Mediators Need to Stop Apologizing About Justice

Theory-of-Change Symposium

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Charlie Irvine argues that the mediation community should focus squarely on the goal of promoting substantive justice. He is a mediator and the Course Leader of the Strathclyde Law School's Masters Program in Mediation and Conflict Resolution in Glasgow, Scotland.

Mediators were on the back foot about justice long before I joined the game. To labour the sporting metaphor, big hitters from left and right mounted attacks so eloquent, so minutely argued (and such fun to read) that mediators ceded the ground altogether. If we speak of justice at all, it is to claim that other benefits flowing from our work – cost, speed, comprehensibility, humane-ness – render its shortcomings a price worth paying.

By 1998, Robert Benjamin was already mourning the loss of that early vision of "conspiracy with the parties" where the mediator could say, "Here is what the law may be. What do you people want to do?"[1] By 2020, we could caricature busy (and successful) mediators as saying, "Here is what your clients want to do. What does the law say?"

Goals

The history is tortuous, but the Theory-of-Change Symposium encourages us to look forward, starting with our goals. So here are three:

- Restore non-lawyers' confidence that they are capable of serious thinking about justice.
- Make the case that mediation, insofar as it facilitates people's justice reasoning, provides more, not less, justice than formal adjudication.
- Redefine justice beyond the ever-sharpening "shadow of the law."[2]

The History

Where to start? Well, the 1970s. From my (UK) perspective, it seems no sooner had Frank Sander and others begun to institutionalize US mediation inside the

[1] Robert Benjamin, Mediation as a Subversive Activity, mediate.com (1998).

[2] Robert H. Mnookin & Lewis Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 YALE LAW JOURNAL 950 (1979).

"multi-door courthouse"[3] than critics found it wanting. The vague term "ADR" didn't help. When deploring the privatization of justice, the culprit resembled arbitration. When settlement was the bogeyman, ADR looked more like mediation.

This is well-trodden territory. A few key names provide the gist. Consumer champion Laura Nader found consensual processes wanting because they couldn't deliver what US courts in class actions had started to do: name, shame and punitively damage large corporations.[4] Socio-legal scholar Richard Abel loftily accused "informal justice" of providing the powerful with a "sword to enforce their rights" while denying the disadvantaged the "equivalent shield."[5] And Yale law professor Owen Fiss's broadside enumerated the harms of any outcome to a dispute other than formal adjudication, including privatizing justice and depriving courts of "interpretive occasions."[6]

Although approaching 40 years old, these critiques remain "largely unchallenged"[7] and recently have been recycled in England & Wales,[8] even influencing my own small jurisdiction of Scotland.[9] While they undoubtedly include some caricaturing, their substance remains troubling for mediation. If it fails to deliver justice, all the cost and time savings in the world are little consolation. While people may resent expensive lawyers and baffling delays, they certainly don't want injustice, nor "second class justice."[10]

Preconditions for Change

Theory of change process asks us to "map back" from our goals to work out the steps needed to achieve them. I propose two.

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[3] Frank E. A. Sander, *Alternative Methods of Dispute Resolution: An Overview*, 37 UNIVERSITY OF FLORIDA LAW REVIEW 1, 12 (1985).

[4] Laura Nader, *Disputing Without the Force of Law*, 88 YALE LAW JOURNAL 998 (1979).

[5] Richard L. Abel, *The Contradictions of Informal Justice, in* THE POLITICS OF INFORMAL JUSTICE, VOL. 1. THE AMERICAN EXPERIENCE 267, 296 (Richard L. Abel ed., 1982).

[6] Owen M. Fiss, *Against Settlement*, 93 YALE LAW JOURNAL 1073, 1085 (1984).

[7] SIMON ROBERTS & MICHAEL PALMER, DISPUTE PROCESSES: ADR AND THE PRIMARY FORMS OF DECISION-MAKING 9 (2d ed. 2005).

[8] HAZEL GENN, JUDGING CIVIL JUSTICE (THE HAMLYN LECTURES (2008)) (2010); Michael Bartlet, *Mandatory Mediation and the Rule of Law*, 1 AMICUS CURIAE 50 (2019); Linda Mulcahy, *The Collective Interest in Private Dispute Resolution*, 33 OXFORD JOURNAL OF LEGAL STUDIES 59 (2013).

[9] Charlie Irvine, *The Sound of One Hand Clapping: The Gill Review's Faint Praise for Mediation*, 14 EDINBURGH LAW REVIEW 85 (2010).

[10] Martin A. Frey, *Does ADR Offer Second Class Justice?* 36 TULSA LAW JOURNAL 727 (2000).

First, we need a much better understanding of non-lawyers' thinking about justice. A first-year law student wrote recently: "*Lay individuals are not capable of concluding rationally justified outcomes."* In the absence of alternative perspectives, is it surprising that studying law heightens the belief that justice is too complicated for ordinary people's reasoning?

We need to build on research like that of Tamara Relis, whose detailed ethnography of medical negligence mediation is a goldmine of information about the consumers of the justice system. From her, we learn that parties' – both plaintiffs' and defendants' – aims for litigation and mediation are so different from those of their attorneys and mediators that they occupy "parallel worlds."[11] Other scholars have studied consumer perspectives on matters like procedural preferences[12] and satisfaction with the mediator[13] but rarely seek ordinary people's views on substantive justice. This is the subject of my own doctoral research, and I'd like to challenge others to address the topic and help enrich our understanding of the people we serve.

Second, alongside empirical work we need to re-think our theories of justice. We need to distinguish justice from legality.[14] Law is important but it's not all there is. If justice is defined solely in legal terms, only legal experts deserve a seat at the table. Access to justice becomes access to law. Access to mediation, insofar as it allows for outcomes other than what the law provides, becomes, at best, a quick and dirty alternative, and at worst, a positive harm.

Life would grind to a halt if every agreement and every relationship required judicial approval. A broader theory of justice would extend legitimacy to the vast amount of energy expended by ordinary people on issues of fairness and justice outside the legal system.[15]

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[11] TAMARA RELIS, PERCEPTIONS IN LITIGATION AND MEDIATION: LAWYERS, DEFENDANTS, PLAINTIFFS AND GENDERED PARTIES *8* (2009). One notable exception is Nancy A. Welsh, *Stepping Back Through the Looking Glass: Conversations with Real Disputants About Institutionalized Mediation and its Value*, 19 OHIO STATE JOURNAL ON DISPUTE RESOLUTION 573 (2004).

[12] Donna Shestowsky, *Inside the Mind of the Client: An Analysis of Litigants' Decision Criteria for Choosing Procedures*, 36 CONFLICT RESOLUTION QUARTERLY 69 (2018); Roselle Wissler, *Court-Connected Mediation In General Civil Cases: What We Know From Empirical Research,* 17 OHIO STATE JOURNAL ON DISPUTE RESOLUTION 641 (2002).

[13] **Error! Main Document Only.**Jess K. Alberts, Brian L. Heisterkamp & Robert M. McPhee, *Disputant Perceptions of and Satisfaction with a Community Mediation Program*, 16 INTERNATIONAL JOURNAL OF CONFLICT MANAGEMENT 218 (2005); **Error! Main Document Only.**Lorig Charkoudian, Deborah Thompson Eisenberg & Jamie Walter, *What Difference Does ADR Make? Comparison of ADR and Trial Outcomes in Small Claims Court,* 35 CONFLICT RESOLUTION QUARTERLY 7 (2017).

[14] John Gardner, *The Twilight of Legality* (**Error! Main Document Only.**Oxford Legal Studies Research Paper No. 4/2018 Sept. 23, 2017) https://ssrn.com/abstract=3109517. **Error! Main Document Only.**

[15] Tania Sourdin, *The Role of the Courts in the New Justice System*, 7 YEARBOOK ON ARBITRATION AND MEDIATION 95 (2015).

Mediators need a theory of justice that accounts not only for parties' substantive thinking – what's the right thing to do here? – but strategies and tactics too. We are quite comfortable with the notion of lawyers engaging in a game of litigation. Why not lay people? The people I have interviewed were quite open about their thinking on factors like risk, cost, presentation and, just like lawyers, legal rules.[16]

Basic Assumptions

In the interests of brevity, I list these without supporting arguments (tough for an academic!).

- Non-lawyers have the capacity to reason about and to achieve justice.
- Legal education, rather than expanding this capacity, narrows and focuses it towards a particular purpose, i.e., predicting the outcome of adjudicative processes, usually at appellate level.[17]
- This, in turn, has led those who operate the justice system to neglect and undervalue that wider capacity, characterising it as "subjective."[18]

Interventions

Next, theory of change asks what interventions are required to achieve the goals. I see two:

First, gather more data regarding ordinary people's justice reasoning. This is a challenge to both researchers and practitioners, and further subdivides into qualitative and quantitative methods.

Qualitative approaches include interviews, observation, and document analysis. Hundreds of studies already exist but tend to focus on process issues like user satisfaction or mediator behaviour. Researchers should examine substantive justice and how outcomes were arrived at.

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[16] A large body of scholarship already exists on the question of justice in mediation. *See, e.g.,* James Coben, *Gollum, Meet Smeagol: A Schizophrenic Rumination on Mediator Values Beyond Self Determination and Neutrality*, 5 CARDOZO JOURNAL OF CONFLICT RESOLUTION 65 (2004); Jonathan M. Hyman & Lela P. Love, *If Portia Were a Mediator: An Inquiry into Justice in Mediation*, 9 CLINICAL LAW REVIEW 157 (2002); Ellen A. Waldman & Lola Akin Ojelabi, *Mediators and Substantive Justice: A View from Rawls' Original Position,* 30 OHIO STATE JOURNAL ON DISPUTE RESOLUTION 391 (2016).

[17] *See* John Lande & Jean R. Sternlight, *The Potential Contribution of ADR to an Integrated Curriculum: Preparing Law Students for Real World Lawyering*, 25 OHIO STATE JOURNAL ON DISPUTE RESOLUTION 247 (2010).

[18] Debbie De Girolamo, *Sen, Justice and the Private Realm of Dispute Resolution*, 14 INTERNATIONAL JOURNAL OF LAW IN CONTEXT 353 (2018).

Quantitative approaches reach much larger populations by putting numerical values on the subject of study, e.g., how just was the outcome on a scale of 1-10? One variant is to build on qualitative findings and present respondents with a list; e.g. which of the following factors influenced your thoughts on the outcome – "teaching the other party a lesson," "'getting some money," "realising things might not go my way in court," or "being put back in the position I was in before the dispute."[19] Surveys can be administered by mediators and mediation program directors. While the questions lack subtlety, the larger sample may provide important insights.

Second, dialogue with policymakers and the justice system. We need to counterbalance the emphasis on cost and speed as mediation's primary benefits. We know that fairness and justice matter too. Indeed, our clients often plough on with ill-advised litigation if they view a proposed settlement as unjust. Armed with more data about ordinary people's justice reasoning, we can be bold in challenging the idea that our work is second-class. We offer a process where parties can negotiate both the outcome and the criteria for evaluating that outcome. This could be seen as the ideal, with adjudication the "alternative," a fall-back for hard cases.

Indicators

How will we know that change has occurred? Here are some suggested indicators:

- Mediation schemes employ measures other than settlement rates, cost savings, and speed.

- Mediation schemes express outcomes in terms of justice delivered.

- Mediation schemes (and individual mediators) contribute to the formation and development of justice norms through systemic reporting, for example, by contributing to an anonymised digest of outcomes.

- Consumers develop greater agency, choosing to resolve their own dispute as a default, rather than when compelled or cajoled by the justice system.

Conclusion

The Theory-of-Change Symposium asks us to work out what the world would look like if our dreams became reality. Doubtless my vision of bringing lay people's reasoning inside the justice tent requires refinement. Not all will share it.

But from the moment I first heard a famous mediation scholar say mediators had no interest in fairness and justice, my hackles were raised. My mind shot to the hundreds of people who had sat in my office wrestling with those very things. This post is dedicated to them and all the mediators with the empathy and confidence to work with them as they hone resolutions that are fair and just.

[19] All of these have emerged in my own research.