because they are stated as abstractions in court cases, rather than evidenced by the testimony of real people whom the government is attempting to protect. Moreover, for the most part, traditional litigation does not require litigants to acknowledge that they have caused harm to others. In fact, it arguably discourages acknowledgement and taking responsibility for one's actions because an admission may be followed by remedial court judgments against the defendant.⁵²² Lawyers of wrongdoers are, for the most part, neither schooled in nor comfortable with counseling clients to acknowledge responsibility and make amends. Their primary impetus is to defend their client's positions at all costs.

Traditional litigation also does not help either party to develop a clear understanding of his interests, goals, or vision for a future with the opponent absent the intervention of extraordinary lawyers or judges. Trial lawyers traditionally have been trained to narrow their focus to those issues and concerns that are litigable and refer or defer broader concerns of the client to others. For all of these reasons, transformative mediation or other restorative practices may be able to offer both victims and those who have harmed them more real justice than the courts can give, even acknowledging that a mediation may flounder if a recalcitrant wrongdoer walks away.

Moreover, there is evidence that ADR practices can transform even the most hardened wrongdoers⁵²³ and aggrieved

⁵¹⁹ See, e.g., *Texas A&M Students Form Human Wall To Block Westboro Baptist Church Protestors From Soldier Roy Tisdale's Funeral*, Huffington Post, May 30, 2013, available at http://www.huffingtonpost.com/2012/07/06/texas-am-students_n_1653002.html (last visited Oct. 19, 2013).

⁵²⁰ See Strum, *supra* note 12, at 97-99 (describing testimony on emotional harm and court reactions to it).

⁵²¹ See *id.* at 52-53, 59-60.

⁵²² See Pavlick, *supra* note 181, at 854.

⁵²³ See, e.g., Malcolm Thorburn, *The Impossible Dreams and Modest Reality of Restorative Justice*, 30 *Queens L.J.* 863, 877 (2005) (recounting, albeit with skepticism, restorative justice stories of "hardened criminals who volunteer to take care of their victims" and "drug-addicted robbers who change their ways").

victims. Perhaps one of the most astonishing restorative justice narratives documents the journey of the Streufert family, who had to deal with the brutal rape and murder of their eighteen-year-old daughter, Carin, just after she came home from her first year in college.⁵²⁴ After imprisoning her murderers did not bring closure to the family, they worked with mediator Mark Umbreit to confront the offenders about their daughter and their loss and to learn more about what happened in her final moments.⁵²⁵

In coming to acknowledge these offenders as human beings worthy of dialogue and accountable for their wrongdoing, the Streufert family was able to partially work through its grief,⁵²⁶ a result not usually available in the traditional justice system. Restorative justice advocates recount many other less dramatic but equally surprising results: property victims of youthful offenders who become their mentors and parental figures, employees who were able to find a workable relationship with their supervisor after fifteen years of tension, and so forth.⁵²⁷

IV. Designing a System: Processes and Framing Causes of Action

Although the specific parameters of a mediation-only legal system for currently non-justiciable causes of action will need to be worked out, there are some initial criteria for defining such causes of action and at least one formula for handling such causes of action in the context of the current common law court system. Consistent with the purpose for creating

a separate mediation-only track for currently non-justiciable causes of action, lawmakers, whether legislatures or courts, could triage possible conflicts into three categories.

First, some conflicts should simply result in more traditional causes of action. These are emerging conflicts and harms that should be redressable through traditional judicial decision-making. For instance, new torts of invasion of privacy or cyber-harms might fit into this category. For these harms, damages, injunctions, and other traditional remedies should be available to plaintiffs regardless of whether they proceed to court-annexed mediation and achieve an outcome.

Second, some conflicts are not appropriately dealt with by a public judicial system at all, not even by mandatory mediation, for a variety of public policy reasons ranging from manageability to public value concerns about privacy. As examples, even if mediation might be a helpful tool in resolving these kinds of conflicts, nobody would have a legislative body order mediation in most cases of parent-child conflicts over the parent's child-rearing decisions, „trash-talking” between friends in a high school, or emotional antagonism between neighbors because one is using his property for purposes disliked by the neighbor, such as plantings or buildings.

Third, some causes of action should be mediation-only claims, with a clear definition of the elements of those causes of action either by statute or common law court definition. To use a contemporary example that is flummoxing lawmakers,

⁵²⁴ See, e.g., *Glimmer of Hope*, Nat'l Film Bd. of Can., <http://onf-nfb.gc.ca/en/our-col-lection/?idfilm=33348#nav-resume>.

⁵²⁵ See Lynette Parker, *Video Review: Glimmer of Hope*, Restorative Justice Online (Jul. 2006), <http://www.restorativejustice.org/editions/2006/july06/videoreview>.

⁵²⁶ See *Glimmer of Hope*, *supra* note 215.

⁵²⁷ See, e.g., Doug Borch, *Stories of Courage and Compassion*, The Centre for Restorative Justice, <http://www.sfu.ca/crj/news/stories/doug-borch.html> (discussing the story of how one homeowner who was a victim of a youth's break-in learned of the youth's poverty and bought the child's family food for Christmas dinner).

schools have seen a rise in cyberstalking, cyberbullying, and threatening or demeaning commentary by students against other students, which have resulted in violence or hostile environments on school grounds.⁵²⁸ The line between criminal or civilly punishable, unprotected behavior and protected First Amendment speech is still being drawn.⁵²⁹

However, a court or legislative body might determine that some hostile commentary is appropriate for mandatory mediation, even if it would be protected from criminal punishment or civil damages under the First Amendment.

What common elements would most mediation-only causes of action have? To make a list, one might look at constitutional cases where harm has occurred but there was no remedy available. Some of these cases, such as *Snyder*, involve so-called „hate speech.” These are cases in which speakers exercising their First Amendment rights use derogatory language that cause severe emotional harm or fear in others, but their speech is nevertheless protected, unlike true threats, inciting words, fighting words, or libel.⁵³⁰ A second group of such cases sound in invasion of privacy. One example is the publication of painfully embarrassing facts, such as the identity of a rape victim, which is protected by the First Amendment if the information is lawfully obtained.⁵³¹ These cases involve many of the standard

elements of tort law, including morally wrong behavior; a single culpable party; and some identifiable harm to an individual person, which is widely regarded by society as beyond the pale. Yet, under current Supreme Court jurisprudence, these cases are non-justiciable, either civilly or criminally.⁵³²

Why might it be preferable to use elements similar to traditional torts to define those conflicts that would now become justiciable only through mediation but not through the courts? First, unless the alleged behavior is widely considered morally problematic in society's eyes, it is difficult to justify responding with public resources. As hate speech and invasion of privacy cases have illustrated, it may sometimes be difficult to draw the line between morally offensive behavior and publicly acceptable, or even publically laudable, behavior. For example, both society and its legal institutions, all the way up to the Supreme Court, have struggled over whether expression of disapproval of a minority group or its behavior - such as „Islam threatens Western values” - is hate speech.⁵³³ Similarly, there have been debates about whether disclosure of the name of a rape victim is not only defensible, but also good because publication of rapes lessens the shame for other rape victims and promotes truth about the realities of rape in our society.⁵³⁴ Except as limited by constitutional or similar constraints, public

⁵²⁸ See Bethan Noonan, Note, *Crafting Legislation to Prevent Cyberbullying: The Use of Education, Reporting, and Threshold Requirements*, 27 J. Contemp. Health L. & Pol'y 330, 334-35 (2011) (describing the prevalence of student cyberbullying).

⁵²⁹ See *id.* at 339-43 (describing Supreme Court responses to First Amendment defenses).

⁵³⁰ See Ronald L.K. Collins & Sam Chaltain, *We Must Not Be Afraid to be Free: Stories of Free Expression in America* 172-73 (2011) (discussing public responses to hate speech).

⁵³¹ See, e.g., *Cox Broad. Corp. v. Conn.*, 420 U.S. 469 (1975).

⁵³² See *id.*

⁵³³ See, e.g., Adam Liptak, *Hate Speech or Free Speech? What Much of West Bans is Protected in U.S.*, N.Y. Times (June 11, 2008), <http://www.nytimes.com/2008/06/11/world/americas/liht-hate.4.13645369.html> (discussing Canadian struggles with the definition of hate speech); see also Mike LaBossiere, *Funerals, Freedom, and God Hates Fags*, *Talking Philosophy* (Oct. 8, 2010), <http://blog.talkingphilosophy.com/?p=2237> (arguing the ethics versus legal rights of what free speech entails).

⁵³⁴ See, e.g., Michelle Johnson, *Of Public Interest: How Courts Handle Rape Victims' Privacy Suits*, *Comm. L. & Pol'y* 201, 201 (1999).

policy, as expressed by legislatures in statutes and by those courts empowered to extend the common law, should establish what is morally wrongful enough to require a defendant to enter mediation.

Second, the mediation-only parallel system might better handle cases that do not involve wrongful states of mind that are traditionally required in common law criminal and tort cases.⁵³⁵ To be sure, strict liability torts and crimes seem to be growing in number.⁵³⁶ Yet, there may be good reasons to grant a mediation-only cause of action for still other cases where there is no traditional intent. Although both systems have elimination of future harm as a goal, strict liability accomplishes that goal through the use of a threat (i.e. deterrence)⁵³⁷ rather than seeking the wrongdoer's voluntary and good faith desistance from the behavior, as transformative mediation does. Other torts are premised on the need for cost-shifting from an injured plaintiff to a defendant.⁵³⁸ By contrast, transformative mediation is not primarily about distributive justice, but instead about personal empowerment and interaction.⁵³⁹

Thus, not every element of a traditional tort would need to be present in a mediation-only cause of action. As another example, both tort and criminal causes of action require some causal connection between the wrongful behavior and the harmful outcome.⁵⁴⁰ This element is not necessary in a mediation-only cause of action. In mediation, because the objective is restoration of a relationship, prevention of future harm, or some agreed-upon amelioration of past harm, a strict rule of proof of causation is not as necessary, or may at least be relaxed. Although mediation might be helpful to resolve conflicts that do not involve these elements, the goals of mediation do not require a causation element because the goal of the mediation is not to assign responsibility, but to change behavior and relationships.

Another modifiable element, one that has bedeviled lawmakers attempting to distinguish wrongs appropriate for adjudication from those that are not, is the problem of harm. The common law customarily recognizes only certain kinds of injury as compensable, many of which

⁵³⁵ See George P. Fletcher, *Fairness and Utility in Tort Theory*, 85 Harv. L. Rev. 537, 539 (1972) (describing how strict liability, which is liability without fault, is suspect in both tort and criminal law).

⁵³⁶ See, e.g., Jeffrey S. Parker, *The Economics of Mens Pea*, 79 Va. L. Rev. 741, 786 (1993) ("Recent commentary... suggests that this regime of strict liability crime has begun to expand beyond its conventional domain..."); David G. Owen, *The Fault Pit*, 26 Ga. L. Rev. 703, 705 (1992) (discussing the growth of both strict liability and negligence torts).

⁵³⁷ See generally K. James Sangston, Note, *III Tell You What Happened If You Promise Not to Sue Me - Will No-Fault Liability Improve Patient Safety Through Increased Reporting of Medical Errors?*, 19 Ga. St. U. L. Rev. 1227, 1237 (2003) (noting medical tort system goals as "compensation to the injured patient, deterrence of the provider's harmful behavior, and fairness to both parties").

⁵³⁸ See generally *id.*

⁵³⁹ See Robert Baruch Bush & Sally Pope, *Changing the Quality of Conflict Interaction: The Principles and Practice of Transformative Mediation*, 3 Pepp. Disp. Resol. L.J. 67, 85-86 (2002) (discussing empowerment and recognition shifts through communication, which are the goals of transformative mediation).

⁵⁴⁰ See, e.g., Michael Steenson, *Engler v. Illinois Farmers Insurance Co. and Negligent Infliction of Emotional Distress*, 32 Wm. Mitchell L. Rev. 1335, 1364 (2006) (noting requirement of establishing causation in intentional infliction of emotional distress cases.); see also Susan W. Brenner & Megan Rehberg, "Kiddie Crime"? *The Utility of Criminal Law in Controlling Cyberbullying*, 8 First Amend. L. Rev. 1, 39 (2009) (noting difficulty of establishing causation between perpetrator and victim in cyberbullying cases because of sometimes indirect chain of causation).

can be established in the material world - a physical injury, death, or the loss of property that can be proven. To be sure, the law once recognized more kinds of especially damaging emotional harm that usually had reputational consequences, such as vulgar telephone harassment of women,⁵⁴¹ slander, or, in an older era, alienation of affections.⁵⁴² Yet, in recent times, both courts and legislatures have been slower to extend legal protection to less tangible and less objectively provable injuries. For example, courts and legislatures have required that non-tangible harm be substantiated by tangible evidence - e.g., those who suffer emotional stress often had to show that they had to seek medical help for it⁵⁴³ - or have required that emotional harm be coupled with egregious behavior or significantly wrongful intent in order to warrant traditional legal redress. Thus, for example, intentional infliction of emotional distress claims that involve malicious intent and egregious behavior have long been recognized, sometimes without proof of health consequences.⁵⁴⁴

However, negligent infliction of emotional distress, a relatively new tort in some jurisdictions that involves both a less wrongful state of mind and usually less wrongful behavior, has been particularly hard to establish without a tangible manifestation of medical or other harm to the victim.⁵⁴⁵

Once again, because mediation does not seek to assign blame and force one party to give up his property to his victim, the need objectively to identify the precise nature of harm and prove it convincingly is not as great. That is not to say that the law should recognize purely subjective slights that an unusually sensitive person might consider damaging - for instance, a teasing remark about someone's height or weight. However, there will be certain kinds of emotional or other non-tangible harm that society is prepared to acknowledge as severe enough to warrant some legal intervention, if not traditional adjudication. In addition to public disclosure of facts involving rape or incest involving a young person or child, for example, some other situations

⁵⁴¹ See, e.g., Brenner & Rehberg, *supra* note 231, at 16 (discussing century-old crimes punishing vulgar and obscene telephone calls).

⁵⁴² See Rodney A. Smolla 1 Law of Defamation § 4:65 (2d ed. 2011 updated) (distinguishing emotional harm of intentional infliction tort from reputational harm redressed by libel); Shauna M. Deans, Comment, *The Forgotten Side of the Battlefield in America's War on Infidelity: A Call for Revamping Reviving and Reworking of Criminal Conversation and Alienation of Affections*, 53 How. L.J. 377, 388 (2010) (discussing intangible harm redressed by alienation of affections and criminal conversation torts).

⁵⁴³ See, e.g., Brenner & Rehberg, *supra* note 231, at 19-20 (discussing Michigan stalking statute requiring "significant mental suffering or distress that may, but does not necessarily, require medical or other professional treatment or counseling").

⁵⁴⁴ See, e.g., Kenneth W. Simons, *A Restatement (Third) of Intentional Torts?*, 48 ARIZ. L. REV. 1061, 1079 (2006) (noting that nominal damages and recovery for emotional harm are generally available even without physical harm). *But*

see Brenner & Rehberg, *supra* note 231, at 22 (noting that the "emotional distress" stalking and harassment statutes require more than "self-diagnosed psychic injury" but incorporate a "reasonable person" standard to ensure that such conduct inflicts "an objectively ascertainable harm").

⁵⁴⁵ See Simons, *supra* note 235, at 1079 ("'Intentional wrongdoers,' as we tend to call them, are the worst type of tortfeasor, worse than merely reckless or negligent actors. (Indeed, on this view, intentional torts could be considered a highly aggravated subcategory of negligence: negligence is modestly unreasonable behavior, while an intentional tort is *highly* unreasonable behavior.); John J. Kircher, *The Four Faces of Tort Law: Liability for Emotional Harm*, 90 Marq. L. Rev. 789, 810 (2007) (noting an early recovery barrier to negligent infliction of emotional distress was the requirement that "the plaintiff sustain some contemporaneous physical injury or physical impact to their person as a result of the negligent act," which is still followed in some states). Kircher also notes that the Restatement Second of Torts requires physical harm as well. *Id.* at 831.

might give rise to legitimate social concern. Examples might well include the picketing of Lance Corporal Snyder's funeral or even cyberbullying that does not rise to the level of legal stalking or libel.⁵⁴⁶ Or, to use a recent example, there might be a mediation-only cause of action for the Internet publication of photos of intimate behavior by a person who was not aware he was being filmed.⁵⁴⁷ All of these situations might be ripe for, and indeed handled better by, court-annexed mediation than by a traditional public trial where even more damage may be done to the victims.

Ultimately, through the techniques of mediation, such as narrative, interest identification, and option generation, the use of transforming processes may generate outcomes that are more important to the parties than any outcome they might have achieved through litigation, even if litigation had been available to the plaintiff. In addition to the possibility of some repair of an ongoing relationship, which lessens the chance of conflict over future issues, a defendant in such a process may be educated about the ways in which his or her practices cause harm and may be motivated to find alternative ways to conduct business that do not result in those harms.

For instance, in some restorative processes, such as those involving Muslims whose employers have violated their religious accommodation rights, victims and their advocates have been

moved to publicly praise former wrongdoers for mending their ways.⁵⁴⁸ In this way, victims are empowered because they are the narrators who frame the story, and wrongdoers receive public encouragement to continue to do the right thing in the future. As suggested, even if the mediation is unsuccessful because a defendant is recalcitrant, a victim may find new power to name her victimization. In so doing, she may achieve some sense of personal power over the situation and come closer to winning her struggle to prevent future victimization.

Moreover, a plaintiff may be emotionally empowered to get past the wrong he has suffered when he is able to hear the defendant's story and to learn that the defendant's reasons for his behavior were not motivated by the ill will or disempowering intent that the victim assumes.⁵⁴⁹ Often in criminal justice restorative processes, the fear victims feel that a victimizer is larger than life and a continuing threat is ameliorated when victims can come to understand that their victimizers are also vulnerable and broken.⁵⁵⁰

V. Testing a Mediation-Only Cause of Action: Constitutional Concerns

This Article argues, as a matter of public policy, that courts and legislatures should create mediation-only causes of action for conflicts that currently are not adjudicated through the common law court system. However, there are

⁵⁴⁶ See *supra* text accompanying notes 21-31 (describing Mr. Snyder's experience); *supra* text accompanying notes 219-20 (highlighting issues with cyberbullying).

⁵⁴⁷ A parallel example might be found in the 2012 suicide of a Rutgers student whose roommates spied on his sexual tryst with a man using their webcam. Christina Boyle, *Tyler's Angst: Troubled pre-suicide, But Spying Drove him to it*, N.Y. Daily News, June 28, 2012, at 22, 2012 WLNR 14227655 (last visited October 19, 2013).

⁵⁴⁸ See CAIR Minnesota, <http://mn.cair.com/> (last visited Oct. 19, 2013).

⁵⁴⁹ For example, a victim of home vandalism may discover that the perpetrator is taking out his anger because of abuse he is suffering in his own home.

⁵⁵⁰ See, e.g., Changing Lenses, *supra* note 188, at 20-26, 191-93 (describing victim disempowerment and use of restorative justice to restore a sense of safety and right the balance between victim and offender).

important reasons that some conflicts are not justiciable. In addition to the problem of establishing common elements of wrongful behavior - intent, causation, and harm - that have traditionally been required to justify coercing a defendant or depriving him of his property, overriding public policy values can counsel against punishing even an admitted wrongdoer. Many times, these values are constitutional constraints.

Using the hate speech case of *Snyder v. Phelps* and invasion of privacy/rape disclosure cases, it is important to test whether these larger social concerns should counsel against requiring a defendant to enter mediation because of his behavior, even if a court would be barred from awarding damages or imposing criminal liability for that behavior.

Cynthia Cohn, a seventeen-year-old girl, was raped and choked to death in August 1971.⁵⁵¹ During the indictment of six boys for the rape, a newsman for WBS-TV, owned by Cox Broadcasting, was shown a copy of the indictment naming Cynthia as the victim.⁵⁵² He later identified Cynthia by name and showed her high school yearbook photo in a news broadcast, which the station repeated the next day.⁵⁵³ Michelle Johnson repeats the damage documented in news reports on the family: „[f]or Cynthia’s family, the public disclosure of her name turned life into a nightmare. Her brother and sisters were subjected to humiliating taunts. Cruel children posted graffiti that read:

FREE THE SANDY SPRINGS SIX.”⁵⁵⁴ Described as „hurt, mortified, and angry,” Cohn’s father sued the TV station for invasion of privacy under a Georgia statute that makes the publication of a rape victim’s name a misdemeanor.⁵⁵⁵

In a similar case, B.J.F. sued *The Florida Star* under a Florida law prohibiting the publication of a rape victim’s name.⁵⁵⁶ The Jacksonville-based newspaper inadvertently published B.J.F.’s name after obtaining it from a copy of the crime report posted in the press-room.⁵⁵⁷ As a result of this story, which B.J.F. learned about from friends, „[h]er mother received several threatening phone calls, and eventually the victim felt compelled to move, change her phone number, seek police protection and get counseling for mental health.”⁵⁵⁸ She was originally awarded \$100,000 in damages for negligent violation of the non-disclosure law.⁵⁵⁹

In both of these private disclosure cases and the *Snyder* case, the Supreme Court ruled that the First Amendment protected the wrongdoers. In the *Snyder* case, the trial jury found Phelps guilty of intentional infliction of emotional distress and invasion of privacy.⁵⁶⁰ However, the Supreme Court used a somewhat garbled version of the public forum doctrine to argue that WBC was legally entitled to express its opinion on public property despite the emotional harm to LCpl. Snyder’s father.⁵⁶¹ In *Cohn*, after the Georgia high court ruled that Mr. Cohn could bring an invasion of privacy suit

⁵⁵¹ Johnson, *supra* note 225, at 221.

⁵⁵² *Id.*

⁵⁵³ *Id.*

⁵⁵⁴ *Id.* (quoting *The Right to Privacy*, *Newsweek*, Mar. 17, 1975, at 66).

⁵⁵⁵ *Id.* at 221-22 (describing Martin Cohn’s suit against the broadcasting company).

⁵⁵⁶ 5«cThe Florida Star v. B.J.F., 491 U.S. 524, 536-38 (1989) (overturning the Florida law).

⁵⁵⁷ *Id.* at 524 (also noting that publication of B.J.F.’s name violated *The Florida Star*’s own

internal policy); Johnson, *supra* note 225, at 226; see also Patrick McNulty, *The Public Disclosure of Private Facts: There is Life after Florida Star*, 50 Drake L. Rev. 93, 125 (2001) (noting threats B.J.F.’s mother received that B.J.F. would be raped again).

⁵⁵⁸ Johnson, *supra* note 225, at 226-27.

⁵⁵⁹ *Id.* at 228.

⁵⁶⁰ *Snyder v. Phelps*, 131 S. Ct. 1207, 1214 (2011).

⁵⁶¹ *Id.* at 1219-21.

against the broadcasters,⁵⁶² the Supreme Court held that the publication of legally obtained, non-libelous information was protected under the First Amendment⁵⁶³ and that the statute protecting the names of rape victims was therefore unconstitutional.⁵⁶⁴ In *Florida Star*, the Supreme Court similarly held that news organizations cannot be sued for printing legally obtained information unless the state has an interest of the highest order that takes into consideration the specific facts of the case.⁵⁶⁵

In these cases, the Supreme Court considered the larger public policy issues that would arise if putative First Amendment rights were suppressed. In determining that such speech is protected under the Speech or Press Clauses of the First Amendment, the predominant considerations that the Court focuses on are foundational. In a simple version of this argument, free speech and freedom of the press are necessary to properly inform citizens in a democratic country. If the government is able to suppress speech, then citizens will not have the correct information (the so-called truth-seeking rationale) or the opportunity to debate values and options in order to exercise their civic responsibilities to inform their legislators how they should vote (the self-government rationale).⁵⁶⁶ Moreover, no one will be able to stand up to a corrupt government and show that it is abusing its power (the so-called checking rationale).⁵⁶⁷ The narratives that

inform the foundational paradigm are various: an arbitrary government administrator or agency silencing an individual who is trying simply to tell the truth to his community or to state his opinion; a bureaucrat, bent on calming the waters, suppressing speech because it causes conflict; or the government, as an efficient machine, bulldozing any dissent in the way of accomplishing its objective.

In cases considered here, like *Cohn* and *Snyder*, the foundational rationale applies, particularly the slippery slope argument that, if the government is allowed to begin suppressing some arguably less valuable speech, it will use the opportunity to suppress more valuable speech. In cases like *Cohn*, those in conflict are private parties - the TV conglomerate and the family of the rape victim - and the state, through non-disclosure laws, merely acts as a surrogate and protector for families harmed by publication of such painful and sensitive information. In *Snyder*, although the Supreme Court determined that the speech dealt with a matter of public concern, the real conflict was between a grieving family and the speakers who caused them emotional pain at a vulnerable time. Though many states have passed funeral picketing statutes in response to the Westboro Baptist Church members travelling the country to picket funerals, even these statutes are primarily aimed at protecting vulnerable families,

⁵⁶² *Cox Broad. Corp. v. Cohn*, 200 S.E.2d 127, 133 (1973), *rev'd*, 420 U.S. 469 (1975).

⁵⁶³ *Cox Broad. Corp.*, 420 U.S. at 596-97.

⁵⁶⁴ *Id.*

⁵⁶⁵ *The Florida Star v. B.J.F.*, 491 U.S. 524, 541 (1989). The Supreme Court followed this case up with two other cases upholding the right of newspapers to print the names of juvenile offenders - when they were legally obtained from police, witnesses, and prosecutors - despite a law

prohibiting the publication of juvenile names. See *id.* at 228-32 (describing *Smith v. Daily Mail Publ'g Co.*, 443 U.S. 97 (1979) and *Okla. Publ'g Co. v. Dist. Court of Okla.*, 430 U.S. 308 (1977)).

⁵⁶⁶ See Collins & Chaltain, *supra* note 221, at 43-44, 48 (discussing Meiklejohn's theories of truth-seeking and self-government).

⁵⁶⁷ *Id.* at 54 (discussing Blasi's "checking" argument).

not suppressing the ideas or even methods of the WBC.⁵⁶⁸

Creating a mediation-only cause of action against either hate speech or speech that invades privacy would not give rise to the concerns that the courts cite in protecting wrongful speech. In the case of individual speech, the Supreme Court's main concerns have been to avoid either prospective self-censorship or retrospective punishment of speakers, either civilly or criminally.⁵⁶⁹ In the case of the press, which is usually considered a business, the concern is that permitting civil lawsuits for publication of information will make the business of news less viable. Newspapers and other media will either be less courageous in ferreting out the truth, or if they are willing to do their jobs, they will pay a heavy price that may destroy their business operations and subsequently deprive the public of their voice.⁵⁷⁰ Additionally, if reporters and editors can be jailed or criminally fined for what they write or print, the individuals who gather news will be more timid about telling the truth to the public.⁵⁷¹

A mediation-only remedy is not nearly so threatening. The absence of a criminal penalty should lessen the concerns of both speakers and the press that they will be personally punished for what they say. They cannot be arrested or prevented from saying or printing what they will. Moreover, there is no threat of civil dam-

ages since mediation cannot produce a settlement without the agreement of both parties, and they are not subject to the judgment of either juries or judges that the damages they caused should be ameliorated with large money judgments.

Of course, any time a person can be haled into court, even into mediation, there is a cost in terms of his time and, potentially, money if he gets legal advice about his options. He may also be required to pay for the mediation, depending on how the funding structure for the mediation justice system works. There is also the hassle of having to explain himself to his victim or to a court reviewing whether a mediation cause of action exists. Repeated requests for mediation become burdensome on media organizations and on individuals engaged in repetitive speech harassment like the Westboro Baptist Church.

However, such a cost seems minimal when balanced against the harm that this kind of speech has caused other individuals - not the government, but vulnerable persons who have no way to defend themselves against organized and sometimes powerful groups like churches and television conglomerates. Although it is tempting to advocate for a bright line for protection - a few First Amendment advocates continue to be almost absolutist in calling for no sanctions for harmful speech, except perhaps in the

⁵⁶⁸ See, e.g., Major John L. Kiel, Jr., *Crossing the Line: Reconciling the Right to Picket Military Funerals with the First Amendment*, 198 Mil. L. Rev. 67, 78-82 (2008) (discussing intent of funeral picketing statutes and noting a court's finding that the New York anti-picketing statute's "primary motive was to provide a measure of 'protection and tranquility' to funeral-goers, and not to suppress certain messages because the state disagrees with their content").

⁵⁶⁹ See, e.g., Lee Bollinger, *The Tolerant Society* 48 - 49 (1986) (discussing arguments against punishing harmful speech); William T. Mabrey, *Toward a Theory of First Amendment Process: Injunctions of Speech, Subsequent*

Punishment, and the Costs of the Prior Restraint Doctrine, 67 Cornell L. Rev. 245, 253-54, 261 (1982) (discussing Milton's view of self censorship and its application in Supreme Court prior restraint cases).

⁵⁷⁰ Mabrey, *supra* note 260, at 254, 268-69 (noting that "the publication of speech is increasingly monopolized by cost-conscious businesses that are not noted for 'putting large capital to the hazards of courage'").

⁵⁷¹ See, e.g., *Columbia Broad. Sys., Inc. v. Democratic Nat'l Comm.*, 412 U.S. 94, 166 (1973) (Douglas, J., concurring) (discussing use of subpoenas and jailing reporters to get anti-war information).

court of public opinion⁵⁷² - in real life, some speech does cause harm.

Moreover, as proposed in this Article, mandatory mediation would be ordered only where a specific cause of action is created through legislation or the common law. Requiring that mediation-only causes of action be explicitly defined should eliminate much of the guesswork from a speaker's calculus of whether the threat of mediation is greater than the value of his speech. Some states have already developed well-recognized torts or specific statutory prohibitions that give speakers advance notice of the consequences of their actions. Although there may be torts, such as intentional infliction of emotional distress, where the elements are not as specifically and concretely defined, state case law will be available to speakers to understand when they are stepping over the line from completely costless speech to speech for which they may be haled into mediation. In cases like Snyder, the likelihood that an individual will be repeatedly haled into mediation for his harassing or invasive speech is relatively small given that most of these situations are context-specific, and many victims may choose to forget the slights and move on with their lives. Should an individual continue to harass or invade the privacy of another person, then already recognized criminal and civil causes of action come into play, such as stalking,⁵⁷³ which do not raise the same First Amendment concerns as isolated instances of „candid” speech.

Media organizations may raise a somewhat different concern: affected persons may make mediation-only claims that themselves are not problematic but that in the aggregate may be so costly as

to chill speech. Given the tortious nature of the media, mediation-only cases are likely to surface. However, it is unlikely that reputable media or other organizations will find the numbers of mediations they have to attend to be so significant that it will change their practices. Taking the Cohn and Florida Star cases as examples, it may well be that the decisions to name these rape victims were thoughtless ones made by inexperienced reporters or editors who, upon reflection, may have acted differently, especially after the community outcry over the decision. Alternatively, these reporters and editors may have decided that a particular case was so unusual that naming the victim was critical to the story - e.g., there was evidence that she had possibly made up the story, she was a well-known person publicly linked to the perpetrator, or the victim's identity was a matter of common knowledge in the community anyway. In these cases, requiring a media organization to attend a single mediation is not an onerous burden on the organization.

Of course, there remains the possibility that individuals will file repetitive nuisance mediation-only cases against organizations. They may imagine that a deep pocket is available or so detest the organization's behavior that they would like to use these cases to get an organization like the Westboro Baptist Church to stop its harmful activities. Once again, however, because of the lack of coercive threats of a traditional lawsuit (like damages and discovery) to back up nuisance cases, one would anticipate that very few individuals would find the cost of filing a mediation-only suit worth the possible value of creating a nuisance for

⁵⁷² See, e.g., Patricia R. Stembridge, 80 B.U. L. Rev. 907, 920-23 (2000) (discussing views of the ACLU and New York Times reporter Lyle Dennison on First Amendment absolutism).

⁵⁷³ See Robert Miller, "Stalk Talk": A First Look at Anti-Stalking Legislation, 50 Wash. & Lee L. Rev. 1303, 1305-16 (1993) (describing varieties of anti-stalking legislation).

their opponents. Similarly, few defendants would feel forced to settle because it would be cheaper than attending mediation. Moreover, since these causes of action would require sworn pleadings attesting to the specific elements of the case, if these are truly nuisance actions used to harass a defendant with no substantive validity, the court would have the power to punish the plaintiffs.

It is also worth considering whether the so-called „truth-seeking,” „self-fulfillment,” or „safety valve” rationales⁵⁷⁴ of the First Amendment are significant enough in these kinds of cases to outweigh the value to injured parties of requiring attendance at mediations. If indeed the First Amendment considers either the subjective expression of emotion or the objective explication of a fact to be an unalloyed good regardless of its impact, then mediation causes of action in the First Amendment context pose real problems.

However, there is little evidence that these rationales are considered absolute arguments in favor of harmful speech. The Court has often rejected the safety valve and self-fulfillment rationales when creating exceptions to the First Amendment. For example, the safety valve argument has not stopped the Court from refusing to recognize protection for fighting words, true threats, libel, obscenity, or inciting speech.⁵⁷⁵ Moreover, the self-fulfillment rationale has never been considered sufficiently weighty to prevent states from punishing obscenity, child

pornography, or the „angry speech” exceptions just mentioned.⁵⁷⁶ Each of these cases recognizes that there is a point where self-expression and speech go too far and implicate personal or governmental interests too weighty to be overridden by possible chilling or slippery slope concerns.

It remains to be seen whether the truth-telling rationale for speech is sufficiently weighty to overcome mediation causes of action for truthful (or even misleading or false) information dissemination. Generally speaking, the truth-telling rationale has not limited the government from punishing (or compensating with civil damages) at least some speech that is truthful. Thus, for example, the Supreme Court permitted damages to be awarded to Hugo Zacchini against Scripps-Howard, which filmed his entire „human cannonball” act at the admission-fee only Geauga County Fair and broadcast it on the 11 o'clock news, thereby diminishing its economic value.⁵⁷⁷ National Enterprises similarly had to pay President Ford's publisher for printing too much of his copyrighted book.⁵⁷⁸ The same is true with many other examples of intellectual property, including the use of famous people's likenesses or the publication of similar proprietary information.⁵⁷⁹ Apparently, the Court believes that the protection of property outweighs the truth-telling rationale of the speech clause in such cases.

⁵⁷⁴ See generally, Bollinger, *supra* note 260, at 45 - 48 (1986) (discussing the self-fulfillment, truth-seeking, and self-government theories of the First Amendment); Collins & Chaltain, *supra* note 221, at 55 (discussing Emerson's "safety valve" and Bollinger's "tolerance-producing" theories of the First Amendment).

⁵⁷⁵ See Bollinger, *supra* note 260, at 176-86 (discussing the incitement, fighting words, libel, and obscenity exceptions); Collins & Chaltain, *supra* note 221, at 203 (discussing the true threat exception).

⁵⁷⁶ See, e.g., Collins & Chaltain, *supra* note 221, at 317 (discussing the child pornography exception).

⁵⁷⁷ See *Zacchini v. Scripps-Howard Broad. Co.*, 433 U.S. 562, 575-76 (1977).

⁵⁷⁸ See *Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 569 (1985).

⁵⁷⁹ See Paul M. Schwartz & Karl-Nikolaus Peife, *Prosser's Privacy and the German Right of Personality: Are Four Privacy Torts Better than One Unitary Concept?*, 98 CAL. L. REV. 1925,1941-42 (2010) (discussing Prosser's explanation of the tort of appropriation of a plaintiffs name and likeness).

However, it is worth considering whether this argument loses its force when the harmed party's property rights are not at stake. The Cohn and Florida Star cases are good for testing this question since in both examples there was arguably some truth-telling value in disclosing the name of the rape victim. The name is, after all, a truthful statement. In each of these cases, the plaintiffs argued that their non-property rights were invaded: the right to keep certain information about themselves secret or at least private (an aspect of the right to autonomy); the right not to be openly shamed in public; and the right to live in dignity despite the terrible injustice that was done to them as innocent persons.⁵⁸⁰ It is difficult to understand the values of a society in which economic rights like Zacchini's are protected and dignitary and autonomy rights like B.J.F.'s are not, but these Supreme Court cases suggest this result.

On a more practical level, both federal and state laws protect the identity of certain victims of sexual abuse if the trial court lays the appropriate predicate for the use of initials or pseudonyms in place of the victim's true name.⁵⁸¹ The fact that these laws have not been successfully overturned, even though most plaintiffs have lost their lawsuits for publication of their names,⁵⁸² implies that the Cohn line of cases is not a blank check for the press to disclose embarrassing, truthful information. Rather, the suppression of

such information must be based on context in cases of substantial demonstrable harm or likelihood of such harm.

The rationale for protecting media and others who publish information that would violate a state law or common law right loses much of its force when we replace traditional criminal or civil suits with mediation-only causes of action. Even assuming that a particular media organization decided that it had a First Amendment duty to publish the name of every rape victim, it is not clear what harm or even chilling effect the media outlet would suffer by being required to appear at mediation and explain to the women whom they had harmed why they felt ethically obliged to disclose their identities. If this policy were indeed a matter of principle, the media outlet would presumably have a strong incentive and desire to explain this principle to someone who felt unjustifiably harmed by the disclosure. Moreover, such an explanation is more than mandatory mediation even requires of a wrongdoer in most states that use court-annexed mediation, where a defendant could appear at the mediation and refuse to speak or even to listen.

Indeed, those who use hate speech may want their victims to hear their point of view in a face-to-face encounter, whether to win them over to the hater's point of view or to exacerbate the pain they cause. It does not appear that the

⁵⁸⁰ See, e.g., McNulty, *supra* note 248, at 125 (noting that B.J.F.'s right was to "civilly protect the 'essential dignity and worth of every human being - a concept at the root of any decent system of ordered liberty'").

⁵⁸¹ See, e.g., 18 U.S.C. § 3509(d) (3) (2006) (permitting the use of pseudonyms in federal cases where the judge determines that requiring the child to testify and be identified in open court would cause substantial psychological harm); Patrick Noaker, *Using Pseudonyms in Sexual Abuse Cases*, BENCH & B. MINN. 16, 17-18 (Feb. 7, 2012) (describing

federal court and Minnesota court provisions for the protection of the identity of victims in criminal and civil cases while noting that the law for civil plaintiffs in Minnesota is not so clear). *But see* Johnson, *supra* note 225, at 203 (noting that although courts have not invalidated state criminal statutes preventing disclosure of rape victims' names, they have put into question whether such statutes can ever be constitutionally enforced).

⁵⁸² See generally Johnson, *supra* note 225, at 203-25.

Westboro Baptist Church would want to avoid a confrontation with the victims, the Snyders, if the Snyders asked for mediation. Those who actually believe that they are telling the truth and stand on principle, as apparently the Church does, would be unlikely to view the opportunity to spew their views in even closer proximity to their victims as chilling their speech. On the other hand, those speakers whose true purpose is to intimidate their victims might well be foiled since the presence of others in the room would buffer the coercive or harmful effects of their speech. However, to suggest that requiring them to mediate after they engage in hate speech will chill their willingness to use such speech in the future seems far-fetched. The truth-telling rationale is, then, no longer an excuse for protecting the speech.

It is still worth questioning what the point of spending public resources to require a likely recalcitrant speaker to come into a meeting with his victim is. If the speaker stands on principle, arguing that the public needs to know „as fact” the comments he is making, it seems unlikely that he will change his mind after a meeting with his victim.

As suggested earlier, however, there may be many reasons that someone who has used speech to harm another might come to regret his actions. For instance, the defendant may not have had the context to understand his victim’s situation and history. One can imagine that a defendant who must come face-to-face with the person he has harmed may discover someone with whom he may share interests or values and may change his mind about the truthfulness or value of his speech. Or, as in the Cohn and Florida Star cases, a speaker may not have had the life experience to understand how what appears to be a seemingly innocent disclosure has damaged his victim.

Mediation might serve to educate him as to what a rape victim endures in the aftermath of such a tragedy. Alternatively, he may persist in his belief that this speech was not wrongful but agree to discontinue it as a matter of respect or accommodation to his victim and his community. Any of these „change of heart” experiences may cause him to be willing to make an apology to his victim, which may be more important than damages or settlement. Finally, the wrongdoer may find an alternative solution that ameliorates some of the unintended consequences of his behavior. What difference would it have made for the Cohn family if Cox Broadcasting, having disclosed the name of their daughter, reported on all of the cruelty the family was experiencing and editorialized about the wrongfulness of the taunting that they suffered? Litigation could not obtain that remedy for the Cohns, but mediation could.

Even if the speaker is unmoved by the harms caused to his victims, as perhaps Westboro Baptist Church members seem to be, mediation can empower victims to reclaim their sense of dignity and control over their lives. By expressing anger, telling their perpetrators how they have been harmed, and seeing their perpetrators’ lives, they may be able to put the wrongs they have suffered into perspective and move beyond them to a healthier emotional life. In some cases, being able to understand why a speaker would feel obliged to engage in the behavior that harmed the victim might take some of the sting out of the harm, as the victim can realize that the act was not a personal attack.

Conclusion

We should be moved to decry the inability of the common law system to bring justice to many who have suffered wrongs that all recognize as tragic for the

victims, particularly those harms that wound the dignity and the spirit of vulnerable human beings. In some cases, relief exists in theory through private causes of action, but systemic flaws such as the lack of available counsel, inadequate judicial personnel, or public ignorance about rights stymie justice. In some cases, bringing a lawsuit or otherwise seeking justice simply prolongs the difficulties and pain of the victim, thus pouring salt into a wound that cannot heal through law. In other cases, the law is irredeemably inadequate to bring justice because the injustice is beyond any repair. Yet, in some cases like the ones considered here, society has stayed the hand of the law, preventing parties from bringing claims, primarily because of larger public concerns, such as the protection of constitutional rights, that outweigh the injustice suffered by particular victims. In some of these cases, justice can be offered to victims through court-connected mandatory mediation, but first, causes of action need to be defined so everyone knows when wrongdoers can be expected to face their victims.

As this Article suggests, justice is much larger than a judgment, an award of damages, or a court's order for a wrongdoer to cease his behavior. Sometimes it means granting a victim an opportunity to face her wrongdoer, to express her pain, to seek explanation, to

demand apology. Sometimes it means bringing the community to bear on a wrongdoer so that he can recognize the depth of suffering he has caused, accept responsibility for it, offer an explanation, and perhaps make some attempt to mend the wrong as best he can. Sometimes it means making the community aware of its own responsibility to both victim and wrongdoer to help them to turn a new page in their lives.

These are the values that undergird the transformative mediation and restorative justice movements, and these are the values that court-connected mandatory mediation can bring if a new mediation-only jurisprudence were implemented, not to replace, but to supplement the work of the common law courts. Much like the breath of new life that equity once brought to the common law courts, court-connected mediation can serve the common law as a rival for justice. Indeed, such a system, with its defined causes of action and processes that engage conflict, can serve as an inspiration to the common law and a reminder that justice need not be broken at its edges.

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