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Interactive Course on Mediation as an Alternative Dispute Resolution Process

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SELECTED READINGS

Fiss, *Against Settlement*, 93 Yale L.J. 1073-1090 (1984)

Hyman and Love, *If Portia Were a Mediator: An Inquiry into Justice in Mediation*, 9 Clin. L. Rev. 157- 193 (Fall 2002)

Fisher, Ury, and Patton, GETTING TO YES: NEGOTIATING AGREEMENT WITHOUT GIVING IN, Penguin Books (2d Ed. 1991) (selected chapters)

Stulberg and Love, THE MIDDLE VOICE: MEDIATING CONFLICT SUCCESSFULLY, Carolina Academic Press (2009) (selected chapters)

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Against Settlement

by
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Comment

Against Settlement

Owen M. Fiss†

In a recent report to the Harvard Overseers, Derek Bok called for a new direction in legal education.[1] He decried "the familiar tilt in the law curriculum toward preparing students for legal combat," and asked instead that law schools train their students "for the gentler arts of reconciliation and accommodation."[2] He sought to turn our attention from the courts to "new voluntary mechanisms"[3] for resolving disputes. In doing so, Bok echoed themes that have long been associated with the Chief Justice,[4] and that have become a rallying point for the organized bar and the source of a new movement in the law. This movement is the subject of a new professional journal,[5] a newly formed section of the American Association of Law Schools, and several well-funded institutes. It has even received its own acronym—ADR (Alternative Dispute Resolution).

The movement promises to reduce the amount of litigation initiated, and accordingly the bulk of its proposals are devoted to negotiation and mediation prior to suit. But the interest in the so-called "gentler arts" has not been so confined. It extends to ongoing litigation as well, and the advocates of ADR have sought new ways to facilitate and perhaps even pressure parties into settling pending cases. Just last year, Rule 16 of the Federal Rules of Civil Procedure was amended to strengthen the hand of the trial judge in brokering settlements: The "facilitation of settlement"

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† Alexander M. Bickel Professor of Public Law, Yale University. This essay is based on a speech I gave in San Francisco on January 6, 1984, at a joint session of the Civil Procedure and Alternative Dispute Resolution Sections of the American Association of Law Schools.

1. Bok, *A Flawed System*, HARV. MAG., May-June 1983, at 38, *reprinted in* N.Y. ST. B.J., Oct. 1983, at 8, N.Y. ST. B.J., Nov. 1983, at 31; *excerpted in* 33 J. LEGAL EDUC. 570 (1983).
2. Bok, *supra* note 1, at 45.
3. *Id.*
4. *See, e.g.*, Burger, *Isn't There a Better Way?*, 68 A.B.A. J. 274 (1982); Burger, *Agenda for 2000 A.D.—A Need for Systematic Anticipation*, 70 F.R.D. 83, 93–96 (1976).
5. The *Journal of Dispute Resolution*, published by the University of Missouri-Columbia School of Law, is scheduled to begin publication in June, 1984.

became an explicit purpose of pre-trial conferences, and participants were officially invited, if that is the proper word, to consider "the possibility of settlement or the use of extrajudicial procedures to resolve the dispute."[6] Now the Advisory Committee on Civil Rules is proposing to amend Rule 68 to sharpen the incentives for settlement: Under this amendment, a party who rejects a settlement offer and then receives a judgment less favorable than that offer must pay the attorney's fees of the other party.[7] This amendment would effect a major change in the traditional American rule, under which each party pays his or her own attorney's fees.[8] It would also be at odds with a number of statutes that seek to facilitate certain types of civil litigation by providing attorney's fees to plaintiffs if they win, without imposing liability for the attorney's fees of their adversaries if they lose.[9]

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6. FED. R. CIV. P. 16. In a similar spirit, the Second Circuit has instituted a Civil Appeals Management Plan (CAMP), which empowers a court officer to direct the parties to a civil appeal to appear at a pre-argument conference "to consider the possibility of settlement," before their case is scheduled for argument. CAMP ¶¶ 4-5, *reprinted in* 2D CIR. R. 54. Conferences are held in approximately 90% of the cases assigned to CAMP; staff counsel grant requests by the parties not to hold pre-argument conferences because of "unsettleable issues" in fewer than one in ten cases. Letter from Vincent Flanigan, Management Analyst, Second Circuit Judicial Conference, to Owen M. Fiss (Apr. 12, 1984). For a review of the debate over CAMP's success, see Hoffman, *The Bureaucratic Spectre: Newest Challenge to the Courts*, 66 JUDICATURE 60, 70 & nn.42-44 (1982). For a discussion of the problems which arise when judges become deeply involved in pre-trial attempts to facilitate settlement, see Resnik, *Managerial Judges*, 96 HARV. L. REV. 374 (1982).

7. In pertinent part, Rule 68 currently provides:

> At any time more than 10 days before the trial begins, a party defending a claim may serve upon the adverse party an offer to allow judgment to be taken against him for the money or property or to the effect specified in his offer, with costs then accrued . . . . If [the offer is rejected and] the judgment finally obtained by the offeree is not more favorable than the offer, the offeree must pay the costs incurred after the making of the offer.

FED. R. CIV. P. 68. The term "costs" has been interpreted not to include attorneys' fees. Roadway Express v. Piper, 447 U.S. 752, 759-63 (1980); Chesny v. Marek, 720 F.2d 474, 480 (7th Cir. 1983), *cert. granted*, 52 U.S.L.W. 3770 (U.S. Apr. 23, 1984) (No. 83-1437).

The proposed amended rule would provide, in pertinent part:

> At any time more than 30 days before the trial begins, any party may serve upon an adverse party an offer, denominated as an offer under this rule, to settle a claim for the money or property or to the effect specified in his offer and to enter into a stipulation dismissing the claim or to allow judgment to be entered accordingly . . . .
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> If the judgment finally entered is not more favorable to the offeree than an unaccepted offer . . . , the offeree must pay the costs and expenses, including reasonable attorneys' fees, incurred by the offeror after the making of the offer . . . . The amount of the expenses and interest may be reduced to the extent expressly found by the court, with a statement of reasons, to be excessive or unjustified under all of the circumstances. In determining whether a final judgment is more or less favorable to the offeree than the offer, the costs and expenses of the parties shall be excluded from consideration. Costs, expenses, and interest shall not be awarded to an offeror found by the court to have made an offer in bad faith.
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> . . . . This rule shall not apply to class or derivative actions under Rules 23, 23.1, and 23.2.

Committee on Rules of Prac. & Proc. of the Judicial Conference of the United States, *Preliminary Draft of Proposed Amendments to the Federal Rules of Civil Procedure*, 98 F.R.D. 339, 361-63 (1983).

8. *See* Alyeska Pipeline Serv. Co. v. Wilderness Soc'y, 421 U.S. 240, 247 (1975).

9. The Civil Rights Attorney's Fees Awards Act of 1976 provides that, in a variety of civil rights

The advocates of ADR are led to support such measures and to exalt the idea of settlement more generally because they view adjudication as a process to resolve disputes. They act as though courts arose to resolve quarrels between neighbors who had reached an impasse and turned to a stranger for help.[10] Courts are seen as an institutionalization of the stranger and adjudication is viewed as the process by which the stranger exercises power. The very fact that the neighbors have turned to someone else to resolve their dispute signifies a breakdown in their social relations; the advocates of ADR acknowledge this, but nonetheless hope that the neighbors will be able to reach agreement before the stranger renders judgment. Settlement is that agreement. It is a truce more than a true reconciliation, but it seems preferable to judgment because it rests on the consent of both parties and avoids the cost of a lengthy trial.

In my view, however, this account of adjudication and the case for settlement rest on questionable premises. I do not believe that settlement as a generic practice is preferable to judgment or should be institutionalized on a wholesale and indiscriminate basis. It should be treated instead as a highly problematic technique for streamlining dockets. Settlement is for me the civil analogue of plea bargaining: Consent is often coerced; the bargain may be struck by someone without authority; the absence of a trial and judgment renders subsequent judicial involvement troublesome; and although dockets are trimmed, justice may not be done. Like plea bargaining, settlement is a capitulation to the conditions of mass society and should be neither encouraged nor praised.

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actions, a "court, in its discretion, may allow the prevailing party . . . a reasonable attorney's fee as part of the costs." 42 U.S.C. § 1988 (1976 & Supp. V 1981). The Supreme Court has read the Act to mean that prevailing plaintiffs should normally recover their attorneys' fees, while prevailing defendants are not normally entitled to such awards. *See* Christiansburg Garment Co. v. EEOC, 434 U.S. 412, 416–18 (1978).

In Delta Air Lines v. August, 450 U.S. 346 (1981), the Court held that Rule 68 does not allow a prevailing defendant to recover any costs (including attorney's fees) from a Title VII plaintiff even though the defendant had proposed a settlement prior to trial. The Court found that such an application of Rule 68 would be contrary to the concept of the private attorney general underlying Title VII. *Id.* at 360 n.27. Given the Court's insistence in *Alyeska Pipeline* that any expansion of the concept of the private attorney general would require specific statutory authorization, 421 U.S. at 263–64, and given Congress' response—the 1976 Act—it would be ironic for the Supreme Court to use its rulemaking power to constrict the use of private attorneys general by amending Rule 68. In Chesny v. Marek, 720 F.2d 474, 479 (7th Cir. 1983), *cert. granted*, 52 U.S.L.W. 3770 (U.S. Apr. 23, 1984) (No. 83-1437), Judge Posner interpreted the "costs" provision of current Rule 68 to exclude attorney's fees. He found that including them would deter private attorneys general, would thus involve "substantive" not "procedural" effects, and would therefore exceed the bounds of the Rules Enabling Act, 28 U.S.C. § 2072 (1976). Judge Posner also noted that by the mid-1970's, Congress had enacted between 75 and 90 separate fee-shifting statutes. *Id.* at 477.

For statutes in other fields of law that award attorney's fees to prevailing plaintiffs but not to prevailing defendants, see, e.g., 5 U.S.C. § 552a(g)(B) (1982) (Privacy Act); 15 U.S.C. § 15 (1982) (antitrust).

10. Martin Shapiro provides one formulation of the dispute-resolution story. *See* M. SHAPIRO, COURTS: A COMPARATIVE AND POLITICAL ANALYSIS 1–2 (1981).

The Imbalance of Power

By viewing the lawsuit as a quarrel between two neighbors, the dispute-resolution story that underlies ADR implicitly asks us to assume a rough equality between the contending parties. It treats settlement as the anticipation of the outcome of trial and assumes that the terms of settlement are simply a product of the parties' predictions of that outcome.[11] In truth, however, settlement is also a function of the resources available to each party to finance the litigation, and those resources are frequently distributed unequally. Many lawsuits do not involve a property dispute between two neighbors, or between AT&T and the government (to update the story), but rather concern a struggle between a member of a racial minority and a municipal police department over alleged brutality, or a claim by a worker against a large corporation over work-related injuries. In these cases, the distribution of financial resources, or the ability of one party to pass along its costs, will invariably infect the bargaining process, and the settlement will be at odds with a conception of justice that seeks to make the wealth of the parties irrelevant.

The disparities in resources between the parties can influence the settlement in three ways. First, the poorer party may be less able to amass and analyze the information needed to predict the outcome of the litigation, and thus be disadvantaged in the bargaining process. Second, he may need the damages he seeks immediately and thus be induced to settle as a way of accelerating payment, even though he realizes he would get less now than he might if he awaited judgment. All plaintiffs want their damages immediately, but an indigent plaintiff may be exploited by a rich defendant because his need is so great that the defendant can force him to accept a sum that is less than the ordinary present value of the judgment. Third, the poorer party might be forced to settle because he does not have the resources to finance the litigation, to cover either his own projected expenses, such as his lawyer's time, or the expenses his opponent can impose through the manipulation of procedural mechanisms such as discovery. It might seem that settlement benefits the plaintiff by allowing him to avoid the costs of litigation, but this is not so. The defendant can anticipate the plaintiff's costs if the case were to be tried fully and decrease his offer by that amount. The indigent plaintiff is a victim of the costs of litigation even if he settles.[12]

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11. *See* Posner, *An Economic Approach to Legal Procedure and Judicial Administration*, 2 J. Legal Stud. 399 (1973); Priest, *Regulating the Content and Volume of Litigation: An Economic Analysis*, 1 Sup. Ct. Econ. Rev. 163 (1982); Shavell, *Suit, Settlement, and Trial: A Theoretical Analysis Under Alternative Methods for the Allocation of Legal Costs*, 11 J. Legal Stud. 55 (1982).

12. The offer-of-settlement rule of the proposed Rule 68 would only aggravate the influence of distributional inequalities. It would make the poorer party liable for the attorney's fees of his adver-

There are exceptions. Seemingly rich defendants may sometimes be subject to financial pressures that make them as anxious to settle as indigent plaintiffs. But I doubt that these circumstances occur with any great frequency. I also doubt that institutional arrangements such as contingent fees or the provision of legal services to the poor will in fact equalize resources between contending parties: The contingent fee does not equalize resources; it only makes an indigent plaintiff vulnerable to the willingness of the private bar to invest in his case. In effect, the ability to exploit the plaintiff's lack of resources has been transferred from rich defendants to lawyers who insist upon a hefty slice of the plaintiff's recovery as their fee. These lawyers, moreover, will only work for contingent fees in certain kinds of cases, such as personal-injury suits. And the contingent fee is of no avail when the defendant is the disadvantaged party. Governmental subsidies for legal services have a broader potential, but in the civil domain the battle for these subsidies was hard-fought, and they are in fact extremely limited, especially when it comes to cases that seek systemic reform of government practices.[13]

Of course, imbalances of power can distort judgment as well: Resources influence the quality of presentation, which in turn has an important bearing on who wins and the terms of victory. We count, however, on the guiding presence of the judge, who can employ a number of measures to lessen the impact of distributional inequalities. He can, for example, supplement the parties' presentations by asking questions, calling his own witnesses, and inviting other persons and institutions to participate as amici.[14] These measures are likely to make only a small contribution to-

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sary, which are likely to be greater than the plaintiff's own legal fees when the defendant retains higher-priced counsel. Thus, fee shifting presents a greater risk to plaintiffs than to defendants. In cases where the prevailing plaintiff is entitled to attorney's fees pursuant to a specific statute, the defendant already has an incentive to settle, namely, to avoid becoming responsible for the plaintiff's legal expenses at trial. (He would still be liable for the plaintiff's pre-trial expenses if the court found that the settlement was sufficiently favorable to make the plaintiff a prevailing party, *see* Maher v. Gagne, 448 U.S. 122, 129–30 (1980), but these expenses are presumably significantly lower than the expenses of actually completing pre-trial preparation and proceeding to trial.) Rule 68 thus does not make the defendant more amenable to settlement. It does, however, place additional burdens on plaintiffs, because under Rule 68 they would risk incurring the attorney's fees of the defendant. *See* Bitsouni v. Sheraton Hartford Corp., 33 Fair Empl. Prac. Cas. (BNA) 898, 901–02 (D. Conn. 1983).

13. *See* 42 U.S.C. § 2996f(b)(3), (6), (8), (9) (Supp. V 1981) (restricting use of Legal Services Corporation funds for, *inter alia*, political, abortion-rights, and desegregation litigation).

14. In a case challenging conditions in Texas' state prison system, for example, Judge Justice ordered the United States to appear as an amicus curiae "[i]n order to investigate the facts alleged in the prisoners' complaints, to participate in such civil action with the full rights of a party thereto, and to advise this Court at all stages of the proceedings as to any action deemed appropriate by it." *In re* Estelle, 516 F.2d 480, 482 (5th Cir. 1975) (quoting unpublished district court order), *cert. denied*, 426 U.S. 925 (1976). The decree which was eventually entered found systemic constitutional violations and ordered sweeping changes in the state's prisons. *See* Ruiz v. Estelle, 503 F. Supp. 1265 (S.D. Tex. 1980), *motion to stay order granted in part and denied in part*, 650 F.2d 555 (5th Cir. 1981), *add'l motion to stay order granted in part and denied in part*, 666 F.2d 854 (5th Cir. 1982).

ward moderating the influence of distributional inequalities, but should not be ignored for that reason. Not even these small steps are possible with settlement. There is, moreover, a critical difference between a process like settlement, which is based on bargaining and accepts inequalities of wealth as an integral and legitimate component of the process, and a process like judgment, which knowingly struggles against those inequalities. Judgment aspires to an autonomy from distributional inequalities, and it gathers much of its appeal from this aspiration.

The Absence of Authoritative Consent

The argument for settlement presupposes that the contestants are individuals. These individuals speak for themselves and should be bound by the rules they generate. In many situations, however, individuals are ensnared in contractual relationships that impair their autonomy: Lawyers or insurance companies might, for example, agree to settlements that are in their interests but are not in the best interests of their clients, and to which their clients would not agree if the choice were still theirs.[15] But a deeper and more intractable problem arises from the fact that many parties are not individuals but rather organizations or groups. We do not know who is entitled to speak for these entities and to give the consent upon which so much of the appeal of settlement depends.

Some organizations, such as corporations or unions, have formal procedures for identifying the persons who are authorized to speak for them. But these procedures are imperfect: They are designed to facilitate transactions between the organization and outsiders, rather than to insure that the members of the organization in fact agree with a particular decision. Nor do they eliminate conflicts of interests. The chief executive officer of a corporation may settle a suit to prevent embarassing disclosures about his managerial policies, but such disclosures might well be in the interest of the shareholders.[16] The president of a union may agree to a settlement as a way of preserving his power within the organization; for that very reason, he may not risk the dangers entailed in consulting the rank and file or in subjecting the settlement to ratification by the membership.[17] More-

15. In Glazer v. J.C. Bradford & Co., 616 F.2d 167 (5th Cir. 1980), for example, the court held that the plaintiff was bound by his attorney's offer of settlement simply because he had earlier instructed his attorney to investigate the possibility of settling the case.

16. In Wolf v. Barkes, 348 F.2d 994 (2d Cir. 1965), *cert. denied*, 382 U.S. 941 (1966), Curtis Publishing Company, one of whose stockholders had brought a derivative suit against several corporate officers alleging mismanagement and waste, settled privately with those officers. This settlement effectively eliminated the stockholders' ability to get an accounting of managerial behavior.

17. For a general discussion of how unions often bind their members to collective bargaining agreements without allowing members any role in the negotiating process or any right to ratify the contract eventually agreed to, see Hyde, *Democracy in Collective Bargaining*, 93 Yale L.J. 793 (1984).

over, the representational procedures found in corporations, unions, or other private formal organizations are not universal. Much contemporary litigation, especially in the federal courts, involves governmental agencies,[18] and the procedures in those organizations for generating authoritative consent are far cruder than those in the corporate context. We are left to wonder, for example, whether the attorney general should be able to bind all state officials, some of whom are elected and thus have an independent mandate from the people, or even whether the incumbent attorney general should be able to bind his successors.[19]

These problems become even more pronounced when we turn from organizations and consider the fact that much contemporary litigation involves even more nebulous social entities, namely, groups. Some of these groups, such as ethnic or racial minorities, inmates of prisons, or residents of institutions for mentally retarded people, may have an identity or existence that transcends the lawsuit, but they do not have any formal organizational structure and therefore lack any procedures for generating authoritative consent. The absence of such a procedure is even more pronounced in cases involving a group, such as the purchasers of Cuisinarts between 1972 and 1982, which is constructed solely in order to create funds large enough to make it financially attractive for lawyers to handle the case.[20]

The Federal Rules of Civil Procedure require that groups have a "representative";[21] this representative purports to speak on behalf of the group, but he receives his power by the most questionable of all elective procedures—self-appointment or, if we are dealing with a defendant class,

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18. According to Judge Gilbert Merritt, almost half of the cases in the Sixth Circuit involve suits against government agencies or officials. Merritt, *Owen Fiss in* Paradise Lost: *The Judicial Bureaucracy in the Administrative State*, 92 YALE L.J. (1983) (forthcoming).

19. In March of this year, the Civil Rights Division announced its intention to support the position of white municipal employees in Birmingham, Alabama, who are attacking the city's affirmative action policy, even though that policy was initiated under a consent decree that the Division had previously negotiated and obtained in a suit to eliminate discrimination against blacks, United States v. Jefferson County, Civ. Act. No. 75-P-0666-S (N.D. Ala. Aug. 21, 1981) (approving consent decree). *See U.S. to Support Whites in Suits On Bias Decree*, N.Y. Times, Mar. 5, 1984, at A1, col. 2.

In the fall of 1982, the Reagan Administration announced that it would not defend the Internal Revenue Service's policy of withholding tax-exempt status from private educational institutions that discriminated on the basis of race. The IRS had initiated the policy after a three-judge district court had issued an injunction prohibiting the IRS from exempting such schools. Green v. Kennedy, 309 F. Supp. 1127 (D.D.C.), *appeal dismissed sub nom.* Cannon v. Green, 398 U.S. 956 (1970). The Supreme Court appointed a private attorney, William Coleman, essentially to defend the decree when the Reagan Administration announced its position. *See* Bob Jones Univ. v. United States, 102 S. Ct. 1965 (1982) ("invit[ing]" Coleman to brief and argue case "in support of the judgments below"), 103 S. Ct. 2017 (1983) (affirming IRS' policy); N.Y. Times, Apr. 20, 1982, at A1, col. 5; *id.* at D21, col. 1 (describing government's actions and Coleman's appointment).

20. *See In re* Cuisinart Food Processor Antitrust Litig., [1982–83 Transfer Binder] TRADE REG. REP. (CCH) ¶ 65,680 (D. Conn. Oct. 24, 1983).

21. FED. R. CIV. P. 23(a).

appointment by an adversary. The rules contemplate notice to the members of the group about the pendency of the action and the claims of the representative, but it is difficult to believe that notice could reach all members of the group, or that it could cure the defects in the procedures by which the representative gets his power. The forces that discourage most members of the group from stepping forward to initiate suits will also discourage them from responding to whatever notice may reach them. The sponsors of the amendment to Rule 68 recognize the nature of class actions and exempt them from its special procedures.[22] But this exemption does little more than create an incentive for casting all civil litigation as class actions, with their attendant procedural complexities, and leaves the problem of generating authoritative consent for organizational parties unsolved. The new Rule 16 does not even recognize the problem.

Going to judgment does not altogether eliminate the risk of unauthorized action, any more than it eliminates the distortions arising from disparities in resources. The case presented by the representative of a group or an organization admittedly will influence the outcome of the suit, and that outcome will bind those who might also be bound by a settlement. On the other hand, judgment does not ask as much from the so-called representatives. There is a conceptual and normative distance between what the representatives do and say and what the court eventually decides, because the judge tests those statements and actions against independent procedural and substantive standards. The authority of judgment arises from the law, not from the statements or actions of the putative representatives, and

22. 98 F.R.D. at 363; *see supra* note 7. The Advisory Committee Note explains that Rule 23 class actions are exempted from new Rule 68's scope because "the offeree's rejection [of an offer] would burden a named representative-offeree with the risk of exposure to heavy liability for costs and expenses that could not be recouped from unnamed class members. The latter prospect, moreover, could lead to a conflict of interest between the named representative and other members of the class." 98 F.R.D. at 367. The danger the Committee points to, however, is not confined to class actions, but would exist whenever an individual plaintiff represents a group, for example, as a private attorney general.

The failure of the Committee to comprehend fully the concept of the private attorney general is further revealed by its insistence that the result at trial be "more favorable *to the offeree* than an unaccepted offer . . . ." 98 F.R.D. at 362 (emphasis added). Private attorneys general vindicate important societal interests as well as their own private concerns, *see, e.g.*, Fortner Enters. v. United States Steel Corp., 394 U.S. 495, 502 (1969); Newman v. Piggie Park Enters., 390 U.S. 400, 401–02 (1968) (per curiam), and yet, any benefits of an individual plaintiff's suit that redound to the public at large rather than to the named plaintiff may not be weighed in the Rule 68 determination. For example, in an employment discrimination case, an individual plaintiff might seek $25,000 in damages for past harm and an injunction against the continuation of discriminatory practices. He may reject the defendant's offer to settle for $5000, go to trial, and receive an injunction and $1000. Under Title VII, he would be able to recover attorney's fees as a prevailing party. *Cf.* McCann v. Coughlin, 698 F.2d 112, 128–29 (2d Cir. 1983) (nominal damages of $1 sufficient to justify attorney's fees). By contrast, under the proposed Rule 68, he stands in danger of incurring liability for his opponent's attorney's fees on the theory that the injunction he obtained is of less value *to him* than the defendant's offer of settlement.

thus we allow judgment to bind persons not directly involved in the litigation even when we are reluctant to have settlement do so.

The procedures that have been devised for policing the settlement process when groups or organizations are involved have not eliminated the difficulties of generating authoritative consent. Some of these procedures provide a substantive standard for the approval of the settlement and do not even consider the issue of consent. A case in point is the Tunney Act. The Act establishes procedures for giving outsiders notice of a proposed settlement in a government antitrust suit and requires the judge to decide whether a settlement proposed by the Department of Justice is in "the public interest."[23] This statute implicitly acknowledges the difficulty of determining who is entitled to speak for the United States in some authoritative fashion and yet provides the judge with virtually no guidance in making this determination or in deciding whether to approve the settlement. The public-interest standard in fact seems to invite the consideration of such nonjudicial factors as popular sentiment and the efficient allocation of prosecutorial resources.[24]

Other policing mechanisms, such as Rule 23, which governs class actions, make no effort to articulate a substantive standard for approving

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23. Antitrust Penalties & Procedures Act of 1974, Pub. L. No. 93-528, § 2, 88 Stat. 1706, 1707 (codified at 15 U.S.C. § 16(e) (1982)). In pertinent part, the Act provides:

> Before entering any consent judgment proposed by the United States under this section, the court shall determine that the entry of such judgment is in the public interest. For the purpose of such determination, the court may consider—
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> (1) the competitive impact of such judgment, including termination of alleged violations, provisions for enforcement and modification, duration or relief sought, anticipated effects of alternative remedies actually considered, and any other considerations bearing upon the adequacy of such judgment;
>
> (2) the impact of entry of such judgment upon the public generally and individuals alleging specific injury from the violations set forth in the complaint including consideration of the public benefit, if any, to be derived from a determination of the issues at trial.

24. In Maryland v. United States, 103 S. Ct. 1240 (1983), the Supreme Court summarily affirmed the district court's approval of a consent decree proposed by the government in the AT&T antitrust case. In dissent, Justice Rehnquist, joined by the Chief Justice and Justice White, questioned the constitutionality of § 16(e). The District Court had interpreted § 16(e) to mean that the proposed consent decree should be accepted "if it effectively opens the relevant markets to competition and prevents the recurrence of anticompetitive activity, all without imposing undue and unnecessary burdens upon other aspects of the public interest . . . ." United States v. American Tel. & Tel. Co., 552 F. Supp. 131, 153 (D.D.C. 1982), *aff'd sub nom.* Maryland v. United States, 103 S. Ct. 1240 (1983) (per curiam). Justice Rehnquist, however, said: "It is not clear to me that this standard, or any other standard the District Court could have devised, admits of resolution by a court exercising the judicial power established by Article III of the Constitution." 103 S. Ct. at 1242. He continued:

> The question whether to prosecute a lawsuit is a question of the execution of the laws, which is committed to the executive by Article II. There is no standard by which the benefits to the public from a "better" settlement of a lawsuit than the Justice Department has negotiated can be balanced against the risk of an adverse decision, the need for a speedy resolution of the case, the benefits obtained in the settlement, and the availability of the Department's resources for other cases.

Id. at 1243.

settlements, but instead entrust the whole matter to the judge.[25] In such cases, the judge's approval theoretically should turn on whether the group consents, but determining whether such consent exists is often impossible, since true consent consists of nothing less than the expressed unanimity of all the members of a group, which might number in the hundreds of thousands and be scattered across the United States. The judge's approval instead turns on how close or far the proposed settlement is from what he imagines would be the judgment obtained after suit. The basis for approving a settlement, contrary to what the dispute-resolution story suggests, is therefore not consent but rather the settlement's approximation to judgment. This might appear to remove my objection to settlement, except that the judgment being used as a measure of the settlement is very odd indeed: It has never in fact been entered, but only imagined. It has been constructed without benefit of a full trial, and at a time when the judge can no longer count on the thorough presentation promised by the adversary system. The contending parties have struck a bargain, and have every interest in defending the settlement and in convincing the judge that it is in accord with the law.

The Lack of a Foundation for Continuing Judicial Involvement

The dispute-resolution story trivializes the remedial dimensions of lawsuits and mistakenly assumes judgment to be the end of the process. It supposes that the judge's duty is to declare which neighbor is right and which wrong, and that this declaration will end the judge's involvement (save in that most exceptional situation where it is also necessary for him to issue a writ directing the sheriff to execute the declaration). Under these assumptions, settlement appears as an almost perfect substitute for judgment, for it too can declare the parties' rights. Often, however, judgment is not the end of a lawsuit but only the beginning. The involvement of the court may continue almost indefinitely. In these cases, settlement cannot provide an adequate basis for that necessary continuing involvement, and thus is no substitute for judgment.

The parties may sometimes be locked in combat with one another and view the lawsuit as only one phase in a long continuing struggle. The entry of judgment will then not end the struggle, but rather change its terms and the balance of power. One of the parties will invariably return to the court and again ask for its assistance, not so much because condi-

25. "A class action shall not be dismissed or compromised without the approval of the court, and notice of the proposed dismissal or compromise shall be given to all members of the class in such manner as the court directs." Fed. R. Civ. P. 23(e).

tions have changed, but because the conditions that preceded the lawsuit have unfortunately not changed. This often occurs in domestic-relations cases, where the divorce decree represents only the opening salvo in an endless series of skirmishes over custody and support.[26]

The structural reform cases that play such a prominent role on the federal docket provide another occasion for continuing judicial involvement. In these cases, courts seek to safeguard public values by restructuring large-scale bureaucratic organizations.[27] The task is enormous, and our knowledge of how to restructure on-going bureaucratic organizations is limited. As a consequence, courts must oversee and manage the remedial process for a long time—maybe forever. This, I fear, is true of most school desegregation cases, some of which have been pending for twenty or thirty years.[28] It is also true of antitrust cases that seek divestiture or reorganization of an industry.[29]

The drive for settlement knows no bounds and can result in a consent decree even in the kinds of cases I have just mentioned, that is, even when a court finds itself embroiled in a continuing struggle between the parties or must reform a bureaucratic organization. The parties may be ignorant of the difficulties ahead or optimistic about the future, or they may simply believe that they can get more favorable terms through a bargained-for agreement. Soon, however, the inevitable happens: One party returns to court and asks the judge to modify the decree, either to make it more effective or less stringent. But the judge is at a loss: He has no basis for assessing the request. He cannot, to use Cardozo's somewhat melodramatic formula, easily decide whether the "dangers, once substantial, have become attenuated to a shadow,"[30] because, by definition, he never knew the dangers.

The allure of settlement in large part derives from the fact that it avoids the need for a trial. Settlement must thus occur before the trial is complete and the judge has entered findings of fact and conclusions of law. As a

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26. Domestic relations cases form the largest subject-matter category of cases on state court dockets. *See* NAT'L CENTER FOR STATE COURTS, STATE COURT CASELOAD STATISTICS: THE STATE OF THE ART 53 (1978). Much of this litigation occurs after the entry of initial decrees. *See* Oldham, Book Review, 54 U. COLO. L. REV. 469, 478–80 (1983) (reviewing L. WEITZMAN, THE MARRIAGE CONTRACT (1981)).

27. I define the relationship between structural reform and the dispute-resolution story more fully elsewhere. *See* Fiss, *The Social and Political Foundations of Adjudication*, 6 L. & HUM. BEHAV. 121 (1982).

28. *See, e.g.*, Clark v. Board of Educ., 705 F.2d 265 (8th Cir. 1983) (continuation of Little Rock desegregation case); Brown v. Board of Educ., 84 F.R.D. 383 (D. Kan. 1979) (seeking intervention in original Topeka desegregation case on behalf of class represented by Linda Brown's daughter).

29. In United States v. United Shoe Mach. Corp., 391 U.S. 244 (1968), for example, the government successfully reopened a decade-old decree because competition in the shoe machinery market had not yet been attained.

30. United States v. Swift & Co., 286 U.S. 106, 119 (1932).

consequence, the judge confronted with a request for modification of a consent decree must retrospectively reconstruct the situation as it existed at the time the decree was entered, and decide whether conditions today have sufficiently changed to warrant a modification in that decree. In the Meat Packers litigation, for example, where a consent decree governed the industry for almost half a century, the judge confronted with a request for modification in 1960 had to reconstruct the "danger" that had existed at the time of the entry of the decree in 1920 in order to determine whether the danger had in fact become a "shadow."[31] Such an inquiry borders on the absurd, and is likely to dissipate whatever savings in judicial resources the initial settlement may have produced.

Settlement also impedes vigorous enforcement, which sometimes requires use of the contempt power. As a formal matter, contempt is available to punish violations of a consent decree.[32] But courts hesitate to use that power to enforce decrees that rest solely on consent, especially when enforcement is aimed at high public officials, as became evident in the Willowbrook deinstitutionalization case[33] and the recent Chicago desegregation case.[34] Courts do not see a mere bargain between the parties as a sufficient foundation for the exercise of their coercive powers.

Sometimes the agreement between the parties extends beyond the terms of the decree and includes stipulated "findings of fact" and "conclusions of law," but even then an adequate foundation for a strong use of the judicial power is lacking. Given the underlying purpose of settlement—to avoid trial—the so-called "findings" and "conclusions" are necessarily the products of a bargain between the parties rather than of a trial and an independent judicial judgment. Of course, a plaintiff is free to drop a lawsuit altogether (provided that the interests of certain other persons are not compromised), and a defendant can offer something in return, but that bargained-for arrangement more closely resembles a contract than an injunction. It raises a question which has already been answered whenever

31. *See* United States v. Swift & Co., 189 F. Supp. 885, 904, 910–12 (N.D. Ill. 1960), *aff'd* 367 U.S. 909 (1961). For a history of the Meat Packers' consent decree over a fifty-year period, see O. Fiss, Injunctions 325–99 (1972).

32. *See* D. Dobbs, Handbook on the Law of Remedies § 2.9, at 93–94, 99 n.25 (1973).

33. New York State Ass'n for Retarded Children v. Carey, 631 F.2d 162, 163–64 (2d Cir. 1980) (court unwilling to hold governor in contempt of consent decree when legislature refused to provide funding for committee established by court to oversee implementation of decree). The First Circuit explicitly acknowledged limitations on the power of courts to enforce consent decrees in Brewster v. Dukakis, 687 F.2d 495, 501 (1st Cir. 1982), and Massachusetts Ass'n for Retarded Citizens v. King, 668 F.2d 602, 610 (1st Cir. 1981).

34. In United States v. Board of Educ., 717 F.2d 378, 384–85 (7th Cir. 1983), the Court of Appeals found that the district court had acted too hastily in ordering the United States to provide additional financial support for Chicago's voluntary desegregation program pursuant to the consent decree which the federal government and the school board had entered into with the plaintiffs. The Seventh Circuit instead instructed the district court to give the federal government time to comply voluntarily with its obligations.

an injunction is issued, namely, whether the judicial power should be used to enforce it. Even assuming that the consent is freely given and authoritative, the bargain is at best contractual and does not contain the kind of enforcement commitment already embodied in a decree that is the product of a trial and the judgment of a court.

Justice Rather Than Peace

The dispute-resolution story makes settlement appear as a perfect substitute for judgment, as we just saw, by trivializing the remedial dimensions of a lawsuit, and also by reducing the social function of the lawsuit to one of resolving private disputes: In that story, settlement appears to achieve exactly the same purpose as judgment—peace between the parties—but at considerably less expense to society. The two quarreling neighbors turn to a court in order to resolve their dispute, and society makes courts available because it wants to aid in the achievement of their private ends or to secure the peace.

In my view, however, the purpose of adjudication should be understood in broader terms. Adjudication uses public resources, and employs not strangers chosen by the parties but public officials chosen by a process in which the public participates. These officials, like members of the legislative and executive branches, possess a power that has been defined and conferred by public law, not by private agreement. Their job is not to maximize the ends of private parties, nor simply to secure the peace, but to explicate and give force to the values embodied in authoritative texts such as the Constitution and statutes: to interpret those values and to bring reality into accord with them. This duty is not discharged when the parties settle.

In our political system, courts are reactive institutions. They do not search out interpretive occasions, but instead wait for others to bring matters to their attention. They also rely for the most part on others to investigate and present the law and facts. A settlement will thereby deprive a court of the occasion, and perhaps even the ability, to render an interpretation. A court cannot proceed (or not proceed very far) in the face of a settlement. To be against settlement is not to urge that parties be "forced" to litigate, since that would interfere with their autonomy and distort the adjudicative process; the parties will be inclined to make the court believe that their bargain is justice. To be against settlement is only to suggest that when the parties settle, society gets less than what appears, and for a price it does not know it is paying. Parties might settle while leaving justice undone. The settlement of a school suit might secure the peace, but not racial equality. Although the parties are prepared to live under the terms they bargained for, and although such peaceful coexistence may be

a necessary precondition of justice,[35] and itself a state of affairs to be valued, it is not justice itself. To settle for something means to accept less than some ideal.

I recognize that judges often announce settlements not with a sense of frustration or disappointment, as my account of adjudication might suggest, but with a sigh of relief. But this sigh should be seen for precisely what it is: It is not a recognition that a job is done, nor an acknowledgment that a job need not be done because justice has been secured. It is instead based on another sentiment altogether, namely, that another case has been "moved along," which is true whether or not justice has been done or even needs to be done. Or the sigh might be based on the fact that the agony of judgment has been avoided.

There is, of course, sometimes a value to avoidance, not just to the judge, who is thereby relieved of the need to make or enforce a hard decision, but also to society, which sometimes thrives by masking its basic contradictions. But will settlement result in avoidance when it is most appropriate? Other familiar avoidance devices, such as certiorari,[36] at least promise a devotion to public ends, but settlement is controlled by the litigants, and is subject to their private motivations and all the vagaries of the bargaining process. There are also dangers to avoidance, and these may well outweigh any imagined benefits. Partisans of ADR—Chief Justice Burger, or even President Bok—may begin with a certain satisfaction with the status quo. But when one sees injustices that cry out for correction—as Congress did when it endorsed the concept of the private attorney general[37] and as the Court of another era did when it sought to enhance access to the courts[38]—the value of avoidance diminishes and the agony of judgment becomes a necessity. Someone has to confront the betrayal of our

35. Some observers have argued that compliance is more likely to result from a consent decree than from an adjudicated decree. *See* O. Fiss & D. Rendleman, Injunctions 1004 (2d ed. 1984). But increased compliance may well be due to the fact that a consent decree asks less of the defendant, rather than from its creating a more amicable relationship between the parties. *See* McEwen & Maiman, *Mediation in Small Claims Court: Achieving Compliance Through Consent*, 18 Law & Soc'y Rev. 11 (1984).

36. *See generally* A. Bickel, The Least Dangerous Branch 111-99 (1962) (discussing "the passive virtues"). For an analysis of the doctrines of vagueness and overbreadth as techniques for avoidance, see Note, *The Void-for-Vagueness Doctrine in the Supreme Court*, 109 U. Pa. L. Rev. 67 (1960).

37. For a discussion of the role of the private attorney general, see *supra* notes 9 & 22. The Federal Question Jurisdictional Amendments Act of 1980, Pub. L. No. 96-486, 94 Stat. 2369 (codified at 28 U.S.C. § 1331 (Supp. V 1981)), which eliminated the jurisdictional amount in federal question cases, reflects a similar sentiment: A claim's significance cannot be measured simply by the amount of money involved. *See* H.R. Rep. No. 1461, 94th Cong., 2d Sess. 2, *reprinted in* 1980 U.S. Cong. Code & Ad. News 5063, 5063-64.

38. For a discussion of the Supreme Court's decisions during the 1960's and early 1970's suggesting that access to the courts and the opportunity to litigate are essential due process rights, see Michelman, *The Supreme Court and Litigation Access Fees* (pts. 1 & 2), 1973 Duke L.J. 1153, 1974 Duke L.J. 527.

deepest ideals and be prepared to turn the world upside down to bring those ideals to fruition.

The Real Divide

To all this, one can readily imagine a simple response by way of confession and avoidance: We are not talking about *those* lawsuits. Advocates of ADR might insist that my account of adjudication, in contrast to the one implied by the dispute-resolution story, focuses on a rather narrow category of lawsuits. They could argue that while settlement may have only the most limited appeal with respect to those cases, I have not spoken to the "typical" case. My response is twofold.

First, even as a purely quantitative matter, I doubt that the number of cases I am referring to is trivial. My universe includes those cases in which there are significant distributional inequalities; those in which it is difficult to generate authoritative consent because organizations or social groups are parties or because the power to settle is vested in autonomous agents; those in which the court must continue to supervise the parties after judgment; and those in which justice needs to be done, or to put it more modestly, where there is a genuine social need for an authoritative interpretation of law. I imagine that the number of cases that satisfy one of these four criteria is considerable; in contrast to the kind of case portrayed in the dispute-resolution story, they probably dominate the docket of a modern court system.

Second, it demands a certain kind of myopia to be concerned only with the number of cases, as though all cases are equal simply because the clerk of the court assigns each a single docket number. All cases are not equal. The Los Angeles desegregation case,[39] to take one example, is not equal to the allegedly more typical suit involving a property dispute or an automobile accident. The desegregation suit consumes more resources, affects more people, and provokes far greater challenges to the judicial power. The settlement movement must introduce a qualitative perspective; it must speak to these more "significant" cases, and demonstrate the propriety of settling them. Otherwise it will soon be seen as an irrelevance, dealing with trivia rather than responding to the very conditions that give the movement its greatest sway and saliency.

Nor would sorting cases into "two tracks," one for settlement, and another for judgment, avoid my objections. Settling automobile cases and leaving discrimination or antitrust cases for judgment might remove a

39. *See* Crawford v. Board of Educ., 46 Cal. App. 3d 872, 120 Cal. Rptr. 334 (Ct. App. 1975), *aff'd*, 17 Cal. 3d, 551 P.2d 28, 130 Cal. Rptr. 724 (1976). For a recent recounting of the history of the 20 years of litigation, see Crawford v. Board of Educ., 103 S. Ct. 3211, 3214–15 (1982).

large number of cases from the dockets, but the dockets will nevertheless remain burdened with the cases that consume the most judicial resources and represent the most controversial exercises of the judicial power. A "two track" strategy would drain the argument for settlement of much of its appeal. I also doubt whether the "two track" strategy can be sensibly implemented. It is impossible to formulate adequate criteria for prospectively sorting cases. The problems of settlement are not tied to the subject matter of the suit, but instead stem from factors that are harder to identify, such as the wealth of the parties, the likely post-judgment history of the suit, or the need for an authoritative interpretation of law. The authors of the amendment to Rule 68 make a gesture toward a "two track" strategy by exempting class actions and shareholder derivative suits, and by allowing the judge to refrain from awarding attorney's fees when it is "unjustified under all of the circumstances."[40] But these gestures are cramped and ill-conceived, and are likely to increase the workload of the courts by giving rise to yet another set of issues to litigate.[41] It is, moreover, hard to see how these problems can be avoided. Many of the factors that lead a society to bring social relationships that otherwise seem wholly private (e.g., marriage) within the jurisdiction of a court, such as imbalances of power or the interests of third parties, are also likely to make

40. 98 F.R.D. at 362.

41. It is far from clear that either the current offer-of-judgment rule or the proposed amendments are likely to reduce the overall volume of litigation. Although such a rule increases the potential costs a plaintiff faces should he lose, and thus means a plaintiff will be willing to settle for a smaller amount than he would demand if there were no potential liability for the defendant's expenses, it also increases the potential benefits a defendant will receive should his offer exceed the amount the plaintiff recovers at trial (since the defendant will both retain the difference between the offer and the amount actually recovered and will recover his expenses), and thus means a defendant will offer less in a settlement. There is no reason to assume that the gap between the plaintiff's demand and the defendant's offer will be relatively smaller because of the offer-of-judgment rule. *See* Priest, *supra* note 11, at 171.

Moreover, Rule 68 makes no exception for cases seeking non-monetary relief, such as injunctions. It thus requires the court to decide whether the injunction actually obtained was in fact "better" or "more favorable" than the decree the defendant was willing to enter prior to trial.

The "reasonability" language of the proposed rule, *supra* note 7, creates potential attorney-client conflicts that may also spark litigation. By implication, a court which grants an offeror all of his expenses has decided that the offeree was unreasonable in his refusal. If the offeree based that refusal on the advice of counsel, then that advice was unreasonable, and a malpractice suit can be expected to recover fees assessed against the client in the original case.

The proposed rule's exclusion of costs and attorney's fees from the assessment of whether an offer is more or less favorable than an eventual judgment, 98 F.R.D. at 362, may cause additional conflicts between plaintiffs and their attorneys. Suppose that a defendant offers a plaintiff $100,000 as full relief including attorney's fees and costs. If the plaintiff accepts this offer, then his attorney forfeits the right to attorney's fees under a statutory fee-shifting scheme. If, however, the plaintiff refuses the offer, then the plaintiff may be liable to the defendant for the defendant's attorney's fees and costs, even though the plaintiff's total "recovery" at trial—for example, $80,000 on the merits and $30,000 in attorneys' fees—exceeds the defendant's offer because the plaintiff recovered less on the merits. In these circumstances, the lawyer may press his client to litigate because this will assure the lawyer his fee, even though the client will thereby be exposed to possible liability for the defendant's costs and expenses.

settlement problematic. Settlement is a poor substitute for judgement; it is an even poorer substitute for the withdrawal of jurisdiction.

For these reasons, I remain highly skeptical of a "two track" strategy, and would resist it. But the more important point to note is that the draftsmen of Rule 68 are the exception. There is no hint of a "two track" strategy in Rule 16. In fact, most ADR advocates make no effort to distinguish between different types of cases or to suggest that "the gentler arts of reconciliation and accommodation" might be particularly appropriate for one type of case but not for another. They lump all cases together. This suggests that what divides me from the partisans of ADR is not that we are concerned with different universes of cases, that Derek Bok, for example, focuses on boundary quarrels while I see only desegregation suits. I suspect instead that what divides us is much deeper and stems from our understanding of the purpose of the civil law suit and its place in society. It is a difference in outlook.

Someone like Bok sees adjudication in essentially private terms: The purpose of lawsuits and the civil courts is to resolve disputes, and the amount of litigation we encounter is evidence of the needlessly combative and quarrelsome character of Americans. Or as Bok put it, using a more diplomatic idiom: "At bottom, ours is a society built on individualism, competition, and success."[42] I, on the other hand, see adjudication in more public terms: Civil litigation is an institutional arrangement for using state power to bring a recalcitrant reality closer to our chosen ideals. We turn to the courts because we need to, not because of some quirk in our personalities. We train our students in the tougher arts so that they may help secure all that the law promises, not because we want them to become gladiators or because we take a special pleasure in combat.

To conceive of the civil lawsuit in public terms as America does might be unique. I am willing to assume that no other country—including Japan, Bok's new paragon[43]—has a case like *Brown v. Board of Education*[44] in which the judicial power is used to eradicate the caste structure. I am willing to assume that no other country conceives of law and uses law in quite the way we do. But this should be a source of pride rather than shame. What is unique is not the problem, that we live short of our

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42. Bok, *supra* note 1, at 42.

43. *Id.* at 41. As to the validity of the comparisons and a more subtle explanation of the determinants of litigiousness, see Haley, *The Myth of the Reluctant Litigant*, 4 J. JAPANESE STUD. 359, 389 (1978) ("Few misconceptions about Japan have been more widespread or as pernicious as the myth of the special reluctance of the Japanese to litigate."); *see also* Galanter, *Reading the Landscape of Disputes: What We Know and Don't Know (And Think We Know) About Our Allegedly Contentious and Litigious Society*, 31 UCLA L. REV. 4, 57-59 (1983) (paucity of lawyers in Japan due to restrictions on number of attorneys admitted to practice rather than to non-litigousness).

44. 347 U.S. 483 (1954); 349 U.S. 294 (1955).

ideals, but that we alone among the nations of the world seem willing to do something about it. Adjudication American-style is not a reflection of our combativeness but rather a tribute to our inventiveness and perhaps even more to our commitment.

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IF PORTIA WERE A MEDIATOR: AN INQUIRY INTO JUSTICE IN MEDIATION

Jonathan M. Hyman, Lela P. Love[a1]

WESTLAW LAWPRAC INDEX

LED---- Law School & Continuing Legal Education

Summum ius summa iniura. [The strictest following of law can lead to the greatest injustice.]

Marcus Tullius Cicero, De Officiis (About Duties) I. 10, 33 No one can say

That the trial was not fair. The trial was fair,

Painfully fair by every rule of law,

And that it was [fair] made not the slightest difference.

The Law's our yardstick, and it measures well

Or well enough when there are yards to measure.

Measure a wave with it, Measure a fire,

Cut sorrow up in inches, weigh content.

You can weigh John Brown's body well enough,

But how and in what balance weigh John Brown?

Stephen Vincent Benet, John Brown's Body Creon: And am I wrong, if I maintain my rights?

Haemon: Talk not of rights; thou spurn'st the due of Heaven.

Sophocles, Antigone lines 744-745 Whoever undertakes to set himself up as a judge in the field of truth and knowledge is shipwrecked by the laughter of the gods.

Albert Einstein The receiver in the cause has acquired a goodly sum of money by it, but has acquired too a distrust of his own mother, and a contempt for his own kind.

Charles Dickens, Bleak House 4 (Houghton Mifflin Ed.)
***158** The practice of mediation is deeply attuned to issues of justice. To one unfamiliar with mediation, it might seem that mediation marks a flight from justice, a move to crude compromise or the abandonment of rights for the sake of making peace or saving time or money. On the contrary, mediation brings to the fore the perennial questions of justice: Has there been a wrong (or several wrongs) and what is the fair correction that provides a just measure for the kind and degree of harm done? What is a fair and just distribution of the resources available? How can stability and community be restored in light of the wrong? What should a mediator do to try to assure that the process itself remains just? Mediators, like judges and arbitrators, must attend to these issues.

However, justice in mediation is different from justice in adjudication. Unlike a judge, jury or arbitrator, a mediator does not have the responsibility to determine an appropriate remedy or a just distribution. That is for the parties themselves to do. The mediator must attend to the process, help the parties recognize the legitimacy of different perspectives on justice, and work towards a resolution that comports with the parties' considered views of a fair and acceptable outcome.

The dispute between Shylock and Antonio in Shakespeare's The Merchant of Venice provides a vehicle to compare justice in adjudication with justice in a hypothetical mediation of the same conflict. In the play's famous trial scene, Portia, the heroine, disguised as a male lawyer, uses clever legal tactics to protect Antonio from Shylock's claim for "a pound of [Antonio's] flesh" . While execution on Antonio's bond may be unjust (Antonio's life for a mere debt does not seem fair), and that potential injustice is prevented, other injustices go unanswered. Multiple incidents of injuries and wrongs running through the history between Shylock and Antonio call out for redress. The anti-Semitism depicted in the play, the wrongs and disrespect suffered by Shylock, like the oppression of marginal, powerless individuals and groups, remain unchecked-if not exacerbated-by litigation. How might mediation deal with those larger issues of social justice?

After exploring justice issues in a work of fiction, the resolutions in four different mediations are described. An analysis follows each case, noting how justice was served, despite the outcomes being entirely different than the likely adjudicated resolution of a similar case. A neighborhood dispute over noise, a commercial dispute over damaged property, an employment discrimination case, and a matter concerning a claim that a town ordinance is unconstitutional--all result in outcomes that are in keeping with notions of justice, yet would not be possible in adjudication.

Finally, the importance and relevance of this analysis for law school education is explored. Justice is a central and critical inquiry for any student or practitioner in the legal arena. Service as a mediator, ***159** in the context of law school mediation clinics, provides a unique opportunity to reflect on justice issues, unencumbered by the responsibility to advocate for one side.

Introduction

Using mediation rather than adjudication to resolve disputes carries important implications for justice.[1] How can an agreed-upon solution, crafted by disputing parties rather than by duly appointed arbiters, judges or juries, comport with ideals of justice? Critics claim that mediation and settlement sacrifice a just result, a result in keeping with articulated and accepted societal norms, for mere efficiency or expedience.[2] Such critiques neglect the multi-faceted nature of justice. This article examines how a justice rationale undergirds the consensual resolution of disputes, while another justice rationale undergirds adjudication. Justice-seeking is a central component of all dispute resolution processes, and one that mediators, like judges and arbitrators, must attend to. Rather than abandoning justice, the unique attributes of mediation enable mediators to help those who ultimately have the most intimate understanding of the complexities of their situation achieve a resolution they find "just" .

***160** Justice in adjudicative systems comes from above,[3] from the application by a judge, jury or arbitrator of properly created standards or rules to "facts" as determined by the adjudicator. Justice inheres in two aspects of that system - in the

standards or rules that are applied, and in the process that is used to apply them. Mediation has parallel, but very different, aspects. The rules, standards, principles and beliefs that guide the resolution of the dispute in mediation are those held by the parties. The guiding norms in mediation may be legal, moral, religious or practical. In mediation, parties are free to use whatever standards they wish, not limited to standards that have been adopted by the legislature or articulated by the courts.[4] Consequently, justice ***161** in mediation comes from below, from the parties.[5] Similarly, the process of mediation has different guiding principles than adjudication. Parties may address any issue they wish, not limited to legal causes of action; they may bring in any information they wish, not limited by rules of evidence and procedure to probative evidence, relevant to legal causes of action and meeting evidentiary requirements for authenticity and accuracy. On the other hand, norms of "fair process" guide mediators and adjudicators alike. Both must act in an unbiased and impartial manner and be perceived as neutral. Both must give all participants a level playing field with an equal opportunity to be heard and equal attention and amenities in proceeding through the process.[6]

Judges and arbitrators must understand that both the formal procedures that guide their conduct and the publicly articulated norms that intersect with the facts are the critical pillars of justice in adjudication. It is equally important for mediators to understand the sources of justice in mediation, so that they can develop strategies and techniques to enhance the opportunities to make mediation a richer field in which to do justice, and to avoid injustice, while honoring the primacy of the parties' decision-making and values.

This article approaches the question of justice in mediation in four Parts. In Part I, we review various approaches to justice, discuss key justice concepts and delineate important questions that this analysis will not address. Part II uses Shakespeare's The Merchant of Venice to explore some of the limits of justice in adjudication and some of the ways mediation can provide a rich alternative in light of those limits. Part III examines the interplay of justice in the context of the resolution of specific issues in several actual mediations. Part IV explores ***162** the implications of this discussion for clinical legal education.

I. What We Mean When We Talk About Justice

Because explicit concepts of justice are not a prominent part of the literature or practice of mediation, we would like to sketch out, as a preliminary matter, the kinds of concepts of justice we will bring to our analysis of The Merchant of Venice and other mediation situations. We start by distinguishing the adjudicative approach to justice and highlighting certain issues that are beyond the scope of this analysis.

Lawyers tend to view justice as the application of law through the legal system. Substantive rules of law, judicial discretion, and the procedures for adjudicating disputes all strive to comport with ideals of fairness and justice. How well they succeed is the subject of constant debate and legislative and judicial reform, but justice and fairness provide one standard by which rules, practice and procedure are measured.

The application of a rule of law and the form of justice adjudication provides is not irrelevant to the justice-from-below of mediation. To a significant degree, the public law provides the norms that guide private dispute resolution.[7] Parties often settle disputes by keeping in mind and balancing the entitlements the litigation system promises. Furthermore, some scholars suggest that mediation becomes unjust if the issues it considers and the results it achieves stray too far from the issues and results that would obtain in the adjudicatory system, particularly where parties get diverted to mediation after coming to the courts for a judgment.[8] If mediation too cavalierly ignores the public ***163** norms and results that we would expect from the adjudicatory system questions of injustice may arise: Were the parties ignorant of their rights?[9] Did the courts (to which the case was brought) fail to protect important entitlements?[10] Was one of the parties bullied by the other? Did mediator bias and dominant culture norms unfairly disadvantage a party?[11]

Additionally, an analysis of justice as it inheres in particular mediations does not answer the different set of justice issues posed by whether public institutions should require or mandate mediation as part of the public justice system.[12] Should courts require litigants first to use mediation to try to resolve their disputes?[13] If they do, are they robbing the judicial system of its charge to produce just results in a ***164** public forum where the outcome can be scrutinized and where the decision will

ultimately become a public precedent?[14] Do mediation programs reduce the overall time and resources spent by litigating parties,[15] and if they do, are these efficiencies worth whatever other costs they impose, such as a reduced opportunity for a full discovery and airing of legally relevant facts? Is the societal benefit provided by mediation sufficient to support the complex rules of confidentiality and privilege in mediation that have been developing?[16] Where mediation is incorporated into a larger system of justice, these questions must be answered. However, they can only be answered if it is clear that mediation, like adjudication, rests on a compelling justice rationale. Acknowledging that those important questions must ultimately be answered, this article focuses instead on exploring the justice rationale in mediation itself-a necessary first step in answering questions about designing a coherent justice system.

The justice that pertains in mediation is the justice the parties themselves experience, articulate and embody in their resolution of the dispute. For individuals, public legal norms are but one factor in a constellation of norms and expectations creating a sense of correct conduct, fair procedure and a just outcome. For our discussion, the parties' own views of justice, not the views of judges and lawyers, become the key measure of justice in mediation.[17]

Among the dilemmas of a discussion of justice in mediation is the assumption, not always warranted, that parties settle matters when the proposed settlement comports with their notions of justice. In reality, a party's sense of justice can be but one of several reasons for which she decides to accept or not accept a proposed resolution. The decision-making process entails weighing various reasons and factors against each other to reach a decision to settle. For example, a party may settle a matter because the costs of litigating have become too high, or she feels it is time to move on with her life, or she simply no longer cares about the outcome, or she wants the dispute to end. Justice, in certain instances, may have little to do with the decision to settle a dispute! Notwithstanding this insight, most people do not voluntarily ***165** sign agreements which they experience as "unjust." The phenomena of parties persistently and vigorously fighting when relatively little is at stake from a financial perspective and the costs of disputing are disproportionately high argues that justice-seeking is a central pre-occupation for many, perhaps most, parties in the disputing universe.

While justice in mediation relies on each party's own private sense of justice, conversations about justice differ from a discussion of competing private tastes or personal preferences. There is a difference, for instance, between wanting money from another party because it is justly deserved, and wanting money because it is pleasurable or satisfying to have more money. A sense of justice is in part a social phenomenon built on family and community beliefs and norms. A discussion in a mediation of what is fair or just, or what is deserved, articulates these norms more explicitly and fully than simply making competing claims for resources or demands for desired actions. When parties bring justice norms to a mediation and make them part of the discussion, they are educating each other, building justice norms in their family, workplace, business or community-in a manner parallel to (however different from) the public declaration of precedents and norms that litigation achieves.

The differing sources of justice in mediation and adjudication have important consequences for assessing the role of justice in a mediation. Mediators, as human beings, are part of the same social and moral world as the parties. When parties seek to satisfy their sense of fairness and justice, as well as their psychological and material needs, the mediator can understand the claim to justice with the same kind of empathetic response that she brings to each party's feelings and interests. As with other forms of empathetic response, a mediator need not agree with a party's views about what is more fair or more just, but should be able to articulate the meaning of justice as the party sees it, and help the party think through his ideas in ways that might lead to a resolution.[18] This means that explicit talk about fairness and justice can, and often does, form an appropriate part of a mediation session.

***166** But of what would such talk consist? When parties talk about fairness and justice, without the overlay of the elaborate system of adjudicatory justice, they will most likely find themselves talking about the well-known Aristotelean categories of reparative justice, distributive justice, and procedural justice.[19] They may also find themselves talking about restoration, retribution, revenge and relationships. Each is discussed below: reparative justice, including a discussion of restorative justice; retribution and revenge (which can be forms of reparative justice); distributive justice; relationships; and procedural justice.

A. Reparative Justice

Parties in mediation may use claims of justice to seek repair of what they see as a wrongful deprivation or harm imposed on them by the other. They need not limit their claims of injustice to acts that may have violated the law. A party who has taken more than is "fair" from the complaining party might have arguably committed an injustice that needs to be corrected, even if the law does not prohibit the taking. Treating someone disrespectfully, taking or diminishing their dignity, for example, might become part of a claim that an injustice was done even though there may be no cognizable "cause of action" for such a wrong. Of course, there can be - and usually is - sharp disagreement between parties over whether a particular action should be characterized as an injustice. Such disagreements are similar to the often-contested question of how much responsibility each party bears for the harm that occurred. A discussion about such disagreements is a form of articulating justice in mediation.

Just as mediation permits the parties to air a wide range of grievances, and permits them to characterize the grievances as injustices if they see them that way, it also permits a wide range of possible repairs for the claimed injustice. Remedies developed in mediation are not limited to adjudicative remedies, such as the payment of money, criminal punishment, or injunctive orders. They can be constructed to deal directly with what the parties see as the injustices that gave rise to the dispute. Examples might include elimination of disparaging comments in a personnel file, correction of the physical condition that caused harm, or a change in certain practices. Sincere apologies, for instance, can serve as a valid remedy to achieve justice in mediation-an outcome not available when a third party adjudicator is imposing a resolution.[20] The recognition and remorse that underlie ***167** apology can arise through the dialogue made possible by mediation and the richer understanding of the situation such dialogue can generate.

The practice of "restorative justice" in the criminal law arena is one example of how the justice concept of repairing a wrong can extend beyond punishment or payment of money. Restorative justice brings together criminal offenders (often juveniles) and their victims in an effort to mediate between them. It provides an opportunity for a victim to tell the offender how he or she has been hurt and harmed, for the offender to understand the impact of his or her action, and for both victim and offender to construct an acceptable plan to redress the wrong. Mediation in this context often results in some plan of action for the offender to take, to try to ameliorate the harm and restore the offender to the community.[21] This kind of action is in addition to, or sometimes in lieu of, the formal imposition of sanctions by the adjudicatory system.[22]

B. Retribution and Revenge

What if a party to a mediation seeks revenge for the wrong claimed to have been done? The notion of "an eye for an eye" is an ancient form of balancing that some experience as both just and "reparative." Frequently, mediated discussions result in the parties' recognition that the wrong they experienced may be counter-balanced by a wrong they sponsored. Or, the proverbial "eye" they wish to extract can be given in a more meaningful (and less costly) way than blinding the other side. In other words, mediated discussions of justice can be responsive to desires for revenge even though revenge, as it is normally ***168** conceived, is not usually the product of mediation.[23] Rather, the desire for revenge is transformed either by recognition of the larger context of the dispute and the "opponent," by remorse and apology, or by meaningful reparations. In contrast, lawsuits are often brought to teach the other side a lesson (i.e., get revenge). Occasionally, they do that. More often, both sides are taught lessons about the uncertainty of any given outcome, the enormous costs of litigation and the indignities of being at the mercy of strangers in a public forum.[24]

C. Distributive Justice

We tend to think of distributive justice in terms of legislative debates or negotiations for structuring transactions: What is a just way to distribute society's resources among different groups or classes of people? How should employers and employees, owners and players, divorcing spouses, or business partners, equitably divide resources?[25] Distributive justice plays an important role in mediations.

It is common to analyze a proposed settlement by predicting the ***169** value of the alternative to agreement. Where litigation is the alternative to settlement, this means assessing the likelihood of prevailing at trial times the expected trial outcome minus the costs of pursuing litigation. By considering the nature and likelihood of particular trial outcomes, parties can vicariously incorporate in their settlement analysis justice concepts that are embodied in adjudicatory law, although such reasoning measures only anticipated justice, not imposed justice - that is, the shadow of the law, rather than the law itself. When the settlement distribution is looked on as a problem of distribution, however, rather than as a compromise of adjudicatory claims, additional justice concepts come into play. The well-known concepts by which we can measure the justice of distributions are equality, equity, and need.[26]

"Splitting the difference" between settlement demands, a common last step in a negotiated distribution, is a claim to equality, and has a powerful attraction to people's sense of fairness and common sense justice.[27] Similarly, siblings, employees, or victims who must share resources in a common fund may be guided by understandable principles of equal treatment.

Equity, as distinct from equality, can support distributions other than an even split.[28] A victim's feelings or a perpetrator's ability to pay can be more important for determining a just distribution than simply splitting the difference or precisely measuring actual losses.[29] The concept of Pareto efficiency[30] also carries implications for justice. That concept asks us to consider, for any given or proposed distribution of resources, whether there is another possible distribution that would make at least one party better off without making any other party worse off. A Pareto improved distribution would, at a minimum, be more efficient, and-since each party gets more (or closer to their notion of their "just deserts") in a Pareto superior outcome-it will probably be experienced as more just. Even without the logical ***170** rigor of the economic concept of Pareto efficiency, such distributions will likely comport with notions of fairness that one "should" relinquish things of low personal value if those things reap enormous benefit for others.

The relative needs of the parties also play into questions of distributive justice.[31] Such considerations make it acceptable for disparate treatment such as the rich being taxed at a higher rate than the poor. The precept from each according to his ability, to each according to his need can fuel claims of justice and lead to responsive settlement terms and sometimes acts of generosity which restore families and communities.[32]

When discussions about fault and blame are not fruitful, mediators may wish to direct the mediation session away from reparative claims and focus on distributional issues instead. Shifting the focus from what happened and who is to blame to the future can ultimately address justice issues. This is true because the ultimate distribution plan needs to balance out how a proposed agreement might divide the available current and foreseeable resources, or might equitably meet the needs of each party, or how the parties might increase the efficiency of their exchange by each trading away things that cost them less in exchange for things they value more. The agreed upon distribution should not violate the parties' senses of equity, equality ***171** and need if it is to be acceptable to them.[33] One used to thinking of justice in terms of adjudication might object to such a redirection as turning away from justice concerns and towards satisfying only personal needs and preferences. On the contrary, in determining an equitable distribution, parties are frequently balancing up-or repairing-past harms in a way that will be most productive for them. To some extent, questions of distributional justice are most important in an interest-based, needs-oriented approach to mediation, and questions of reparative justice play a more prominent role in a mediation context where parties (or their "mediator") focus on evaluating the merits of law-based claims.[34] In a larger sense, however, in the work of crafting acceptable outcomes, the two concepts become inextricably intertwined.

D. Relationships

Mediation can involve efforts to restore or improve a damaged or hurtful relationship between the disputing parties, to re-establish a sense of harmony, or to effect a return to the status quo in a family, business, or community. This can have an instrumental value. If the parties have an on-going relationship, doing business with each other, living near each other, co-parenting, or being members of common economic or social groups, improving their relationship can reduce disputes in the future and make their interaction more economically ***172** or personally rewarding. Improved relationships can be

valuable in themselves, can ripple out and effect a community, and can represent a public good that is a component of a justice system.[35]

How are improved relationships an aspect of justice? Would a mediation produce more justice if it strengthened the relationship between the parties? In traditional Navajo systems, for example, concepts of justice are related to healing and to restoring a person to good relations with both her surroundings and herself.[36] Navajo justice concepts focus on helping parties re-integrate with the group with the goal of nourishing ongoing relationships with family, neighbors and community.[37] Similarly, in China, history and tradition place a high value on social order and harmony and the stability of the group as a whole.[38]

Additionally, good relationships are sometimes a precondition for negotiating reparative or distributive justice; that is, the correction of wrongs and a more just allocation of goods can be accomplished more smoothly and thoughtfully if done in the context of good relationships. Mediation is the only third party dispute resolution process that is or can be targeted to improving relationships.

E. Procedural justice

While mediation lacks the formality and elaborate procedural rules of litigation, it nonetheless provides a rich opportunity to implement procedural justice. From a disputant's perspective, the perception of fairness is linked to having a meaningful opportunity to tell one's story, to feeling that the mediator considers the story, and to being treated with dignity and in an even-handed manner.[39] Adherence ***173** to principles of procedural justice influence the parties' perceptions about the fairness of the process, as well as their perceptions of substantive justice[40] and their willingness to comply with the outcome of the dispute resolution process.[41] The philosopher David Miller argues that a system of justice should be characterized by four critical attributes:

•Equality (treating the participants equally);

•Accuracy (in consideration of whatever information is deemed relevant);

•Publicity (making the rules and procedures apparent to the participants); and

•Dignity (treating the participants in a dignified way, and not requiring undignified actions from them.)[42]

To some extent, ethical standards and practice norms for mediators embody these aspects of procedural justice in mediation. First, mediators should remain impartial and without bias between the parties. Second, resolution through mediation should only occur as a result of the knowing, voluntary decisions of the parties.[43] In fact, many accounts of injustice in mediation include stories about mediators who violate such ethical and practice norms in situations where mediation has been mandated.[44]

Mediation (at least the facilitative variety) is most emphatically a forum in which the parties can be heard.[45] Parties' statements and interactions in mediation are not constrained in the way they are in more formal adjudicative forums.

Some evidence suggests that parties tend to regard a more cooperative, ***174** problem-solving approach to negotiating conflicts as more just, and as leading to substantive resolutions that are more just, than a negotiating process that is more adversarial and contentious.[46] Good mediation often builds just such a problem solving framework for the parties. It can thus provide justice of a form and degree not available in adjudication.

II. The Merchant of Venice

A. A Synopsis

For the reader who is not familiar with The Merchant of Venice a brief summary follows, highlighting some of the ways in which the conflicts depicted in the play bring issues of justice to the fore:

> Bassanio, a nobleman of Venice, has fallen in love with Portia, and needs funds to woo her. He approaches his friend Antonio (the merchant of the title) asking for a loan. Antonio has no ready funds - all his assets are tied up in merchant ships at sea. To help Bassanio, for whom he cares deeply, Antonio seeks a loan from Shylock, a Jewish businessman and money lender.

Antonio's request for a loan is somewhat surprising, because he and Shylock dislike each other. This enmity stems in part from Shylock's subordinated position as a Jew in Venetian society. Shylock voices his bitterness about the way Antonio and others have excluded Shylock (and the Jews) from their business, and the way they have also unfairly competed with him by lending money without the interest that Shylock charges.[47] In raising ill-treatment as an issue between them, Shylock implies that he would like to improve the relationship. Antonio rebuffs that overture and refuses to change the way he treats Shylock.[48] Shylock nevertheless agrees to make the loan to Bassanio, but with the condition that if Bassanio does not repay the loan on time, Shylock may collect a pound of Antonio's flesh. Despite Bassanio's protestations that Antonio should not put himself at such risk simply to help his friend, Antonio unwisely agrees to the loan.[49]

***175** Antonio's ships are lost at sea, and he is unable to repay the loan. Shylock sues to collect his pound of flesh on the bond. He appears to have a strong case. Despite the apparent injustice of enforcing such a severe penalty for failure to keep a contractual obligation, Venetian law has no available doctrine for mitigating contractual bonds that are too extreme.[50] Any exceptions to the law would jeopardize the legal stability that is required if Venice is to keep its reputation as a secure place to do business.

Antonio is saved by Portia, who appears at the trial disguised as a young male legal scholar named Balthasar. She wants to help her fiancé, Bassanio, who succeeded in his wooing in part due to Antonio's generosity. After refusing to permit an equitable exception to the harsh enforcement of the bond, and reiterating the importance to Venice's economic stability of the strict enforcement of its contract laws, Portia nevertheless urges Shylock to forgive the bond as a act of mercy, trying to persuade him with her famous speech[51] that mercy must temper justice else "none of us should see ***176** salvation."[52]

Shylock is unmoved. He "crave[s] the law, The penalty and forfeit of [his] bond,"[53] despite the fact that Bassanio and others have by now offered Shylock twice or three times the amount of the loan in settlement. Shylock's angry and adamant stance is fueled, in part, by the loss of his only daughter, Jessica, who has eloped with Lorenzo, one of Bassanio's cronies, and in the process has both forsaken her Jewish faith and taken Shylock's money.[54]

When it appears that Shylock has won his suit and he prepares to remove a pound of Antonio's flesh, Portia intervenes again. By a close reading of the text of the bond, she asserts that the bond does not authorize Shylock to spill any of Antonio's blood. He can take flesh only if he can do so bloodlessly. That, of course, is impossible. Shylock has lost his suit.

Shylock's woes continue. Portia then notes that by his bond and his suit to enforce it he has violated a Venetian law that prohibits aliens from trying to kill Venetians. His punishment is to forfeit half of his wealth to the person he tried to kill, and the other half to the state, with the state also having the power to execute him. Antonio decides to hold his share of Shylock's wealth in trust for Jessica and Lorenzo, and requires Shylock to convert to Christianity and leave his estate at his death to Jessica and Lorenzo.

This story has intrigued legions of lawyers and law professors, and has generated numerous discussions on the nature of justice.[55] It ***177** compactly displays the tension between equity (not enforcing the bond) and law (enforcing the bond to protect commerce and a reliable rule of law), and it confronts us with the distasteful irony of using unjust methods of reasoning (excessive literalism) to seek just ends (barring enforcement of the bond). Furthermore, it places the legal issues in

a larger context of social injustice (discrimination against and exclusion of Jews). To imagine a mediation of the dispute, instead of a trial, gives us the opportunity to examine these justice issues in a different frame. The play's depiction of adjudication leaves us unsatisfied that justice has been done, and makes the possibility of seeking justice through mediation more inviting.

The play is particularly apt for exploring justice in mediation because it also provides well developed personalities and a rich story. Mediation often entails moving beyond the legal aspects of the parties' dispute and uncovering the real world needs and perceptions that fueled the conflict. The Merchant of Venice gives us the prior relationship of the disputing parties, the economic and social circumstances in which the conflict arose, and the individual values and personal issues that intensified the conflict. The detailed background of the dispute allows us to consider the justice issues of the story in a larger context, the type of context that parties in a real mediation have. We are not limited solely to justice as framed by the concept of legal rights, which in many ways is inadequate to deal with the situation in the play.[56]

***178 B. If Portia Were a Mediator**

In her article about women as lawyers, Professor Carrie Menkel Meadow notes that Portia acts as an advocate, not a mediator.[57] While Portia does make an effort to get the parties to settle their legal dispute, she does not succeed in resolving the matter nor does she employ the strategies or display the mind set of a mediator. Shylock does not waiver from his insistence on securing justice in the form of the payment of the bond owed to him by Antonio, and Antonio offers no settlement terms that are of any interest to Shylock. So the trial proceeds, bringing ruin on Shylock. As an advocate, Portia is admirably successful: she finds a clever argument that demolishes Shylock's claim.[58] But what if she were to mediate, rather than to advocate? What opportunities lie in that path to do "justice" in a more satisfactory way than Shakespeare depicted it?

A good mediation effort by Portia would look quite different from the trial scene in the play. Among other things, Portia's goals and methods as a mediator would include:
•Obtaining the agreement of Shylock and Antonio that they will spend some time articulating their perspectives, listening to each other, and trying to develop options to address the concerns raised.

•Getting them to understand that Portia, as a mediator, will not decide who is right and who is wrong.

•Conducting the mediation in privacy with assurances of confidentiality on the part of the mediator.

•Spending substantial time listening to the parties, starting with a period of time in which each party has ample opportunity to describe how the dispute between them came about.

•Trying to learn Shylock's and Antonio's underlying needs, interests, concerns, principles, values and feelings that lead them to dispute over the bond.

•Trying to find, or help the parties invent, some agreement terms with respect to all issues raised that will best satisfy those needs and ***179** interests.

•Getting the parties to think realistically about the adjudication-and other alternatives they might have - and the serious risks entailed in the event they do not reach agreement.

In the course of doing these tasks the mediator will: spend more time listening to Shylock and Antonio than talking to them; make an effort to encourage Shylock and Antonio to understand the needs, interests, and concerns of the other; explore Shylock's and Antonio's feelings about the events that gave rise to the dispute and about the dispute itself so that the parties operate from an enriched understanding of each other's perceptions and emotions; and urge the parties to examine their respective futures, looking for ways to make the future more desirable.[59]

Portia's actions in the play, of course, demonstrate none of these characteristics. She does most of the talking. She pays no attention to the reasons Shylock and Antonio are embroiled in their dispute. For Shylock, his relationship with Antonio involved financial loss, indignities, and bitter enmity.[60] Antonio demonizes Shylock and his heritage. ***180** Their mutual animosity has a history.

Shylock's response to Portia's plea for mercy is to insist that he craves the law. Ignoring all aspects of the conflict between Shylock and Antonio that cannot be contained in Shylock's legal claim, Portia immediately moves on to interpret the meaning of the bond. In her frame of reference, she has little choice. She has described justice or mercy as the only available choices, and justice is understood to lie in the act of judging by a judge (understood to be the Duke). Portia does not consider that there might be a third option, to search for justice through another process.

In ignoring the broader nature of the conflict, as well as its history, Portia loses a powerful opportunity to investigate what was really at stake for the parties. If Portia were a mediator, she might shift the focus from Shylock's demand for legal satisfaction by using his outburst as an opportunity to expose and explore the parties' history, their views, their values, and their needs. She could ask him to talk more about why he craves the law, to explain to her and to Antonio what it is about the situation and Antonio's past behavior that makes enforcement of the law so important to him. She might then learn more about the indignities Shylock has suffered from Antonio, his enormous loss and pain from the defection of his daughter, his initial intentions with respect to the bond, and so on. Indeed, if Shylock talked about these things, Antonio would learn and might shift his own perspective, and vice versa. Encouraging parties to listen to each other, without the defensive deafness that usually accompanies heated ***181** conflicts, frequently changes the dynamic. Both Shylock and Antonio might gain a clearer insight into the variety of concerns that are motivating each of them and that call for resolution. In the play, Shylock has already refused to discuss his reasons for insisting on the performance of the bond, angrily attributing it to his mere personal preference when challenged by Antonio's friends.[61] But his refusal to disclose his reasons in the adjudicatory setting of the court, publicly facing his enemies and tormentors, is a face-saving measure that keeps his dignity and pride intact. The privacy of mediation, where a non-judgmental, neutral mediator elicits stories from the parties, invites a candor that allows for beneficial exchange. Portia as mediator would give equal attention to Antonio's concerns. Indeed, getting Antonio to articulate his views and his needs may be the more difficult task. Throughout the play, Antonio exhibits a withdrawn, rather uncommunicative and even depressive demeanor.[62] His haughty withdrawal from Shylock is part of the problem, signifying the more concrete financial and personal harms that he and Venetian society have imposed on Shylock, and frustrating any effort Shylock might make to deal with the problem. In the trial, all Antonio had to do was confess the bond, and then prepare himself for its (and his) execution. Mediation would require more participation from him.

Who knows what Shylock and Antonio would say in mediation if Shakespeare re-wrote the play. Probably Shylock would express a need for revenge, but the discussion need not stop there. Shylock would be encouraged to articulate the various injustices that Antonio and his cohorts have heaped upon him, including disrespectful treatment, exclusion from social and financial transactions, and involvement in the elopement of his daughter and the alienation of her affections. None of these are legally cognizable injustices. But if Shylock articulates them as injustices, and if Antonio responds by, for example, denying they are injustices, or by admitting that he can see why Shylock would perceive them as injustices, even though Antonio disagrees that they are, or by admitting that there was some wrongful behavior on his part, though not enough to justify the taking of a pound of flesh, the mediation will have become a forum for the discussion of reparative justice. The efforts of the parties and the mediator to clarify and then resolve these views would be an instance of trying ***182** to reach agreement on what is reparatively just for these people in this situation. Similarly, it is possible that Antonio could begin to appreciate the harm his conduct caused for Shylock, and he might even begin to feel some remorse. As noted above, remorse is a kind of repair for the harms that give rise to a need for revenge, and can be the basis for an honest apology.

Where might this lead? We can't say. It is a characteristic of good mediation that the outcome can never be seen in advance of the process. The participants have to build a solution from their own understandings and their own needs. What works for two parties in one dispute will not work for other parties in a similar dispute, or even for the same parties in another dispute. We can guess, however, that a good solution might include a recognition by Antonio that he had treated Shylock in a demeaning way. Similarly, Shylock's attempt to take Antonio's life through enforcement of the bond is a wrong that must be

addressed. Some form of mutual recognition, perhaps apologies, might be part of the resolution. An agreement might also include restructured payment terms that are more fair and reasonable, in light of the circumstances under which the bond was given. One of Shylock's gravest losses is that of his daughter and only heir; Antonio conceivably has some power to help repair that situation as well. Finally, an agreement might include provisions under which Shylock and Antonio could work together in the future. This might include sending business to each other or recommending each other to other business associates. The issue of some social relations, to prevent the demeaning aspects of the relationship from resurfacing, might also figure in a resolution, particularly since Shylock's daughter, during the course of the play, marries Antonio's friend. While resolutions that involve future business dealings among parties in conflict and shifts in attitude impacting larger issues of social injustice may seem far fetched, future oriented resolutions occur regularly in mediation and social justice can advance person by person.[63]

***183** As parties exchange proposals, issues of distributive or allocative justice become prominent. The process presents opportunities to "create value" and optimize both parties' individual and joint gains.[64] Finding ways to restructure a deal to bring more value to one party, without diminishing its value to the other, making the outcome more Pareto efficient[65] would enact a form of distributive justice, even if the parties do not explicitly consider the efficiency issue in justice terms. If all or part of a settlement proposal consists of terms for repaying the loan, we can imagine a series of offers, demands, and concessions that would raise the issues of equality, equity and need. If Shylock demands a specified amount immediately, and Antonio offers a lesser amount paid over time, they might decide that it is fair to split the difference (equality). Antonio might argue that repayment should be delayed because he has other payments he must make immediately, while Shylock will not suffer financially from later payments (need). Shylock might argue the converse (also need). If they are discussing future business relations, Shylock might argue that it is fair for Antonio to provide more because of the harmful exclusion of Jews from Venetian commerce in the past (equity). None of these arguments about distributive justice can be dispositive, in the same sense that a judge's or jury's decision can finally determine (in theory) what is just, but if these or similar points are part of the parties' discussion, and if they reach an agreement, then the agreement will incorporate, to a greater or lesser degree, their views of justice.

The conflict between Shylock and Antonio also involves broader issues of social injustice. Can mediation address such issues? Assuming that Antonio and Shylock reach some workable agreement, they can provide a model or social precedent as to how gentile and Jew can constructively interact. Like a pebble sending out ripples in a pond, changes by individuals can change the whole-- anti-Semitism can be addressed case by case. Should Antonio's attitude truly shift, he will affect those around him, who in turn will change others. In other words, change, in this case to Venetian society, can come from below (person to person, group to group), as is the case with mediation, or from above, as is the case with litigation or legislation. Both methods are powerful. Obviously, if Antonio cannot make it attractive to Shylock to settle, then the matter would be adjudicated. But we should not underestimate the ability of individuals to ameliorate the effects ***184** of social injustice in meaningful ways by their individual actions, even if they cannot by themselves legislate societal reform.[66]

To incorporate procedural justice, Portia's mediation of the dispute between Shylock and Antonio would have to look quite different from the trial in the play. While Portia might take care to treat the parties equally by giving them equivalent attention and opportunity to talk, her disguise and her hidden interest in the outcome should disqualify her as a mediator. She has come to help Bassanio (the person for whose benefit Antonio gave his bond), which makes her biased towards Antonio, his close friend. She keeps that interest secret. If she were to disclose her true identity and her interest, she would raise a difficult ethical question. Since mediation is a voluntary process, Shylock would have the option to reject her services as a mediator on finding out who she really is. But what if he agreed to keep her as a mediator, anyway? He might wish to do so with the thought that Antonio would be more likely to speak candidly at her urging, or offer serious and reasonable settlement proposals in her presence, than he would with a stranger, thus increasing Shylock's chances of getting a good resolution. Portia would then be faced with the question of whether her continued mediation would create such an appearance of bias that she should refuse to continue, even if the appearance causes no harm to Shylock and is acceptable to him. Additionally, she would have to feel she could be neutral according to her own standards, which would be unlikely, if not impossible, under these circumstances. These are important questions of procedural justice.[67]

Portia could also satisfy Miller's[68] procedural justice conditions of publicity and dignity by the way she conducts the

mediation. It is common for mediators to use the beginning of the mediation session to describe what will happen, emphasizing the voluntariness of the process, the opportunities each party will have to discuss his or her views and proposals, the procedures that might be used (such as separate meetings or caucuses between the mediator and each party alone) and the guidelines for the discussion, the confidentiality of the sessions, and the mediator's neutrality (or interest, if it exists). According each of the parties dignity is something Portia can do by how she speaks to them and what she asks of them.

Accuracy is a value of procedural justice that could be more difficult for Portia to achieve, unless she treats the mediation substantially ***185** differently from the way she treats the trial. In the trial, two key facts remain hidden from Shylock until he has foreclosed settlement. The first is the possibility that the bond might be interpreted to bar him from taking any blood. Shylock rejects the offers of settlement and demands an adjudication in supreme ignorance of this risk. The second is the Venetian law that would punish Shylock as an alien attempting to take the life of a Venetian if he seeks to enforce a deadly bond. Shylock also proceeds in apparent ignorance of that law, a law which ultimately destroys him.[69] In the context of a mediation, we would be troubled by the prospect of Shylock making critical decisions while remaining ignorant of these two possibilities, particularly where Shylock has not availed himself of legal advice. In mediation, the prospect of what would happen if no agreement is reached is highly relevant information. Procedural justice requires reasonable accuracy about such relevant information-or at least access to such information, even though such options can never be known with certainty, but must remain matters of prediction and probability. Here, too, Portia would face a mediator's dilemma if she realizes that Shylock is proceeding in complete ignorance of these risks, risks of which she is well aware. We can't say how Portia would resolve the dilemma. If she were to give Shylock her opinion of the likelihood of the legal result being what Portia (as advocate) advances, she could be jeopardizing the appearance of her neutrality, and she might be giving inaccurate advice as well, since it is often difficult to foresee exactly how the facts that come out at a trial will affect the applicability of the law. But if she were to remain silent, she might be undermining the voluntariness of Shylock's decision. If Antonio knows of these options (which in the play he does not), then Portia's silence could perpetuate a serious imbalance in negotiating power, further undermining the justice of the process. Mediators have no standard way to resolve this dilemma,[70] though in a case like this one, given the ***186** jeopardy that both parties are in, she should certainly urge them to seek counsel.

Dynamics similar to those in The Merchant of Venice regularly present themselves in mediated disputes. People insist on their legal rights in the context of a relationship in which they have suffered hurts and failures of communication. Insistence on rights often keeps the parties from thinking clearly about either their real needs or the risk that the trial judge or arbitrator will use unexpected techniques or call on unforeseen laws to dash their hopes and cause them harm. The origins of their conflict, the forces that perpetuate it, and the best chances to resolve it, are often as hidden as the dynamics of Shylock's dispute with Antonio are at their trial.

III. Mediated Outcomes and Their Implications for Justice

Moving from hypothetical mediation between Shylock and Antonio to actually mediated disputes provides a range of examples of justice delivery in mediation. The following descriptions of mediated outcomes[71] illustrate resolutions that (i) were viewed as fair - or at least acceptable - by all participants (who agreed to the outcome); (ii) restored some balance and harmony among them; (iii) may have increased the likelihood of understanding and better relationship between the parties (understanding that arguably had value even when the parties were strangers); (iv) achieved more Pareto efficient resolutions (placing the outcome closer to, at, or beyond what each party felt was adequate reparation for the harm); (v) saved time, money, and perhaps aggravation and stress (on both individual and institutional levels);[72] (vi) seemed to enhance communication and harmony in communities (in neighborhoods, among businesses, in workplaces, and in larger communities); and (vii) set social precedents for better ordering of relationships. Each of these features is an aspect of civil justice. Moreover, the process of mediation - regardless of outcomes - allowed each party to tell their "story" . The ability to speak, to give voice to a perceived wrong, is something a justice system protects in a democratic regime and a process feature which enhances parties' perception ***187** of justice done.[73]

Imagine the following issues and judge the "justice" in the mediated resolutions.
A. The door. An upstairs and downstairs neighbor have had a fierce dispute about sounds disturbing to the downstairs

neighbor. In the course of the dispute on one occasion, the downstairs neighbor came upstairs and banged on the upstairs neighbor's door, causing a panel in the door to crack. Among the claims of the upstairs neighbor was a demand for $2,000 to replace the broken door. The downstairs neighbor was willing to repair his upstairs neighbor's door himself so that it would "look like new," so he refused to pay the $2,000 his neighbor demanded and indeed felt that he need not pay anything at all. The upstairs neighbor's response was that he wanted an intact door, one as good as the door he had had before the panel was broken, not merely a repaired door; consequently, he would go to court for his $2,000. Ultimately, the parties agreed that they would switch doors, since the downstairs neighbor had an identical door to the upstairs neighbor. Here, the downstairs neighbor paid nothing and gained a door satisfactory to him; the upstairs neighbor got 100% of what he wanted-an intact door. In the course of the mediation, a variety of solutions were explored with respect to the concerns about the sounds upsetting the downstairs neighbor. The agreements reached included the upstairs neighbor wearing slippers inside his apartment, installing wall-to-wall carpeting in the room under which the downstairs neighbor sleeps, and so on. None of these outcomes would have been possible in litigation.

"The Door" illustrates an "integrative" solution, in which each side gets precisely what he wants without cost to the other side. The parties' agreement re-established a modicum of neighborly relations as well, since the parties had to collaborate to effectuate their own resolution. Other issues in the case-sounds heard by the downstairs neighbor and the reactions of the downstairs neighbor to those sounds-were also addressed by mediation. Such issues represent a class of issues that adjudicative processes are ill-suited to address. This resolution illustrates: satisfactory reparation, appropriately measured to harm; the operation of a Pareto efficient result, capitalizing on the parties' differing views of the importance of an "original" and "intact" door, achieving distributional justice as each party receives what he feels is fair; personal action taken (wearing slippers, working on the door, installing carpet) as a kind of payment and establishment of a relationship likely to restore a modicum of neighborly relations and ***188** building harmony, as well as mindfulness of others in a relatively small community.

B. The shrimp boat. A New York City based television network was in a dispute with a Florida shrimp boat captain, whose boat they had leased for the filming of a show. During the lease the boat was destroyed in a hurricane. The parties sought a mediated resolution prior to taking the dispute to litigation. The gap between their monetary positions was bridged by an offer of the television network to host the captain in N.Y.C. and introduce him to all his favorite television stars. This offer, which cost the television studio virtually nothing, fulfilled a lifelong dream of the captain and sufficiently sweetened the deal to make the monetary offer of the network acceptable.

"The Shrimp Boat" represents a Pareto efficient solution where one party adds something of relatively low cost to the offering party but of high value to the recipient. This additional item sufficiently "sweetens the pot" to make the overall deal attractive to both sides. We can speculate that this sort of resolution will foster good relations, which in turn might result in possible business opportunities in the future for the parties. To the extent that conflicts represent situations full of danger and loss, the transformation of this situation into an opportunity to fulfill a lifelong dream of the captain provides meaningful and restorative reparations for the harm suffered.

C. The abusive supervisor. A group of Latin-American men alleged discrimination by a corporation consisting of treatment over the course of a decade that included a hostile work environment, failure to promote qualified individuals because of their ethnicity and inequalities in pay related to ethnic background. A variety of offers were on the table with respect to promotions and damages for inequalities in pay. The workers, however, wanted an opportunity to explain directly to the supervisor the impact on their marriages and their children and their psychological well-being of his verbal derogatory remarks. In the course of the mediation, each of seven men in turn explained to the supervisor the personal impact his conduct had on their lives. For one of the workers, the abusive situation at work was directly connected to his divorce, which in turn (in his view) caused his fourteen year old child to run away. Each of the men wanted assurance that this situation would not happen to others in the future. The supervisor apologized to each person. In addition to agreements with respect to promotions and back pay, the company agreed to a variety of provisions-training programs, new policies-assuring that the events would not recur.

"The Abusive Supervisor" illustrates the importance in justice-seeking of being able to tell one's story to a particular audience and of being able to ensure that similar injustices are prevented. Mediation-insofar ***189** as it gives "voice and choice"--offers unique opportunities for empowerment and altruism, which are not facets of adjudication. The apologies and the new policies are reparative and make the resolution more just than promotions and back pay alone. The employer will have a more humane company, the supervisor presumably has learned a lesson, and the men feel heard and respected. Justice plays a part in this return to a more correct ordering, a moral universe-created by the men speaking their mind and receiving recognition through apology, as well as through other forms of compensation.

D. The ordinance. A Long Island town adopted an ordinance prohibiting standing on a street or highway and soliciting employment from anyone in a motor vehicle and also prohibited anyone in a motor vehicle from hiring or attempting to hire workers.[74] The ordinance was a response to the gathering of Central American refugees seeking day labor at a "shaping point"[75] in the town. Advocacy groups representing the workers challenged the ordinance as an unconstitutional violation of the First Amendment. Advocates for the town claimed the ordinance was necessary for public safety, particularly traffic safety. While many issues were involved in the mediation of this case-for example, use of the city soccer field and other city services by non-English speaking residents, police interaction with non-English speaking people, interactions between Salvadorans and other residents in the town (littering, "cat-calling" to women, public urination)-for the purposes of this example we will examine the resolution of the issue of the ordinance only. With respect to the ordinance, both sides agreed that a new ordinance would be drafted which satisfied the public safety concerns of the town and simultaneously did not offend Salvadoran workers or abridge any constitutional rights. Since a law school clinic was involved in the representation of the Salvadoran workers, the drafting of the new ordinance was taken on by law students, subject to the advice and consent of lawyers involved on both sides.

"The Ordinance" poses a constitutional issue. Should such questions, which might create a meaningful legal precedent, be resolved by mediation? The mediated resolution resulted in the two sides collaborating together to create a satisfactory ordinance, as well as resolving the other issues. The collaboration had two benefits. First, it was a ***190** precedent for collaborating on other issues that the groups faced in the future. And, second, the new ordinance was a type of precedent in itself, an example to which others in similar circumstances could look. Critics of settlement might argue that mediating such cases is an abdication by the courts that are charged with articulating public norms.[76] This critique ignores the fact that in a democracy "a patient confidence in the ultimate justice of the people"[77] to do justice among themselves, sometimes more responsively and creatively than is possible in the courts, is a pillar of our social order.

As important as the substantive outcome was, in the mediation each side listened to the other, treated those on the other side with dignity, and paid attention to issues such as the right to seek a living, public order, and the right to be treated without bias or vindictive stereotypes. The mediation provided an opportunity for the parties to articulate these values and incorporate them into the resolution. These are the kinds of fundamental justice issues that the constitutional claims protect, and for which the legal claims act as a proxy. By using the mediation process, rather than adjudication, the parties had the opportunity to address these issues directly, and find a way to best implement them, rather than try to satisfy them only through legal doctrine and legal logic. Indeed, the interaction and collaboration in the mediation might be seen as an implementation, in a specific and limited setting, of some of the dignitary interests that underlie constitutional rights. The mediation may have served as a model of future respect between these parties, that is, a model for how to build some just constitutional values into their ongoing relationship.

IV. Implications for Clinical Legal Education

The ways in which justice plays a role in mediation carry important implications for legal education in general, and clinical legal education in particular. When law students are mediators, they have the opportunity - and perhaps the responsibility - to grapple with the justice issues in the parties' disputes in ways not available to them in the classroom or a litigation clinic. In pursuing the educational goal of training students to appreciate the multifaceted nature of justice, law schools would do well to foster mediation clinics.

Studying legal doctrines in the classroom, students use "justice" as a touchstone for examining whether doctrines are good or bad. But they do not make decisions or take action, so the application of their concepts is not tested in the real world. Their opportunities to serve ***191** as adjudicators and legislators, making real decisions, are generally limited to simulated classroom roleplays and problems.[78] But simulations do not present the critical dimension of real effects on the lives of real people. When students represent clients in a clinical setting, they do have to make decisions and take action. They invoke concepts of justice in constructing a theory of the case, in arguing to the court, and perhaps in negotiation with the other side. As counsel for their clients, however, their ability to invoke or implement concepts of justice is narrowly channeled by their role as zealous advocates for their clients.

Mediation provides students an opportunity to view a dispute from the vantage point of a neutral and to have a real effect on the lives of real people. Mediation clinics typically assign students to mediate actual disputes, frequently in venues such as small claims courts or community dispute resolution centers.[79] Since mediation does not require a license, students can become legally competent to mediate after meeting the training and practice requirements of their particular venue. Initial training is usually done through simulations, but the classroom component is followed by an apprenticeship where students work with experienced mediators on real disputes. In some programs, after the requisite training and apprenticeship, students proceed to mediate "solo" or with another student serving as a co-mediator.[80] While the monetary stakes are often small, the human drama is vivid, and issues of fairness and justice abound.

Some students (and indeed many lawyers) view negotiation and mediation as a process of compromise,[81] in which notions of a just ***192** outcome are put aside in the interests of avoiding risk and saving time and money. For those students, it is difficult to go beyond concepts of "justice" that are limited to legal rights and entitlements, particularly when students have not yet come to appreciate the value of social harmony, the importance of human relations, and the fact that a party may view a fair outcome in ways dramatically different from an adjudicated resolution. Even when mediating in a law school clinic, students often operate from a rights and entitlements framework and find themselves making judgments about who is telling the truth, who is improperly denying responsibility for what happened, and who should pay what to resolve the matter. That is, they find themselves quickly drawn to an adjudicatory sense of a just outcome. They want to do justice by being judges, not mediators. As teachers, we urge them to put aside these reactions and follow the parties to find what outcome fits the parties' notion of justice. The nonjudgmental stance of the mediator assists the parties to engage in a critical judging process themselves, whereby they can understand and articulate their own principles and values. Ultimately, the mediator acts as a catalyst to help the parties find an outcome which (at least) they can live with and (at best) comports with their highest notions of fairness and justice. In asking students to put aside justice as that term is used in adjudicatory processes, they need greater clarity as to what justice entails in mediation.

Conclusion

Justice is too multi-faceted to be reduced to a definition or a single concept. In its procedural aspect, justice involves notions of equal access, equal treatment, impartiality of the neutral, giving "voice" to each side, disputing costs that are appropriate to the amount in dispute, timeliness of the process, and access to necessary resources by both sides. Any process, be it adjudicative or collaborative, that ignores these procedural dimensions will be perceived as unjust by participants.

In its substantive (or outcome) aspect, justice also has many ***193** faces. A just outcome may be one that seems just to the parties - that "satisfies the heart."[82] An outcome that re-establishes harmony and allows individuals or a community to heal and move forward may be just. An outcome that is durable and stable, prevents future disputes and, insofar as parties are not disappointed, prevents the perception of added injustices may also be considered just. An outcome that is efficient or Pareto optimal increases possibilities for reparative and distributional justice. These aspects of the experience of justice need to be understood as clearly as the achievement of outcomes that comport with societal rules and norms, as determined by arbitrators, judges and juries.

In the adjudication of Shylock vs. Antonio one aspect of justice was realized, but many others were neglected. Mediation has the potential to allow Shylock and Antonio to move beyond their rigid demonization of each other, to create mutually

beneficial solutions to issues posed by their situation and even to address the anti-Semitism in Venetian society by building a better understanding between themselves. Fostering human understanding and creative problem-solving, bridging divides between ethnicities, and creating resolutions that parties feel are fair are critically important aspects of justice that should not be neglected in the law school curriculum.

Footnotes

[a1] Jonathan M. Hyman is Professor of Law at Rutgers School of Law - Newark and Associate Director of the Rutgers Certificate Program in Conflict Management. Lela P. Love is Professor of Law and Director of the Kukin Program for Conflict Resolution at Benjamin N. Cardozo School of Law. The authors thank Jackie Nolan-Haley for her thoughtful comments about the article and Josh Stulberg for his valuable review. We also thank Douglas Van Epps, Sharon Press and Belmont Freeman for their help, and the lively and expert participants in the Theory to Practice Conference, held March 2- 3, 2001 at the University of Massachusetts, Boston, where the idea of using The Merchant of Venice as a vehicle for considering justice in mediation was first critiqued. Gorka Garcia-Malene, a student at Rutgers Law School, provided very informative and helpful assistance regarding The Merchant of Venice and Barry Rosenhouse, a student at Cardozo School of Law, gave excellent assistance in research and editing.

[1] It is with considerable humility that we embark on any analysis which bears on a concept so elusive of definition as "justice." For a thoughtful article on fairness and mediation more explicitly grounded in the work of philosophers such as Jeremy Bentham, John Stuart Mills, John Rawls, and Ronald Dworkin see Joseph B. Stulberg, Fairness and Mediation, 13 Ohio S. J. of Dis. Res. 909 (1998).

[2] See, e.g., Owen Fiss, Against Settlement, 93 Yale L. J. 1073 (1984).
Efficiency has many aspects. Courts value mediation for its potential in helping judges clear their dockets, even though there is no consensus among scholars and administrators that mediation actually relieves court dockets. E.g., James S. Kakalik, Terence Dunworth, Laurel Hill, Daniel McCaffrey, Marian Oshiro, Nicholas M. Pace & Mary E. Vaiana, An Evaluation of Mediation and Early Neutral Evaluation under the Civil Justice Reform Act (Rand Institute for Civil Justice 1996) [hereinafter "Rand Report"] (finding ADR methods in the federal courts were neither a panacea nor detrimental and did not show any significant changes in time, cost, or lawyer views of satisfaction or fairness). But see, New Research Proves that Mediation Saves Time and Money, 2 Macroscope (Newsletter of the Maryland Mediation and Conflict Resolution Office) 11 (September, 2002) (recent study of the Maryland Mediation and Conflict Resolution Office finding that mediation of workers' compensation cases in Maryland saves time and money for litigants and for the courts). For parties, savings in time and process costs are frequently cited benefits of mediation. Savings in the psychological wear and tear that adjudication entails is another possible benefit, though mediation itself can be challenging psychologically for participants. Finally, the savings entailed in getting a "Pareto-efficient" result is another potential benefit of mediation. See David Metcalfe, Rethinking Pareto-Efficiency and Joint Feasibility, 16 Negotiation J. 29 (2000). A "Pareto-efficient" outcome is one that cannot be improved for one party without making another party worse off, and one which maximizes joint gains to the fullest extent possible, ensuring that all value possible in the situation is distributed to the parties.

[3] Professor Jacqueline Nolan-Haley thoughtfully commented that justice "from above" sounds superior than justice "from below" and, consequently, the dichotomy might be framed as vertical (applied from a hierarchy) justice versus horizontal (derived from parties on the same plane) justice. Telephone conversation of Lela Love with Jacqueline Nolan-Haley (Sept. 19, 2002). We have retained the terms "from above/below," but attach no judgment to them. Like the earth (from below) and the sky (from above) they are equally significant and potent forces with which to reckon.

[4] This is arguably an over-simplification, as the term "mediation" has come to mean many things. See, Jeffrey W. Stemple, The Inevitability of the Eclectic: Liberating ADR from Ideology, 2000 J. of Disp. Res. 247, 248 (arguing in favor of an "eclectic" and flexible approach to mediation that would allow mediators to both assist parties in finding resolution and provide guidance as to the likely court outcome); but see, Lela P. Love and Kimberlee K. Kovach, ADR: An Eclectic Array of Processes Rather Than One Eclectic Process, 2000 J. of Disp. Res. 295 (arguing that mediation plus evaluation should be considered a mixed process). Pinning down a justice rationale for mediation becomes impossible absent a clear target (i.e., a defined rather than eclectic process).
Professor Ellen Waldman points out that mediation can be "norm-generating" (as we describe here), "norm-educating" or

"norm-advocating." Ellen A.Waldman, Identifying the Role of Social Norms in Mediation: A Multiple Model Approach, 48 Hastings L. J. 703 (1997). Professor Clark Freshman notes that the private-ordering vision of mediation (more in keeping with this perspective) competes with the communitarian vision of ADR in which community values can provide the framework for the mediation, either explicitly, as in Jewish or Islamic mediation programs, or in practice, due to mediator values and biases connected to a given community which get imposed on the parties. Clark Freshman, Privatizing Same-Sex "Marriage" Through Alternative Dispute Resolution: Community-Enhancing Versus Community-Enabling Mediation, 44 UCLA L. Rev. 1687, 1692-1694 (1997).

In the context of court-annexed mediation of civil cases, commentators have noted that the trend is towards a mutation of the mediation process in which: attorneys dominate sessions with clients playing little or no role; mediators are selected for their ability to evaluate cases and regularly provide their assessments of the strengths and weaknesses of the legal case; the joint session is marginalized with the process moving quickly to caucus; and there are few non-monetary or "creative" settlements. See, Deborah R. Hensler, A Research Agenda: What We Need to Know About Court-Connected ADR, Disp. Resol. Mag., Fall 1999, at 15 and Nancy A. Welsh, Making Deals in Court-Connected Mediation: What's Justice Got to Do With It?, 79 Wash. U. L. Quarterly 787 (2001) [hereinafter "Making Deals"].

An inquiry into the justice rationale of a "norm-advocating" procedure based on explicit or implicit legal norms or communitarian values, in which the mediator's interventions are based on explicating and advocating for those norms or values (which may not be entirely the same as those of the parties), or court-annexed evaluative "mediation," which more closely resembles judicial settlement conferences, would arrive at different conclusions about justice and is beyond the scope of this analysis.

5 In Card v. Card, 706 So.2d 409 (Fla. Dist. Ct. App. 1998), in upholding a custody order entered by the trial court when the parties had failed to settle the matter, the appellate court highlighted the role parties are called on to play in mediation in terms of fashioning their own norms:

When divorcing parents cede to the judicial branch of government the duty to decide the most intimate family issues, it is not unlikely that one or both parents will be less than satisfied with the decision. The bench and bar have for years now encouraged divorcing parents to resolve their differences through mediation. In effect, parents have been urged to make their own law [emphasis added], in the hope that they can better live with a decision that is their own, rather than a decision that is externally imposed.

6 Professor Joseph Stulberg, in reflecting on fairness principles as they are articulated in statutory schemes concerning mediation, urges that in order to ensure procedural fairness statutes should: define mediation so as to "establish a conversational procedure in which fundamental elements of conversational dignity and respect are secured"; not characterize mediation as informal or non-adversarial to ensure that "inequalities in advocacy skills, verbal and non-verbal party behaviors, and mediator biases have no room to flourish"; and "minimally provide parties with a non-waivable right to counsel" to ensure minimum levels of informed decisionmaking. Stulberg, supra note 1, at 945.

7 See, Robert H. Mnookin & Lewis Kornhauser, Bargaining in the Shadow of the Law: The Case for Divorce, 88 Yale L.J. 950 (1979)(indicating that legal rules, entitlements and procedures are among the factors that affect bargaining and negotiation outcomes).

8 See, e.g., Richard Delgado, Chris Dunn, Pamela Brown, Helena Lee & David Hubbert, Fairness and Formality: Minimizing the Risk of Prejudice in Alternative Dispute Resolution, 1985 Wis. L. Rev. 1359 (1985)(referring to social science data to conclude that people are more likely to act from prejudice and thus wrongly use their power in informal settings, such as mediation) and Trina Grillo, The Mediation Alternative: Process Dangers for Women, 100 Yale L. J. 1545 (1991)(discussing and providing examples of mediators who make judgments about both outcome and party conduct and hence chill self-determination and undermine party autonomy by taking sides); Compare, Gary LaFree & Christine Rack, The Effects of Participants' Ethnicity and Gender on Monetary Outcomes in Mediated and Adjudicated Civil Cases, 30 Law & Soc'y Rev. 767 (1996) (empirical study of ethnic and gender differences in outcomes in adjudication and mediation in small claims matters in New Mexico, finding mixed results, including "no evidence that Anglo women were disadvantaged as claimants or respondents in mediated cases," id. at 791, but also that minority male and female claimants did less well in mediation, but only in cases mediated by at least one Anglo mediator, id. at 789); See also Jacqueline M. Nolan-Haley, Court Mediation and the Search for Justice Through Law, 74 Wash. U. L. Q. 47 (1996)[hereinafter "Justice Through Law"](arguing that in a court-annexed context, if the results stray too far from the results that would obtain in litigation, mediation without informed consent--meaning knowledge of legal rights and

entitlements--may be unjust); Jacqueline M. Nolan-Haley, Informed Consent in Mediation: A Guiding Principle for Truly Educated Decisionmaking, 74 Notre Dame L. Rev. 775 (1999)) [hereinafter "Informed Consent"].

9 Self-determination implies a meaningful level of informed consent to outcomes, and it follows that if a party is ignorant of a right their agreement to forego the right is not "informed." See, Jacqueline M. Nolan-Haley, Justice Through Law, supra note 8. On the other hand, no one bargains-or acts generally-with perfect knowledge. Several scholars suggest that legal values and norms should not receive special treatment over community, religious, individual or other values. See, Freshman, supra note 4, at 1734-1742, 1762-1766 (1997)(questioning why legal values should receive special treatment over community or other values and arguing for the mediator to introduce and encourage parties to consider a wide range of values) and Stulberg, supra note 1.

10 See, Nolan-Haley, Justice Through Law, supra note 8.

11 See, Freshman, supra note 4 at 1716-1742 (discussing and illustrating how mediator biases, norms and values can impact the course of a dispute resolution procedure and hence interfere with party self-determination); Grillo, supra note 8 (describing examples of mediator bias that systematically disadvantaged one party); Isabelle R. Gunning, Diversity Issues in Mediation: Controlling Negative Cultural Myths, 1995 J. Disp. Resol. 55, 79 (arguing that standard mediation techniques might place parties in frameworks or boxes which would make it hard for them to achieve genuine self-determination).

12 In reviewing how mediation or other alternative dispute resolution processes might promote or hinder justice, Professor Robert A. Baruch Bush has listed seven goals for civil justice by which one could measure the success of a system of dispute resolution: 1) resource allocation: the allocation of society's scarce resources among various resource-consuming activities to maximize the benefit or value of those resources; 2) social or distributional justice: the attainment of equity (as between the haves and the have-nots) in the distribution of society's resources, including wealth and power; 3) fundamental rights protection: the articulation and protection of fundamental individual rights; 4) public or social order: the prevention or cessation of hostilities; 5) human relations: promotion of mutual tolerance, respect and appreciation and the development of a sense of shared humanity and social solidarity; 6) legitimacy: the appearance and perception of legitimacy to society's members; and 7) administration: the minimization of the cost of administering social enterprises. Robert A. Baruch Bush, Dispute Resolution Alternatives and The Goals of Civil Justice: Jurisdictional Principles for Process Choice, 1984 Wis. L. Rev. 189.

13 Court-annexed programs diverting litigants into mediation have become very wide spread in the American justice system. In Florida where all civil cases may be diverted to mediation 92,047 cases were referred to mediation by the courts in 2000. Florida Dispute Resolution Center, Florida Mediation and Arbitration Programs: A Compendium (15th ed. 2002).

14 See, e.g., Fiss, supra note 2.

15 See Rand Report., supra note 2.

16 The National Conference of Commissioners on Uniform State Laws and the American Bar Association have developed a model Uniform Mediation Act for adoption by the states. Unif. Mediation Act (2001). The hotly debated provisions regarding privilege and confidentiality have numerous and complicated exceptions. For discussions of the complex drafting history of the Act and debate about its provisions see 85 Marquette Law Review 1 (entire volume)(2001).

17 Nolan-Haley, Justice Through Law, supra note 8, at 49 (noting that justice is derived in mediation "not through the operation of law, but through autonomy and self-determination").

18 Consider the charitable contribution, for example. Sometimes parties are able to resolve their dispute when the alleged wrongdoer

makes a contribution to a charity rather than a payment to the alleged victim. Or the payment to charity might be part of a larger package of payments and acts. The victim may think that such a solution is fair and just (or more fair and just than continuing the dispute) because the wrongdoer has given up some ill-gotten gains, and has provided help to balance out the prior harm. If the victim came into the mediation thinking that a payment to him was required for a fair and just result, the mediator, empathizing with the victim's sense of justice, might explore the victim's understanding of a fair and just result, and together they might discover that the victim's sense could be satisfied by such a third party payment.

[19] Morton Deutsch, Justice and Conflict, in The Handbook of Conflict Resolution 41 (Morton Deutsch & Peter S. Coleman eds.2000).

[20] See Stephen B. Goldberg, Eric D. Green & Frank E.A. Sander, Saying You're Sorry, Negotiation J. 221 (1987) (examining the importance, function and timing of apologies in disputing contexts); Deborah Levi, Why Not Just Apologize? How to Say You're Sorry in ADR, 18 Alternatives 162 (2000)(examining various aspects of meaningful apologies); Deborah L. Levi, The Role of Apology in Mediation, 72 NYU L. Rev. 1165 (1997); Hiroshi Wagatsuma & Arthur Rosett, The Implications of Apology: Law and Culture in Japan and the United States, 20 Law & Soc'y Rev. 461 (1986); see also, Jonathan R. Cohen, Advising Clients to Apologize, 72 S. Cal. L. Rev. 1009 (1999).

[21] Ways for the offender to take responsibility include actions such as expressing full responsibility, verbal or written apology, or acknowledging his or her deficits, such as drug dependency. Ways to correct the harm include monetary payments, victim directed community service, or even service to the victim. Ctr. For Restorative Justice & Peacemaking, Restorative Justice for Victims, Communities and Offenders 17 (1996), available at http:// ssw.che.umn.edu/rjp/resources/documents/cctr96a.pdf (last visited September 25, 2002).

[22] See, generally, Mark S. Umbreit & Jean Greenwood, Ctr. For Restorative Justice & Peacemaking, Guidelines for Victim- Sensitive Victim-offender Mediation: Restorative Justice Through Dialogue (2000). See also, Alyssa H. Shenk, Note, Victim-Offender Mediation:The Road to Repairing Hate Crime Injustice, 17 Ohio St. J. on Disp. Resol. 185 (2001).

[23] A lively literature has developed attacking the dichotomy between justice and revenge. It points out how a desire for revenge can be part of seeking justice. E.g., Jeffrey G. Murphy, Moral Epistemology, the Retributive Emotions, and the 'Clumsy Moral Philosophy' of Jesus Christ, in The Passions of Law 123 (Susan A. Bandes, ed. 1999) (noting that we should not be too quick to exclude retribution from our legitimate reasons for imposing punishment); and Robert C. Solomon, Justice v. Vengeance: On Law and the Satisfaction of Emotion, in The Passions of Law (discussing the ways in which vengeance and justice overlap). In an interesting recent book, Laura Blumenfeld, a journalist, recounts a personal study of vengeance as she set out to get revenge on a Palestinian terrorist who shot and wounded her father, not knowing what revenge would be appropriate or how to bring it about. In the course of her journey, she spoke with Jewish, Muslim and Christian religious authorities, and explored a variety of cultures that have exquisitely calculated measures for determining appropriate revenge. But, unlike her prosecutor husband, she did not separate justice and revenge. "For Baruch [her husband], for most people, justice and revenge are mutually exclusive. But I considered the division false. Revenge has no clear borders. Justice shades into punishment, into retribution, into reprisal, into retaliation, into counterstrikes, into getting even, into vendetta, into vengeance, into revenge." Laura Blumenfeld, Revenge: A Story of Hope 109 (2002). In her quest for justice, she corresponded with the assailant (who was in jail) and came to know the assailant's family, although none of them knew who she was. She ended her idiosyncratic journey with an unexpected and surprising act, revealing who she was for the first time at a court hearing on the assailant's continued incarceration, and supporting his application to be released early because of his poor health. She found an act of "revenge" - revealing her identity - that did not harm the object of her quest.
In some sense, remorse and apology-available outcomes in mediation - are the converse of revenge. Like revenge, remorse has both cognitive and strongly emotive components. Remorse can sometimes be the justice called for by revenge.

[24] The adage He who seeks revenge must dig two graves is an apt warning for those bringing a lawsuit to extract vengeance.

[25] John Rawls uses the term allocative justice to distinguish the more general problem of ordering social institutions "so that a fair, efficient, and productive system of social cooperation can be maintained over time, from one generation to the next[.]" John Rawls, Justice as Fairness: A Restatement 50 (2001)

[26] Deutsch, supra note 19.

[27] The equality inherent in splitting the difference is highly dependent on the context. The difference is most often split between demands, proposals and counter-proposals that have been presented in negotiation, and the fairness of splitting the remaining difference between them is in part - but not entirely - dependent on the fairness of the original and intermediate offers that brought the parties to this final step. Fairness is also partly dependent on other characteristics of the parties, such as their relative wealth, their relative time-related costs, and other needs. See, Howard Raiffa, The Art and Science of Negotiation 51- 54 (1982).

[28] Equity may invoke some of the concepts involved in reparative justice, such as a claim that a party whose "rights" were violated has legitimate claim to more than an even split.

[29] The Honorable Robert Yazzie, "Life Comes From It": Navajo Justice Concepts, 24 N.M. L. Rev. 175, 185 (1994).

[30] See definition supra note 3.

[31] A cynic about human nature might feel that an adjudicative process is always necessary to achieve distributional justice, particularly when the ends of justice require that a "have" relinquish his goods to a "have-not." When gross power disparities are present, the fairness of a process based on autonomous bargaining becomes questionable. See Stulberg supra note 1, at 924-25 (discussing the impact of power relationships on fairness in bargaining). However, mediation has the potential to enable parties to appreciate each other's reality and consequently to make accommodations they would not be legally required to make. For example, landlords who enter mediation asking for rent arrears and an immediate departure of the tenant often shift to a willingness not only to forgive the back rent but also to help the tenant find new living quarters and move. Sometimes this is done out of self-interest; other times distributional justice has come into play. Professor Carrie Menkel-Meadow writes: "[M]ediation...[is] most appropriate for honestly addressing inequalities and meeting the needs of unequal parties. In mediation, people can recognize and face up to their human responsibilities, not because someone has ordered them to, but because they have come fully to understand and comprehend someone else's reality and limitations." Carrie Menkle-Meadow, A Humanist Perspective on ADR, xxviii Fordham Urban L. J. 1073, 1082-83 (2001) [hereintafter "Humanist Perspective"].

[32] In a mediation between siblings conducted by Lela Love, the parties disputed whether a payment made by a deceased parent was a gift or a loan. A wealthy sibling, asserting that the payment was a loan, held to the principle of equal treatment for all children. The poorer sibling, claiming the payment was a gift, asserted that the family took care of its members according to their needs. A resolution of that matter involved the parent's payment being treated as a loan (in deference to the distributional principle of equality) and a gift being made by the wealthy sibling to support his nephew's college expenses (in deference to the principle of need), which equaled the amount of money in dispute. The parties' sense of justice was satisfied, and the family was restored.

[33] In an elaborate expansion of the "I cut, you choose" method of fairly dividing goods, Steven Brams and Alan Taylor have designed a method they call "adjusted winner" to keep the fairness of the simple division while dealing with much more complex distribution problems. The method has each party assign points, totaling 100, to all the goods that must be divided between the parties. The goods are distributed to the parties based on an analysis of the points. Steven J. Brams & Alan D. Taylor, The Win-Win Solution (1999). Other methods of fair division are described in Raiffa, supra note 27, at 288-99.

[34] A mediator who explores and captures the parties' norms about distributional fairness probably creates less of a risk of doing an injustice himself by imposing his values on the parties than one who actively participates in a substantive discussion of fair

reparations. When legal claims, with their embedded concepts of justice, lurk in the background as the basis for reparation claims, a mediator's opinion about fair reparation might begin to sound like an adjudicative judgment; the mediator is telling the parties what the law requires, at least as the mediator sees it. That would be an imperfect kind of quasi-adjudicative judgment, or suggested judgment, since the mediator reaches the opinion without the procedural forms, factual development, and adjudicative thought processes that we most trust in an adjudicative setting. See Lon Fuller, Mediation: Its Forms and Functions, 44 S. Cal. L. Rev. 305, 326, 337 (1971) (describing ways in which mediators should avoid the imposition of law-like rules and avoid "legalizing" various situations in which people are highly interdependent) and Lon Fuller, The Forms and Limits of Adjudication, 92 Harv. L. Rev. 353, 382- 391, 394- 405 (1978) (describing the key attributes of adjudication and distinguishing them from solving "polycentric" problems, which are more amenable to a mediated or negotiated resolution). Distributional issues have less definitive law behind them, and, as matters of common sense and individual preference and need, are less likely to place the mediator in an evaluative posture.

[35] The transformative school of mediation emphasizes that the goal of mediation should be to empower parties to understand their own situation and increase their capacity for self-determination and also to enable parties to recognize the concerns and the personhood of the other party. Empowerment and recognition-good relationship with self and others-are viewed as public values that mediation promotes and a proper goal for a justice system. Robert Baruch Bush & Joseph Folger, The Promise of Mediation (1994). Following this approach, reaching agreement is not a measure of success in mediation. Rather party empowerment and recognition between parties are hallmarks of successful mediation. See also, Jonathan R. Cohen, When People are the Means: Negotiating with Respect, 14 Geo. J. of Legal Ethics 739 (2001) (arguing that respect for the other party is a value in negotiation - and therefore in mediation - separate and apart from the value of gaining material advantage from the negotiation).

[36] Yazzie, supra note 29, at 181.

[37] Id. at 182.

[38] See Jerome A. Cohen, Chinese Mediation on the Eve of Modernization, 54 Cal. L. Rev. 1201 (1966); Stanley Lubman, Mao and Mediation: Politics and Dispute Resolution in Communist China, 55 Cal. L. Rev 1284 (1967).

[39] Welsh, Making Deals, supra note 4, at 793, 820-21; Nancy A. Welsh, Disputants' Decision Control in Court-Connected Mediation: A Hollow Promise Without Procedural Justice, 2002 Journal of Dispute Resolution 179, 180 [hereinafter "Disputants' Decision Control"].

[40] Welsh, Making Deals, supra note 4, at 818-19; Welsh, Disputants' Decision Control, supra note 39, at 184; see also E. Allan Lind & Tom R. Tyler, The Social Psychology of Procedural Justice, 66-70, 205 (1988).

[41] See Welsh, Making Deals, supra note 4, at 819; Craig A. McEwen & Richard J. Maiman, Mediation in Small Claims Court: Achieving Compliance Through Consent, 18 L. & Soc'y Rev. 11, at 44-45 (1984).

[42] David Miller, Principles of Social Justice 99- 101 (1999).

[43] See Model Standards of Conduct for Mediators (approved by the American Arbitration Association, the Litigation and Dispute Resolution Sections of the American Bar Association and the Society of Professionals in Dispute Resolution)(1994)[hereinafter cited as Model Standards] (Standard 1 states that "mediation is based on the principle of self-determination by the parties"; Standard 2 requires that the "mediator shall conduct the mediation in an impartial manner"; and Standard 6, focusing on quality of the process, states that a mediator shall work "to encourage mutual respect among the parties" and be committed "to diligence and procedural fairness").

[44] See, e.g., Grillo, supra note 8.

[45] But see, Nancy A.Welsh, The Thinning Vision of Self-Determination in Court-Connected Mediation: The Inevitable Price of Institutionalization, 6 Harv. Negotiation L. Rev. 1, 25 (2001) (noting a trend towards parties being marginalized and frequently not present in court-annexed mediation of civil cases).

[46] Guoquan Chen, et al., Contributions of Conflict for Justice in Student Groups in China, Unpublished manuscript presented at the 2001 International Association for Conflict Management meeting, Paris (on file with the authors.)

[47] "I hate him for he is a Christian;/ But more, for that in low simplicity/ He lends out money gratis, ... He hates our sacred nation, and he rails/ ... On me, my bargains, and my well-won thrift,/ Which he calls interest." William Shakespeare, The Merchant of Venice, Act I, Scene iii, lines 39- 48. (Kenneth Myrick, ed., Signet Classic (1965)) [hereinafter cited by act, scene and line numbers only.]

[48] I, iii, 127- 33.

[49] The play depicts a very strong bond of affection between Antonio and Bassanio, which goes far to explain Antonio's bad judgment in agreeing to the terms of the loan. Antonio is also extremely confident that he has ample assets to cover his exposure on the loan.

[50] The modern version of such a doctrine is the limitation on the terms of liquidated damages. Although the courts will sometimes enforce damage terms to which the parties have agreed in advance, they will not do so if the terms are too onerous, or, in the language of the Restatement (2d) of Contracts, if the terms are not reasonable in light of the anticipated or actual damages, taking into consideration the difficulty of proving damages. Restatement (Second) of Contracts §356 (1) (1978). And §356(2) permits the enforcement of bonds only to the extent of the loss the bond was meant to protect against.

[51] PORTIA. Do you confess the bond?
ANTONIO. I do.
PORTIA. Then must the Jew be merciful.
SHYLOCK. On what compulsion must I? Tell me that.
PORTIA. The quality of mercy is not strained;
It droppeth as the gentle rain from heaven
Upon the place beneath. It is twice blest:
It blesseth him that gives and him that takes.
'Tis mightiest in the mightiest; it becomes
The throned monarch better than his crown;
His sceptre shows the force of temporal power,
The attribute to awe and majesty,
Wherein doth sit the dread and fear of kings;
But mercy is above this scept'red sway;
It is enthroned in the hearts of kings,
It is an attribute to God himself;
And earthly power doth then show likest God's
When mercy seasons justice. Therefore, Jew,
Though justice be thy plea, consider this:
That, in the course of justice none of us
Should see salvation. We do pray for mercy,
And that same prayer doth teach us all to render
The deeds of mercy. I have spoke thus much
To mitigate the justice of thy plea;

Which if thou follow, this strict court of Venice
Must needs give sentence 'gainst the merchant there. IV, i, 180- 204.

52 IV, i, 198- 99.

53 IV, i, 205- 06.

54 Additionally, Shylock reiterates that his anger and desire for revenge is based on Antonio's public humiliation of Shylock and prejudice against Jews: "He hath disgraced me and /hindired me half a million, laughed at my losses,/ mocked at my gains, scorned my nation, thwarted/ my bargains, cooled my friends, heated mine enemies - and what's his reason? I am a Jew." III, i, 51- 55.

55 Recent scholarship includes Symposium, The Merchant of Venice, 5 Cardozo Stud.L. & Lit.1 (1993); Daniel H. Lowenstein, The Failure of the Act: Conceptions of Law in The Merchant of Venice, Bleak House, Les Miserables, and Richard Weisberg's Poethics, 15 Cardozo L. Rev. 1139, 1157-1174 (1994); Richard A. Posner, Law and Literature 90-99 (1988); Richard Weisberg, Poethics and Other Strategies in Law and Literature 94-104 (1992); Kenji Yoshino, The Lawyer of Belmont, 9 Yale J. of Law and the Humanities 183 (1997); Theodore Ziolkowski, The Mirror of Justice 163-186 (1997); and the University of Texas conference From Text to Performance: Law & Other Performing Arts, available in audio and video on the internet: http://www.utexas.edu/law/news/colloquium/lawandarts/index.html (last visited August 1, 2002). The contracts casebook edited by the Wisconsin Law School faculty uses the trial scene from The Merchant of Venice to highlight two problems of contract law: the enforceability of liquidated damages provisions in contracts, and the technique of using hyperliteralism to interpret language so as to create a more just result than a common sense reading of the contract might entail. 1 Stewart Macaulay, John Kidwell, William Whitford & Marc Galanter, Contracts: Law in Action 104-107, 696-698 (1995). See also, Allan Axelrod, Was Shylock v. Antonio Properly Decided?, 39 Rut. L. Rev. 143 (1986) (ironically using law and economics analysis to consider whether it is economically appropriate to bar debtors from pledging their bodies after death, or promising to go to debtor's prison, as security to their creditors.)

56 Using the story of Shylock for any purpose can be disturbing to some. His character can be depicted as the epitome of an anti-Semitic stereotype of a Jew, and can lend itself to the perpetuation of the very kind of oppression that is part of the injustice described in the play. But Shylock need not be played that way. The history of performance of The Merchant of Venice has demonstrated a broad variety of approaches. Until the early Nineteenth Century, Shylock was usually depicted as a kind of comic and disreputable character, becoming less comic and more offensive over time, in line with much of the anti-Semitic attitudes of the time. Sylvan Barnet, The Merchant of Venice on Stage and Screen, Signet Classic Shakespeare: The Merchant of Venice, supra note 48, at 160-65. In the Nineteenth Century, however, several leading actors completely reversed the depiction, playing Shylock as a noble and deeply wronged tragic hero. Heinrich Heine described the reaction of an English woman to a performance of the play at Drury Lane in London in 1839.
When I saw a performance of [The Merchant of Venice] at Drury Lane, a beautiful pale-faced English woman stood behind me in the box and wept profusely at the end of the fourth act [the trial scene], and called out repeatedly, 'The poor man is wronged.'
Quoted in id. at 166. Edwin Booth, who successfully mounted the play, even dropped the entire fifth act, to keep the focus on Shylock as the wronged hero. Id. at 167. By the Twentieth Century the fifth act had been restored. Id. (Directors could now focus on Portia, and the things she had to do both to get Bassanio as a husband and then to teach him the virtues of domestic love and loyalty). The anti-Semitic dimensions of the play continue to engage directors, however. George Tabori's production in the 1970's staged the play as if it were being performed in a concentration camp under the compulsion of the Nazi guards, a kind of play within a play, using a grotesquely stereotyped anti-Semitic depiction of Shylock. The Shylock character continually broke his part to try to avoid the stereotype, tearing off his false nose and ending with a violent attack on the guards. James C. Bulman, The Merchant of Venice (Shakespeare in Performance) 151 (1991).
The play has such hurtful possibilities because it deals with such an important and charged issue of social injustice. It is for precisely this reason that it is a fruitful subject for examining mediation. In considering the nature and limits of justice in mediation, it is important not to shy away from large and difficult issues of injustice. Strains of similar kinds of prejudice and group oppression appear more often than one would like in conflicts that can become the subjects of mediation. The limits of mediation as a method for dealing with such issues should be explored.

57 Carrie Menkel-Meadow, Portia Redux, 2 Va. J. Soc. Pol'y & L. 75 (1994).

58 Her advocacy skill, however, leaves us questioning whether she has done justice or used just means.

59 Our description of mediation embodies what has been labeled a broad, facilitative approach to mediation, rather than a narrow or evaluative one. See Leonard L. Riskin, Understanding Mediators' Orientations, Strategies, and Techniques: A Grid for the Perplexed, 1 Harv. Neg. L. Rev. 7 (1996)(describing four distinct orientations to mediation: broad, facilitative: the mediator addresses all issues of concern to the parties, not just the legal ones, and facilitates the parties' evaluation of their various options without evaluating for them the strengths and weaknesses of each; narrow, facilitative: the mediator defines the problem narrowly (e.g., sticking with the legal cause of action) and facilitates the parties' own evaluation of their various options; narrow, evaluative: the mediator defines the problem narrowly, usually only in terms of legal claims and defenses, and predicts the court outcome and proposes terms of agreement; and broad, evaluative: the mediator addresses all issues raised by the parties, predicts the court (or other) outcome and proposes terms of agreement). By contrast to what is described above as Portia's goals and methods, if Portia were to use a narrow, evaluative approach, she would focus on Shylock's legal claim and Antonio's legal defenses, and perhaps give an opinion on the likely court outcome. Such an approach would be more aligned with justice as it inheres in adjudicative systems, rather than the standards of justice outlined in this article.
Nor does the description of Portia the mediator capture the transformative approach to mediation. A transformative mediator would keep the focus on individual party empowerment and inter-party recognition in contrast to encouraging problem-solving and agreement once a richer understanding among parties were developed. See, Bush & Folger, supra note 35; Joseph P. Folger and Robert A. Baruch Bush, Transformative Mediation and Third-Party Intervention: Ten Hallmarks of a Transformative Approach to Practice, 13 Med. Q. 263 (Summer 1996) (describing particular strategies of a transformative mediator).
For other accounts of mediation, see Freshman, supra note 4 (describing community enforcing and community enabling mediation); Welsh, Making Deals, supra note 4 (describing court-annexed evaluative mediation of non-family civil cases); Waldman supra note 4 (describing norm-educating and norm-enforcing mediation).

60 When Antonio asks Shylock to lend Bassanio money, Shylock points out:
Signor Antonio, many a time and oft
In the Rialto you have rated me
About my money and my usances.
Still have I born it with a patient shrug,
For suff'rance is the badge of all our tribe.
You call me misbeliever, cutthroat dog,
And spet upon my Jewish gaberdine,
And all for use of that which is mine own.
Well then, it now appears you need my help.
Go to, then. You come to me and you say
'Shylock, we would have moneys'-you say so,
You that did void your rheum upon my beard,
And foot me as you spurn a stranger cur
Over your threshold! Moneys is your suit.
What should I say to you? Should I not say
"Hath a dog money? Is it possible
A cur can lend three thousand ducats?" Or
Shall I bend low, and in a bondman's key
With bated breath and whisp'ring humbleness,
Say this:
"Fair sir, you spet on me on Wednesday last,
You spurned me such a day, another time
You called me dog; and for these courtesies
I'll lend you thus much moneys" ? I, iii, 103- 126.

61 IV, i, 34- 62.

62 In the first line of the play Antonio says: "In sooth I know not why I am so sad." I.i.1. And he sharply rebuffs Shylock's effort to develop a fuller relationship with him. "I am as like to call thee [a cur] again,/ To spet on thee again, to spurn thee too." I, iii, 127-128. In the trial scene, he puts up no defense, and seems quite willing to let Shylock take his pound of flesh when it appears that the law provides no escape from the terms of the bond.

63 Peter Alscher has spelled out an alternate staging of The Merchant of Venice that shows how both Shylock and Antonio bear some responsibility for the wrongs that occurred, and how both have an opportunity to correct them. In this version, Portia addresses her quality of mercy speech (see supra note 51) in alternate parts to both Shylock and Antonio, not just to Shylock, as is usually done, telling Antonio that he, too, must be merciful. And when it is revealed that Venetian law calls for the death of Shylock, as an alien, for attempting the life of Antonio, a Venetian, Alscher's version gives Antonio the choice to destroy that law, a law that is one of the fundamental wrongs from which Shylock suffers. Antonio does not rise to that challenge. Peter J. Alscher, "I would be friends with you .. "Staging Directions for a Balanced Resolution to "The Merchant of Venice" Trial Scene, 5 Cardozo Studies in Law and Lit. 1 (1993). This focus on both parties and their responsibility for what happened and how to correct it is similar to what Portia would do as a mediator, but the lecturing, commanding quality of Portia's words in the play, even as restaged by Alscher, would not be appropriate for mediation.

64 Robert H. Mnookin, Scott R. Peppet & Andrew S. Tulumello, Beyond Winning 2- 17 (2000); David Lax & James Sebenius, The Manager as Negotiator 88-116 (1986).

65 See Metcalfe, supra note 2.

66 Consider the impact of the personal examples of Martin Luther King, Mother Teresa, Mahatma Gandhi, or Nelson Mandela on the social injustices surrounding them.

67 Model Standards, supra note 43 (Standard 2 requires mediator impartiality, and Standard 3 requires disclosure of conflicts of interest).

68 See supra note 42 and accompanying text.

69 Perhaps he isn't destroyed. After the trial has concluded, the final act takes place again in Belmont, Portia's estate. Portia is described as traveling to Belmont in the company of a holy hermit, who is not otherwise described. V.1.34. Susan Oldrieve wonders whether the holy hermit could be Shylock himself, after his conversion, emphasizing the similarity of Shylock and Portia as people who must live in the shadows of Venetian (or English) society dominated by Christian men. Susan Oldrieve, Marginalized Voices in "The Merchant of Venice," 5 Cardozo Studies of Law & Lit. 87 (1993). Using that suggestion, Marci Hamilton sees the ways in which the play depicts Shylock as undergoing a true religious conversion, making him religiously and morally more authentic than the manipulative and mercenary Christians with whom he has struggled. Marci A. Hamilton, The End of Law, 5 Cardozo Studies of Law & Lit. 125 (1993).

70 See Nolan-Haley, Search for Justice, supra note 8 (asking whether it is "just" for parties to bargain in court-annexed mediation without relevant legal information and concluding it is not). See also, John Feerick, Carol Izumi, Kimberlee Kovach, Lela Love, Robert Moberly, Leonard Riskin & Edward Sherman, Standards of Professional Conduct in Alternative Dispute Resolution, 1995 J. Disp. Res. 95, 105-110 (examining whether a mediator should give legal information that would change the power dynamic between parties when one (or both) party(ies) may be ignorant about the law).

[71] Examples A (the door), C (the abusive supervisor) and D (the ordinance) were from mediations conducted by Lela Love and/or the Mediation Clinic at the Benjamin N. Cardozo School of Law. Example B (the shrimp boat) is taken from a scenario described by Michael C. Lang, who mediates in New York.

[72] The waste in time, money, aggravation and stress in conflict scenarios are insults added to injuries, and, as they multiply, the perception of injustice increases.

[73] We do not give accounts of what happened during the mediations themselves, so we cannot use these examples to explore issues of procedural justice. But the issues and the outcomes provide opportunities to consider substantive justice.

[74] For a fuller description of this mediation, see Lela P. Love, Glen Cove: Mediation Achieves What Litigation Cannot, Consensus (a quarterly newsletter of the MIT-Harvard Public Dispute Program), no. 20, p. 1 (Oct. 1993) and Lela P. Love & Cheryl B. McDonald, A Tale of Two Cities: Effective Conflict Resolution for Communities in Crisis, Dispute Resolution Magazine (published by the ABA Section of Dispute Resolution)(Fall 1997).

[75] A shaping point is a locale where day laborers congregate, and employers go to find workers.

[76] See Fiss, supra note 2.

[77] Abraham Lincoln, First Inaugural Address, in <http:// showcase.netins.net/web/creative/lincoln/speeches/1inaug.htm> (last visited October 1, 2002).

[78] For example, simulated arbitrations have been used in a contracts class at Rutgers to help students understand how their lay ideas of justice may differ from legal doctrine, and to understand how legal doctrine might influence their sense of a right result. See Jonathan M. Hyman, Discovery and Invention: The NITA Method in the Contracts Classroom, 66 Notre Dame L. Rev. 759- 84 (1991).

[79] Nolan-Haley, Search for Justice, supra note 8 (describing and analyzing cases mediated by Fordham Law School students in a Mediation Clinic based in Small Claims Court); James H. Stark, Preliminary Reflections on the Establishment of a Mediation Clinic, 2 Clin. L. Rev. 457 (1996) (describing how students can use their mediation placement experiences to analyze the process).

[80] The Mediation Clinic at Benjamin N. Cardozo School of Law requires that students mediate in an apprentice program, supervised by a professor, in the fall semester, and then in the spring semester mediate solo or in co-mediation teams once they have been certified by their community dispute resolution center, except when they mediate more complex (typically EEOC) cases when they are again joined by a professor/co-mediator.

[81] For many mediators and mediation scholars, "compromise" -where each party must sacrifice or relinquish some element of his claim or position to reach a mutually tolerable middle ground-is not as promising as a search for resolution that meet each party's interests. Professor Carrie Menkel-Meadow notes: "Compromise may produce the same sense of arbitrary peace and injustice [as adjudication], if, for example, we simply 'split the difference' to achieve peace and closure. Instead, ...rather than compromise, where each party is likely to feel as if they have still 'given up something,' we should seek to meet each other's needs and interests and not cut the orange or chocolate cake in half. Menkel-Meadow, Humanist Perspective, supra note 31, at 1084. As mediation practitioners, we note that the word "compromise" (as in "Are you willing to compromise?") tends to stall, rather than start, movement towards settlement. On the other hand, in fact, sequential changes in settlement proposals often do form the basis of negotiated or mediated settlements and cannot be ignored (even though a mediator might not label them as "compromises"). See, Robert B. Cialdini, Influence: The Psychology of Persuasion 17- 56 (rev. ed. 1993) (describing the psychological power of

reciprocation in inducing people to act and accept an agreement).

82 This is a native American concept linked to a just outcome.

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GETTING TO YES

Negotiating Agreement Without Giving In

Roger Fisher and William Ury
& for the Second Edition, Bruce Patton
of the Harvard Negotiation Project

I THE PROBLEM

1. Don't Bargain Over Positions

1 Don't Bargain Over Positions

Whether a negotiation concerns a contract, a family quarrel, or a peace settlement among nations, people routinely engage in positional bargaining. Each side takes a position, argues for it, and makes concessions to reach a compromise. The classic example of this negotiating minuet is the haggling that takes place between a customer and the proprietor of a secondhand store:

Customer

How much do you want for this brass dish?

Oh come on, it's dented. I'll give you $15.

Well, I could go to $20, but I would never pay anything like $75. Quote me a realistic price.

Shopkeeper

That is a beautiful antique, isn't it? I guess I could let it go for $75.

Really! I might consider a serious offer, but $15 certainly isn't serious.

You drive a hard bargain, young lady. $60 cash, right now.

Customer	**Shopkeeper**
$25.	It cost me a great deal more than that. Make me a *serious* offer.
$37.50. That's the highest I will go.	Have you noticed the engraving on that dish? Next year pieces like that will be worth twice what you pay today.

And so it goes, on and on. Perhaps they will reach agreement; perhaps not.

Any method of negotiation may be fairly judged by three criteria: It should produce a wise agreement if agreement is possible. It should be efficient. And it should improve or at least not damage the relationship between the parties. (A wise agreement can be defined as one that meets the legitimate interests of each side to the extent possible, resolves conflicting interests fairly, is durable, and takes community interests into account.)

The most common form of negotiation, illustrated by the above example, depends upon successively taking—and then giving up—a sequence of positions.

Taking positions, as the customer and storekeeper do, serves some useful purposes in a negotiation. It tells the other side what you want; it provides an anchor in an uncertain and pressured situation; and it can eventually produce the terms of an acceptable agreement. But those purposes can be served in other ways. And positional bargaining fails to meet the basic criteria of producing a wise agreement, efficiently and amicably.

Arguing over positions produces unwise agreements

When negotiators bargain over positions, they tend to lock themselves into those positions. The more you clarify your position

and defend it against attack, the more committed you become to it. The more you try to convince the other side of the impossibility of changing your opening position, the more difficult it becomes to do so. Your ego becomes identified with your position. You now have a new interest in "saving face"—in reconciling future action with past positions—making it less and less likely that any agreement will wisely reconcile the parties' original interests.

The danger that positional bargaining will impede a negotiation was well illustrated by the breakdown of the talks under President Kennedy for a comprehensive ban on nuclear testing. A critical question arose: How many on-site inspections per year should the Soviet Union and the United States be permitted to make within the other's territory to investigate suspicious seismic events? The Soviet Union finally agreed to three inspections. The United States insisted on no less than ten. And there the talks broke down—over positions—despite the fact that no one understood whether an "inspection" would involve one person looking around for one day, or a hundred people prying indiscriminately for a month. The parties had made little attempt to design an inspection procedure that would reconcile the United States's interest in verification with the desire of both countries for minimal intrusion.

As more attention is paid to positions, less attention is devoted to meeting the underlying concerns of the parties. Agreement becomes less likely. Any agreement reached may reflect a mechanical splitting of the difference between final positions rather than a solution carefully crafted to meet the legitimate interests of the parties. The result is frequently an agreement less satisfactory to each side than it could have been.

Arguing over positions is inefficient

The standard method of negotiation may produce either agreement, as with the price of a brass dish, or breakdown, as with the

number of on-site inspections. In either event, the process takes a lot of time.

Bargaining over positions creates incentives that stall settlement. In positional bargaining you try to improve the chance that any settlement reached is favorable to you by starting with an extreme position, by stubbornly holding to it, by deceiving the other party as to your true views, and by making small concessions only as necessary to keep the negotiation going. The same is true for the other side. Each of those factors tends to interfere with reaching a settlement promptly. The more extreme the opening positions and the smaller the concessions, the more time and effort it will take to discover whether or not agreement is possible.

The standard minuet also requires a large number of individual decisions as each negotiator decides what to offer, what to reject, and how much of a concession to make. Decision-making is difficult and time-consuming at best. Where each decision not only involves yielding to the other side but will likely produce pressure to yield further, a negotiator has little incentive to move quickly. Dragging one's feet, threatening to walk out, stonewalling, and other such tactics become commonplace. They all increase the time and costs of reaching agreement as well as the risk that no agreement will be reached at all.

Arguing over positions endangers an ongoing relationship

Positional bargaining becomes a contest of will. Each negotiator asserts what he will and won't do. The task of jointly devising an acceptable solution tends to become a battle. Each side tries through sheer will power to force the other to change its position. "I'm not going to give in. If you want to go to the movies with me, it's *The Maltese Falcon* or nothing." Anger and resentment often result as one side sees itself bending to the rigid will of the other while its own legitimate concerns go unaddressed. Positional bargaining thus strains and sometimes shatters the relationship between the parties. Commercial enterprises that have been doing business together for years may part company. Neighbors may

stop speaking to each other. Bitter feelings generated by one such encounter may last a lifetime.

When there are many parties, positional bargaining is even worse

Although it is convenient to discuss negotiation in terms of two persons, you and "the other side," in fact, almost every negotiation involves more than two persons. Several different parties may sit at the table, or each side may have constituents, higher-ups, boards of directors, or committees with whom they must deal. The more people involved in a negotiation, the more serious the drawbacks to positional bargaining.

If some 150 countries are negotiating, as in various United Nations conferences, positional bargaining is next to impossible. It may take all to say yes, but only one to say no. Reciprocal concessions are difficult: to whom do you make a concession? Yet even thousands of bilateral deals would still fall short of a multilateral agreement. In such situations, positional bargaining leads to the formation of coalitions among parties whose shared interests are often more symbolic than substantive. At the United Nations, such coalitions produce negotiations between "the" North and "the" South, or between "the" East and "the" West. Because there are many members in a group, it becomes more difficult to develop a common position. What is worse, once they have painfully developed and agreed upon a position, it becomes much harder to change it. Altering a position proves equally difficult when additional participants are higher authorities who, while absent from the table, must nevertheless give their approval.

Being nice is no answer

Many people recognize the high costs of hard positional bargaining, particularly on the parties and their relationship. They hope to avoid them by following a more gentle style of negotiation. Instead of seeing the other side as adversaries, they prefer to see

them as friends. Rather than emphasizing a goal of victory, they emphasize the necessity of reaching agreement. In a soft negotiating game the standard moves are to make offers and concessions, to trust the other side, to be friendly, and to yield as necessary to avoid confrontation.

The following table illustrates two styles of positional bargaining, soft and hard. Most people see their choice of negotiating strategies as between these two styles. Looking at the table as presenting a choice, should you be a soft or a hard positional bargainer? Or should you perhaps follow a strategy somewhere in between?

The soft negotiating game emphasizes the importance of building and maintaining a relationship. Within families and among friends much negotiation takes place in this way. The process tends to be efficient, at least to the extent of producing results quickly. As each party competes with the other in being more generous and more forthcoming, an agreement becomes highly likely. But it may not be a wise one. The results may not be as tragic as in the O. Henry story about an impoverished couple in which the loving wife sells her hair in order to buy a handsome chain for her husband's watch, and the unknowing husband sells his watch in order to buy beautiful combs for his wife's hair. However, any negotiation primarily concerned with the relationship runs the risk of producing a sloppy agreement.

More seriously, pursuing a soft and friendly form of positional bargaining makes you vulnerable to someone who plays a hard game of positional bargaining. In positional bargaining, a hard game dominates a soft one. If the hard bargainer insists on concessions and makes threats while the soft bargainer yields in order to avoid confrontation and insists on agreement, the negotiating game is biased in favor of the hard player. The process will produce an agreement, although it may not be a wise one. It will certainly be more favorable to the hard positional bargainer than to the soft one. If your response to sustained, hard positional

bargaining is soft positional bargaining, you will probably lose your shirt.

There is an alternative

If you do not like the choice between hard and soft positional bargaining, you can change the game.

The game of negotiation takes place at two levels. At one level, negotiation addresses the substance; at another, it focuses—usually implicitly—on the procedure for dealing with the substance. The first negotiation may concern your salary, the terms

Problem

Positional Bargaining: Which Game Should You Play?

Soft	Hard
Participants are friends.	Participants are adversaries.
The goal is agreement.	The goal is victory.
Make concessions to cultivate the relationship.	Demand concessions as a condition of the relationship.
Be soft on the people and the problem.	Be hard on the problem and the people.
Trust others.	Distrust others.
Change your position easily.	Dig in to your position.
Make offers.	Make threats.
Disclose your bottom line.	Mislead as to your bottom line.
Accept one-sided losses to reach agreement.	Demand one-sided gains as the price of agreement.
Search for the single answer: the one *they* will accept.	Search for the single answer: the one *you* will accept.
Insist on agreement.	Insist on your position.
Try to avoid a contest of will.	Try to win a contest of will.
Yield to pressure.	Apply pressure.

of a lease, or a price to be paid. The second negotiation concerns how you will negotiate the substantive question: by soft positional bargaining, by hard positional bargaining, or by some other method. This second negotiation is a game about a game—a "meta-game." Each move you make within a negotiation is not only a move that deals with rent, salary, or other substantive questions; it also helps structure the rules of the game you are playing. Your move may serve to keep the negotiations within an ongoing mode, or it may constitute a game-changing move.

This second negotiation by and large escapes notice because it seems to occur without conscious decision. Only when dealing with someone from another country, particularly someone with a markedly different cultural background, are you likely to see the necessity of establishing some accepted process for the substantive negotiations. But whether consciously or not, you are negotiating procedural rules with every move you make, even if those moves appear exclusively concerned with substance.

The answer to the question of whether to use soft positional bargaining or hard is "neither." Change the game. At the Harvard Negotiation Project we have been developing an alternative to positional bargaining: a method of negotiation explicitly designed to produce wise outcomes efficiently and amicably. This method, called *principled negotiation* or *negotiation on the merits*, can be boiled down to four basic points.

These four points define a straightforward method of negotiation that can be used under almost any circumstance. Each point deals with a basic element of negotiation, and suggests what you should do about it.

People: Separate the people from the problem.
Interests: Focus on interests, not positions.

Options: Generate a variety of possibilities before deciding what to do.

Criteria: Insist that the result be based on some objective standard.

The first point responds to the fact that human beings are not computers. We are creatures of strong emotions who often have radically different perceptions and have difficulty communicating clearly. Emotions typically become entangled with the objective merits of the problem. Taking positions just makes this worse because people's egos become identified with their positions. Hence, before working on the substantive problem, the "people problem" should be disentangled from it and dealt with separately. Figuratively if not literally, the participants should come to see themselves as working side by side, attacking the problem, not each other. Hence the first proposition: *Separate the people from the problem.*

The second point is designed to overcome the drawback of focusing on people's stated positions when the object of a negotiation is to satisfy their underlying interests. A negotiating position often obscures what you really want. Compromising between positions is not likely to produce an agreement which will effectively take care of the human needs that led people to adopt those positions. The second basic element of the method is: *Focus on interests, not positions.*

The third point responds to the difficulty of designing optimal solutions while under pressure. Trying to decide in the presence of an adversary narrows your vision. Having a lot at stake inhibits creativity. So does searching for the one right solution. You can offset these constraints by setting aside a designated time within which to think up a wide range of possible solutions that advance shared interests and creatively reconcile differing interests. Hence the third basic point: Before trying to reach agreement, *invent options for mutual gain.*

Where interests are directly opposed, a negotiator may be able to obtain a favorable result simply by being stubborn. That method tends to reward intransigence and produce arbitrary results. However, you can counter such a negotiator by insisting that his single say-so is not enough and that the agreement must reflect some fair standard independent of the naked will of either side. This does not mean insisting that the terms be based on the standard you select, but only that some fair standard such as market value, expert opinion, custom, or law determine the outcome. By discussing such criteria rather than what the parties are willing or unwilling to do, neither party need give in to the other; both can defer to a fair solution. Hence the fourth basic point: *Insist on using objective criteria.*

The method of principled negotiation is contrasted with hard and soft positional bargaining in the table below, which shows the four basic points of the method in boldface type.

The four propositions of principled negotiation are relevant from the time you begin to think about negotiating until the time either an agreement is reached or you decide to break off the effort. That period can be divided into three stages: analysis, planning, and discussion.

During the *analysis* stage you are simply trying to diagnose the situation—to gather information, organize it, and think about it. You will want to consider the people problems of partisan perceptions, hostile emotions, and unclear communication, as well as to identify your interests and those of the other side. You will want to note options already on the table and identify any criteria already suggested as a basis for agreement.

During the *planning* stage you deal with the same four elements a second time, both generating ideas and deciding what to do. How do you propose to handle the people problems? Of your interests, which are most important? And what are some realistic objectives? You will want to generate additional options and additional criteria for deciding among them.

Again during the *discussion* stage, when the parties commu-

Problem

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Search for the single answer: the one *they* will accept.	Search for the single answer: the one *you* will accept.
Insist on agreement.	Insist on your position.
Try to avoid a contest of will.	Try to win a contest of will.
Yield to pressure.	Apply pressure.

Solution

Change the Game—Negotiate on the Merits

Principled

Participants are problem-solvers.

The goal is a wise outcome reached efficiently and amicably.

Separate the people from the problem.

Be soft on the people, hard on the problem.

Proceed independent of trust.

Focus on interests, not positions.

Explore interests.

Avoid having a bottom line.

Invent options for mutual gain.

Develop multiple options to choose from; decide later.

Insist on using objective criteria.

Try to reach a result based on standards independent of will.

Reason and be open to reason; yield to principle, not pressure.

nicate back and forth, looking toward agreement, the same four elements are the best subjects to discuss. Differences in perception, feelings of frustration and anger, and difficulties in communication can be acknowledged and addressed. Each side should come to understand the interests of the other. Both can then jointly generate options that are mutually advantageous and seek agreement on objective standards for resolving opposed interests.

To sum up, in contrast to positional bargaining, the principled negotiation method of focusing on basic interests, mutually satisfying options, and fair standards typically results in a *wise* agreement. The method permits you to reach a gradual consensus on a joint decision *efficiently* without all the transactional costs of digging in to positions only to have to dig yourself out of them. And separating the people from the problem allows you to deal directly and empathetically with the other negotiator as a human being, thus making possible an *amicable* agreement.

Each of the next four chapters expands on one of these four basic points. If at any point you become skeptical, you may want to skip ahead briefly and browse in the final three chapters, which respond to questions commonly raised about the method.

2 Separate the People from the Problem

Everyone knows how hard it is to deal with a problem without people misunderstanding each other, getting angry or upset, and taking things personally.

A union leader says to his crew, "All right, who called the walkout?"

Jones steps forward. "I did. It was that bum foreman Campbell again. That was the fifth time in two weeks he sent me out of our group as a replacement. He's got it in for me, and I'm tired of it. Why should I get all the dirty work?"

Later the union leader confronts Campbell. "Why do you keep picking on Jones? He says you've put him on replacement detail five times in two weeks. What's going on?"

Campbell replies, "I pick Jones because he's the best. I know I can trust him to keep things from fouling up in a group without its point person. I send him on replacement only when it's a key person missing, otherwise I send Smith or someone else. It's just that with the flu going around there've been a lot of point people out. I never knew Jones objected. I thought he liked the responsibility."

In another real-life situation, an insurance company lawyer says to the state insurance commissioner:

"I appreciate your time, Commissioner Thompson. What I'd like to talk to you about is some of the problems we've been having with the presumption clause of the strict-liability regulations. Basically, we think the way the clause was written causes

it to have an unfair impact on those insurers whose existing policies contain rate adjustment limitations, and we would like to consider ways it might be revised——"

The Commissioner, interrupting: "Ms. Monteiro, your company had ample opportunity to voice any objection it had during the hearings my department held on those regulations before they were issued. I ran those hearings, Ms. Monteiro. I listened to every word of testimony, and I wrote the final version of the strict-liability provisions personally. Are you saying I made a mistake?"

"No, but——"

"Are you saying I'm unfair?"

"Certainly not, sir, but I think this provision has had consequences none of us foresaw, and——"

"Listen, Monteiro, I promised the public when I campaigned for this position that I would put an end to killer hair dryers and $10,000 bombs disguised as cars. And these regulations have done that.

"Your company made a $50 million profit on its strict-liability policies last year. What kind of fool do you think you can play me for, coming in here talking about 'unfair' regulations and 'unforeseen consequences'? I don't want to hear another word of that. Good day, Ms. Monteiro."

Now what? Does the insurance company lawyer press the Commissioner on this point, making him angry and probably not getting anywhere? Her company does a lot of business in this state. A good relationship with the Commissioner is important. Should she let the matter rest, then, even though she is convinced that this regulation really is unfair, that its long-term effects are likely to be against the public interest, and that not even the experts foresaw this problem at the time of the original hearings?

What is going on in these cases?

Negotiators are people first

A basic fact about negotiation, easy to forget in corporate and international transactions, is that you are dealing not with abstract

representatives of the "other side," but with human beings. They have emotions, deeply held values, and different backgrounds and viewpoints; and they are unpredictable. So are you.

This human aspect of negotiation can be either helpful or disastrous. The process of working out an agreement may produce a psychological commitment to a mutually satisfactory outcome. A working relationship where trust, understanding, respect, and friendship are built up over time can make each new negotiation smoother and more efficient. And people's desire to feel good about themselves, and their concern for what others will think of them, can often make them more sensitive to another negotiator's interests.

On the other hand, people get angry, depressed, fearful, hostile, frustrated, and offended. They have egos that are easily threatened. They see the world from their own personal vantage point, and they frequently confuse their perceptions with reality. Routinely, they fail to interpret what you say in the way you intend and do not mean what you understand them to say. Misunderstanding can reinforce prejudice and lead to reactions that produce counterreactions in a vicious circle; rational exploration of possible solutions becomes impossible and a negotiation fails. The purpose of the game becomes scoring points, confirming negative impressions, and apportioning blame at the expense of the substantive interests of both parties.

Failing to deal with others sensitively as human beings prone to human reactions can be disastrous for a negotiation. Whatever else you are doing at any point during a negotiation, from preparation to follow-up, it is worth asking yourself, "Am I paying enough attention to the people problem?"

Every negotiator has two kinds of interests: In the substance and in the relationship

Every negotiator wants to reach an agreement that satisfies his substantive interests. That is why one negotiates. Beyond that, a negotiator also has an interest in his relationship with the other

side. An antiques dealer wants both to make a profit on the sale and to turn the customer into a regular one. At a minimum, a negotiator wants to maintain a working relationship good enough to produce an acceptable agreement if one is possible given each side's interests. Usually, more is at stake. Most negotiations take place in the context of an ongoing relationship where it is important to carry on each negotiation in a way that will help rather than hinder future relations and future negotiations. In fact, with many long-term clients, business partners, family members, fellow professionals, government officials, or foreign nations, the ongoing relationship is far more important than the outcome of any particular negotiation.

The relationship tends to become entangled with the problem. A major consequence of the "people problem" in negotiation is that the parties' relationship tends to become entangled with their discussions of substance. On both the giving and receiving end, we are likely to treat people and problem as one. Within the family, a statement such as "The kitchen is a mess" or "Our bank account is low" may be intended simply to identify a problem, but it is likely to be heard as a personal attack. Anger over a situation may lead you to express anger toward some human being associated with it in your mind. Egos tend to become involved in substantive positions.

Another reason that substantive issues become entangled with psychological ones is that people draw from comments on substance unfounded inferences which they then treat as facts about that person's intentions and attitudes toward them. Unless we are careful, this process is almost automatic; we are seldom aware that other explanations may be equally valid. Thus in the union example, Jones figured that Campbell, the foreman, had it in for him, while Campbell thought he was complimenting Jones and doing him a favor by giving him responsible assignments.

Positional bargaining puts relationship and substance in conflict. Framing a negotiation as a contest of will over positions

aggravates the entangling process. I see your position as a statement of how you would like the negotiation to end; from my point of view it demonstrates how little you care about our relationship. If I take a firm position that you consider unreasonable, you assume that I also think of it as an extreme position; it is easy to conclude that I do not value our relationship—or you—very highly.

Positional bargaining deals with a negotiator's interests both in substance and in a good relationship by trading one off against the other. If what counts in the long run for your company is its relationship with the insurance commissioner, then you will probably let this matter drop. Or, if you care more about a favorable solution than being respected or liked by the other side, you can try to trade relationship for substance. "If you won't go along with me on this point, then so much for you. This will be the last time we meet." Yet giving in on a substantive point may buy no friendship; it may do nothing more than convince the other side that you can be taken for a ride.

Separate the relationship from the substance; deal directly with the people problem

Dealing with a substantive problem and maintaining a good working relationship need not be conflicting goals if the parties are committed and psychologically prepared to treat each separately on its own legitimate merits. Base the relationship on accurate perceptions, clear communication, appropriate emotions, and a forward-looking, purposive outlook. Deal with people problems directly; don't try to solve them with substantive concessions.

To deal with psychological problems, use psychological techniques. Where perceptions are inaccurate, you can look for ways to educate. If emotions run high, you can find ways for each person involved to let off steam. Where misunderstanding exists, you can work to improve communication.

To find your way through the jungle of people problems, it is useful to think in terms of three basic categories: perception, emotion, and communication. The various people problems all fall into one of these three baskets.

In negotiating it is easy to forget that you must deal not only with their people problems, but also with your own. Your anger and frustration may obstruct an agreement beneficial to you. Your perceptions are likely to be one-sided, and you may not be listening or communicating adequately. The techniques which follow apply equally well to your people problems as to those of the other side.

Perception

Understanding the other side's thinking is not simply a useful activity that will help you solve your problem. Their thinking *is* the problem. Whether you are making a deal or settling a dispute, differences are defined by the difference between your thinking and theirs. When two people quarrel, they usually quarrel over an object—both may claim a watch—or over an event—each may contend that the other was at fault in causing an automobile accident. The same goes for nations. Morocco and Algeria quarrel over a section of the Western Sahara; India and Pakistan quarrel over each other's development of nuclear bombs. In such circumstances people tend to assume that what they need to know more about is the object or the event. They study the watch or they measure the skid marks at the scene of the accident. They study the Western Sahara or the detailed history of nuclear weapons development in India and Pakistan.

Ultimately, however, conflict lies not in objective reality, but in people's heads. Truth is simply one more argument—perhaps a good one, perhaps not—for dealing with the difference. The difference itself exists because it exists in their thinking. Fears, even if ill-founded, are real fears and need to be dealt with. Hopes, even if unrealistic, may cause a war. Facts, even if established, may do nothing to solve the problem. Both parties may agree that

one lost the watch and the other found it, but still disagree over who should get it. It may finally be established that the auto accident was caused by the blowout of a tire which had been driven 31,402 miles, but the parties may dispute who should pay for the damage. The detailed history and geography of the Western Sahara, no matter how carefully studied and documented, is not the stuff with which one puts to rest that kind of territorial dispute. No study of who developed what nuclear devices when will put to rest the conflict between India and Pakistan.

As useful as looking for objective reality can be, it is ultimately the reality as each side sees it that constitutes the problem in a negotiation and opens the way to a solution.

Put yourself in their shoes. How you see the world depends on where you sit. People tend to see what they want to see. Out of a mass of detailed information, they tend to pick out and focus on those facts that confirm their prior perceptions and to disregard or misinterpret those that call their perceptions into question. Each side in a negotiation may see only the merits of its case, and only the faults of the other side's.

The ability to see the situation as the other side sees it, as difficult as it may be, is one of the most important skills a negotiator can possess. It is not enough to know that they see things differently. If you want to influence them, you also need to understand empathetically the power of their point of view and to feel the emotional force with which they believe in it. It is not enough to study them like beetles under a microscope; you need to know what it feels like to be a beetle. To accomplish this task you should be prepared to withhold judgment for a while as you "try on" their views. They may well believe that their views are "right" as strongly as you believe yours are. You may see on the table a glass half full of cool water. Your spouse may see a dirty, half-empty glass about to cause a ring on the mahogany finish.

Consider the contrasting perceptions of a tenant and a landlady negotiating the renewal of a lease:

Tenant's perceptions	**Landlady's perceptions**
The rent is already too high.	The rent has not been increased for a long time.
With other costs going up, I can't afford to pay more for housing.	With other costs going up, I need more rental income.
The apartment needs painting.	He has given that apartment heavy wear and tear.
I know people who pay less for a comparable apartment.	I know people who pay more for a comparable apartment.
Young people like me can't afford to pay high rents.	Young people like him tend to make noise and to be hard on an apartment.
The rent ought to be low because the neighborhood is rundown.	We landlords should raise rents in order to improve the quality of the neighborhood.
I am a desirable tenant with no dogs or cats.	His hi-fi drives me crazy.
I always pay the rent whenever she asks for it.	He never pays the rent until I ask for it.
She is cold and distant; she never asks me how things are.	I am a considerate person who never intrudes on a tenant's privacy.

Understanding their point of view is not the same as agreeing with it. It is true that a better understanding of their thinking may lead you to revise your own views about the merits of a situation. But that is not a *cost* of understanding their point of view, it is a *benefit*. It allows you to reduce the area of conflict, and it also helps you advance your newly enlightened self-interest.

Don't deduce their intentions from your fears. People tend to assume that whatever they fear, the other side intends to do. Consider this story from the *New York Times:* "They met in a bar, where he offered her a ride home. He took her down unfamiliar streets. He said it was a shortcut. He got her home so fast she caught the 10 o'clock news." Why is the ending so surprising? We made an assumption based on our fears.

It is all too easy to fall into the habit of putting the worst interpretation on what the other side says or does. A suspicious interpretation often follows naturally from one's existing perceptions. Moreover, it seems the "safe" thing to do, and it shows spectators how bad the other side really is. But the cost of interpreting whatever they say or do in its most dismal light is that fresh ideas in the direction of agreement are spurned, and subtle changes of position are ignored or rejected.

Don't blame them for your problem. It is tempting to hold the other side responsible for your problem. "Your company is totally unreliable. Every time you service our rotary generator here at the factory, you do a lousy job and it breaks down again." Blaming is an easy mode to fall into, particularly when you feel that the other side is indeed responsible. But even if blaming is justified, it is usually counterproductive. Under attack, the other side will become defensive and will resist what you have to say. They will cease to listen, or they will strike back with an attack of their own. Assessing blame firmly entangles the people with the problem.

When you talk about the problem, separate the symptoms from the person with whom you are talking. "Our rotary generator that you service has broken down again. That is three times in the last month. The first time it was out of order for an entire week. This factory needs a functioning generator. I want your advice on how we can minimize our risk of generator breakdown. Should we change service companies, sue the manufacturer, or what?"

face, not only for himself and for the judicial system, but for the parties. Instead of just telling one party, "You win," and telling the other, "You lose," he explains how his decision is consistent with principle, law, and precedent. He wants to appear not as arbitrary, but as behaving in a proper fashion. A negotiator is no different.

Often in a negotiation people will continue to hold out not because the proposal on the table is inherently unacceptable, but simply because they want to avoid the feeling or the appearance of backing down to the other side. If the substance can be phrased or conceptualized differently so that it seems a fair outcome, they will then accept it. Terms negotiated between a major city and its Hispanic community on municipal jobs were unacceptable to the mayor—until the agreement was withdrawn and the mayor was allowed to announce the same terms as his own decision, carrying out a campaign promise.

Face-saving involves reconciling an agreement with principle and with the self-image of the negotiators. Its importance should not be underestimated.

Emotion

In a negotiation, particularly in a bitter dispute, feelings may be more important than talk. The parties may be more ready for battle than for cooperatively working out a solution to a common problem. People often come to a negotiation realizing that the stakes are high and feeling threatened. Emotions on one side will generate emotions on the other. Fear may breed anger, and anger, fear. Emotions may quickly bring a negotiation to an impasse or an end.

First recognize and understand emotions, theirs and yours. Look at yourself during the negotiation. Are you feeling nervous? Is your stomach upset? Are you angry at the other side? Listen to them and get a sense of what their emotions are. You may find it useful to write down what you feel—perhaps fearful, worried,

angry—and then how you might like to feel—confident, relaxed. Do the same for them.

In dealing with negotiators who represent their organizations, it is easy to treat them as mere mouthpieces without emotions. It is important to remember that they too, like you, have personal feelings, fears, hopes, and dreams. Their careers may be at stake. There may be issues on which they are particularly sensitive and others on which they are particularly proud. Nor are the problems of emotion limited to the negotiators. Constituents have emotions too. A constituent may have an even more simplistic and adversarial view of the situation.

Ask yourself what is producing the emotions. Why are you angry? Why are they angry? Are they responding to past grievances and looking for revenge? Are emotions spilling over from one issue to another? Are personal problems at home interfering with business? In the Middle East negotiation, Israelis and Palestinians alike feel a threat to their existence as peoples and have developed powerful emotions that now permeate even the most concrete practical issue, like distribution of water in the West Bank, so that it becomes almost impossible to discuss and resolve. Because in the larger picture both peoples feel that their own survival is at stake, they see every other issue in terms of survival.

Make emotions explicit and acknowledge them as legitimate. Talk with the people on the other side about their emotions. Talk about your own. It does not hurt to say, "You know, the people on our side feel we have been mistreated and are very upset. We're afraid an agreement will not be kept even if one is reached. Rational or not, that is our concern. Personally, I think we may be wrong in fearing this, but that's a feeling others have. Do the people on your side feel the same way?" Making your feelings or theirs an explicit focus of discussion will not only underscore the seriousness of the problem, it will also make the negotiations less reactive and more "pro-active." Freed from the burden of unexpressed emotions, people will become more likely to work on the problem.

Allow the other side to let off steam. Often, one effective way to deal with people's anger, frustration, and other negative emotions is to help them release those feelings. People obtain psychological release through the simple process of recounting their grievances. If you come home wanting to tell your husband about everything that went wrong at the office, you will become even more frustrated if he says, "Don't bother telling me; I'm sure you had a hard day. Let's skip it." The same is true for negotiators. Letting off steam may make it easier to talk rationally later. Moreover, if a negotiator makes an angry speech and thereby shows his constituency that he is not being "soft," they may give him a freer hand in the negotiation. He can then rely on a reputation for toughness to protect him from criticism later if he eventually enters into an agreement.

Hence, instead of interrupting polemical speeches or walking out on the other party, you may decide to control yourself, sit there, and allow them to pour out their grievances at you. When constituents are listening, such occasions may release their frustration as well as the negotiator's. Perhaps the best strategy to adopt while the other side lets off steam is to listen quietly without responding to their attacks, and occasionally to ask the speaker to continue until he has spoken his last word. In this way, you offer little support to the inflammatory substance, give the speaker every encouragement to speak himself out, and leave little or no residue to fester.

Don't react to emotional outbursts. Releasing emotions can prove risky if it leads to an emotional reaction. If not controlled, it can result in a violent quarrel. One unusual and effective technique to contain the impact of emotions was used in the 1950s by the Human Relations Committee, a labor-management group set up in the steel industry to handle emerging conflicts before they became serious problems. The members of the committee adopted the rule that only one person could get angry at a time. This made it legitimate for others not to respond stormily to an angry outburst. It also made letting off emotional steam easier by

making an outburst itself more legitimate: "That's OK. It's his turn." The rule has the further advantage of helping people control their emotions. Breaking the rule implies that you have lost self-control, so you lose some face.

Use symbolic gestures. Any lover knows that to end a quarrel the simple gesture of bringing a red rose goes a long way. Acts that would produce a constructive emotional impact on one side often involve little or no cost to the other. A note of sympathy, a statement of regret, a visit to a cemetery, delivering a small present for a grandchild, shaking hands or embracing, eating together—all may be priceless opportunities to improve a hostile emotional situation at small cost. On many occasions an apology can defuse emotions effectively, even when you do not acknowledge personal responsibility for the action or admit an intention to harm. An apology may be one of the least costly and most rewarding investments you can make.

Communication

Without communication there is no negotiation. Negotiation is a process of communicating back and forth for the purpose of reaching a joint decision. Communication is never an easy thing, even between people who have an enormous background of shared values and experience. Couples who have lived with each other for thirty years still have misunderstandings every day. It is not surprising, then, to find poor communication between people who do not know each other well and who may feel hostile and suspicious of one another. Whatever you say, you should expect that the other side will almost always hear something different.

There are three big problems in communication. First, negotiators may not be talking to each other, or at least not in such a way as to be understood. Frequently each side has given up on the other and is no longer attempting any serious communication with it. Instead they talk merely to impress third parties or their own constituency. Rather than trying to dance with their nego-

tiating partner toward a mutually agreeable outcome, they try to trip him up. Rather than trying to talk their partner into a more constructive step, they try to talk the spectators into taking sides. Effective communication between the parties is all but impossible if each plays to the gallery.

Even if you are talking directly and clearly to them, they may not be hearing you. This constitutes the second problem in communication. Note how often people don't seem to pay enough attention to what you say. Probably equally often, you would be unable to repeat what they had said. In a negotiation, you may be so busy thinking about what you are going to say next, how you are going to respond to that last point or how you are going to frame your next argument, that you forget to listen to what the other side is saying now. Or you may be listening more attentively to your constituency than to the other side. Your constituents, after all, are the ones to whom you will have to account for the results of the negotiation. They are the ones you are trying to satisfy. It is not surprising that you should want to pay close attention to them. But if you are not hearing what the other side is saying, there is no communication.

The third communication problem is misunderstanding. What one says, the other may misinterpret. Even when negotiators are in the same room, communication from one to the other can seem like sending smoke signals in a high wind. Where the parties speak different languages the chance for misinterpretation is compounded. For example, in Persian, the word "compromise" apparently lacks the positive meaning it has in English of "a midway solution both sides can live with," but has only a negative meaning as in "our integrity was compromised." Similarly, the word "mediator" in Persian suggests "meddler," someone who is barging in uninvited. In early 1980 U.N. Secretary General Waldheim flew to Iran to seek the release of American hostages. His efforts were seriously set back when Iranian national radio and television broadcast in Persian a remark he reportedly made on his arrival in Tehran: "I have come as a *mediator* to work out a *compromise*."

Within an hour of the broadcast, his car was being stoned by angry Iranians.

What can be done about these three problems of communication?

Listen actively and acknowledge what is being said. The need for listening is obvious, yet it is difficult to listen well, especially under the stress of an ongoing negotiation. Listening enables you to understand their perceptions, feel their emotions, and hear what they are trying to say. Active listening improves not only what you hear, but also what they say. If you pay attention and interrupt occasionally to say, "Did I understand correctly that you are saying that . . . ?" the other side will realize that they are not just killing time, not just going through a routine. They will also feel the satisfaction of being heard and understood. It has been said that the cheapest concession you can make to the other side is to let them know they have been heard.

Standard techniques of good listening are to pay close attention to what is said, to ask the other party to spell out carefully and clearly exactly what they mean, and to request that ideas be repeated if there is any ambiguity or uncertainty. Make it your task while listening not to phrase a response, but to understand them as they see themselves. Take in their perceptions, their needs, and their constraints.

Many consider it a good tactic not to give the other side's case too much attention, and not to admit any legitimacy in their point of view. A good negotiator does just the reverse. Unless you acknowledge what they are saying and demonstrate that you understand them, they may believe you have not heard them. When you then try to explain a different point of view, they will suppose that you still have not grasped what they mean. They will say to themselves, "I told him my view, but now he's saying something different, so he must not have understood it." Then instead of listening to your point, they will be considering how to make their argument in a new way so that this time maybe you will fathom it. So show that you understand them. "Let me see whether I

follow what you are telling me. From your point of view, the situation looks like this. . . ."

As you repeat what you understood them to have said, phrase it *positively* from their point of view, making the strength of their case clear. You might say, "You have a strong case. Let me see if I can explain it. Here's the way it strikes me. . . ." Understanding is not agreeing. One can at the same time understand perfectly and disagree completely with what the other side is saying. But unless you can convince them that you do grasp how they see it, you may be unable to explain your viewpoint to them. Once you have made their case for them, then come back with the problems you find in their proposal. If you can put their case better than they can, and then refute it, you maximize the chance of initiating a constructive dialogue on the merits and minimize the chance of their believing you have misunderstood them.

Speak to be understood. Talk to the other side. It is easy to forget sometimes that a negotiation is not a debate. Nor is it a trial. You are not trying to persuade some third party. The person you are trying to persuade is seated at the table with you. If a negotiation is to be compared with a legal proceeding, the situation resembles that of two judges trying to reach agreement on how to decide a case. Try putting yourself in that role, treating your opposite number as a fellow judge with whom are you attempting to work out a joint opinion. In this context it is clearly unpersuasive to blame the other party for the problem, to engage in name-calling, or to raise your voice. On the contrary, it will help to recognize explicitly that they see the situation differently and to try to go forward as people with a joint problem.

To reduce the dominating and distracting effect that the press, home audiences, and third parties may have, it is useful to establish private and confidential means of communicating with the other side. You can also improve communication by limiting the size of the group meeting. In the negotiations over the city of Trieste in 1954, for example, little progress was made in the talks among Yugoslavia, Britain, and the United States until the three principal

negotiators abandoned their large delegations and started meeting alone and informally in a private house. A good case can be made for changing Woodrow Wilson's appealing slogan "Open covenants openly arrived at" to "Open covenants privately arrived at." No matter how many people are involved in a negotiation, important decisions are typically made when no more than two people are in the room.

Speak about yourself, not about them. In many negotiations, each side explains and condemns at great length the motivations and intentions of the other side. It is more persuasive, however, to describe a problem in terms of its impact on you than in terms of what they did or why: "I feel let down" instead of "You broke your word." "We feel discriminated against" rather than "You're a racist." If you make a statement about them that they believe is untrue, they will ignore you or get angry; they will not focus on your concern. But a statement about how you feel is difficult to challenge. You convey the same information without provoking a defensive reaction that will prevent them from taking it in.

Speak for a purpose. Sometimes the problem is not too little communication, but too much. When anger and misperception are high, some thoughts are best left unsaid. At other times, full disclosure of how flexible you are may make it harder to reach agreement rather than easier. If you let me know that you would be willing to sell a house for $80,000, after I have said that I would be willing to pay as much as $90,000, we may have more trouble striking a deal than if you had just kept quiet. The moral is: Before making a significant statement, know what you want to communicate or find out, and know what purpose this information will serve.

Prevention works best

The techniques just described for dealing with problems of perception, emotion, and communication usually work well. However, the best time for handling people problems is before they become people problems. This means building a personal and

organizational relationship with the other side that can cushion the people on each side against the knocks of negotiation. It also means structuring the negotiating game in ways that separate the substantive problem from the relationship and protect people's egos from getting involved in substantive discussions.

Build a working relationship. Knowing the other side personally really does help. It is much easier to attribute diabolical intentions to an unknown abstraction called the "other side" than to someone you know personally. Dealing with a classmate, a colleague, a friend, or even a friend of a friend is quite different from dealing with a stranger. The more quickly you can turn a stranger into someone you know, the easier a negotiation is likely to become. You have less difficulty understanding where they are coming from. You have a foundation of trust to build upon in a difficult negotiation. You have smooth, familiar communication routines. It is easier to defuse tension with a joke or an informal aside.

The time to develop such a relationship is before the negotiation begins. Get to know them and find out about their likes and dislikes. Find ways to meet them informally. Try arriving early to chat before the negotiation is scheduled to start, and linger after it ends. Benjamin Franklin's favorite technique was to ask an adversary if he could borrow a certain book. This would flatter the person and give him the comfortable feeling of knowing that Franklin owed him a favor.

Face the problem, not the people. If negotiators view themselves as adversaries in a personal face-to-face confrontation, it is difficult to separate their relationship from the substantive problem. In that context, anything one negotiator says about the problem seems to be directed personally at the other and is received that way. Each side tends to become defensive and reactive and to ignore the other side's legitimate interests altogether.

A more effective way for the parties to think of themselves is as partners in a hardheaded, side-by-side search for a fair agreement advantageous to each.

3 Focus on Interests, Not Positions

Consider the story of two men quarreling in a library. One wants the window open and the other wants it closed. They bicker back and forth about how much to leave it open: a crack, halfway, three quarters of the way. No solution satisfies them both.

Enter the librarian. She asks one why he wants the window open: "To get some fresh air." She asks the other why he wants it closed: "To avoid the draft." After thinking a minute, she opens wide a window in the next room, bringing in fresh air without a draft.

For a wise solution reconcile interests, not positions

This story is typical of many negotiations. Since the parties' problem appears to be a conflict of positions, and since their goal is to agree on a position, they naturally tend to think and talk about positions—and in the process often reach an impasse.

The librarian could not have invented the solution she did if she had focused only on the two men's stated positions of wanting the window open or closed. Instead she looked to their underlying interests of fresh air and no draft. This difference between positions and interests is crucial.

Interests define the problem. The basic problem in a negotiation lies not in conflicting positions, but in the conflict between each side's needs, desires, concerns, and fears. The parties may say:

"I am trying to get him to stop that real estate development next door."

Or "We disagree. He wants $100,000 for the house. I won't pay a penny more than $95,000."

But on a more basic level the problem is:

"He needs the cash; I want peace and quiet."

Or "He needs at least $100,000 to settle with his ex-wife. I told my family that I wouldn't pay more than $95,000 for a house."

Such desires and concerns are *interests*. Interests motivate people; they are the silent movers behind the hubbub of positions. Your position is something you have decided upon. Your interests are what caused you to so decide.

The Egyptian-Israeli peace treaty blocked out at Camp David in 1978 demonstrates the usefulness of looking behind positions. Israel had occupied the Egyptian Sinai Peninsula since the Six Day War of 1967. When Egypt and Israel sat down together in 1978 to negotiate a peace, their positions were incompatible. Israel insisted on keeping some of the Sinai. Egypt, on the other hand, insisted that every inch of the Sinai be returned to Egyptian sovereignty. Time and again, people drew maps showing possible boundary lines that would divide the Sinai between Egypt and Israel. Compromising in this way was wholly unacceptable to Egypt. To go back to the situation as it was in 1967 was equally unacceptable to Israel.

Looking to their interests instead of their positions made it possible to develop a solution. Israel's interest lay in security; they did not want Egyptian tanks poised on their border ready to roll across at any time. Egypt's interest lay in sovereignty; the Sinai had been part of Egypt since the time of the Pharaohs. After centuries of domination by Greeks, Romans, Turks, French, and British, Egypt had only recently regained full sovereignty and was not about to cede territory to another foreign conqueror.

At Camp David, President Sadat of Egypt and Prime Minister

Begin of Israel agreed to a plan that would return the Sinai to complete Egyptian sovereignty and, by demilitarizing large areas, would still assure Israeli security. The Egyptian flag would fly everywhere, but Egyptian tanks would be nowhere near Israel.

Reconciling interests rather than positions works for two reasons. First, for every interest there usually exist several possible positions that could satisfy it. All too often people simply adopt the most obvious position, as Israel did, for example, in announcing that they intended to keep part of the Sinai. When you do look behind opposed positions for the motivating interests, you can often find an alternative position which meets not only your interests but theirs as well. In the Sinai, demilitarization was one such alternative.

Reconciling interests rather than compromising between positions also works because behind opposed positions lie many more interests than conflicting ones.

Behind opposed positions lie shared and compatible interests, as well as conflicting ones. We tend to assume that because the other side's positions are opposed to ours, their interests must also be opposed. If we have an interest in defending ourselves, then they must want to attack us. If we have an interest in minimizing the rent, then their interest must be to maximize it. In many negotiations, however, a close examination of the underlying interests will reveal the existence of many more interests that are shared or compatible than ones that are opposed.

For example, look at the interests a tenant shares with a prospective landlord:

1. Both want stability. The landlord wants a stable tenant; the tenant wants a permanent address.
2. Both would like to see the apartment well maintained. The tenant is going to live there; the landlord wants to increase the value of the apartment as well as the reputation of the building.
3. Both are interested in a good relationship with each other.

The landlord wants a tenant who pays the rent regularly; the tenant wants a responsive landlord who will carry out the necessary repairs.

They may have interests that do not conflict but simply differ. For example:

1. The tenant may not want to deal with fresh paint, to which he is allergic. The landlord will not want to pay the costs of repainting all the other apartments.
2. The landlord would like the security of a down payment of the first month's rent, and he may want it by tomorrow. The tenant, knowing that this is a good apartment, may be indifferent on the question of paying tomorrow or later.

When weighed against these shared and divergent interests, the opposed interests in minimizing the rent and maximizing the return seem more manageable. The shared interests will likely result in a long lease, an agreement to share the cost of improving the apartment, and efforts by both parties to accommodate each other in the interest of a good relationship. The divergent interests may perhaps be reconciled by a down payment tomorrow and an agreement by the landlord to paint the apartment provided the tenant buys the paint. The precise amount of the rent is all that remains to be settled, and the market for rental apartments may define that fairly well.

Agreement is often made possible precisely because interests differ. You and a shoe-seller may both like money and shoes. Relatively, his interest in the fifty dollars exceeds his interest in the shoes. For you, the situation is reversed: you like the shoes better than the fifty dollars. Hence the deal. Shared interests and differing but complementary interests can both serve as the building blocks for a wise agreement.

How do you identify interests?

The benefit of looking behind positions for interests is clear. How to go about it is less clear. A position is likely to be concrete and explicit; the interests underlying it may well be unexpressed, intangible, and perhaps inconsistent. How do you go about understanding the interests involved in a negotiation, remembering that figuring out *their* interests will be at least as important as figuring out *yours*?

Ask "Why?" One basic technique is to put yourself in their shoes. Examine each position they take, and ask yourself "Why?" Why, for instance, does your landlord prefer to fix the rent—in a five-year lease—year by year? The answer you may come up with, to be protected against increasing costs, is probably one of his interests. You can also ask the landlord himself why he takes a particular position. If you do, make clear that you are asking not for justification of this position, but for an understanding of the needs, hopes, fears, or desires that it serves. "What's your basic concern, Mr. Jones, in wanting the lease to run for no more than three years?"

Ask "Why not?" Think about their choice. One of the most useful ways to uncover interests is first to identify the basic decision that those on the other side probably see you asking them for, and then to ask yourself why they have not made that decision. What interests of theirs stand in the way? If you are trying to change their minds, the starting point is to figure out where their minds are now.

Consider, for example, the negotiations between the United States and Iran in 1980 over the release of the fifty-two U.S. diplomats and embassy personnel held hostage in Tehran by student militants. While there were a host of serious obstacles to a resolution of this dispute, the problem is illuminated simply by looking at the choice of a typical student leader. The demand of the United States was clear: "Release the hostages." During much of 1980 each student leader's choice must have looked something like that illustrated by the balance sheet below.

4 Invent Options for Mutual Gain

The case of Israel and Egypt negotiating over who should keep how much of the Sinai Peninsula illustrates both a major problem in negotiation and a key opportunity.

The problem is a common one. There seems to be no way to split the pie that leaves both parties satisfied. Often you are negotiating along a single dimension, such as the amount of territory, the price of a car, the length of a lease on an apartment, or the size of a commission on a sale. At other times you face what appears to be an either/or choice that is either markedly favorable to you or to the other side. In a divorce settlement, who gets the house? Who gets custody of the children? You may see the choice as one between winning and losing—and neither side will agree to lose. Even if you do win and get the car for $12,000, the lease for five years, or the house and kids, you have a sinking feeling that they will not let you forget it. Whatever the situation, your choices seem limited.

The Sinai example also makes clear the opportunity. A creative option like a demilitarized Sinai can often make the difference between deadlock and agreement. One lawyer we know attributes his success directly to his ability to invent solutions advantageous to both his client and the other side. He expands the pie before dividing it. Skill at inventing options is one of the most useful assets a negotiator can have.

Yet all too ofen negotiators end up like the proverbial children

who quarreled over an orange. After they finally agreed to divide the orange in half, the first child took one half, ate the fruit, and threw away the peel, while the other threw away the fruit and used the peel from the second half in baking a cake. All too often negotiators "leave money on the table"—they fail to reach agreement when they might have, or the agreement they do reach could have been better for each side. Too many negotiations end up with half an orange for each side instead of the whole fruit for one and the whole peel for the other. Why?

DIAGNOSIS

As valuable as it is to have many options, people involved in a negotiation rarely sense a need for them. In a dispute, people usually believe that they know the right answer—their view should prevail. In a contract negotiation they are equally likely to believe that their offer is reasonable and should be adopted, perhaps with some adjustment in the price. All available answers appear to lie along a straight line between their position and yours. Often the only creative thinking shown is to suggest splitting the difference.

In most negotiations there are four major obstacles that inhibit the inventing of an abundance of options: (1) premature judgment; (2) searching for the single answer; (3) the assumption of a fixed pie; and (4) thinking that "solving their problem is their problem." In order to overcome these constraints, you need to understand them.

Premature Judgment

Inventing options does not come naturally. *Not* inventing is the normal state of affairs, even when you are outside a stressful negotiation. If you were asked to name the one person in the world most deserving of the Nobel Peace Prize, any answer you might start to propose would immediately encounter your reservations and doubts. How could you be sure that that person was

the *most* deserving? Your mind might well go blank, or you might throw out a few answers that would reflect conventional thinking: "Well, maybe the Pope, or the President."

Nothing is so harmful to inventing as a critical sense waiting to pounce on the drawbacks of any new idea. Judgment hinders imagination.

Under the pressure of a forthcoming negotiation, your critical sense is likely to be sharper. Practical negotiation appears to call for practical thinking, not wild ideas.

Your creativity may be even more stifled by the presence of those on the other side. Suppose you are negotiating with your boss over your salary for the coming year. You have asked for a $4,000 raise; your boss has offered you $1,500, a figure that you have indicated is unsatisfactory. In a tense situation like this you are not likely to start inventing imaginative solutions. You may fear that if you suggest some bright half-baked idea like taking half the increase in a raise and half in additional benefits, you might look foolish. Your boss might say, "Be serious. You know better than that. It would upset company policy. I am surprised that you even suggested it." If on the spur of the moment you invent a possible option of spreading out the raise over time, he may take it as an offer: "I'm prepared to start negotiating on that basis." Since he may take whatever you say as a commitment, you will think twice before saying anything.

You may also fear that by inventing options you will disclose some piece of information that will jeopardize your bargaining position. If you should suggest, for example, that the company help finance the house you are about to buy, your boss may conclude that you intend to stay and that you will in the end accept any raise in salary he is prepared to offer.

Searching for the single answer

In most people's minds, inventing simply is not part of the negotiating process. People see their job as narrowing the gap be-

tween positions, not broadening the options available. They tend to think, "We're having a hard enough time agreeing as it is. The last thing we need is a bunch of different ideas." Since the end product of negotiation is a single decision, they fear that free-floating discussion will only delay and confuse the process.

If the first impediment to creative thinking is premature criticism, the second is premature closure. By looking from the outset for the single best anwer, you are likely to short-circuit a wiser decision-making process in which you select from a large number of possible answers.

The assumption of a fixed pie

A third explanation for why there may be so few good options on the table is that each side sees the situation as essentially either/or—either I get what is in dispute or you do. A negotiation often appears to be a "fixed-sum" game; $100 more for you on the price of a car means $100 less for me. Why bother to invent if all the options are obvious and I can satisfy you only at my own expense?

Thinking that "solving their problem is their problem"

A final obstacle to inventing realistic options lies in each side's concern with only its own immediate interests. For a negotiator to reach an agreement that meets his own self-interest he needs to develop a solution which also appeals to the self-interest of the other. Yet emotional involvement on one side of an issue makes it difficult to achieve the detachment necessary to think up wise ways of meeting the interests of both sides: "We've got enough problems of our own; they can look after theirs." There also frequently exists a psychological reluctance to accord any legitimacy to the views of the other side; it seems disloyal to think up ways to satisfy them. Shortsighted self-concern thus leads a negotiator to develop only partisan positions, partisan arguments, and one-sided solutions.

PRESCRIPTION

To invent creative options, then, you will need (1) to separate the act of inventing options from the act of judging them; (2) to broaden the options on the table rather than look for a single answer; (3) to search for mutual gains; and (4) to invent ways of making their decisions easy. Each of these steps is discussed below.

Separate inventing from deciding

Since judgment hinders imagination, separate the creative act from the critical one; separate the process of thinking up possible decisions from the process of selecting among them. Invent first, decide later.

As a negotiator, you will of necessity do much inventing by yourself. It is not easy. By definition, inventing new ideas requires you to think about things that are not already in your mind. You should therefore consider the desirability of arranging an inventing or brainstorming session with a few colleagues or friends. Such a session can effectively separate inventing from deciding.

A brainstorming session is designed to produce as many ideas as possible to solve the problem at hand. The key ground rule is to postpone all criticism and evaluation of ideas. The group simply invents ideas without pausing to consider whether they are good or bad, realistic or unrealistic. With those inhibitions removed, one idea should stimulate another, like firecrackers setting off one another.

In a brainstorming session, people need not fear looking foolish since wild ideas are explicitly encouraged. And in the absence of the other side, negotiators need not worry about disclosing confidential information or having an idea taken as a serious commitment.

There is no right way to run a brainstorming session. Rather, you should tailor it to your needs and resources. In doing so, you may find it useful to consider the following guidelines.

Before brainstorming:

1. *Define your purpose.* Think of what you would like to walk out of the meeting with.

2. *Choose a few participants.* The group should normally be large enough to provide a stimulating interchange, yet small enough to encourage both individual participation and free-wheeling inventing—usually between five and eight people.

3. *Change the environment.* Select a time and place distinguishing the session as much as possible from regular discussions. The more different a brainstorming session seems from a normal meeting, the easier it is for participants to suspend judgment.

4. *Design an informal atmosphere.* What does it take for you and others to relax? It may be talking over a drink, or meeting at a vacation lodge in some picturesque spot, or simply taking off your tie and jacket during the meeting and calling each other by your first names.

5. *Choose a facilitator.* Someone at the meeting needs to facilitate—to keep the meeting on track, to make sure everyone gets a chance to speak, to enforce any ground rules, and to stimulate discussion by asking questions.

During brainstorming:

1. *Seat the participants side by side facing the problem.* The physical reinforces the psychological. Physically sitting side by side can reinforce the mental attitude of tackling a common problem together. People facing each other tend to respond personally and engage in dialogue or argument; people sitting side by side in a semicircle of chairs facing a blackboard tend to respond to the problem depicted there.

2. *Clarify the ground rules, including the no-criticism rule.* If the participants do not all know each other, the meeting begins with introductions all around, followed by clarification of the ground rules. Outlaw negative criticism of any kind.

Joint inventing produces new ideas because each of us

invents only within the limits set by our working assumptions. If ideas are shot down unless they appeal to all participants, the implicit goal becomes to advance an idea that no one will shoot down. If, on the other hand, wild ideas are encouraged, even those that in fact lie well outside the realm of the possible, the group may generate from these ideas other options that *are* possible and that no one would previously have considered.

Other ground rules you may want to adopt are to make the entire session off the record and to refrain from attributing ideas to any participant.

3. *Brainstorm.* Once the purpose of the meeting is clear, let your imaginations go. Try to come up with a long list of ideas, approaching the question from every conceivable angle.

4. *Record the ideas in full view.* Recording ideas either on a blackboard or, better, on large sheets of newsprint gives the group a tangible sense of collective achievement; it reinforces the no-criticism rule; it reduces the tendency to repeat; and it helps stimulate other ideas.

After brainstorming:

1. *Star the most promising ideas.* After brainstorming, relax the no-criticism rule in order to winnow out the most promising ideas. You are still not at the stage of deciding; you are merely nominating ideas worth developing further. Mark those ideas that members of the group think are best.

2. *Invent improvements for promising ideas.* Take one promising idea and invent ways to make it better and more realistic, as well as ways to carry it out. The task at this stage is to make the idea as attractive as you can. Preface constructive criticism with: "What I like best about that idea is . . . . Might it be better if . . . ?"

3. *Set up a time to evaluate ideas and decide.* Before you break up, draw up a selective and improved list of ideas from the session and set up a time for deciding which of these ideas to advance in your negotiation and how.

Consider brainstorming with the other side. Although more difficult than brainstorming with your own side, brainstorming with people from the other side can also prove extremely valuable. It is more difficult because of the increased risk that you will say something that prejudices your interests despite the rules established for a brainstorming session. You may disclose confidential information inadvertently or lead the other side to mistake an option you devise for an offer. Nevertheless, joint brainstorming sessions have the great advantages of producing ideas which take into account the interests of all those involved, of creating a climate of joint problem-solving, and of educating each side about the concerns of the other.

To protect yourself when brainstorming with the other side, distinguish the brainstorming session explicitly from a negotiating session where people state official views and speak on the record. People are so accustomed to meeting for the purpose of reaching agreement that any other purpose needs to be clearly stated.

To reduce the risk of appearing committed to any given idea, you can make a habit of advancing at least two alternatives at the same time. You can also put on the table options with which you obviously disagree. "I could give you the house for nothing, or you could pay me a million dollars in cash for it, or . . ." Since you are plainly not proposing either of these ideas, the ones which follow are labeled as mere possibilities, not proposals.

To get the flavor of a joint brainstorming session, let us suppose the leaders of a local union are meeting with the management of a coal mine to brainstorm on ways to reduce unauthorized one- or two-day strikes. Ten people—five from each side—are present, sitting around a table facing a blackboard. A neutral facilitator asks the participants for their ideas, and writes them down on the blackboard.

Facilitator: OK, now let's see what ideas you have for dealing with this problem of unauthorized work stoppages. Let's try to get ten ideas on the blackboard in five minutes. OK, let's start. Tom?

Tom (Union): Foremen ought to be able to settle a union member's grievance on the spot.

Facilitator: Good, I've got it down. Jim, you've got your hand up.

Jim (Management): A union member ought to talk to his foreman about a problem before taking any action that——

Tom (Union): They do, but the foremen don't listen.

Facilitator: Tom, please, no criticizing yet. We agreed to postpone that until later, OK? How about you, Jerry? You look like you've got an idea.

Jerry (Union): When a strike issue comes up, the union members should be allowed to meet in the bathhouse immediately.

Roger (Management): Management could agree to let the bathhouse be used for union meetings and could assure the employees' privacy by shutting the doors and keeping the foremen out.

Carol (Management): How about adopting the rule that there will be no strike without giving the union leaders and management a chance to work it out on the spot?

Jerry (Union): How about speeding up the grievance procedure and having a meeting within twenty-four hours if the foreman and union member don't settle it between themselves?

Karen (Union): Yeah. And how about organizing some joint training for the union members and the foremen on how to handle their problems together?

Phil (Union): If a person does a good job, let him know it.

John (Management): Establish friendly relations between union people and management people.

Facilitator: That sounds promising, John, but could you be more specific?

John (Management): Well, how about organizing a union-management softball team?

Tom (Union): And a bowling team too.

Roger (Management): How about an annual picnic get-together for all the families?

And on it goes, as the participants brainstorm lots of ideas. Many of the ideas might never have come up except in such a brainstorming session, and some of them may prove effective in reducing unauthorized strikes. Time spent brainstorming together is surely among the best-spent time in negotiation.

But whether you brainstorm together or not, separating the act of developing options from the act of deciding on them is extremely useful in any negotiation. Discussing options differs radically from taking positions. Whereas one side's position will conflict with another's, options invite other options. The very language you use differs. It consists of questions, not assertions; it is open, not closed: "One option is . . . . What other options have you thought of?" "What if we agreed to this?" "How about doing it this way?" "How would this work?" "What would be wrong with that?" Invent before you decide.

Broaden your options

Even with the best of intentions, participants in a brainstorming session are likely to operate on the assumption that they are really looking for the *one* best answer, trying to find a needle in a haystack by picking up every blade of hay.

At this stage in a negotiation, however, you should not be looking for the right path. You are developing room within which to negotiate. Room can be made only by having a substantial number of markedly different ideas—ideas on which you and the other side can build later in the negotiation, and among which you can then jointly choose.

A vintner making a fine wine chooses his grapes from a number of varieties. A baseball team looking for star players will send talent scouts to scour the local leagues and college teams all over the nation. The same principle applies to negotiation. The key to wise decision-making, whether in wine-making, baseball, or negotiation, lies in selecting from a great number and variety of options.

If you were asked who should receive the Nobel Peace Prize this year, you would do well to answer "Well, let's think about it" and generate a list of about a hundred names from diplomacy, business, journalism, religion, law, agriculture, politics, academia, medicine, and other fields, making sure to dream up a lot of wild ideas. You would almost certainly end up with a better decision this way than if you tried to decide right from the start.

A brainstorming session frees people to think creatively. Once freed, they need ways to think about their problems and to generate constructive solutions.

Multiply options by shuttling between the specific and the general: The Circle Chart. The task of inventing options involves four types of thinking. One is thinking about a particular problem—the factual situation you dislike, for example, a smelly, polluted river that runs by your land. The second type of thinking is descriptive analysis—you diagnose an existing situation in general terms. You sort problems into categories and tentatively suggest causes. The river water may have a high content of various chemicals, or too little oxygen. You may suspect various upstream industrial plants. The third type of thinking, again in general terms, is to consider what ought, perhaps, to be done. Given the diagnoses you have made, you look for prescriptions that theory may suggest, such as reducing chemical effluent, reducing diversions of water, or bringing fresh water from some other river. The fourth and final type of thinking is to come up with some specific and feasible suggestions for action. Who might do what tomorrow to put one of these general approaches into practice? For instance, the state

environmental agency might order an upstream industry to limit the quantity of chemical discharge.

The Circle Chart on the next page illustrates these four types of thinking and suggests them as steps to be taken in sequence. If all goes well, the specific action invented in this way will, if adopted, deal with your original problem.

The Circle Chart provides an easy way of using one good idea to generate others. With one useful action idea before you, you (or a group of you who are brainstorming) can go back and try to identify the general approach of which the action idea is merely one application. You can then think up other action ideas that would apply the same general approach to the real world. Similarly, you can go back one step further and ask, "If this theoretical approach appears useful, what is the diagnosis behind it?" Having articulated a diagnosis, you can generate other approaches for dealing with a problem analyzed in that way, and then look for actions putting these new approaches into practice. One good option on the table thus opens the door to asking about the theory that makes this option good and then using that theory to invent more options.

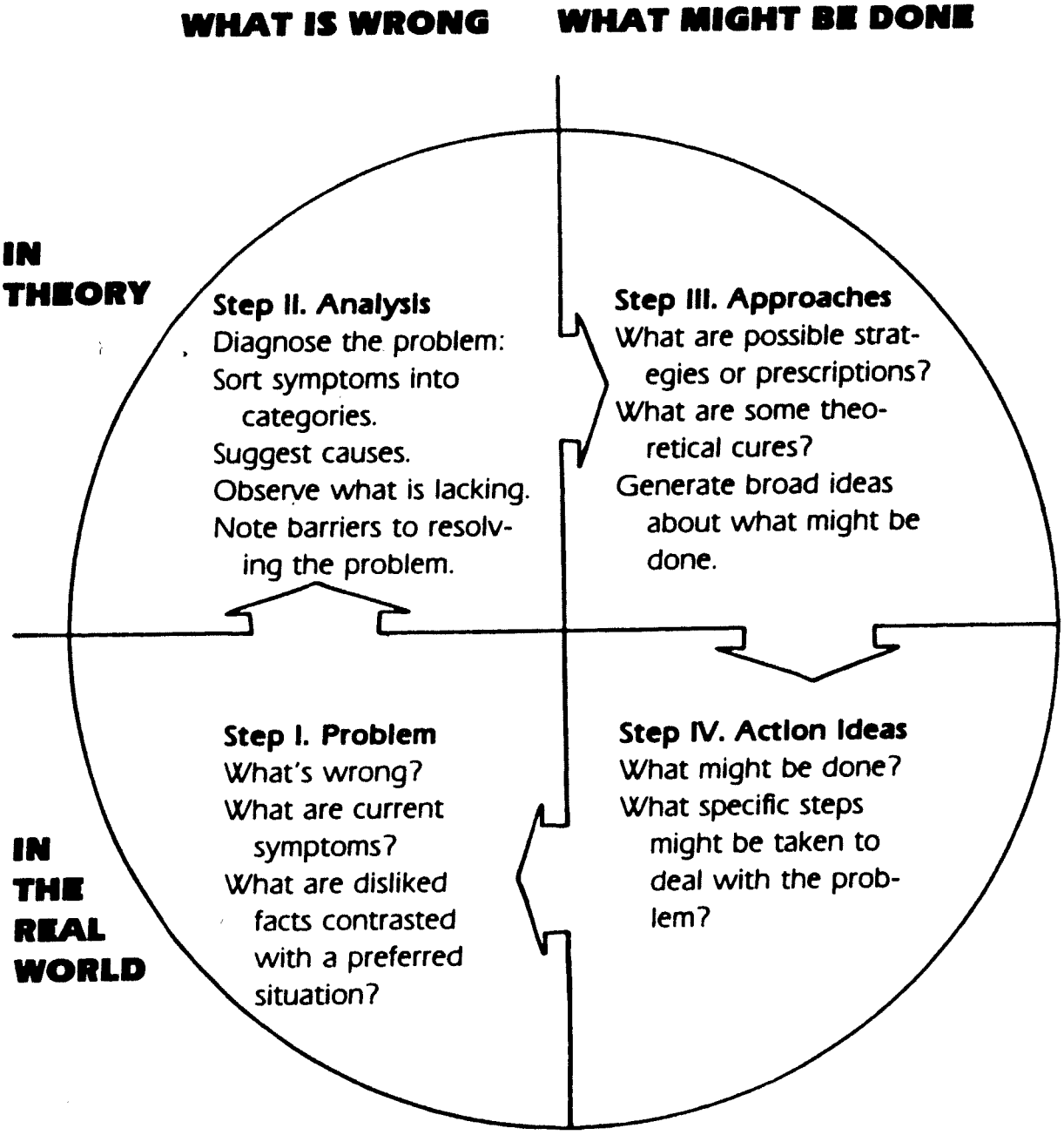
An example may illustrate the process. In dealing with the conflict over Northern Ireland, one idea might be to have Catholic and Protestant teachers prepare a common workbook on the history of Northern Ireland for use in the primary grades of both school systems. The book would present Northern Irish history as seen from different points of view and give the children exercises that involve role-playing and putting themselves in other people's shoes. To generate more ideas, you might start with this action suggestion and then search out the theoretical approach that underlies it. You might find such general propositions as:

"There should be some common educational content in the two school systems."

"Catholics and Protestants should work together on small, manageable projects."

CIRCLE CHART

The Four Basic Steps in Inventing Options



"Understanding should be promoted in young children before it is too late."

"History should be taught in ways that illuminate partisan perceptions."

Working with such theory you may be able to invent addi-

tional action suggestions, such as a joint Catholic and Protestant film project that presents the history of Northern Ireland as seen through different eyes. Other action ideas might be teacher exchange programs or some common classes for primary-age children in the two systems.

Look through the eyes of different experts. Another way to generate multiple options is to examine your problem from the perspective of different professions and disciplines.

In thinking up possible solutions to a dispute over custody of a child, for example, look at the problem as it might be seen by an educator, a banker, a psychiatrist, a civil rights lawyer, a minister, a nutritionist, a doctor, a feminist, a football coach, or one with some other special point of view. If you are negotiating a business contract, invent options that might occur to a banker, an inventor, a labor leader, a speculator in real estate, a stockbroker, an economist, a tax expert, or a socialist.

You can also combine the use of the Circle Chart with this idea of looking at a problem through the eyes of different experts. Consider in turn how each expert would diagnose the situation, what kinds of approaches each might suggest, and what practical suggestions would follow from those approaches.

Invent agreements of different strengths. You can multiply the number of possible agreements on the table by thinking of "weaker" versions you might want to have on hand in case a sought-for agreement proves beyond reach. If you cannot agree on substance, perhaps you can agree on procedure. If a shoe factory cannot agree with a wholesaler on who should pay for a shipment of damaged shoes, perhaps they can agree to submit the issue to an arbitrator. Similarly, where a permanent agreement is not possible, perhaps a provisional agreement is. At the very least, if you and the other side cannot reach first-order agreement, you can usually reach second-order agreement—that is, agree on where you disagree, so that you both know the issues in dispute, which are not always obvious. The pairs of adjectives below suggest potential agreements of differing "strengths":

Stronger	Weaker
Substantive	Procedural
Permanent	Provisional
Comprehensive	Partial
Final	In principle
Unconditional	Contingent
Binding	Nonbinding
First-order	Second-order

Change the scope of a proposed agreement. Consider the possibility of varying not only the strength of the agreement but also its scope. You could, for instance, "fractionate" your problem into smaller and perhaps more manageable units. To a prospective editor for your book, you might suggest: "How about editing the first chapter for $300, and we'll see how it goes?" Agreements may be partial, involve fewer parties, cover only selected subject matters, apply only to a certain geographical area, or remain in effect for only a limited period of time.

It is also provocative to ask how the subject matter might be enlarged so as to "sweeten the pot" and make agreement more attractive. The dispute between India and Pakistan over the waters of the Indus River became more amenable to settlement when the World Bank entered the discussions; the parties were challenged to invent new irrigation projects, new storage dams, and other engineering works for the benefit of both nations, all to be funded with the assistance of the Bank.

Look for mutual gain

The third major block to creative problem-solving lies in the assumption of a fixed pie: the less for you, the more for me. Rarely if ever is this assumption true. First of all, both sides can always be worse off than they are now. Chess looks like a zero-sum game; if one loses, the other wins—until a dog trots by and knocks over the table, spills the beer, and leaves you both worse off than before.

Even apart from a shared interest in averting joint loss, there almost always exists the possibility of joint gain. This may take the form of developing a mutually advantageous relationship, or of satisfying the interests of each side with a creative solution.

Identify shared interests. In theory it is obvious that shared interests help produce agreement. By definition, inventing an idea which meets shared interests is good for you and good for them. In practice, however, the picture seems less clear. In the middle of a negotiation over price, shared interests may not appear obvious or relevant. How then can looking for shared interests help?

Let's take an example. Suppose you are the manager of an oil refinery. Call it Townsend Oil. The mayor of Pageville, the city where the refinery is located, has told you he wants to raise the taxes Townsend Oil pays to Pageville from one million dollars a year to two million. You have told him that you think one million a year is quite sufficient. The negotiation stands there: he wants more, you want to pay what you have been paying. In this negotiation, a typical one in many ways, where do shared interests come into play?

Let's take a closer look at what the mayor wants. He wants money—money undoubtedly to pay for city services, a new civic center, perhaps, and to relieve the ordinary taxpayers. But the city cannot obtain all the money it needs for now and for the future just from Townsend Oil. They will look for money from the petrochemical plant across the street, for example, and, for the future, from new businesses and from the expansion of existing businesses. The mayor, a businessman himself, would also like to encourage industrial expansion and attract new businesses that will provide new jobs and strengthen Pageville's economy.

What are your company's interests? Given the rapid changes in the technology of refining oil, and the antiquated condition of your refinery, you are presently considering a major refurbishment

and expansion of the plant. You are concerned that the city may later increase its assessment of the value of the expanded refinery, thus making taxes even higher. Consider also that you have been encouraging a plastics plant to locate itself nearby to make convenient use of your product. Naturally, you worry that the plastics plant will have second thoughts once they see the city increasing taxes.

The shared interests between the mayor and you now become more apparent. You both agree on the goals of fostering industrial expansion and encouraging new industries. If you did some inventing to meet these shared goals, you might come up with several ideas: a tax holiday of seven years for new industries, a joint publicity campaign with the Chamber of Commerce to attract new companies, a reduction in taxes for existing industries that choose to expand. Such ideas might save you money while filling the city's coffers. If on the other hand the negotiation soured the relationship between company and town, both would lose. You might cut back on your corporate contributions to city charities and school athletics. The city might become unreasonably tough on enforcing the building code and other ordinances. Your personal relationship with the city's political and business leaders might grow unpleasant. The relationship between the sides, often taken for granted and overlooked, frequently outweighs in importance the outcome of any particular issue.

As a negotiator, you will almost always want to look for solutions that will leave the other side satisifed as well. If the customer feels cheated in a purchase, the store owner has also failed; he may lose a customer and his reputation may suffer. An outcome in which the other side gets absolutely nothing is worse for you than one which leaves them mollified. In almost every case, your satisfaction depends to a degree on making the other side sufficiently content with an agreement to want to live up to it.

Three points about shared interests are worth remembering.

First, shared interests lie latent in every negotiation. They may not be immediately obvious. Ask yourself: Do we have a shared interest in preserving our relationship? What opportunities lie ahead for cooperation and mutual benefit? What costs would we bear if negotiations broke off? Are there common principles, like a fair price, that we both can respect?

Second, shared interests are opportunities, not godsends. To be of use, you need to make something out of them. It helps to make a shared interest explicit and to formulate it as a shared *goal.* In other words, make it concrete and future-oriented. As manager of Townsend Oil, for example, you could set a joint goal with the mayor of bringing five new industries into Pageville within three years. The tax holiday for new industries would then represent not a concession by the mayor to you but an action in pursuit of your shared goal.

Third, stressing your shared interests can make the negotiation smoother and more amicable. Passengers in a lifeboat afloat in the middle of the ocean with limited rations will subordinate their differences over food in pursuit of their shared interest in getting to shore.

Dovetail differing interests. Consider once again the two children quarreling over an orange. Each child wanted the orange, so they split it, failing to realize that one wanted only the fruit to eat and the other only the peel for baking. In this case as in many others, a satisfactory agreement is made possible because each side wants *different* things. This is genuinely startling if you think about it. People generally assume that differences between two parties create the problem. Yet differences can also lead to a solution.

Agreement is often based on disagreement. It is as absurd to think, for example, that you should always begin by reaching agreement on the facts as it is for a buyer of stock to try to convince the seller that the stock is likely to go up. If they did agree that the stock would go up, the seller would probably not sell. What makes a deal likely is that the buyer believes the price will go up

6 What If They Are More Powerful?

(*Develop Your BATNA—Best Alternative To a Negotiated Agreement*)

Of what use is talking about interests, options, and standards if the other side has a stronger bargaining position? What do you do if the other side is richer or better connected, or if they have a larger staff or more powerful weapons?

No method can guarantee success if all the leverage lies on the other side. No book on gardening can teach you to grow lilies in a desert or cactus in a swamp. If you enter an antique store to buy a sterling silver George IV tea set worth thousands of dollars and all you have is one hundred-dollar bill, you should not expect skillful negotiation to overcome the difference. In any negotiation there exist realities that are hard to change. In response to power, the most any method of negotiation can do is to meet two objectives: *first,* to protect you against making an agreement you should reject and *second,* to help you make the most of the assets you do have so that any agreement you reach will satisfy your interests as well as possible. Let's take each objective in turn.

Protecting yourself

When you are trying to catch an airplane your goal may seem tremendously important; looking back on it, you see you could have caught the next plane. Negotiation will often present you with a similar situation. You will worry, for instance, about failing to reach agreement on an important business deal in which you have invested a great deal of yourself. Under these conditions, a major danger is that you will be too accommodating to the views

of the other side—too quick to go along. The siren song of "Let's all agree and put an end to this" becomes persuasive. You may end up with a deal you should have rejected.

The costs of using a bottom line. Negotiators commonly try to protect themselves against such an outcome by establishing in advance the worst acceptable outcome—their "bottom line." If you are buying, a bottom line is the highest price you would pay. If you are selling, a bottom line is the lowest amount you would accept. You and your spouse might, for example, ask $200,000 for your house and agree between yourselves to accept no offer below $160,000.

Having a bottom line makes it easier to resist pressure and temptations of the moment. In the house example, it might be impossible for a buyer to pay more than $144,000; everyone involved may know that you bought the house last year for only $135,000. In this situation, where you have the power to produce agreement and the buyer does not, the brokers and anyone else in the room may turn to you. Your predetermined bottom line may save you from making a decision you would later regret.

If there is more than one person on your side, jointly adopting a bottom line helps ensure that no one will indicate to the other side that you might settle for less. It limits the authority of a lawyer, broker, or other agent. "Get the best price you can, but you are not authorized to sell for less than $160,000," you might say. If your side is a loose coalition of newspaper unions negotiating with an association of publishers, agreement on a bottom line reduces the risk that one union will be split off by offers from the other side.

But the protection afforded by adopting a bottom line involves high costs. It limits your ability to benefit from what you learn during negotiation. By definition, a bottom line is a position that is not to be changed. To that extent you have shut your ears, deciding in advance that nothing the other party says could cause you to raise or lower that bottom line.

A bottom line also inhibits imagination. It reduces the incen-

tive to invent a tailor-made solution which would reconcile differing interests in a way more advantageous for both you and them. Almost every negotiation involves more than one variable. Rather than simply selling your place for $160,000, you might serve your interests better by settling for $135,000 with a first refusal on resale, a delayed closing, the right to use the barn for storage for two years, and an option to buy back two acres of the pasture. If you insist on a bottom line, you are not likely to explore an imaginative solution like this. A bottom line—by its very nature rigid—is almost certain to be *too* rigid.

Moreover, a bottom line is likely to be set too high. Suppose you are sitting around the breakfast table with your family trying to decide the lowest price you should accept for your house. One family member suggests $100,000. Another replies, "We should get at least $140,000." A third chimes in, "$140,000 for *our* house? That would be a steal. It's worth at least $200,000." Who sitting at the table will object, knowing they will benefit from a higher price? Once decided upon, such a bottom line may be hard to change and may prevent your selling the house when you should. Under other circumstances a bottom line may be too low; rather than selling at such a figure, you would have been better off renting.

In short, while adopting a bottom line may protect you from accepting a very bad agreement, it may keep you both from inventing and from agreeing to a solution it would be wise to accept. An arbitrarily selected figure is no measure of what you should accept.

Is there an alternative to the bottom line? Is there a measure for agreements that will protect you against both accepting an agreement you should reject and rejecting an agreement you should accept? There is.

Know your BATNA. When a family is deciding on the minimum price for their house, the right question for them to ask is not what they "ought" to be able to get, but what they will do if by a certain time they have not sold the house. Will they keep it

on the market indefinitely? Will they rent it, tear it down, turn the land into a parking lot, let someone else live in it rent-free on condition they paint it, or what? Which of those alternatives is most attractive, all things considered? And how does that alternative compare with the best offer received for the house? It may be that one of those alternatives is more attractive than selling the house for $160,000. On the other hand, selling the house for as little as $124,000 may be better than holding on to it indefinitely. It is most unlikely that any arbitrarily selected bottom line truly reflects the family's interests.

The reason you negotiate is to produce something better than the results you can obtain without negotiating. What are those results? What is that alternative? What is your BATNA—your Best Alternative To a Negotiated Agreement? *That* is the standard against which any proposed agreement should be measured. That is the only standard which can protect you both from accepting terms that are too unfavorable and from rejecting terms it would be in your interest to accept.

Your BATNA not only is a better measure but also has the advantage of being flexible enough to permit the exploration of imaginative solutions. Instead of ruling out any solution which does not meet your bottom line, you can compare a proposal with your BATNA to see whether it better satisfies your interests.

The insecurity of an unknown BATNA. If you have not thought carefully about what you will do if you fail to reach an agreement, you are negotiating with your eyes closed. You may, for instance, be too optimistic and assume that you have many other choices: other houses for sale, other buyers for your secondhand car, other plumbers, other jobs available, other wholesalers, and so on. Even when your alternative is fixed, you may be taking too rosy a view of the consequences of not reaching agreement. You may not be appreciating the full agony of a lawsuit, a contested divorce, a strike, an arms race, or a war.

One frequent mistake is psychologically to see your alternatives in the aggregate. You may be telling yourself that if you do

not reach agreement on a salary for this job, you could always go to California, or go South, or go back to school, or write, or work on a farm, or live in Paris, or do something else. In your mind you are likely to find the sum of these alternatives more attractive than working for a specific salary in a particular job. The difficulty is that you cannot have the sum total of all those other alternatives; if you fail to reach agreement, you will have to choose just one.

In most circumstances, however, the greater danger is that you are *too* committed to reaching agreement. Not having developed any alternative to a negotiated solution, you are unduly pessimistic about what would happen if negotiations broke off.

As valuable as knowing your BATNA may be, you may hesitate to explore alternatives. You hope this buyer or the next will make you an attractive offer for the house. You may avoid facing the question of what you will do if no agreement is reached. You may think to yourself, "Let's negotiate first and see what happens. If things don't work out, then I'll figure out what to do." But having at least a tentative answer to the question is absolutely essential if you are to conduct your negotiations wisely. Whether you should or should not agree on something in a negotiation depends entirely upon the attractiveness to you of the best available alternative.

Formulate a trip wire. Although your BATNA is the true measure by which you should judge any proposed agreement, you may want another test as well. In order to give you early warning that the content of a possible agreement is beginning to run the risk of being too unattractive, it is useful to identify one far from perfect agreement that is better than your BATNA. Before accepting any agreement worse than this trip-wire package, you should take a break and reexamine the situation. Like a bottom line, a trip wire can limit the authority of an agent. "Don't sell for less than $158,000, the price I paid plus interest, until you've talked to me."

A trip wire should provide you with some margin in reserve. If after reaching the standard reflected in your trip wire you decide

to call in a mediator, you have left him with something on your side to work with. You still have some room to move.

Making the most of your assets

Protecting yourself against a bad agreement is one thing. Making the most of the assets you have in order to produce a good agreement is another. How do you do this? Again the answer lies in your BATNA.

The better your BATNA, the greater your power. People think of negotiating power as being determined by resources like wealth, political connections, physical strength, friends, and military might. In fact, the relative negotiating power of two parties depends primarily upon how attractive to each is the option of not reaching agreement.

Consider a wealthy tourist who wants to buy a small brass pot for a modest price from a vendor at the Bombay railroad station. The vendor may be poor, but he is likely to know the market. If he does not sell the pot to this tourist, he can sell it to another. From his experience he can estimate when and for how much he could sell it to someone else. The tourist may be wealthy and "powerful," but in this negotiation he will be weak indeed unless he knows approximately how much it would cost and how difficult it would be to find a comparable pot elsewhere. He is almost certain either to miss his chance to buy such a pot or to pay too high a price. The tourist's wealth in no way strengthens his negotiating power. If apparent, it *weakens* his ability to buy the pot at a low price. In order to convert that wealth into negotiating power, the tourist would have to apply it to learn about the price at which he could buy an equally or more attractive brass pot somewhere else.

Think for a moment about how you would feel walking into a job interview with no other job offers—only some uncertain leads. Think how the talk about salary would go. Now contrast that with how you would feel walking in with two other job offers.

How would that salary negotiation proceed? The difference is power.

What is true for negotiations between individuals is equally true for negotiations between organizations. The relative negotiating power of a large industry and a small town trying to raise taxes on a factory is determined not by the relative size of their respective budgets, or their political clout, but by each side's best alternative. In one case, a small town negotiated a company with a factory just outside the town limits from a "goodwill" payment of $300,000 a year to one of $2,300,000 a year. How?

The town knew exactly what it would do if no agreement was reached: It would expand the town limits to include the factory and then tax the factory the full residential rate of some $2,500,000 a year. The corporation had committed itself to keeping the factory; it had developed no alternative to reaching agreement. At first glance the corporation seemed to have a great deal of power. It provided most of the jobs in the town, which was suffering economically; a factory shutdown or relocation would devastate the town. And the taxes the corporation was already paying helped provide the salaries of the very town leaders who were demanding more. Yet all of these assets, because they were not converted into a good BATNA, proved of little use. Having an attractive BATNA, the small town had more ability to affect the outcome of the negotiation than did one of the world's largest corporations.

Develop your BATNA. Vigorous exploration of what you will do if you do not reach agreement can greatly strengthen your hand. Attractive alternatives are not just sitting there waiting for you; you usually have to develop them. Generating possible BATNAs requires three distinct operations: (1) inventing a list of actions you might conceivably take if no agreement is reached; (2) improving some of the more promising ideas and converting them into practical alternatives; and (3) selecting, tentatively, the one alternative that seems best.

The first operation is inventing. If, by the end of the month,

Company X does not make you a satisfactory job offer, what are some things you might do? Take a job with Company Y? Look in another city? Start a business on your own? What else? For a labor union, alternatives to a negotiated agreement would presumably include calling a strike, working without a contract, giving a sixty-day notice of a strike, asking for a mediator, and calling on union members to "work to rule."

The second stage is to improve the best of your ideas and turn the most promising into real alternatives. If you are thinking about working in Chicago, try to turn that idea into at least one job offer there. With a Chicago job offer in hand (or even having discovered that you are unable to produce one) you are much better prepared to assess the merits of a New York offer. While a labor union is still negotiating, it should convert the ideas of calling in a mediator and of striking into drafts of specific operational decisions ready for execution. The union might, for instance, take a vote of its membership to authorize a strike if a settlement is not achieved by the time the contract expires.

The final step in developing a BATNA is selecting the best among the alternatives. If you do not reach agreement in the negotiations, which of your realistic alternatives do you now plan to pursue?

Having gone through this effort, you now have a BATNA. Judge every offer against it. The better your BATNA, the greater your ability to improve the terms of any negotiated agreement. Knowing what you are going to do if the negotiation does not lead to agreement will give you additional confidence in the negotiating process. It is easier to break off negotiations if you know where you're going. The greater your willingness to break off negotiations, the more forcefully you can present your interests and the basis on which you believe an agreement should be reached.

The desirability of disclosing your BATNA to the other side depends upon your assessment of the other side's thinking. If your BATNA is extremely attractive—if you have another customer

waiting in the next room—it is in your interest to let the other side know. If they think you lack a good alternative when in fact you have one, then you should almost certainly let them know. However, if your best alternative to a negotiated agreement is worse for you than they think, disclosing it will weaken rather than strengthen your hand.

Consider the other side's BATNA. You should also think about the alternatives to a negotiated agreement available to the other side. They may be unduly optimistic about what they can do if no agreement is reached. Perhaps they have a vague notion that they have a great many alternatives and are under the influence of their cumulative total.

The more you can learn of their alternatives, the better prepared you are for negotiation. Knowing their alternatives, you can realistically estimate what you can expect from the negotiation. If they appear to overestimate their BATNA, you will want to lower their expectations.

Their BATNA may be better for them than any fair solution you can imagine. Suppose you are a community group concerned about the potential noxious gases to be emitted by a power plant now under construction. The power company's BATNA is either to ignore your protests altogether or to keep you talking while they finish building the plant. To get them to take your concerns seriously, you may have to file suit seeking to have their construction permit revoked. In other words, if their BATNA is so good they don't see any need to negotiate on the merits, consider what you can do to change it.

If both sides have attractive BATNAs, the best outcome of the negotiation—for both parties—may well be not to reach agreement. In such cases a successful negotiation is one in which you and they amicably and efficiently discover that the best way to advance your respective interests is for each of you to look elsewhere and not to try further to reach agreement.

When the other side is powerful

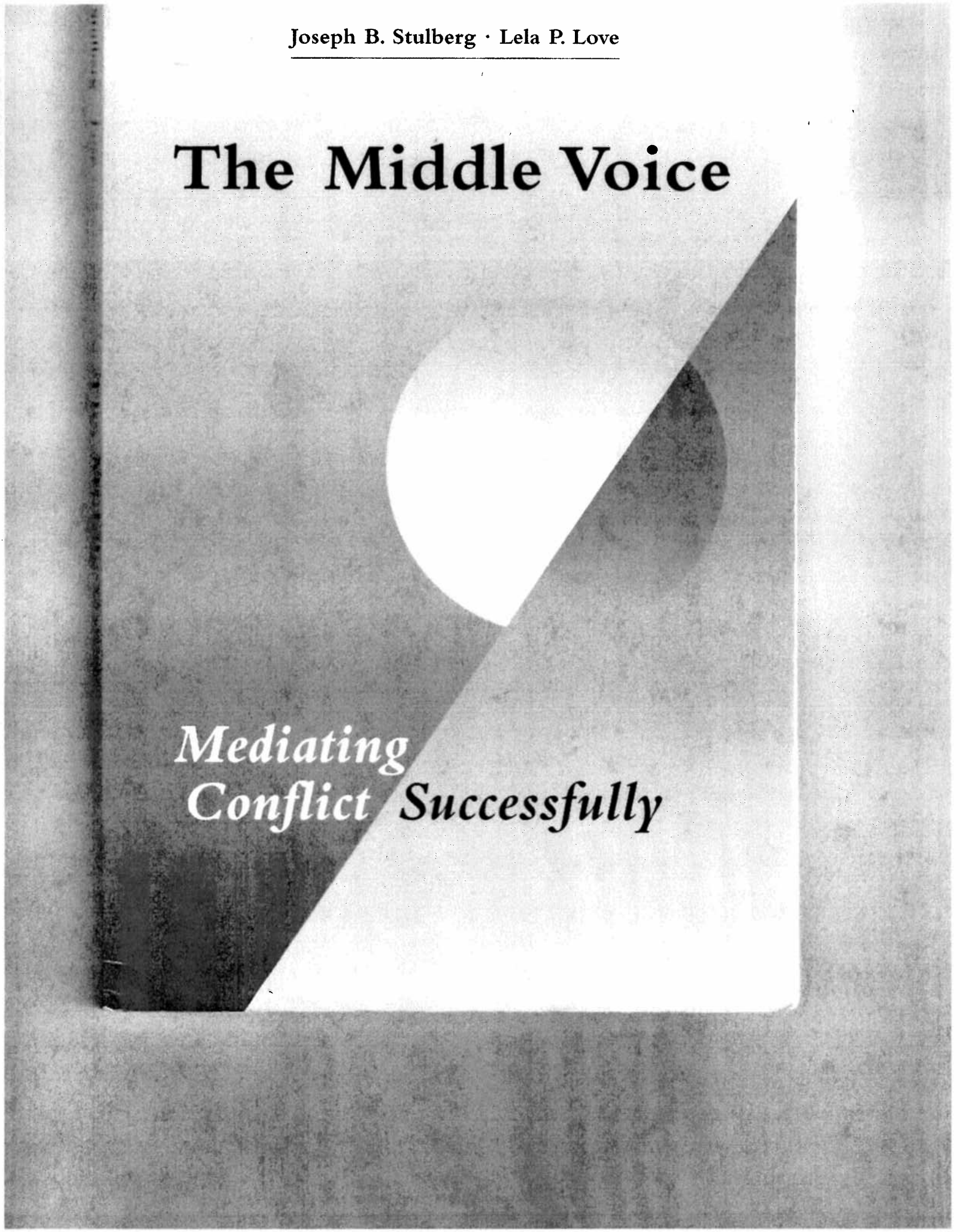
If the other side has big guns, you do not want to turn a negotiation into a gunfight. The stronger they appear in terms of physical or economic power, the more you benefit by negotiating on the merits. To the extent that they have muscle and you have principle, the larger a role you can establish for principle the better off you are.

Having a good BATNA can help you negotiate on the merits. You can convert such resources as you have into effective negotiating power by developing and improving your BATNA. Apply knowledge, time, money, people, connections, and wits into devising the best solution for you independent of the other side's assent. The more easily and happily you can walk away from a negotiation, the greater your capacity to affect its outcome.

Developing your BATNA thus not only enables you to determine what is a minimally acceptable agreement, it will probably raise that minimum. Developing your BATNA is perhaps the most effective course of action you can take in dealing with a seemingly more powerful negotiator.

Joseph B. Stulberg · Lela P. Love

The Middle Voice



Mediating Conflict Successfully

7

Accumulate Information

If we could read the secret history of our enemies, we would find sorrow and suffering enough to dispel all hostility.

Henry Wadsworth Longfellow

The parties have lived with their conflict. They are familiar with its dynamics and tensions. They feel its pressure. The mediator must learn this history as rapidly as possible.

The mediator gathers information with a purpose. He wants to understand the dispute—how the parties experience the "story" they tell. He wants to know what concerns, both substantive and emotional, must be addressed for all parties to settle their dispute. The mediator will not learn everything there is to know about the people he is serving. His interaction with the parties is relatively brief; he will get a glimpse of only a small slice of their lives. So he focuses on discovering information that will further a constructive dialogue. He prompts parties to describe the situation as precisely as possible so that everyone—most importantly, the other side—has a full understanding of the challenge. He targets the concrete matters in which they are entangled—the issues. He elicits common interests. He extracts rules, principles, values, law and customs that are important to the parties. He strives to have the parties articulate their feelings and identify their options if the dispute does not settle.

To accumulate information effectively, mediators must do five things:

1. Listen carefully.
2. Record notes selectively.
3. Ask helpful questions.
4. Support communication in nonverbal and verbal ways.
5. Mine the conversation for "gold."

Listen Carefully

Listening effectively to what someone is saying consists of more than just hearing sounds. One listens to understand the message the speaker is trying to communicate. To listen well is to capture the entire message. Listening skills prevent one from short-circuiting or contaminating that message-sending process. Here are some guidelines that a mediator can follow to insure he receives all that is sent:

Concentrate. Minimize distractions: wear comfortable attire; eat prior to mediating so hunger does not distract you; put extraneous papers and cell phones away. Take notes selectively so as not to interfere with the capacity to listen.

Maintain Focus. People cannot talk as fast as others can listen. A mediator should not use the overlapping time to daydream or worry about something else. Good posture—with the mediator's body oriented towards the speaker and arms relaxed and open—is helpful.

Be patient. One cannot hear, let alone be certain he has captured what someone else is saying, if that person is not given a chance to complete his statements. Sometimes parties repeat themselves. Some speakers are hard to understand. A patient listener allows a speaker the freedom to tell his story—even if the telling is less than perfect.

Don't interrupt. One cannot listen while talking. It is tempting to interrupt a party by asking questions or providing information, but such behavior both disrupts a speaker's chain of thought and exhibits unhelpful conduct that other participants might copy.

Understand without judgment. Often one stops listening because he does not like what is being said, who is saying it, or the way it is being said. He assumes he knows the argument, and, since he disagrees with it, stops listening. A mediator cannot argue mentally with the speaker. Understand first; evaluate later—much later.

Record Notes Selectively

While listening attentively, it is appropriate for a mediator to take notes. But they are for his purposes only. Any final document reflecting the agreement of the parties will be separate. That fact clarifies the purpose of a mediator's note taking: he records only information that will be useful in helping the parties understand one another better, structure the discussion, and capture proposals and agreement terms. If the mediator's memory is so keen that he can remember everything that was said—and by whom and when—, then he has no need to take any notes at all.

What does a mediator record in his notes? He jots down the names of everyone in the room so that he can address people by name. He captures parties' common interests to provide aspirational goals for the negotiation. He records the issues in dispute that have been identified because he wants everyone to agree on what must be resolved. At times, he may record the precise wording of proposals so that there is no ambiguity. A mediator notes the order in which the parties present their settlement proposals so he can detect whether they are displaying flexibility and movement toward agreement or are escalating their demands. It is important for a mediator to note what has been discussed with only one party in a separate session so that he will not breach confidences. For all these purposes, note taking is useful.

Taking notes, however, is not the same as making a verbatim transcript of the proceedings. By its very nature, note taking is selective. A mediator does not, and should not, take down everything that is said. We often believe that by taking notes as someone talks, we will listen more attentively, demonstrate to the speaker our keen interest in what he is saying, and affirm the seriousness of the occasion by recording it in tangible form. Rubbish!

When a mediator writes things down, he disrupts eye contact with the speaker, thereby losing the ability to capture what is being communicated nonverbally. A mediator can become so preoccupied with his notes that his listening loses pace with the speaker's presentation. Eventually he falls behind and has to interrupt to ask questions that have already been answered. Since a mediator, at first, does not know where the presentation is leading, he has no idea which matters are relevant to the dispute and which are not. In his desire not to omit anything that might be important, he may record almost everything that is said, thereby converting his notes into the very transcript that he did not want to create.

Most dangerous of all, by taking too many notes, the mediator may become a captive of the parties. Suppose, for example, that during the course of a mediation involving two neighbors, one states that his neighbor's seventeen-year-old son, when his parents are not around, has loud parties where he and his friends smoke marijuana. If the mediator writes that down, what will the mother of the seventeen-year-old now believe about the mediator? She will be convinced, with some justification, that the mediator believes that her son has committed a criminal offense. What will the parent do to protect her son's reputation? She will deny the accuracy of the allegations and then retaliate by charging her neighbor with having engaged in illegal

conduct, whether such a charge is true or false; the parent will then wait for the mediator to demonstrate his neutrality by recording her accusations as well. This is a prescription for the discussion to disintegrate rapidly into a shouting match.

A mediator wants note taking to assist, not undercut, his efforts to help the parties reach agreement. He must trust his memory and listen attentively. If he does not remember something that later becomes important, he can always ask the party to restate the point.

Ask Helpful Questions

Most people, once they say everything they need to say—and feel heard—, become more open to hearing others. Many people, if they talk long enough, say things that are inconsistent with their earlier remarks or suggest areas of possible accommodation. Those are levers the mediator can use to encourage shifts and settlements. Thus, the mediator's task is clear: keep people talking. Different forms of questions elicit different information and emotional responses. The mediator wants to develop a rich information base in a short period of time in a climate that invites conversation. What types of questions are most helpful to achieve that?

Start-Up Questions

How can a mediator get people talking, particularly if someone is reluctant, uncomfortable with language, hesitant, nervous or shy? He asks questions that invite the party to discuss specific events or situations with which the party is familiar. These are questions that should be easy for her to answer—in the sense that the party knows the information to share. Questions that include the terms *what, who, when,* and *where* are particularly effective start-up questions:

- Please begin by telling us *what* happened that led to your bringing this concern about your supervisor, Mr. Atkins, to mediation?
- *Why* don't you start by telling me *when* you became a tenant in Mr. Keating's building?
- Could you tell me *where* the incident we will discuss occurred?

These questions force the speaker to start sharing information, but they are not threatening or accusatory in tone. They should help open the door of discussion so that the mediator can quickly follow up with open-ended questions.

Open-Ended Questions

Open-ended questions let the party respond by elaborating on a subject in his own words. Questions that include *what*, as well as phrases such as *tell me more*, generate this response:

- Could you please explain *what* brings you here today?
- *What* happened next?
- Could you *elaborate* on that, please?

Open-ended questions elicit the most information in the shortest amount of time. The parties know best what has happened, or at least what they believe has happened. The mediator's task is to get them to describe it. Using open-ended questions accelerates that process.

One way people reveal their priorities is through their choice of words and topics and the emotions they use to express themselves. The mediator cannot learn whether someone is angry, upset, committed, or nonchalant if all the person does is answer "yes" or "no". Open-ended questions also serve the parties' interests in having the mediator treat them in a dignified, respectful manner, as questions in this form give people a chance to explain the dispute in a way that is most comfortable for them.

Open-Ended but Focused Questions

These questions invite persons to answer in their own words but they target the subject matter. After the parties' initial presentations, the mediator may use such questions to focus the parties' comments on things related to the issues in dispute. For instance, he may ask:

- Will you please tell me more about *the party that occurred last night*?
- Will you tell me *how you conducted the research for this project*?

In so doing, the mediator directs the party to focus his remarks on a specific subject rather than wandering aimlessly.

Justification Questions

These are *why* questions:

- Can you tell me *why* that wage proposal is unacceptable?
- Could you explain *why* you object to Marco's proposed division of project responsibilities?

There are two levels of response to such questions: substantive and perceptual. Both are important to a mediator.

The substantive response displays the person's rational justification for adopting or rejecting the proposed solution. "If X is the problem, then Y is one solution because it relates logically to X in the following way.... But we prefer solution Z to Y because it advances the welfare of our group significantly more than does solution Y, and the cost of solution Z to you is only slightly more than what you would incur under solution Y." The mediator presses to make certain the party's position is internally consistent and rationally persuasive. A credible response either solves the issues or highlights those concerns that the settlement terms must satisfactorily address.

The perceptual response forces the party to reveal whether the grounds for promoting or resisting a proposed solution relate to the personalities of the parties rather than the logic of the solution. Parties might find a solution plausible but resist it because of who suggested it ("If the finance department proposed it, there must be a catch someplace"); the need to take time to convince others ("I understand that you want to save money by buying new software and state-of-the-art robots. But that will result in twenty-seven persons in my unit losing their jobs with no prospect of being employed elsewhere in the company. I can't go along with this proposal until I've had some time to talk with my people and prepare them for this move—the last thing we need is a protest and a work slowdown"); or the fears, concerns, or dreams that the proposal does not address ("If we agree to settle this job discrimination complaint rather than contest it through the administrative hearing and court process, how will we guard against setting a precedent that gives us the reputation of settling any complaint, however frivolous it might be?"). If the mediator gets this type of response to the question of "Why?" or "Why not?," then he must adopt a strategy to meet it, for agreement at the substantive level is a necessary but not sufficient condition for settlement; parties must be *psychologically* ready to settle as well.

Leading Questions

A leading question has two components: first, the answer is contained in the statement of the question; second, the person who is asked the question can respond only by saying "yes" or "no." Here are some examples:

- You were late in submitting the report, weren't you?
- You left the babies unattended while you were playing tennis, didn't you?
- When you leased the apartment to Mr. Domrin, all the appliances were in working order, weren't they?

A person who asks a leading question accomplishes one of two goals: either he makes the person to whom the question is put defensive, flustered, and uneasy, or he makes sure that he, the questioner, tells the "facts" rather than allowing the person being questioned to do so.

One can readily understand why a lawyer conducting a cross-examination asks leading questions. The questions contain conclusions and are accusatory in tone. They are not designed to foster discussion. They do not generate new ideas. They are designed to establish the anchor points around which all consequences must pivot.

As a rule, a mediator should not pose leading questions. It is a mistake for a mediator to believe he can save time or focus discussion by asking leading questions. Parties to such a verbal onslaught become defensive, tense, and no longer consider the mediator neutral. Such a reaction impedes discussions rather than enriches them.

There are, however, some occasions when a mediator may want to ask leading questions. Such questions may be appropriate in a private meeting with a party—a caucus. How a mediator occasionally might use leading questions to generate movement toward settlement will be addressed in chapter 10 on caucusing.

A mediator always acts purposefully, and this includes asking questions. He must think not only about what information he is trying to get but also about how he formulates questions to get it. He does not ask many questions. Particularly in the early stages of gathering the facts, the mediator must get the parties to present the maximum amount of information with the least possible interference.

Support Conversation

There are both nonverbal and verbal ways for a mediator to encourage conversation and check his understanding of what has been said, although he must always be sensitive to when and where he does it.

Nonverbal Communication

Not all communication is verbal. By turning his chair and facing a speaker, the mediator reinforces his commitment to give the speaker undivided attention. By burying his head in his notes and gazing out the window while a party is talking, he communicates a lack of interest in what the speaker is saying.

Likewise, a mediator's physical appearance communicates a sense of respect or disrespect for the parties and their problems.

A mediator communicates the need for patience by not interrupting others. If he stands up while the parties are sitting and tells them not to interrupt each other again, he signals forcefully to the parties that their verbal exchanges have exceeded acceptable limits. He communicates a sense of urgency by glancing down at his watch before asking a question. If the mediator is the only person in the room who is not laughing at a joke that someone has told, people will wonder whether he is also communicating an inability to appreciate humor or empathize with other feelings such as sorrow, pain, or loneliness.

A mediator can also communicate nonverbally his assessment of the credibility of a party's description of events or the plausibility of a proposed solution. If a mediator frowns as he hears one party present proposed solutions, or if he throws his pen into the air and pushes his chair back from the table, he is communicating the judgment that the proposal is a disaster. On the other hand, if the mediator suddenly stops writing as one party presents his proposals, slowly and quietly places his pen on the paper while looking directly and pensively at the party who is speaking, then the mediator is signaling to the speaker and everyone else that what is being said is worthy of everyone's attention.

The lesson is clear: a mediator must be aware of this dimension of conduct. He must marshal his actions to convey the idea he wishes to communicate. He cannot control how parties interpret all of his nonverbal behavior any more than he can always be certain they have understood everything he has said. At the very least, however, he can make certain that his nonverbal actions are consistent with his verbal statements.

Just as the mediator communicates nonverbally, so do the parties to the dispute. People say things with anger or fear. They communicate a feeling of nervousness or impatience by tapping their foot or pen or speaking with a voice that shakes. They communicate a sense of panic or vulnerability with their eyes, a sense of pride or defiance with their posture. The mediator must be attuned to capturing messages from these communication sources.

Verbal Reinforcement and Clarification

A mediator actively seeks to ensure he understands the parties' communications and to demonstrate that understanding to them. In doing so, he displays a level of interest and respect that encourages disclosure and further communication.

A mediator can ask questions to clarify previous statements. He can attempt to summarize in his own words what was said. He can, in a separate session

with the party, try to confirm his understanding of what the party said by identifying the emotion that the statement exhibits or the priority ranking the party attaches to particular items.

However, a mediator should never try to show his understanding of what was said by simply repeating back to the parties in their own words what they just said. For example, at the close of one party's presentation, a mediator should NOT respond as follows:

> Let me make sure that I understand what you are saying. You stated that the facilities at the neighborhood school, including the swimming pool, the gymnasium, and art rooms, are adequate and ideal for your children to use after school, on weekends, and during the summer. You said that the families in your neighborhood consist of hardworking, honest, religious people. You said that there are two real reasons why the school district refuses to open up its facilities for use to neighborhood residents during those non-school hours: first, the school board members are a bunch of snobs who don't understand how difficult it is to have kids engaged in healthy activities because they are rich enough to send their kids to summer camp or enroll them in private lessons; second, the teachers are too lazy and selfish to spend time supervising your children after the class day has ended. You said that the parents in the neighborhood would be willing and capable of supervising the children at their school during the non-school hours.
>
> Have I understood everything that you have said and proposed? Fine. Now, would the school district representative like to address himself to these proposals?

This mediator has made three serious mistakes. First, a mediator is not simply a tape recorder with a playback button; if he understands what was said, he should show it by summarizing the statements in his own words.

Second, from the moment a person begins to serve as mediator, he should try to reorient the way the parties view their situation. He starts to do this by always describing the dispute in less explosive, nonjudgmental language. Harsh language is an important barometer of parties' feelings, but restating insults rarely helps promote party dialogue and collaboration. For instance, a mediator must not regurgitate the parents' accusation that the school board members "are a bunch of rich, insensitive snobs;" rather, he might note that the parent group feels strongly about their children having recreational opportunities and facilities during nonschool hours and is asking that the school district make the facilities at the neighborhood school available to them. The mediator should

not repeat the parent group's charges that the school district employs "lazy teachers"; instead, he should note that the parent group is offering to handle supervision of the children at the school by assigning that responsibility to various neighborhood residents.

Summarizing the parents' concerns in this way diffuses any personal attacks and helps to shift the parties' attention to the issues they must resolve and the proposals being made, rather than on attacking one another. In the process, the mediator provides the parties with a new, shared point of departure for considering settlement options. Those who assert pejoratively that a mediator is simply being "diplomatic" when he uses different words to characterize the elements of a dispute fail to appreciate the strategic leverage he obtains through the deft use of language.

Third, disputing parties have strong emotions. Despite what the mediator has said about his neutrality, if one party hears the mediator repeat allegations, assertions of fact, or conclusions in the language of his adversary, then he will conclude, fairly or not, that the mediator believes everything the other has said before he has even given everyone a chance to state what has happened or what should be done. If that occurs, the mediator's potential contribution may be irreversibly diminished. It does no good for him to turn to the party and say: "I'm not agreeing with what he is saying—I'm simply indicating that I understand what he has said." Parties hear such summaries differently, and the mediator is left in the position of "protesting too much."

The mediator might properly conclude that it is important to summarize his understanding of the parties' presentations to reassure them that he has grasped what is at stake or to establish his credibility by displaying mastery over the technical details of their proposal. But he must proceed with care.

Mine the Conversation for "Gold"

Listening carefully, recording only targeted notes, using helpful questioning formats and supporting parties' communication are critical performance skills, but a mediator must do more when accumulating information. He must know what he is listening for—what elements of the conversation will turn two monologues into a dialogue.

Imagine the following statement:

> My brother is a selfish, rich, arrogant, sexist capitalist who cares only about money and shouldn't be able to call himself my brother. He is using his position as executor of our parents' estate to rob me and my child,

> Jason, of our heritage. He pretends to like Jason by inviting him to his home, but then claims that the support our deceased parents gave to Jason's education was a "loan" that I must repay—that would be $60,000 that he says he'll take out of my share of the estate. Over my dead body! So, he'll just get a bigger portion. I will take him to court before allowing that. I don't care how much it costs. It wasn't a loan! It was loving grandparents supporting a needy grandchild. Our parents always believed in supporting education. And he wants to sell our family farm to developers. How can he take this property and rape it? He has no respect for our parents' intention that the land would remain pristine and be protected. We should sell to the Nature Conservancy—not developers! Actually, I'd like to keep the farm for future generations. On top of every other insult, he took Jason to a nightclub on Jason's birthday where there were strippers. What kind of values does that teach a kid? He should be helping him meet decent people rather than corrupting him.

Listening to this statement, most people hear insults, put-downs and threats. But a mediator hears it differently: he finds "gold nuggets" that are building blocks for constructive conversation. What should a mediator be listening for?

Interests

Interests are the silent, powerful movers behind positions that parties take. There will be no resolution if someone believes that his primary interests have not been respected, secured, or advanced. The mediator might conclude from

the statement above the speaker has at least three that she wants met: Jason's development and well being; her brother's respecting the wishes of their parents; and their collectively maintaining family connections and traditions. It is possible that her brother shares some or all of these interests; if so, those constitute *common interests*.

Issues

Issues are those distinct and negotiable matters or behaviors that frustrated a party's interests and resulted in the need for mediation. The issues become the subjects around which an agreement is built—if the parties want an agreement. Issues constitute the bargaining agenda. The issues the speaker referenced above could be described as: the $60,000 paid for Jason's education; the family farm; and Jason's birthday celebration.

Proposals

Proposals are suggestions or offers for the resolution of issues. Like interests and issues, proposals can be hard to hear if they are embedded among threats and insults. The opening proposals in the example above are: the $60,000 payment should be treated as a gift from the grandparents to Jason; the farm should be retained by the family or sold to the Nature Conservancy; and social events sponsored by the speaker's brother should promote Jason's career and moral development.

Feelings

Feelings are frequently hurt in an atmosphere where interests are frustrated, insults are felt, and misunderstanding abounds. The speaker in the example above may feel angry, frustrated, upset, and unloved. Once those feelings are expressed—and understood—they can be addressed and often change.

Principles, Values and Rules

Most people are governed by values, principles and rules that guide conduct. Laws (and our understanding of them) also provide an important guidepost. The mediator listens carefully to learn the parties' central tenets. The

principles each party holds dear will need to be reflected in the resolution. The speaker above believes that:

- Executors should not engage in self-dealing.
- Grandparents should support the education of needy family members.
- Family land should be protected and preserved.
- Nightclubs with strippers are not appropriate places to take young people.

As each bargaining issue is examined, these tenets—and ones raised by her brother—will be addressed.

These building blocks—and others noted in later chapters—are what mediators listen for. They enable a mediator both to organize the information that is shared—or hurled—by the parties and distinguish between those comments to which he will invite further discussion and those that will drop by the wayside. No other intervener or counselor listens to disputing parties in this distinctive way.

The mediator must remember that events affect different people differently. A mediator does not listen effectively if he always anticipates what someone will say, completes his thoughts for him, assumes that this person's problem is the same as ones he has dealt with before, or "expedites" the process by asking a series of questions. The mediator does not know what has happened. He wants people to state their concerns. As they do, they not only enrich his appreciation of the situation but also help the parties understand each other more clearly, perhaps for the first time. Then it is time to move ahead.

During this early stage of the discussion, the mediator's posture is to be as supportive and non-disruptive as he can. The mediator should keep quiet and let everyone talk, and talk, and talk, always knowing what he is listening for. He must not act precipitously. His patience will always be tested, if for no other reason than the parties might believe that a mediator who is not talking or asking lots of questions is not "doing anything." But that perception will be effectively addressed shortly. Once a mediator is confident that the parties have shared the landscape of their dispute, he moves confidently to help them reshape its terrain.

8

Develop the Discussion Strategy

The greatest challenge to any thinker is stating the problem in a way that will allow a solution.

Bertrand Russell

The parties to a dispute have clashing ideas regarding what has happened or what they should do. Once they describe their dispute, the mediator must manage the discussion in a way that does not simply reinforce their differences. She must take the content of what each party has said, rearrange and reshape it, and then get parties to look at this new phenomenon in a structured way. She does so by first identifying and exploring the parties' common interests.

Find Common Interests

In Chapter 7, the idea of *interests* was introduced. As the parties present their concerns, the mediator is listening for interests. Interests are basic human motivators, the underlying needs that drive parties. They include: respect, recognition, reputation, financial stability, freedom, fun, shelter, security, safety, love, control, and health. In many situations parties share an interest in re-establishing control over their lives. Usually, both landlords and tenants want a safe, clean and secure building. Even in the midst of a divorce, both parents usually want a happy childhood for their children. Management and labor share an interest in a thriving business. Normally, neighbors want their environment to be cordial and comfortable. These powerful common interests are often lost sight of in the heat of conflict. If the mediator begins the discussion by extracting the common interests and generating agreement on the large targets for the mediation, the conversation has a goal—securing or

advancing the common interests—that can draw parties towards collaboration. The next step is to crystallize the bargaining agenda itself—the issues.

Identify and Frame the Issues

As the mediator listens to each side talk, she distills a series of negotiating issues. Once the parties explore and resolve the issues, they will have resolved their dispute. The sum of the issues comprises the bargaining agenda.

An *issue* is a matter, practice, or action that frustrates or in some way adversely affects a person's interests, goals, or needs. Abortion, for example, is a social issue because its practice adversely affects the goals or interests of some people (for example, interests in freedom and control of one's body, on the one hand, and in furthering religious convictions and preserving life, on the other).

Issues are not facts. Whether abortion, for instance, is a widespread practice or is safe only when practiced by persons with particular training or when performed under particular conditions are factual matters that may be important to a discussion and resolution of the issue, but they are not the issue. To take a less important matter, how the issue of washing the dinner plates is resolved may be affected by the fact of who washed last night's plates—but knowing that fact does not automatically resolve the issue.

A *negotiating issue* is an issue that negotiators—that is, identifiable individuals—are capable of resolving with the resources available to them. Employers and unions can negotiate specific wage standards for themselves, but they cannot resolve the social issue of unemployment. Individual agencies and employees can address issues of employment practices for women and minorities by adopting affirmative action programs and policies, but they cannot resolve the social issues of sexism or racism.

A mediator wants to help parties identify negotiating issues and then focus discussion on them. A helpful way to identify a negotiating issue is to ask: what did one party do to drive the other party crazy? Label that action or practice, and one has just identified a negotiating issue.

People can negotiate about anything: where to eat dinner, what a person's salary should be, what classes to take next semester, where to locate a nuclear power plant. But the bargaining agenda should not be cluttered with topics the disputants cannot resolve.

> *Example 1.* On December 1, three employees of a large corporation in New York City win tickets to attend the Orange Bowl, to be held in Florida on the evening of New Year's Day. The personnel handbook states that all employees are entitled to full pay for eleven designated holidays, one of which is New Year's Day. But the handbook also states that an employee must be present both the day before and the day after the holiday in order to be paid for that holiday. Each employee has used up his allotted vacation time, and it is impossible for anyone to attend the game and return home in time to attend work on January 2. They approach their supervisor and ask to negotiate the issue of holiday pay; they propose that she change the policy so that employees in her department receive pay for holidays as long as they are at work either the day before or the day after the holiday. The negotiating issue of holiday pay, however, cannot be resolved by these parties, as the supervisor does not have the authority to establish policy governing vacation pay.

A mediator must help the parties formulate issues in specific terms. Sometimes parties' discussions flounder not because they disagree about the substance of a matter but because one party literally does not know what the other side wants to discuss.

> *Example 2.* A group of parents registered their concern about their children's low reading scores by conducting a sit-in at their neighborhood elementary school. They demanded to meet with the superintendent of schools. At their first meeting with the superintendent's representative, the parent group presented their list of three issues, as follows: "administrators and administrative performance, teachers and teacher performance, students and student performance." District officials genuinely did not understand what they were being asked to consider. The mediators met with the parent group to distill the negotiating issues of concern to the parents. As a result of those meetings, the parent group submitted another list of issues that pinpointed their concerns: library resources; time allocation between various subjects being taught; incentives for teachers; curriculum in each grade; testing practices; and so on. Three months later, the parties reached an agreement.

Finally, a mediator must promptly translate the issues into language that is nonjudgmental because negotiating parties, in almost every setting, formulate their concerns in accusatory, critical terms that are unhelpful to constructive discussion.

Example 3.
MONICA: Maria, I can't work on this project with Ritu. She is so inconsiderate. It is freezing cold in our office. She keeps knocking the thermostat down to 60.
RITU: C'mon. A little fresh air keeps the blood flowing and is good for everyone's health. In fact, we should open the window so people like you wake up.
MARIA (the boss/mediator): The two of you must complete your project by the end of the day, so I suggest that we figure out quickly how you will deal with the matter of *temperature in your room.*

It seems sensible to identify negotiating issues precisely and label them in neutral language—i.e., in language that does not favor or antagonize any party. The reason it is important for the mediator to do this—and why she makes a significant contribution to resolving disputes in doing so—is that parties often neglect to do it. They are understandably wrapped up in the matter. Frequently, they see only their own concerns and have no patience to listen to the concerns of others. When they talk, they hurl accusations and blame at each other. The mediator's job is to build a structure within which the parties can channel their remarks. From the information that she accumulates, the mediator sorts out the parties' negotiating issues and uses them to build the bargaining agenda. Consider the following information that a mediator learned from the parties and examine how she first identifies common interests and then frames negotiating issues in nonjudgmental terms:

Example 4. Keith Browning is a high school history teacher. The school year has ended and graduation exercises are scheduled for next week. Ann Jackson, a student in Browning's U.S. history class, submitted her term paper two weeks ago, four days after the announced deadline. Browning gave Jackson an "F" for the paper, citing its tardiness as the conclusive reason for his action. When Jackson spoke to Browning about her paper and the grade, he noted that the paper was very well written, unlike papers she had submitted earlier in the term; he strongly hinted that she had plagiarized someone's work in writing the paper. Since Jackson left that meeting, she has been telling her friends that Browning is a racist; graffiti containing similar charges have appeared on walls in the hallways and restrooms. Jackson is a senior in high school; because she received an "F" on her paper, she will not pass the course, and, since the course is required for graduation, she will not graduate with her class.

Last week, Browning was walking toward his car in the faculty parking lot when he saw Jackson and three of her friends standing by his car. When they saw him, they immediately ran. When Browning reached his car, he noted that the left back tire was slashed and the window on the left side was shattered. The next day, Browning filed a complaint at the neighborhood mediation center, demanding that Jackson pay him $380 for the damage to his car that was caused by her vandalism.

Browning is a fifty-five-year-old white male who has taught at the high school for twenty-four years. Jackson is a seventeen-year-old black female. Her paper was titled "The Biography of Malcolm X." She adamantly claims that she wrote the term paper herself and describes her effort as "the hardest I have ever worked on anything because I was so fascinated by the subject."

First, the mediator would explore common interests. Both Browning and Jackson share an interest in their *reputation* in the school environment. Both share an interest in *respect* and *recognition*—as teacher and student—from one another. And both share an interest in his or her respective *career*. Browning's standing in the school is important to his continuing there as a teacher. Jackson needs a high school diploma for her career. Starting the conversation by acknowledging these interests can remind the parties of what is at stake and of important commonalities they share. Each side's interests have been adversely impacted by one another's actions. But, since each side has the power to do things for the other that can mitigate those impacts, the negotiating issues should be welcome and powerful conversational magnets.

Next, the mediator frames the issues. Here, the mediator's notes might reflect the following issues:

- *Jackson's Term Paper*
  Grade Given the Paper
  Browning's Remarks about the Paper's Quality
- *Comments about Browning*
  Jackson's Statements about Browning to Third Parties
  Graffiti about Browning
- *Damage to Browning's Car*
  The Tire
  The Window

Many of these matters—the remarks made by Browning and Jackson, the graffiti, the treatment of Jackson's paper—affect important interests of both Jackson and Browning. Since they have the power to do something about those

issues, the issues are *negotiable*. To put it another way, Jackson and Browning have some degree of control over how their own behavior has affected or could affect each other's reputation and could propose things that each might do for the other that would secure their desired status in their school community (of course, proposing solutions and gaining agreement are two separate tasks). Browning, for instance, might consider giving Jackson a passing mark in his course if she passed a test he would devise for her, or Jackson might propose Browning give her an oral exam on her paper topic in order to prove that she wrote the paper herself and, assuming she passes the exam, then give her a passing grade for the course. Jackson and Browning, if moved by each other's remarks, might apologize to one another. Whether they will or can agree to do any of these things is not yet known, but framing the issues is a first step towards enhancing understanding and creating an environment where resolution is possible.

The mediator must label the negotiating issues not to favor any party. If the mediator were to frame the issue of damage to Browning's car as "vandalism of Browning's car," Jackson would experience that statement as accusatory and might immediately believe that the mediator accepts the teacher's version of events, not hers, and conclude that she is no longer neutral. Alternatively, the mediator does not label Browning's reported statements as "racist assumptions and comments by Browning" as that framing would offend Browning. If the mediator takes sides through her language, the conversational dynamic moves towards attack and defense, as opposed to problem solving.

Note that the issue of "damage to Browning's car," can be discussed without Jackson and Browning reaching any determination about Jackson's involvement. Probably, Jackson will not admit that she damaged the car. Mediated discussions are not a forum in which the primary goal is to make Browning prove beyond a reasonable doubt that Jackson committed the crime of which he accuses her. Browning wants money to repair his car. It is not essential to his getting some money from Jackson that she also admit that she damaged the car; the two elements usually go together, but it is not necessary that they do. If Jackson thought it in her best interest to pay Browning some money for the car even though her friends were the ones who damaged it, she is free to do so. All that is open to negotiation (again with the *caveat* that talking about it and agreeing to it don't always occur together).

Framing the issues is only the first step the mediator takes. She must now determine which negotiating issue she wants the parties to discuss first and the order of all remaining issues. To do that, she must develop a strategic framework for the agenda.

Develop a Bargaining Agenda

We can talk about only one thing at a time. If there are two or more negotiating issues to discuss, we must order the discussion. Who decides what the sequence should be? On what basis do we select a negotiating issue to be first?

The mediator plays an important role in establishing the order in which the negotiating issues are discussed. She must be certain that the parties have provided sufficient information so that she can identify and frame all the negotiating issues. (Remember that a mediator's notes should be limited to recording and labeling interests, negotiating issues, and proposals, rather than the facts. Such notes will be a valuable aid in completing this next step.) From that foundation, the mediator develops a bargaining agenda, governed by one overriding concern: discuss the negotiating issues in the order most likely to result in the parties coming to better understandings and possible resolution of *all* issues. The creation of an agenda takes the dispute from a relatively chaotic jumble of accusations, hurt feelings, and blocked interests to an organized group of topics that the parties can address. A simple, elegant and logical agenda boosts confidence that the dispute may be manageable after all.

A Thoughtful Agenda HELPS!

H ighlight common interests
E asy issues first
- Relationship of party to issue
- Remedy

L ogical categories and sequence
P riority for pressing deadlines
S tability and balance

A mediator never locks herself into discussing negotiating issue A before negotiating issue B simply because A occurred earlier than B, because A appears before B in the written proposal, or because the parties discussed A before B when they presented their concerns to the mediator. Instead, she reviews all the matters the parties have raised and makes a quick assessment of how to organize the bargaining agenda.

The mediator applies five organizing principles to structure the agenda. The agenda, in turn, HELPS disputants to achieve a different perspective of their dispute and of ways to address it. Each principle provides a basis for helping the mediator determine the best ordering of the conversation. Once the me-

diator identifies interests and negotiating issues, she can use the following guides to order discussion:

Highlight Common Interests. Similar to presenting a purpose clause to introduce a constitution, an agreement, or a law, framing the bargaining agenda by establishing common goals will pull the parties together. If they can agree on the target, it will be easier to determine both the obstacles (the issues) and the possible resolutions. In the example, after a discussion, Browning and Jackson might acknowledge that they share an interest in respectful treatment and a good reputation.

Easy Issues First. A mediator has the greatest probability for moving discussions forward by operating on the principles of momentum and investment. Simply stated: discuss first the negotiating issue that the mediator believes will be the easiest for the parties to resolve. That way, the parties experience success, generate forward momentum and have something to lose if their talks break down—they have an investment in the mediation. A mediator wants to get parties to agree about something, however trivial, so that they have a template for movement once they get to harder issues. This simple principle does not always govern, but it should always be considered.

Usually, the easiest negotiating issue to resolve is also the least important to the parties. Occasionally, a mediator will get lucky and find that the easiest issue to resolve is also the most important to the parties (for instance, two teenagers might agree quickly on which weekend evening each one will use the family car, but disagree about who must chauffeur their parents to the golf course each afternoon so that the car is available for use). Some parties try to resist the mediator's effort to begin with easier, less important issues; they may comment: "We're wasting our time and fooling no one by talking about those things which have no effect on settling the really tough matters on which we are miles apart." But the mediator must persist, explaining the rationale for a thoughtful ordering of issues. Experience in mediated discussions confirms the following lesson: piercing a party's resistance to change is done most effectively on an incremental basis.

How does a mediator determine which negotiating issue will be the easiest to resolve? There is no foolproof formula for making that decision, but if a mediator decides incorrectly, she will get very rapid feedback from the parties. In deciding what is "easy" to resolve, the mediator might look to:

- *The Relationship of the Parties to the Issue.* The mediator is given a variety of clues regarding the importance of issues to individual parties. The parties, for instance, might display a noticeable vigor while discussing some concerns and exhibit a lack of emotional involvement when mentioning others. They might describe some matters in great detail and spend very little time discussing others. They might use language that indicates varying degrees of commitment to a given item ("I want us to share our parental responsibilities" is more flexible than "I want us to share equally our parental responsibilities"). The mediator must be attuned to listen for these nuances and move rapidly to capitalize on them. Generally, the greater the importance of the issue, the more explosive and difficult it might be to resolve.

  Some parties develop an enormous attachment—emotional, political, philosophical, or personal—to particular issues. A union might announce before collective bargaining sessions begin that its top priority for that round is job security; any management proposal that might jeopardize that interest will be difficult to resolve. A group of corporate board members might have a very strong emotional attachment to providing financial support to a particular local charity because the corporation's deceased founder felt strongly about that charity's work; proposals to eliminate that contribution in favor of another organization will be hotly contested and not easily resolved. The easiest issues to resolve are those from which the parties are most politically and emotionally detached.
- *The Nature of Remedies.* People resolve issues by agreeing to do or not to do something about them. A mediator can compare the issues according to what types of things the parties are being asked to do and evaluate those remedial actions according to two standards:
  1. Mutuality of Exchange. Some negotiating issues can be resolved only if all parties do something for one another: offer an apology or take steps to restore personal reputations that have been tarnished by the dispute. This type of issue might be the easiest to resolve, since all parties start on an equal footing.
  2. Degree of Burden of Compliance. Some negotiating issues can be resolved by one party agreeing to do things that are not too burdensome. The solutions to other issues might require one party to do things that more dramatically affect its welfare or challenge its fundamental interests. The successful mediator will start with those issues for which the solutions require the least burdensome acts.

Logical Categories and Sequence. The mediator can divide the negotiating issues into various substantive categories, assess which category of issue or issues will be the easiest to resolve, and then channel the initial discussion to that category. She might divide issues into such categories as economic and noneconomic; financial and behavioral; financial support, educational ex-

penses, and parenting responsibilities; political, legal, and administrative; or chronological/reverse chronological development of issues. Different types of disputes call for different categories, and the mediator must always consider whether the issues in dispute can be grouped together in helpful ways. The easiest place to start may be with the negotiating issue that developed first in time, or, alternatively, with the most recent issue. The assumption supporting this strategy is that the mediator can rapidly secure agreement from the parties on the first or last link of the chain of issues. The mediator can then use that agreement to put the remaining matters in context.

Some matters are logically related to one another in the sense that agreement on some issues logically requires agreement on others. A parent and child will not agree on the time at which the child must return from attending the high school football game that night if they disagree over the logically prior issue of whether she will be going out at all. A group of landowners might oppose the proposed relocation of the Appalachian Trail because they fear it will split their land and make it impossible to farm; the mediator must clarify whether the landowners object to the presence of an Appalachian Trail in that area at all, or whether they simply oppose the proposed route.

Structuring the discussion of logically related negotiating issues is a tricky matter for the mediator. In some cases it may be more effective to ignore the logically prior issue and begin discussion on its logical consequent. If a child assures her parent that she will be home within half an hour of the end of the high school football game or 10:00 p.m., whichever is earlier, that specific commitment may help her gain agreement on the issue of whether she can go out at all. This approach can lead to success in negotiation even though the issues, logically speaking, are reversed.

The negotiating issues can also be related causally to one another. By first examining the basic cause of the dispute, the mediator enables everyone to address the remaining issues more constructively. Although beginning mediators are particularly apt to choose this rationale for shaping the discussion of the issues, it is a dangerous strategy that should be used only sparingly and with great caution. The search for "basic" causes is often a spurious enterprise; further, this approach encourages parties to view problem solving as an exercise in establishing guilt or innocence for previous conduct rather than as a joint effort in shaping their future in light of their past—hence, using this approach can result in retarding the settlement-building process rather than accelerating it.

Priority for Pressing Deadlines. Some issues must be resolved by a particular deadline if parties want to avoid potentially more costly or undesired consequences. Other issues don't involve the same time pressure. The easiest issue

to resolve normally is the most pressing one, because all parties feel the need to resolve it. If a divorcing couple wants to send their child to private school, they must resolve the issue of tuition payments for that semester even if they have not resolved any other financial arrangements. Failure to resolve it will result in something that both consider undesirable: the child will not attend that particular (or perhaps any) school.

Stability and Balance. In ordering an agenda, the mediator must be aware of the possible impact of choosing an issue of one side first—the other side might feel that the mediator is not neutral. Consequently, where there is an issue of mutual concern, that issue might be discussed first. If the mediator then proposes an issue that is associated with one party next, she could subsequently alternate issues between the parties (e.g., 1. mutual issue; 2. issue of party A; 3. issue of party B ...).

With these five principles in mind, how might the mediator structure the agenda with Jackson and Browning? While different mediators will make different judgments, the application of these standards might result in reframing, re-grouping and re-ordering the negotiating issues as follows:

1. *Communication*
   Browning's Comments about Jackson's Paper
   Jackson's Statements about Browning to Third Parties
   Graffiti about Browning

Communication is mutual in that each side has issues of concern, so the mediator is not choosing one side over the other by starting here. For two of the issues—*Browning's Comments* and *Jackson's Statements*—refraining from future communications about the other party might be easy to do. It may be that the parties would agree to apologize—a result that would generate good will when tackling the more difficult issues that follow. With respect to the *Graffiti about Browning*, Jackson's possible agreement to refrain from writing graffiti and to ask her friends to do the same does not seem burdensome, as it does not entail her admitting she is responsible for the graffiti in the first place. Even if the parties do not come to agreement, the recognition of mutual harm might provide a perspective shift that would be helpful in addressing other issues.

2. *Jackson's Term Paper*

In terms of the chronology, this issue "created" the dispute in the first place. Consequently, logic suggests it be addressed early in the agenda. Looked at another way, it may be much easier to resolve matters concerning the term paper than the *Damage to Browning's Car*, particularly if Browning wants Jackson to

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pay for the damage; there are multiple options that Browning might consider for Jackson, all consistent with his various interests as an educator, if he is motivated to do so.

3. *Damage to Browning's Car*
   The Tire
   The Window

This is perhaps the most explosive and difficult issue. Placing this issue last gives the parties an opportunity to shift their understanding of each other prior to dealing with it. Also, if there has been positive movement, and consequently "investment" based on some agreements, it may help motivate parties to try harder on this issue. Browning, for example, might forego his monetary demand (perhaps covered by insurance already) or Jackson might agree to some reparations.

By thoughtfully structuring the discussion, the mediator can provide order, optimism and momentum—a breath of fresh air for parties embroiled in controversy. Sometimes the parties will want to control the agenda themselves and bargain over the order of the issues. Even in such cases, the mediator continues to analyze alternative agenda structures so if discussions stall, she is prepared to propose a different tack.

A thoughtful agenda does not guarantee immediate success. Nor does it guarantee that the conversation will proceed in a linear way where the parties resolve one issue before moving to another. Rather, the parties may make progress on one issue, then falter; the mediator must be flexible, move to a different issue, and revisit the unresolved issue at a later time.

The mediator's job is to identify negotiating issues clearly, describe them in non-evaluative language, and control the order of discussion. No one will applaud her for doing this job well, but parties will reach an agreement in spite of, not thanks to, the mediator if she does this part of her job poorly. The "D" of BADGER is both difficult and stimulating because the mediator must make decisions instantaneously. She must gather facts, sort them into negotiating issues using nonjudgmental labels, and measure those negotiating issues against principles in a way that HELPS parties move forward. Then, as soon as the parties have completed their presentations, the mediator, without pause, must say, "Why don't we talk first about _____" and, as she fills in the blank, all these tasks must have been completed.

There is one other reason to emphasize the importance of this dimension of the mediator's role. The parties themselves rarely think about these matters. Understandably, they concentrate on the wrongs they have suffered and getting what they want. But someone—the mediator—must organize and manage the discussion process so that they have an improved chance of succeeding.

The mediator is more than a discussion police officer who simply makes sure people can travel the same road without colliding. The mediator must help create new roads, develop road signs, tune up the parties' discussion engines, and escort the parties on their trip. That is what the "D" component of BADGER—develop the discussion strategy—accomplishes.

But even doing all this does not guarantee that the parties will reach their destination. What does the mediator do when the parties simply disagree about how to resolve the matter that the mediator has so deftly framed and placed in a strategic discussion context? How does a mediator get people to change their minds, modify their proposals, or make concessions so they can move toward agreement?

9

Generate Movement

We can't solve problems by using the same kind of thinking we used when we created them.

Albert Einstein

People often disagree. It is more remarkable how frequently they are able to solve their disagreements. Something happens that enables persons in conflict to strike a deal and move ahead. But what are the factors that break a logjam? What gets someone to change his mind and agree to do something he had previously rejected? The mediator must be conscious of these leverage points and use them to generate movement toward understanding and resolution.

The mediator focuses his efforts in five areas. He (1) examines common interests and ideals, (2) expands the information base, (3) encourages individual perspective-taking, and (4) urges the use of negotiating norms and practices. If those fail, he (5) appeals to the big picture. Each target area contains leverage points.

Common Interests and Ideals

Common interests are interwoven into the discussion as each new issue is addressed. If a party could get what he wanted without the cooperation of others, he would have no need to appreciate the interests of others or to expose his own. Most people cooperate voluntarily only if they are convinced that they are not sacrificing their own interests. To gain the cooperation of the other side, the proposed deal must address the interests and ideals of one's counterpart. A mediator can persuade parties to do things by pointing out how proposed settlement terms promote mutual goals rather than reinforce one party's gain at another's expense.

1. *Highlight interdependence.* Everyone wants to win. But the goal of mediated discussions is not for any one party to win. Rather, it is for all parties to develop a shared view of their problem so that they can solve it to their mutual

satisfaction. The mediator emphasizes the reality that one party's ability to achieve its objective depends on securing the freely granted cooperation of others; gaining that cooperation requires that each party believe it will be no worse off after accepting the proposed settlement terms than it was before the discussions began. That does not mean that power relationships among the parties do not affect outcomes, or that there is no room in mediated discussions for tough negotiators." Far from it. But parties must wield their power for some purpose, and the mediator must remind the disputants that using their power to prevail over others is not as effective as using it to get what they need.

2. *Identify joint or shared interests.* When parties to a conflict become preoccupied with getting what they want or piercing the other's obstinacy, they often forget that they have joint interests. An employee and his supervisor have a common interest in a cordial, or at least functional, working relationship. Divorcing business partners have a shared interest in their reputation and careers surviving the split-up intact. Most disputants have a common interest in minimizing the costs of disputing. A mediator must develop and repeatedly remind the parties of their shared needs.

3. *Appeal to commonly held principles.* Disputants can usually agree on general principles. It's their application—the specifics—that creates the controversy. A mediator wants to make sure that parties realize they can agree on something, and he can best accomplish that by getting parties to agree on principles. These principles might be simple guidelines: "Can we all agree that we will not interrupt each other or use disrespectful language during our discussions?" or "Can you agree that it is better to try to work out this problem among yourselves rather than have someone else [boss, judge, parent] tell you what you must do?" They might reflect fundamental moral concerns: "Can you agree that it is wrong to inflict pain intentionally on innocent persons?" The goal of these appeals is identical: to get parties to agree to a principle or guideline that has some bearing, however indirect, on resolving the matters in dispute.

4. *Call for a vision of the ideal.* Disputants can sometimes agree on what an ideal relationship should be between business partners, employees, parents, neighbors, landlords and tenants, and nations. The vision of the ideal then becomes a target in working out the specifics to achieve it. In expressing the ideal, parties often feel stronger and are pleasantly surprised by commonalities.

5. *Emphasize trust-building dimensions of conduct.* Conflicts erode trust among people, and that loss of trust leads them to demand burdensome settlement terms for fear that any less demanding an arrangement will be exploited. A parent does not want her ex-spouse to visit their young children because she does not trust his claim that he has cured his alcoholism; the customer wants his money back rather than having the product repaired because

he has no faith that the machine will ever work as advertised. The mediator must get parties to do things for each other that help restore a sense of trust. These gestures need not be dramatic; there is no quick fix to rebuild a person's confidence in another's reliability. But if parties can demonstrate their ability to comply with agreed-on terms, then that conduct serves to restore the credibility of their word, so that a more confident, less regimented relationship can develop thereafter.

6. *Agree on a process for resolving the dispute.* If parties are unable to resolve any of the substantive negotiating issues through mediated discussions, then the mediator should get them to consider whether they can agree on a different process for resolving their dispute. A feuding couple might agree to seek marriage counseling; a landlord and tenant might agree to resolve their controversy in court; businesses divided by contractual issues might agree to a speedy arbitration process; or parties involved in a personal injury lawsuit might agree to engage a neutral expert for an opinion. By helping disputants establish what the next step will be, the mediator helps them stabilize their relationship for a foreseeable period of time—a contribution whose value should not be minimized.

Information

People often change their mind with new information. A mediator is interested in two things: what people know and what they don't. He wants to use both dimensions to move the parties toward agreement. A mediator cannot become too preoccupied with establishing facts, for that can lead to a paralysis of action; but neither can he ignore facts. A mediator wants to get people to agree to do things; new information often triggers new ideas for possible action.

1. *Facts persuade, so develop them.* If an employer resists granting a raise because he believes it costs too much, then figure out what the real cost will be. Maybe it won't be that expensive, and he will change his mind. If parents are afraid to let a child leave the house at night because they don't know where he will be or with whom, they should find out. They may be less reluctant to let him go if he is participating in a supervised school play than if he plans to hang out on the street corner waiting for some action. Using a calculator in a mediation session to understand the numbers, urging that parties explore the internet to develop options while they wait for their caucus with the mediator, making calls to expand a negotiator's authority, examining documents and pictures that parties bring—all can lead to movement.

2. *Use the absence of facts to create doubts about what has happened or what can happen.* If a landlord cannot establish with a reasonable degree of certainty that his tenant's child hit a baseball through another tenant's window, then the mediator can use that uncertainty to prod him to reduce his demand from full payment for the broken window to assurances that the child not play baseball in the backyard.

3. *Use inconsistent statements to narrow the problem.* If a person complains that his neighbor disturbs him "twenty-four hours a day" by blasting a sound system, but later informs the mediator that he leaves for work every day at 7:30 a.m. and returns home at 6:30 p.m., then the complaining party is not being consistent. The mediator uses that inconsistency not to label the person a liar but to help clarify the problem: it is not a problem of loud music twenty-four hours a day, but one of the volume during those periods when both are home—thirteen hours a day at the most. Subtract another seven hours for the amount of time both people sleep (at the same time, one hopes) and the mediator has narrowed the problem from twenty-four hours to six.

4. *Examine past practices.* Suppose an employee protests his firing for the theft of a seventy five cent candy bar. The amount in question might seem insignificant. But if the employer's past practice has always been to fire employees for theft of company property, regardless of the amount in question, then the mediator might cite that practice in an effort to persuade the employee to drop his protest.

5. *Challenge assumptions.* People assume many things. They assume other people are rich because of the clothes they wear or the cars they drive. They assume the report was filed late because "Jones never hands anything in on time." They assume "all grievances can be resolved with an increased paycheck." The mediator must challenge all assumptions; an erroneous assumption may be blocking an agreement.

6. *Explore feelings.* Feelings are facts. It is important to understand the parties' feelings for at least two reasons. First, as powerful motivators, feelings can be tapped to energize parties to change. For example, suppose siblings are fighting over the disposition of family heirlooms; one sister expresses how much she misses her brothers and sisters and the warmth and fun they used to share. The sister's feelings of love and loss may motivate her to do things for her siblings. Second, feelings are fluid. If parties express their feelings, and the feelings are understood and recognized, the feelings themselves may change. Even if feelings do not change, being heard and understood may itself generate positive feelings by providing recognition and connection. Restoring emotional balance might allow a party to adopt a more flexible approach.

Perspective

Since parties to a mediation do not have to agree, a mediator, in trying to advance resolution, must help them re-examine their perspectives and positions. He does so not only by convincing them that proposed solutions are consistent with their interests, but also by using a series of maneuvers that psychologically position the parties for agreement. Here are some standard techniques that a mediator uses to alter a party's attitude. The mediator must remember that any technique is effective only when used sparingly and sincerely.

1. *Allow for choice.* When parties become locked into a volley of bitter and biting exchanges, an escalating cycle can generate more and more damage. A mediator might ask, "Would you like to continue this conversation about who is at fault—a conversation you have been having for a long time—or do you want to see if we can resolve the issue of _____?" Simply laying out the choice sometimes empowers parties to move in a different direction.

2. *Stroke 'em.* Everyone likes to be complimented. A mediator must reinforce positive behavior by reminding parties that their willingness to mediate, to listen to one another, to come up with proposals, and to "hang in" after (sometimes) many hours of emotional discussion is commendable. When people are praised, they feel stronger. When they are stronger, they are more responsive to others and more creative. To the extent parties are doing a good job, tell them so!

3. *Cite examples with which people can identify.* A mediator must teach and persuade by using vivid examples. To be persuasive, examples must be relevant to, or understandable in the context of, a disputant's individual experience. The mediator who must prod an autocratic manager to work more productively with his free-spirited subordinates is more effective if he cites examples of differing managerial styles portrayed in episodes of a popular television series than if he appeals to the published findings of social science research regarding leadership behavior.

4. *Use humor.* Laughing makes people feel comfortable with themselves and their surroundings. It breaks the tension and helps put matters into perspective. A mediator should not use a mediated discussion as an opportunity to polish a comedy routine, but he should not hesitate to inject a humorous remark into the discussions. The only *caveats* are obvious: the mediator must be sure that everyone gets the joke and the joke must not be at the expense of any party.

5. *Try role reversal.* Sometimes a party will change his position or better appreciate a particular demand of the other party if the mediator gets him to analyze the negotiating issue from the other party's viewpoint. A teenager

might resist obeying his parents' curfew rules because he believes they are unduly restrictive; but a mediator might get him to reconsider his resistance by making the teenager put himself in his parents' shoes and view curfew rules as safety measures developed by persons with an only child living in a high-crime neighborhood.

6. *Exploit peer pressure.* Sometimes a person changes his mind because he does not want to be the only individual in the group who disagrees with the proposed solution. A mediator should capitalize on that need to belong by being sure that the lone party is exposed to the group opinion.

7. *Let silence ring.* Everyone is afraid of silence. A mediator cannot be. People feel awkward when no one is speaking. A mediator must not rush to fill the air with chatter. Silence can bring opportunity. Sometimes one party will relieve the uncomfortable atmosphere by suggesting a possible change in what he is willing to do. The mediator should recognize that movement and explore its possibilities.

8. *Focus on the future, not the past.* A mediator helps parties shape their future. Past events influence that design. But the mediator must remember that no one can change what has happened and that the impact of past events becomes less dominant as their details become ambiguous and disputed. A mediator must not let the parties' competing visions of their past paralyze them.

Suppose a subordinate and his supervisor disagree over whether the supervisor had clearly established the performance objectives that he is now penalizing the subordinate for not meeting. A mediator generates flexibility by expanding the discussion from a contest over what happened or who is at fault to a consideration of the future. Clearly, that discussion will be tempered by their respective beliefs about what occurred; each will propose solutions designed to ensure that similar disputes do not occur. That is fine. A mediator does not want parties to ignore their past; he just wants to be certain they do not become prisoners of it.

9. *Prohibit greed.* In some discussions, one party seems to obtain its favored position on nearly every negotiating issue. At that point, pride creeps in. "I'm on a roll" goes the familiar refrain, and nothing—not even an agreement that gives the party what he needs—will stop it. A mediator must put the brakes on such behavior by reminding that party of how reciprocity and an outcome that benefits both sides can result in compliance with commitments.

10. *Exploit vulnerabilities.* Disputants tend to see things in all-or-nothing terms: "I'm right, you're wrong." One party often insists that only others do what is necessary to correct the situation because they caused the problem. But no one is infallible; everyone has reasons for regret. These lapses constitute vulnerabilities, which the mediator should expose in order to rebalance the discussion. By highlighting vulnerabilities, he emphasizes joint responsibility for the problem and the need for mutual, not unilateral, action to solve it.

11. *Help save face.* Face-saving means maintaining one's dignity or reputation. Everyone says and does things they later regret. Everyone, from time to time, takes positions that are ill-considered. It is rare, however, for people to admit they were wrong or short-sighted. If a mediator can help a party to change positions without looking bad, then movement is far more likely. Sometimes a small concession, a statement of appreciation, or an apology from one side can allow the other side to make a big move without losing face. The mediator must frame the exchange so that the party making the big move does not feel exposed. "Trevor, you say you are willing to give Ashley the house now that she recognizes the extraordinary efforts you made over the years to repair and renovate it." Sometimes, parties will be willing to accept a deal if the proposal appears to come from the mediator rather than from either of the parties. What constitutes acceptable face-saving will be different in every case.

Negotiating Practices

A mediator helps people find acceptable solutions. In moving towards that end, he can avoid impasses by insisting that parties adopt accepted negotiation practices and standards.

1. *Help parties establish priorities.* Parties who assert that every issue is equally significant are either posturing or lack a clear idea of their own interests. Some objectives are more important than others. People make choices by how they act, if not by what they say. A mediator must look for a party's priorities, even if the party does not explicitly rank them.

2. *Develop trade-offs.* Negotiations are a series of exchanges. Parties exchange things only if they believe the items are of roughly comparable worth. However, given items that are roughly comparable according to the internal calculus of each party, individuals may value them differently. Exchanges are built on these differing valuations. Some individuals value time more than money—they would prefer a smaller payment now to a larger payment next week. Some value relationships more than possessions—they would trade an apology for a decrease in what they are paid. That is why priorities must be established before trade-offs are made. Often the mediator will help parties create an acceptable framework: "If A and B are resolved within certain parameters, then will you be willing to do X in order to resolve C?"

3. *Compel parties to acknowledge constraints.* No one will agree to do something that is the equivalent of suicide, and no negotiating party should expect

its counterpart to accept a proposal that has that effect. A business, for example, cannot sell its goods or services below cost for an extended period of time and expect to survive. A mediator must remind parties that their negotiating proposals must not only reflect their own aspirations but also fall within the resource capacity of their negotiating counterparts.

4. *Pursue compromises.* One word that gives mediation a bad name is *compromise.* Many people think that a mediator insists that parties compromise—often interpreted as "split it in half"—to reach a settlement. Unfortunately, compromise carries the stigma of "selling out." This attitude can stand in the way of optimal outcomes. Sometimes compromising is the most desirable alternative. Without using the word "compromise," a mediator encourages parties to do that by urging them to compare what they are getting in return for accepting something less than their desired solution, and to determine whether the exchange is acceptable. There is nothing sinister about that; no one's fundamental interests are necessarily curtailed. A mediator helps parties get what they need, not always what they want.

5. *Look for integrative solutions.* Sometimes people do not have to give up anything to reach a resolution. Suppose there are two furnished, unoccupied offices; one is a large office in the interior section of the office suite, the other a small corner office with a view of the town's park. Two co-workers each demand the corner office. The supervisor brings them together to discuss the matter. He learns that one employee wants the corner office so that he can put his plants on the window ledge where they will flourish in the natural light, whereas the other actually prefers a larger office but wants the desk that is now situated in the corner office. They can resolve the question of office assignment without either having to give up anything. Solutions like this are not readily available for every negotiating issue, but they do sometimes exist, and the mediator must encourage parties to look for them.

6. *Use brainstorming.* Movement is prompted by parties imagining possibilities. A mediator can use brainstorming to get a range of ideas on the table. The mediator invites parties to throw out as many ideas as possible without worrying whether the ideas are good or bad. The mediator captures the ideas—on a flip chart perhaps—without attributing them to a particular party and without judgment. Separating idea-creation from idea-adoption frees people to be creative. Sometimes a bad idea generates a good idea.

7. *Prohibit escalating demands.* Once a party proposes a solution, the mediator must insist that he not try to improve it later on. Assume that a personnel officer offers a job to an applicant. They discuss and agree on all aspects of the job and non-salary employment benefits. When the personnel officer asks the applicant about his salary requirements, the candidate states: "I'm looking for a $60,000 annual salary." The personnel officer replies: "That's fine. We have a deal. I'll confirm our arrangements in writing." Then the candidate says: "On reflection, I really need $65,000 to make it worthwhile for me to make this job move." When a negotiating party escalates his demand, it shifts the target for agreement; such shifting makes resolution impossible because one never knows what it will take to strike a deal. Trust is eroded. A mediator must not let parties negotiate in this fashion because part of the mediator's job is to stabilize expectations. To do so, he must discourage any attempt by a negotiating party to improve its position by increasing its original proposals or resurrecting an earlier proposal that it has since relinquished.

"Out of the Box" Thinking

Can you change this figure to the number 6 using no more than one line? The line can be straight or curved

IX

There are many solutions* to this problem. Identify the "box" you are in when you look at the figure and try to solve the problem using another perspective.

* You could place the letter "S" in front of the figure to make "SIX". You could place 6 after the figure to make "IX6". You could fold the figure in half and rotate it 180 degrees; you would have "VI".

8. *Help orchestrate the dance.* For some negotiators, a negotiation begins with extreme demands and proceeds through a series of incremental moves towards a a mutually-acceptable point. The mediator can facilitate this "dance" in several ways: by helping parties explore whether there is some overlap—a zone of agreement—in what they may be willing to do, by conveying offers in a way that does not antagonize either side, and by trying to shift the discussion so that parties will reveal underlying interests and develop responsive trade-offs.

9. *Use the agenda.* Sometimes when people are stuck, doing something entirely different helps. A problem looks different in the morning when one is fresh and energetic, than it looks at the end of the day. If we make progress on issue A, then issue B might be easier. Consequently, flexibility with the agenda is

helpful. When a discussion gets stuck, shelving a particular matter and shifting the focus elsewhere can generate movement and optimism.

10. *Develop time constraints.* People reach decisions under the pressure of deadlines. Union and management negotiate seriously in the face of a strike deadline. Co-workers resolve disagreements over the format of a company publication as the printer's deadline approaches. Some parties resolve lawsuits as the courtroom door opens. The lesson in each case is the same: for all mediated discussions, there is a time period within which the parties have the power to resolve matters by themselves; once that time has elapsed, new and unpredictable forces intervene to affect or determine the result. Parties become less resistant to settlement as they confront the reality of relinquishing control over their fate to those other forces. A mediator uses deadlines to encourage parties to take responsibility for managing their future.

The mediator deploys these levers to generate movement. If by themselves or in combination they do not succeed, then the mediator appeals to his final target.

The Big Picture: The Costs of Not Settling

When people become overwhelmed by failed attempts to resolve a dispute, they may become impatient, self-righteous and shortsighted. This is not dishonorable; it is a common experience. But it does not help us resolve conflict. It is up to the mediator to remind the parties of a simple fact: obstinacy has a price tag. There are consequences if mediation is not successful. The mediator's job is to force the parties to compare those consequences with the proposed solutions they can freely adopt. For this tactic to be effective, the mediator must use it sparingly. He must portray the cost comparison two ways.

1. *Quality-of-life costs.* What happens if the parties don't resolve their problem? People must alter their life-styles to deal with the unresolved problem. Morale can plummet, people brood, and performance deteriorate; annoyance can fester and resentment build. These can be the real consequences of living with an unresolved problem. The mediator must ask the parties: Do you prefer this over the proposed settlement? If not, then develop an acceptable solution; if yes, there will be no mediated agreement.

This appeal is the most powerful tool in the mediator's kit. He must accurately relate the costs of not settling to the realities of the disputants' situation. He must not be misleading or overdramatic, but he should describe the potential situation with an artistry that vividly captures the human cost of continued impasse. His description must remind the parties of how they rely on each other's conduct to secure their own satisfaction. After that, he can let the parties make their choice.

2. *Process costs.* If mediated discussions collapse, parties will use alternative procedures to resolve their dispute. Minimally, this means that more time will elapse before they resolve their situation. Some procedures may require expending additional resources as well; if a person chooses to resolve a contested employment discharge in court rather than accept proposed settlement terms, he will incur additional legal fees and lose time from work (and possibly wages) to attend the court sessions. Often, litigation takes months—or years—to conclude. Depending on the alternative people choose, they may be required to abide by someone else's determination of how the dispute should be resolved. These are the tangible costs that parties incur if they prefer continued impasse to accepting the proposed settlement terms. The mediator must describe these to the parties—and then let them decide what they want to do.

A mediator uses many tools to persuade parties to move forward without any guarantee that a particular effort will work. Some issues will be resolved easily and without controversy; others will be more difficult. A mediator's personal experience and knowledge of human behavior will guide him in knowing when to increase the pressure, when to relent, and when to return for the final push to settlement.

The mediator must not be deterred from employing every appeal possible to badger the parties to understand their situation fully, to be creative in developing options and to come to terms of agreement. He must not feel badly about pushing a party to reconsider and reevaluate positions the party appears reluctant to change; if a party does not want to settle, he has the freedom to decline. The mediator's job is to help the parties reach an agreement, not to win a popularity contest. His job is to encourage movement, persistently and energetically.

Generating movement is the heart of the mediator's work, the culmination of everything he has done—beginning the discussion, accumulating information, and developing the discussion agenda—because the goal of those efforts is to establish a context in which persuasion can occur. Trying to do this is intellectually challenging and emotionally exhausting. It is what makes mediating an intensely rewarding experience.

Mediators use one specific procedure to generate movement that requires separate analysis. This procedure—meeting separately with the parties—combines in microcosm all the discussion strategies and persuasive techniques already analyzed. It is the one mediation procedure that constitutes our conventional image of "shuttle diplomacy." The procedure operates on different psychological and strategic premises from those discussed previously. In many

contexts, mediated discussions can proceed with all parties present all the time; the mediator directs discussion, clarifies communication, encourages candor, and tries to move parties toward agreement in everyone's presence. At times, however, a mediator may believe that progress toward agreement will come—that is, persuasion will be effective—only by talking alone with individual parties. On what basis a mediator makes that decision and how he conducts these individual meetings are matters we must now consider.