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# Gollum, Meet Smeagol: A Schizophrenic Rumination on Mediator Values Beyond Self Determination and Neutrality

James Coben

*Mitchell Hamline School of Law*, [james.coben@mitchellhamline.edu](mailto:james.coben@mitchellhamline.edu)

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# Gollum, Meet Smeagol: A Schizophrenic Rumination on Mediator Values Beyond Self Determination and Neutrality

## **Abstract**

The author asserts that the exclusive reliance on the "Two Towers" of self-determination and neutrality as the foundation for mediation practice has inevitably left us with a process routinely characterized by mediator manipulation and deception. The "tricks" are tolerated by sophisticated repeat players, and absent transparency in practice, disturbingly not known to others. The evolution of mediation, from empowerment/community roots to corporate/court sustenance, is no surprise given the nation's journey through the Reagan revolution, the ideology of free markets, and the Supreme Court's unbridled support for freedom to contract in disputing. In short, mediation is at a crossroads needing to confront its mythology and find commitment to values beyond self-determination and neutrality.

## **Keywords**

Mediation, Self-determination, Neutrality, Justice, Empowerment

## **Disciplines**

Dispute Resolution and Arbitration

# GOLLUM, MEET SMÉAGOL: A SCHIZOPHRENIC RUMINATION ON MEDIATOR VALUES BEYOND SELF-DETERMINATION AND NEUTRALITY

*James R. Coben \**

Let me begin by declaring my biases. First, I am a dissatisfied consumer of mediation services, having represented both employment discrimination and family law clients in mediations. The mediators' rapid retreat to caucus, their tendency to incorrectly evaluate my clients' cases, and their strong push for particular settlement structures while simultaneously proclaiming process neutrality, all too frequently have left me (and my clients) disappointed and disillusioned. Second, I am a chronicler of "mediation car wrecks" – a voyeur, if you will, of those times when mediations go so badly that the parties end up disputing about them in court.<sup>1</sup> Third, I am a regulator—having been since 1999 a member of Minnesota's State Supreme Court Alternative Dispute Resolution ("ADR") Review Board, called upon to both investigate and determine whether mediators (and other neutrals) have violated state ethics rules. Fourth, I have an inherent suspicion of anything that is too politically popular, which comes from a long history of always supporting losing candidates (other than the late Paul Wellstone, my beloved Senator). Finally, my pre-law days involved political and field organizing on intelligence agency oversight issues, (at a much different time in our history when the Church and Pike Committee reports<sup>2</sup> had just been issued and

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\* Associate Professor of Law and Director, Dispute Resolution Institute, Hamline University School of Law.

<sup>1</sup> There were more than 300 such cases in 2003. Citations on file with author, who along with fellow Hamline Professor Peter Thompson is currently writing an article analyzing mediation disputing trends in America's courts over the last five years. The database is not yet fully complete, but preliminary analysis makes clear that such cases are dramatically increasing in frequency and most often involve disputes about enforcement of mediated settlements.

<sup>2</sup> See *Final Report of the Select Committee to Study Governmental Operations with Respect to Intelligence Activities of the United States Senate*, 94th Cong., 1st Sess., U.S. Government Printing Office, No. 94-755, Apr. 14, 1976, Vol 1-6 (Church Committee). The final report of the House Select Intelligence Committee (established in July 1975 and chaired by Representative Otis Pike of New York) was never officially released by Congress, but in-

folks were sensitive to things like civil liberties) which gives me a bit of a conspiracy theory approach to the world and a “fundamental rights” background as well.

Collectively, these biases incline me to take a dark view of the quality of justice delivered in mediation. Specifically, I assert that the exclusive reliance on the “Two Towers” of self-determination and neutrality as the foundation for mediation practice has inevitably left us with a process routinely characterized by mediator manipulation and deception. The “tricks” are tolerated by sophisticated repeat players, and absent transparency in practice, disturbingly not known to others. The evolution of mediation, from empowerment/community roots to corporate/court sustenance, is no surprise given the nation’s journey through the Reagan revolution, the ideology of free markets, and the Supreme Court’s unbridled support for freedom to contract in disputing. In short, mediation is at a crossroads needing to confront its mythology and find commitment to values beyond self-determination and neutrality.

This rather dark (and admittedly dramatic) thesis, together with the fact that I happen to be the father of a thirteen and ten year old, with whom I am always in search of a common culture, has led me to organize this Article using metaphors from the cinematic blockbuster trilogy *The Lord of the Rings*.<sup>3</sup> In my view, it is a good fit for a host of reasons. First, there is the obvious parallel between trilogy characters and symposium panelists. Anyone the least bit familiar with the history of ADR knows that Carrie Menkel-Meadow<sup>4</sup> is none other than Lady Galadriel from Lothorian.<sup>5</sup> Josh Stulberg<sup>6</sup> is a lock for the wise wizard Gandolf.<sup>7</sup>

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stead published in *THE VILLAGE VOICE*, Feb. 16, 1976, at 1 and later in book form in Britain under the title *CIA, THE PIKE REPORT* (Spokesman Books 1977).

<sup>3</sup> The three films (*The Fellowship of the Ring*; *The Two Towers*; and *The Return of the King*), all directed by Peter Jackson, are based on the trilogy of the same name written by J.R.R. Tolkien.

<sup>4</sup> Professor of Law, Georgetown University Law Center.

<sup>5</sup> Lady Galadriel:

The Queen of the elven realm of Lorien, and wife of Celeborn. Called the Lady of Light, Galadriel is a wielder of great power and wisdom. Although of significant age, she appears as a beautiful young woman. Galadriel is considered one of the mightiest of the Eldar, and it is because of her power alone that Lorien has remained a sanctuary against Sauron and his evil.

Available at <http://www.canoe.ca/JamLordOfTheRingsBios/galadriel.html> (Mar. 16, 2004).

<sup>6</sup> Professor of Law, The Ohio State University Moritz College of Law.

<sup>7</sup> Gandolf:

[A] being of great power, sent by the Valar (gods) to contest evil in Middle Earth. He and his fellow wizards (sometimes called Istari) are forbidden to challenge evil by

And, in my quest for a reinvigorated set of values to guide the Fellowship of mediation, I am inclined to suggest Clark Freshman<sup>8</sup> as Aragorn<sup>9</sup>—a “Return of the King”, if you will—based on his authorship of a 1997 article envisioning an activist role for mediators.<sup>10</sup>

More to come later in the Article about this latter casting recommendation. For now, I will stop with role assignment because I am not about to name any of my fellow panelists a dwarf.<sup>11</sup> More importantly, there simply are not enough women characters in the trilogy to do justice to the contributions of the many talented women in our field.

Oh, but about me. I am Sméagol<sup>12</sup>—the young hobbit-like river dweller corrupted and transformed into the pitiable creature Gollum, who is ultimately destroyed by the ring of power. The role works well if for no other reason than being placed on a panel with the likes of Carrie Menkel-Meadow and Joseph Stulberg would make any mortal feel like a hobbit. But more apt for this Article is that fact that the Sméagol/Gollum schizophrenic character best summarizes my internal dialogue and external dissonance about mediation, especially about the state of mediation justice. Moreover, the character is about an ugly transformation – something that mediation itself has endured.

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direct confrontation, or to dominate the races of Middle Earth, but are instead sent to rouse the Free Peoples to resistance and guide them in their struggle.

Available at <http://www.canoe.ca/JamLordOfTheRingsBios/gandalf.html> (Mar. 16, 2004).

<sup>8</sup> Professor of Law, University of Miami School of Law.

<sup>9</sup> Aragorn: “A Ranger, soldier, and king-in-waiting, Aragorn is the descendant of the ancient Kings of Gondor, and is the leader of the Dunédan.” Available at <http://www.canoe.ca/JamLordOfTheRingsBios/aragorn.html> (Mar. 16, 2004).

<sup>10</sup> See Clark Freshman, *Privatizing Same-Sex “Marriage” Through Alternative Dispute Resolution: Community-Enhancing Versus Community-Enabling Mediation*, 44 UCLA L. REV. 1687 (1997).

<sup>11</sup> In the movie and book trilogy, the nine member Fellowship at the center of the story includes Hobbits, Men, an Elf, and a Dwarf named Gimli.

<sup>12</sup> Gollum/Sméagol:

Originally named Sméagol, Gollum was once a member of a Hobbit group that lived along banks of the River Anduin. Gollum first came into contact with the Ring as a boy, after his friend Déagol discovered it by chance in the riverbed. Immediately enamored by the Ring’s beauty (and unknowingly influenced by its malignant power) Gollum killed his friend in order to possess it, and then fled his homeland, taking the Ring with him. He retreated to the caves under the mountains, where he lurked for many centuries. Gollum used the Ring as a simple talisman of invisibility, unaware of its true power and malevolence, or the fact that it was devouring his mind. By the time The Lord of the Rings opens, Gollum is a very old and completely broken in mind and spirit after many long centuries with the Ring.

Available at <http://www.canoe.ca/JamLordOfTheRingsBios/gollum.html> (Mar. 16, 2004).

## THE FELLOWSHIP (MEDIATION)

First, I offer a brief and romantic history. Indeed, for those of you familiar with Howard Shore's academy-award winning score, imagine "Concerning Hobbits"<sup>13</sup> playing happily and innocently in the background as you read. The Sméagol in me traces mediation's roots to the community justice movement.<sup>14</sup> Out of a desire to offer a meaningful alternative to the adversarial legal system,<sup>15</sup> mediation claimed to reflect a different set of underlying principles and to hold out different aspirations. Early mediation advocates were concerned with lofty objectives—community empowerment, social harmony, healing, democracy building, decentralization, the fostering of generosity, and the nurturing of creativity.<sup>16</sup> Sméagol remembers when settlement was characterized more as a process of reconciliation, than as an end in itself.<sup>17</sup> Party empowerment was manifested in mediation practice through:

- 1) voluntariness of participation;
- 2) the fostering of active party participation in communication;
- 3) mediator forbearance on giving his or her views on any issues in dispute;
- 4) disputant responsibility for the process, including identifying the issues to be resolved, recognizing the concerns and interests underlying their positions, generating options for

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<sup>13</sup> *Track 2, THE LORD OF THE RINGS: THE FELLOWSHIP OF THE RING* (2001 Reprise Records), music composed, orchestrated and conducted by Howard Shore.

<sup>14</sup> See, e.g., Deborah R. Hensler, *Our Courts, Ourselves: How The Alternative Dispute Resolution Movement is Re-Shaping our Legal System*, 108 PENN. ST. L. REV. 165, 170-73 (2003) ("[t]he adoption of mediation by community justice centers may have reflected a belief that mediation—often characterized by its supporters as antithetical to adversarial dispute resolution processes—was more likely to nurture positive relationships within the community.").

<sup>15</sup> See generally Patricia Hughes, *Mandatory Mediation: Opportunity or Subversion?*, 19 WINDSOR Y.B. ACCESS TO JUST. 161, 164-72 (2001) ("[t]hirty years ago, its proponents promoted mediation and other forms of 'ADR' as a system-wide alternative to resolving disputes and empowering both disadvantaged groups and individual litigants.").

<sup>16</sup> See generally D.N. Smith, *A Warmer Way of Disputing: Mediation and Conciliation*, 26 AM. J. COMP. L. 205 (1978) (attributing growth of mediation centers to "a growing feeling of dissatisfaction with, and a more critical attitude towards, professionals, an increasing consciousness that America and Americans must recapture a sense of 'community,' and a growing feeling that individuals must play a more active role in determining how their lives are to be lived"); see also Hughes, *supra* note 15.

<sup>17</sup> See Andrew McThenia & Thomas Shaffer, *For Reconciliation*, 94 YALE L.J. 1660 (1985) ("settlement is sometimes a beginning and is sometimes a postscript, but it is not the essence of the enterprise of dispute resolution.").

resolution of their dispute, and evaluating the resolution options; and

5) the creation of a climate of cooperation.<sup>18</sup>

Nearly three decades later, we are all a bit older and maybe wiser as well. Again, for you Howard Shore fans, think the more wistful version of the hobbit song contained in “The Taming of Smeagol.”<sup>19</sup> Sustained institutionalization has brought a profound shift in mediation practice.<sup>20</sup> The community empowerment roots of mediation have given way to court and corporate sustenance – often through mandated use of mediation in a wide array of contexts.<sup>21</sup> The desire to efficiently settle cases and to do so in a way familiar to the legal system has trumped all other objectives.<sup>22</sup> In many jurisdictions, mediators so readily separate parties rather than strive to keep them engaged together in conversation that the process is barely distinguishable from a judicially managed settlement conference. The only difference is that the neutral running the show is, to paraphrase Owen Fiss, a stranger chosen by the par-

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<sup>18</sup> See Nancy A. Welsh, *The Thinning Vision of Self-Determination in Court-Connected Mediation: The Inevitable Price of Institutionalization?*, 6 HARV. NEGOT. L. REV. 1, 18-20 (2000).

<sup>19</sup> Track 2, THE LORD OF THE RINGS: THE TWO TOWERS (2002 Reprise Records), music composed, orchestrated and conducted by Howard Shore.

<sup>20</sup> See, e.g., Joseph P. Folger, “Mediation Goes Mainstream” – *Taking the Conference Theme Challenge*, 3 PEPP. DISP. RESOL. L.J. 1, 1 (2002) (arguing that the institutionalization of mediation within the courts and other settings has diminished the defining “alternative” characteristics of the mediation process and has tended to turn mediation into a forum for dispute resolution that is highly directive and evaluative in the service of reaching settlements); see also Welsh, *supra* note 18, at 5 (observing that “the party-centered empowerment concepts that anchored the original vision of self-determination are being replaced with concepts that are more reflective of the norms and traditional practices of lawyers and judges, as well as the courts’ strong orientation to efficiency and closure of cases through settlement”).

<sup>21</sup> See generally Holly A. Streeter-Schaefer, *A Look at Court Mandated Civil Mediation*, 49 DRAKE L. REV. 367 (2001).

<sup>22</sup> See Dorothy J. Della Noce, *Mediation Theory and Policy: The Legacy of the Pound Conference*, 17 OHIO ST. J. ON DISP. RESOL. 545, 550 (2002) (“In ‘connecting’ with the courts, mediation became more an instrument to serve the traditional values, goals and interests of the judicial system, and less a social process in its own right, with its own separate history, traditions, norms, and goals.”); see also Robert A. Baruch Bush, *Substituting Mediation for Arbitration: The Growing Market for Evaluative Mediation, and What it Means for the ADR Field*, 3 PEPP. DISP. RESOL. L. J. 111, 113-14 (2002) (noting “evidence of a rising level of ‘market demand’ for a form of mediation in which the mediator provides expert case evaluation (assessing strengths and weaknesses of each party’s case), substantive settlement recommendations (based on predictions of court outcomes, for example), and strong pressures to accept those recommendations, in addition to tightly managing the discussion process”).

ties rather than "a public official chosen by a process in which the public participates."<sup>23</sup>

The Gollum in me notes with glee that employers and corporate interests have jumped onto the ADR bandwagon with considerable zeal,<sup>24</sup> which should come as no surprise. At least some empirical evidence suggests that repeat players (rarely individuals) benefit the most from informal disputing processes.<sup>25</sup> In a wonderful illustration of the general principle that "the rich get richer," larger employers and corporations now have the luxury of choice, not just of court venue, but also of process for their disputing.<sup>26</sup>

With a shift to settlement orientation now firmly established, the time is right to reexamine the foundations of mediation practice.

## THE TWO TOWERS

If you really want to talk about mythology, there are no better subjects than mediation's two most sacred cows: self-determination and neutrality.

### A. Self Determination

Defining self-determination is like asking, "where exactly is Middle Earth (the fictional land of the epic struggles detailed in the Trilogy)? Answer: "No one knows." But for some reason the utter lack of clarity does not get in the way of the story. The same is true

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<sup>23</sup> Owen Fiss, *Against Settlement*, 93 YALE L.J. 1073, 1085 (1984).

<sup>24</sup> See, e.g., John Lande, *Getting the Faith: Why Business Lawyers and Executives Believe in Mediation*, 5 HARV. NEGOT. L. REV. 137 (2000); see also Catherine Cronin-Harris, *Mainstreaming: Systematizing Corporate Use of ADR*, 59 ALB. L. REV. 847 (1996).

<sup>25</sup> See Lisa S. Bingham, *On Repeat Players, Adhesive Contracts, and the Use of Statistics in Judicial Review of Employment Arbitration Awards*, 29 MCGEORGE L. REV. 223 (1998) (explicating empirical study showing that repeat player employers do better in arbitration than one-shotters and that employers arbitrating pursuant to a personnel manual do better than those arbitrating under an individual contract). See also Lisa S. Bingham, *Emerging Due Process Concerns in Employment Arbitration: A Look at Actual Cases*, 47 LAB. L.J. 108 (1996). But cf., Michael Z. Green, *Debunking the Myth of Employer Advantage from Using Mandatory Arbitration for Discrimination Claims*, 31 RUTGERS L.J. 399 (2000).

<sup>26</sup> See Carrie Menkel-Meadow, *Do the "Haves" Come Out Ahead in Alternative Judicial Systems?: Repeat Players in ADR*, 15 OHIO ST. J. ON DISP. RESOL. 19, 26 (1999) ("Haves" come out ahead by being able to choose and manipulate what process will be used to enforce substantive rights.").



for mediation. Self-determination is often said to be mediation's "prime directive."<sup>27</sup> Although contained in numerous ethical codes,<sup>28</sup> self-determination is nowhere explicitly defined. Sméagol would assert that the concept is nonetheless discernible through a number of practice principles, nicely summarized by Professor Nancy Welsh as follows:

- ~ the parties are at the center of the mediation process;
- ~ the parties are the principal actors and creators within the process; the parties actively and directly participate in the communication and negotiation;
- ~ the parties choose and control the substantive norms to guide their decision-making; the parties create the options for settlement; and the parties control whether or not to settle<sup>29</sup>

Gollum dismisses this romanticism and notes that from the very beginning a host of critics sounded alarm about the underlying legitimacy of a disputing process committed to self-determination and neutrality of intervention in a society plagued by asymmetric distribution of power. In 1985, Owen Fiss offered a generic critique of settlement for its reliance on bargaining and acceptance of "inequalities of wealth as an integral and legitimate component of the process."<sup>30</sup> He lauded adjudication's use of accountable public officials seeking "to explicate and give force to the values embodied in authoritative texts such as the Constitution and statutes"<sup>31</sup> rather than simply the intervention of strangers chosen by the parties to "simply secure the peace."<sup>32</sup> And, Fiss considered the great benefit of judging to be its aspiration "to an autonomy from distributional inequalities."<sup>33</sup>

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<sup>27</sup> Baruch Bush, *supra* note 22, at 115. ("Indeed, the central value and watchword of mediation, echoed in the scholarly and practitioner literature, in 'policy papers' of professional mediator organizations and even in statutory provisions on mediation, was 'self-determination.'").

<sup>28</sup> See, e.g., *Model Standards of Conduct for Mediators*, § I (American Bar Association, American Arbitration Association, and the Society of Professionals in Dispute Resolution, 1994) ("Self-determination is the fundamental principle of mediation. It requires that the mediation process rely upon the ability of the parties to reach a voluntary, uncoerced agreement."). *Model Standards of Practice for Family and Divorce Mediation* Standard 1a (2001) ("Self-determination is the fundamental principle of family mediation. The mediation process relies upon the ability of participants to make their own voluntary and informed decisions.").

<sup>29</sup> Welsh, *supra* note 18, at 8.

<sup>30</sup> Fiss, *supra* note 23, at 1078.

<sup>31</sup> *Id.* at 1085.

<sup>32</sup> *Id.*

<sup>33</sup> *Id.*

Also in 1985, Richard Delgado warned against the tendency of informal disputing processes to magnify prejudices with resulting adverse impact on minority participants.<sup>34</sup> He bemoaned the “deflection of energy from collective action” and the resulting loss of opportunity for justice through law.<sup>35</sup> In 1991, Trina Grillo wrote eloquently about the risks, particularly for women in divorce mediation, posed by mediators’ intentional de-emphasis of principles, blame, and rights, and their active discouragement of anger and discussion of past fault.<sup>36</sup> In 1995, Isabelle Gunning passionately described the impact of adverse cultural myths that corrosively erode the negotiating power of non-dominant community members in mediation’s exchange of story and narrative.<sup>37</sup> That same year, Laura Nader described the dangers of “harmony ideology” and the inevitability of coercive influence in unregulated, and largely hidden, informal disputing processes.<sup>38</sup>

Sméagol points out that at least some of these critiques have been answered—at least rhetorically<sup>39</sup>—by virtue of the fact that the litigation alternative is so unattractive, and equally flawed. But rhetoric and the accompanying stinging critique of litigation is no match for empirical evidence, the lack of which is palpable.<sup>40</sup>

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<sup>34</sup> See Richard Delgado et al., *Fairness and Formality: Minimizing the Risk of Prejudice in Alternative Dispute Resolution*, 1985 WIS. L. REV. 1359 (1985).

<sup>35</sup> See *id.*

<sup>36</sup> See Trina Grillo, *The Mediation Alternative: Process Dangers for Women*, 100 YALE L.J. 1545, 1548 (1991).

<sup>37</sup> See Isabelle Gunning, *Diversity Issues in Mediation: Controlling Negative Cultural Myths*, 1995 J. DISP. RESOL. 55 (1995).

<sup>38</sup> See Laura Nader, *Controlling Processes in the Practice of Law: Hierarchy and Pacification in the Movement To Re-Form Dispute Ideology*, 9 OHIO ST. J. ON DISP. RESOL. 1 (1993).

Mandatory mediation abridges American freedom because it is often outside the law, eliminates choice of procedure, removes equal protection before an adversary law, and is generally hidden from view. The situation is much like that in psychotherapy, little regulation and little accountability. Mind control activities operate best in isolation, and those who have read the literature on influence understand that people in life crises are vulnerable to coercive influence.

*Id.* at 12-13.

<sup>39</sup> See, e.g., McThenia & Shaffer, *supra* note 17. See also Joshua D. Rosenberg, *In Defense of Mediation*, 33 ARIZ. L. REV. 467 (1991).

<sup>40</sup> Virtually no empirical work has been completed to examine the justice concerns raised by early critiques. One exception frequently referenced in mediation literature is 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).

Controlling for case characteristics eliminated ethnic and gender differences in adjudication, but some ethnic differences remained in mediated case outcomes. Specifically, cases including at least one Anglo mediator resulted in higher monetary

## B. Neutrality

In stark contrast to the way wise elders and community members often play a leading role in the dispute resolution processes of indigenous cultures,<sup>41</sup> contemporary mediation has evolved to increasingly separate interveners from the communities they serve. This detachment flows primarily from a non-interventionist notion of neutrality, the second ill-defined foundational concept of mediation.<sup>42</sup>

With increased institutionalization and court-annexation, mediation has been dramatically influenced by legal and judicial concepts of impartiality and concerns about conflicts of interest. Thus, it should be no surprise that “neutrality” is most often defined as the obligation for mediators to act with “impartiality”<sup>43</sup> – the “freedom from favoritism or bias in word, action or appearance, and includ[ing] a commitment to assist all participants as opposed to any one individual.”<sup>44</sup>

For Sméagol, this “outcome” neutrality is sufficient. But the Gollum in me knows that the “fiction” of neutrality has significant practice implications, succinctly summarized by John Forester and David Stitzel more than fifteen years ago:

[Neutrality] hides hundreds of strategic judgments that must be made—each of which can practically affect the benefits achieved by any party. It hides the normative judgments that a mediator must make about what are good and bad agreements under the practical circumstances at hand. And it suggests a technical objectivity, an absence of responsibility, a “good guy” image of the mediator that actually obscures not only issues of power and

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outcomes for Anglo claimants, and minority female claimants received lower monetary outcomes in mediated cases in which both mediators were women.

*Id.*

<sup>41</sup> See generally Gunning, *supra* note 37, at 83.

<sup>42</sup> For a recent succinct review of the history of neutrality in mediation, see Scott R. Peppet, *Contractarian Economics And Mediation Ethics: The Case for Customizing Neutrality Through Contingent Fee Mediation*, 82 T. L. REV. 227, 253-7 (2003).

<sup>43</sup> See, e.g., Model Standards, *supra* note 28, at § II:

The concept of mediator impartiality is central to the mediation process. A mediator shall mediate only those matters in which she or he can remain impartial and even-handed. If at any time the mediator is unable to conduct the process in an impartial manner, the mediator is obligated to withdraw.

*Id.*

<sup>44</sup> Model Standards of Practice for Family and Divorce Mediation Standard IVA (2001).

representation, but the mediator's own active influence on the outcomes that may be achieved.<sup>45</sup>

Particularly odious is the inevitability that the non-interventionist fiction of "neutrality" obscures a favoring of the dominant community and dominant values.<sup>46</sup> As Isabelle Gunning pointed out in her seminal 1995 article:

In the mediation process, parties will always identify relevant identity and organizational categories and draw upon the cultural myths which relate to those categories which most help to legitimate their narratives. When minority or disadvantaged group members participate in mediation, the cultural myths that will be accessed are largely negative and often wholly reliant, not upon personal experience or truth, but upon taboos inculcated during childhood and reaffirmed through the media and other cultural mediums.<sup>47</sup>

Given this reality, only in the mythological world of mediation could silence ever be considered neutral.

#### THE TRIUMPH OF INFLUENCE

So where is our Fellowship now? The foundational concepts of self-determination and neutrality trumpet loudly, while the practice reality is the routine, but undisclosed mediator exercise of influence. Indeed, Christopher Moore's oft-cited mediation treatise proclaims without hesitation or concern "mediators, although neutral in relationship to the parties and generally impartial toward the substantive outcome, *are directly involved in influencing disputants toward settlement.*"<sup>48</sup> The same text goes on at length to catalog the myriad number of ways that mediators exercise pressure and persuasion:

- ~ managing the negotiation process (agenda control);
- ~ managing communication between and within parties (active listening; reframing; use of caucus);

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<sup>45</sup> John Forester & David Stitzel, *Beyond Neutrality: The Possibilities of Activist Mediation in Public Sector Conflicts*, 5 NEGOT. J. 251, 260 (1989).

<sup>46</sup> See Gunning, *supra* note 37, at 68 ("Disadvantaged group members will have more negative cultural myths uniquely related to them, i.e., stereotypes, that undermine the ability of their narratives to compete effectively.").

<sup>47</sup> *Id.* at 79.

<sup>48</sup> CHRISTOPHER W. MOORE, *THE MEDIATION PROCESS: PRACTICAL STRATEGIES FOR RESOLVING CONFLICT* 327 (2d ed. 1996) (emphasis added).

- ~ control of physical setting and negotiations (seating arrangements; table shape, room size);
- ~ timing decisions (imposition or removal of deadlines for settlement; when to convey offers and responses);
- ~ managing the information exchange (packaging information so it will be heard);
- ~ engineering associational influence (choosing who is at the table with settlement in mind);
- ~ use of authority (the mediator's own, as an expert or respected elder, or that of outsiders);
- ~ managing doubt (encouraging doubt as a way to moderate a party's position);
- ~ rewarding behavior (the offer of friendship, respect, or interest in a parties' well-being).<sup>49</sup>

The formal triumph of influence was officially celebrated on April 5, 2002. On that day, the Dispute Resolution Section of the American Bar Association held its annual meeting in Seattle, Washington. Robert B. Cialdini provided the plenary—"Using the Science of Influence to Improve the Art of Persuasion." Over a thousand people in the audience (most of them mediators) enjoyed a skillfully delivered presentation summarizing and celebrating the author's best-selling book *INFLUENCE: THE PSYCHOLOGY OF PERSUASION*.<sup>50</sup> In a nutshell –

You'll learn the six psychological secrets behind our powerful impulse to comply, how skilled persuaders use them without detection, how to defend yourself against them—and how to put those secrets to work in your own behalf.<sup>51</sup>

After offering sustained applause, we exited the hall thrilled to receive a personalized set of six principles<sup>52</sup> conveniently reproduced on a laminated card for easy reference during mediations.

Why applause rather than outrage? I have two theories. First, we were numb. Mediation is both by historical happenstance and underlying ideology a creature of the Reagan revolution.<sup>53</sup> It is

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<sup>49</sup> *Id.* at 327-33, *paraphrased in* James R. Coben, *Mediation's Dirty Little Secret: Straight Talk About Mediator Manipulation and Deception*, 2 J. Alt. Dis. Resol. in Emp. 4, 6 (2000).

<sup>50</sup> See ROBERT B. CIALDINI, *INFLUENCE: THE PSYCHOLOGY OF PERSUASION* (1993).

<sup>51</sup> *Id.*, on backcover.

<sup>52</sup> The six principles ("weapons") of influence, to each of which the book devotes a chapter, are: consistency, reciprocation, social proof, authority, liking, and scarcity. See *id.* at xiii.

<sup>53</sup> See, e.g., Stephen N. Subrin, *A Traditionalist Looks at Mediation: It's Here to Stay and Much Better Than I Thought*, 3 NEV. L.J. 196, 215 (2003) ("free market theories that have dominated the ideological landscape for the past twenty-five years, and their emphasis on individual agency and choice," must be considered an integral part of recent media-

utterly consistent with the Supreme Court's green light on freedom to contract about disputing – well refined by two decades of pro-arbitration decisions.<sup>54</sup> Indeed, what could honor the free market more efficiently than corporate players freeing themselves of legislative and court mandates so they can apply individual standards of justice?<sup>55</sup> How totally appropriate then that the triumph of influence was presented to the mediators by a market researcher!<sup>56</sup>

Second, there was no surprise or outrage over the triumph of influence because of its inevitability. The foundation concepts of self-determination and neutrality are so nebulous that they were ripe for manipulation. Precisely because they exist only as mythology, the concepts are ignored. Finally, mediation has been defined too much by the negative critique of the litigation alternative rather than a positive endorsement (supported empirically) for mediation itself.

Why bemoan the triumph of influence? Gollum would reframe the question as: "What's wrong if, in the service of self-de-

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tion history); see also Deborah R. Hensler, *Suppose It's Not True: Challenging Mediation Ideology*, 2002 J. OF DISP. RESOL. 81, 84 (2002) ("The idea that Americans should prefer mediation to litigation and adjudication may have received a boost from the decades long tort reform campaign by the business community, which sometimes is framed as a critique of litigiousness and other times as a critique of lawyers.").

<sup>54</sup> See, e.g. *Volt Info. Sci., Inc. v. Bd. of Tr. of Leland Stanford Junior University*, 489 U.S. 468, 478, 109 S.Ct. 1248, 1255 (1989) ("The FAA was designed 'to overrule the judiciary's long-standing refusal to enforce agreements to arbitrate, and to place such agreements' upon the same footing as other contracts." While Congress was no doubt aware that the Act would encourage the expeditious resolution of disputes, "its passage was motivated, first and foremost, by a congressional desire to enforce agreements into which parties had entered." Accordingly, we have recognized that the FAA does not require parties to arbitrate when they have not agreed to do so, nor does it prevent parties who do agree to arbitrate from excluding certain claims from the scope of their arbitration agreement. It simply requires courts to enforce privately negotiated agreements to arbitrate, like other contracts, in accordance with their terms [citations omitted]); see also *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 26 (1991) ("Although all statutory claims may not be appropriate for arbitration, '[h]aving made the bargain to arbitrate, the party should be held to it unless Congress itself has evinced an intention to preclude a waiver of judicial remedies for the statutory rights at issue,'"") quoting *Mitsubishi Motors Corp. v. Soler*, 473 U.S. 614, 628 (1985).

<sup>55</sup> As Hamline University Professor, Jim Bonilla, bluntly put it at the Fall 2003 Hamline Law School Symposium on Restorative Justice, "it makes lots of sense to me that corporations would like mediation. I mean they don't want a bunch of Latinos coming in there and doing a class action suit about them dumping stuff in their neighborhoods." Symposium Transcript, reproduced in James Coben and Penelope Harley, *Intentional Conversations About Restorative Justice, Mediation and the Practice of Law*, 25 HAMLINE J. PUB. L. & POLICY (2004 forthcoming).

<sup>56</sup> CIALDINI, *supra* note 50, front cover ("'For marketers, this book is among the most important books written in the last ten years.' Journal of Marketing Research.").

termination, mediators use weapons of influence?" Perhaps if all consumers of mediation were sophisticated repeat players, like lawyers and their more wealthy customers, perhaps the "tricks" of influence (manipulation and deception to frame it more pejoratively) might be acceptable (though hardly aspirational) from a purely utilitarian perspective. After all, it could be asserted that the "tricks" work, if by working, we mean getting a deal done.

However, the Sméagol in me knows that we live in a world where the "repeat players" frequently engage "one-timers" in mediation.<sup>57</sup> Sméagol frets over the potential of great harm when consumers are unaware that tricks are being used - and that typically means people without counsel and unsophisticated clients who are the victims of the conspiracies that so frequently occur between mediators and lawyers (against clients) in mediation.

Indeed, how many times have you read or witnessed a continuing legal education presentation where a speaker explores the notion that mediation is particularly appropriate when necessary to "drum some sense" into clients? All good lawyers regularly confront this challenge of assisting clients to gain perspective about their cases. Using mediation to attain this objective is certainly laudable, but only if the client is told this is what the mediation venue is about. Regrettably, my suspicion is that lawyers, more often than not, fail to disclose this particular motivation in recommending mediation to clients.

More important, the mediator's waging of influence undermines justice precisely because the weapons of influence are not being used in the name of justice - or for that matter in the name of anything at all, other than settlement. In sum, I am not convinced that "justice" will simply emerge through engagement in a dialogic problem-solving process. Sméagol of course says "yes, yes;" but Gollum, loathe as he is to confront the status quo, knows that real justice will remain elusive so long as mediation mythology demands that the mediator is disengaged from the pursuit of justice and mediator practice is marked by active (and most commonly) surreptitious spinning of the conversation. We need something "heftier" to hang our hats (helmets) on.

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<sup>57</sup> See Menkel-Meadow, *supra* note 26, at 32-35 (cataloguing the many ways "repeat players" such as corporations, employers, health care providers, banks, securities brokers and others, compel participation of "one-shotters" in alternative dispute resolution processes through use of mandatory dispute resolution provisions contained in form contracts).

## RETURN OF THE KING

So where is our Fellowship now? Just like in the concluding film of the Trilogy, a battle rages. The Fellowship of mediation is at a critical transition point. A bit of inspiration is needed, and in my view, a new set of fundamental principles needs to be declared.

In 1996, Jackie Nolan-Haley succinctly summarized the great divide of competing visions for the heart and soul of mediation as between mediator as “disinterested referee” and “empowerment specialist.”<sup>58</sup> Given this divide and the many available articulations of mediator role and mediation justice, what are the candidates for ascension to the throne? Staying loyal to my “Hollywood” theme, the categories and nominees are:

## A. It’s Not About Justice at All

*Empowerment and Recognition (Baruch Bush and Joe Folger):*

The transformative framework posits that, despite conflict’s natural destabilizing impacts on interaction, people have the capacity to regain their footing and shift back to a restored sense of strength or confidence in self (the *empowerment* shift) and openness or responsiveness to the other (the *recognition* shift). The model assumes that this *transformation of the interaction* itself is what matters most to parties in conflict – even more than resolution on favorable terms.<sup>59</sup>

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<sup>58</sup> Jackie Nolan-Haley, *Court Mediation and the Search for Justice Through Law*, 74 WASH. U. L. Q. 47, 93 (1996).

<sup>59</sup> See website of the Institute for the Study of Conflict Transformation, Inc., “transformative framework” available at <http://www.transformativemediation.org/transformative.htm> (emphasis in original) (“Moreover, these positive moves also feed into each other on all sides, and the interaction can therefore regenerate and assume a constructive, connecting, and humanizing character.”). When mediation is viewed as a form of engagement designed to change the quality of human interaction in conflict, justice is irrelevant. For example, two very recent (and excellent) articles summarizing principles of transformative mediation make the point through omission – the word “justice” does not appear at all, except in a few footnotes referring to other published works. See Dorothy J. Della Noce et al., *Clarifying the Theoretical Underpinnings of Mediation: Implications for Practice and Policy*, 3 PEPP. DISP. RESOL. L. J. 39 (2002); see also Robert A. Baruch Bush & Sally Ganong Pope, *Changing the Quality of Conflict Interaction: The Principles and Practice of Transformative Mediation*, 3 PEPP. DISP. RESOL. L. J. 67 (2002).



## B. It's About the Parties' Understanding of Justice

*Party Autonomy (Lela Love and Jon Hyman):*

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.<sup>60</sup>

*Private Ordering (Clark Freshman):*

In a private-ordering understanding of mediation, a mediator simply teases out the parties' values and helps them craft a resolution that reflects their values. The implicit notion of such mediators is that parties can (and perhaps should) discover their own values and how they apply to problems; the values of law or other parts of a community are relevant only if a party wants to bring up such values. The implicit notion of the good mediator is one who mirrors the parties' values and helps work those values into an agreement about a particular dispute. The implicit notion of neutrality is that a mediator is neutral when the mediator is passive about raising values.<sup>61</sup>

*Norm-Generating (Ellen Waldman):*

"The leitmotif of the norm-generating model, then, is its inattention to social norms. In an effort to spur innovative problem-solving, the model situates party discussion in a normative tabula rasa. The only relevant norms are those the parties identify and agree upon."<sup>62</sup>

*The Irrelevance of Probable Litigated Outcome (Joseph Stulberg):*

"It is irrelevant to the mediator if the terms of agreement are inefficient, shortsighted, or less than what one party could have gained in winning lawsuit."<sup>63</sup>

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<sup>60</sup> See Jonathan M. Hyman & Lela P. Love, *If Portia Were a Mediator: An Inquiry Into Justice in Mediation*, 9 CLINICAL L. REV. 157, 164 (2002).

<sup>61</sup> See Freshman, *supra* note 10, at 1692.

<sup>62</sup> Ellen A. Waldman, *Identifying the Role of Social Norms in Mediation: A Multiple Model Approach*, 48 HASTINGS L. J. 703, 718-719 (1997).

<sup>63</sup> JOSEPH P. STULBERG, *TAKING CHARGE/MANAGING CONFLICT* 142 (1987). "What is relevant is that the parties have decided that, given their scheme of priorities, they can live with the solution, and the mediator is confident that the proposed terms will endure in practice." *Id.*

C. It's About Informed Decision-Making and  
"Consideration" of Justice

*Informed Consent (Jackie Nolan Haley):*

Parties in court mediation who resolve disputes based on their ethics, culture, sense of morality, personal fairness and the like, instead of law, should have consciously chosen to disregard their legal rights. In order to achieve the analogue to justice through law, parties must know their legal rights before choosing to abandon them in mediation. In short, the exercise of self-determination in mediation should be informed. For if the self is unknowing, just what is it determining?<sup>64</sup>

*Norm-Educating (Ellen Waldman):*

Contrary to the norm-generating model, where discussion of societal standards is thought to impede autonomy and distract parties from their true needs, this model's consideration of social norms is thought to enhance autonomy by enabling parties to make the most informed decisions possible.<sup>65</sup> The fact that a dispute implicates norms of which the parties should be informed does not, however, imply that the parties must adopt or implement them. In disputes calling for the norm-educating model, the parties' interests in reaching settlement, even a settlement that disregards social and legal norms, outweigh whatever societal interest exists in the application of those norms.<sup>66</sup>

*A Proposed Ethical Standard to "Consider" Justice (Jon Hyman):*

Promotion of Justice: mediators should seek to avoid injustice in the process of mediation and in mediated agreements. Commentary: Concepts of justice play a role in mediation. Mediators should avoid actions that can make the process of mediation unjust. And they should try to help the parties find terms of agreement that the parties do not view as unjust. In addition to concern for the place of justice in particular mediations, mediators should strive to improve the practice of mediation in general, so that it can lead to agreements that are more fair and just.<sup>67</sup>

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<sup>64</sup> Nolan-Haley, *supra* note 58, at 91.

<sup>65</sup> Waldman, *supra* note 62, at 731-32.

<sup>66</sup> *Id.* at 739.

<sup>67</sup> See Session 4.08, 2003 Session Materials Binder, Association for Conflict Resolution Third Annual Conference: "The World of Conflict Resolution: A Mosaic of Possibilities, October 15-18, 2003."

## D. It's About Enforcing Norms

*The Relevance of Probable Litigated Outcome (Judith Maute):*

As to substantive fairness, the probable litigated outcome should serve as a reference point; the parties are free to find a solution that better serves their personal values and concerns. The mediator, however, should refuse to finalize an agreement when one party takes undue advantage of the other, when the agreement is so unfair that it would be a miscarriage of justice, or when the mediator believes it would not receive court approval.<sup>68</sup>

*Targeted Norm Advocacy (Ellen Waldman):*

In this process, however, the mediator not only educates the parties about the relevant legal and ethical norms, but also insists on their incorporation into the agreement. In this sense, her role extend[s] beyond that of an educator; she becomes to some degree, a safeguarder of social norms and values. She apprises the parties of relevant social norms, not simply to facilitate the parties' informed decisionmaking and provide a beginning framework for discussion; she provides information about legal and ethical norms to secure their implementation.<sup>69</sup>

*Community-Enhancing (Clark Freshman):*

A community-enhancing understanding of mediation regards mediation instead as a means of helping individuals order their activities and resolve their disputes consistent with the values of some relevant community. At the more superficial level, community-enhancing mediation means that a particular body of principles, such as Jewish or Islamic law, or some less formal set of community practices, should determine the outcome of a particular dispute. This would mean that how a couple divides property and child care should reflect the norms or practices of the community. In a less obvious way, a second aspect is that the process of mediation reinforces the individuals' sense of connection to a particular community and may make the individuals, at some level of consciousness, think of themselves as members of that community so thoroughly that they themselves order their lives according to the norms of the community without any additional process. The im-

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<sup>68</sup> See Judith L. Maute, *Public Values and Private Justice: A Case for Mediator Accountability*, 4 GEO. J. LEGAL ETHICS 503, 504-05 (1991).

<sup>69</sup> See Waldman, *supra* note 62, at 745.

plicit image of both mediators and parties is that individuals are members of communities and/or should be members of communities.<sup>70</sup>

*Equality as a Shared Value (Isabelle Gunning):*

In order to structure mediation so that it can work most of the time in favor of everybody, the value of equality must be introduced, injected when necessary. Mediation, then, becomes another locus in American political, social and legal life where ideas about equality are defined and redefined. When parties' conflicts are stymied by the presence of negative cultural myths and interpretive frameworks about disadvantaged identity groups, then the injection of equality values is appropriate so that the parties can try to either identify shared positive cultural myths and interpretive frameworks or to create them.<sup>71</sup>

E. It's About Something More

*Rationality (Kevin Gibson, Leigh Thompson & Max Bazerman):*

"The goal of neutrality should be less paramount in mediation theory and practice. Instead, mediators should strive to foster 'rational' outcomes,"<sup>72</sup> which are dependent on three elements: 1) agreement if and only if both parties can better achieve goals through negotiation, than by impasse; 2) agreement that is maximally efficient; and 3) full consideration of the allocation of disputed resources).<sup>73</sup>

*Moral Discussion (Sara Cobb):*

An engaged mediator who actively advances a morality of personal responsibility and accountability by:

favoring versions of 'reality' that: 1) clearly establish the suffering of each party; 2) create descriptions of that suffering that connect it back to their own actions, without minimizing the suffering or 'laming the victim;' 3) positively connote the intentions of each actor, with other actors; 4) create variation in character

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<sup>70</sup> See Freshman, *supra* note 10, at 1692-93.

<sup>71</sup> See Gunning, *supra* note 37, at 86.

<sup>72</sup> Kevin Gibson et al., *Shortcomings of Neutrality in Mediation: Solutions Based on Rationality*, 12 NEGOT. J. 69, 72 (1996).

<sup>73</sup> See *id.* at 72-73.

traits; and 5) add complexity to the value sets in use, i.e., incorporating more and different values.<sup>74</sup>

*Community-Enabling (Clark Freshman):*

Active neutrality of the mediator that introduces a wide range of values and encourages parties to consider how such values, or some combination of them, might fit their needs. Under active neutrality, the mediator does not raise issues in the exceptional case; the mediation process introduces various norms as a matter of course in every mediation.<sup>75</sup>

And the winner is. . . frankly, I am not ready to actually declare a King, despite my earlier casting suggestion (and continued conviction) that Clark Freshman would be a solid Aragorn. But, I am ready to assert that the last three formulations of mediator role (rationality, moral discussion, and community enabling) are most likely to assure the delivery of justice in mediation. In my view, these formulations all share five critical elements.

First, they all accept the impossibility of classically framed “neutrality.” Rather than continue the fiction that mediators are non-interventionist and not in a position to influence decision-making, these models embrace an activist agenda. The famous quote from 20th century physicist Werner Heisenberg comes to mind: “we have to remember that what we observe is not nature in itself but nature exposed to our method of questioning.”<sup>76</sup> In other words, there is no such thing as the neutral observer. Silence, in the words of Isabelle Gunning at the Symposium, is bias.

Second, these three formulations of the mediator role are transparent in acknowledging what will happen anyway – an activist role for the mediator. Better for consumers that the agenda is a declared one, rather than a secret one, or the even worse false declaration that influence is not being waged.

Third, the mediator is charged in these three models with working toward “optimality,” not simply agreement. At the simplest level, why bother moving the enterprise of mediation forward if we are not convinced that there really is value added by the mediator. Sméagol is convinced that mediators can help parties find

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<sup>74</sup> Sara Cobb, *Creating Sacred Space: Toward a Second-Generation Dispute Resolution Practice*, 28 FORDHAM URB. L.J. 1017 (2001).

<sup>75</sup> See Freshman, *supra* note 10, at 1762-63.

<sup>76</sup> Werner Heisenberg, *PHYSICS AND PHILOSOPHY: THE REVOLUTION IN MODERN SCIENCE* 58 (Prometheus Books 1999).

better solutions to problems than parties can find on their own. In this, even Gollum concurs.

Fourth, these three models support, indeed require, active consideration of a wide range of norms (not just the ones parties volunteer). This maximizes the informed consent that so many mediation justice theorists endorse but also increases the likelihood of individuals, including the mediators themselves, taking personal responsibility for their actions. And, true to mediation's early roots, these models neither impose a particular set of norms on the parties, nor make an assumption that legal norms trump all others.

Finally, they all make central a vision of the "common good," of "community," however difficult that is to define. Another way of framing this last point was hinted at by Nancy Welsh. As Professor Welsh put it, "at some level, we're really saying that 'values' conflicts from the conflict wheel<sup>77</sup> are back on the table."<sup>78</sup> As usual, she got it exactly right. For too long, the predominant mediation-training model has been to avoid discussing fundamental values out of fear that the conversation is too difficult to manage.<sup>79</sup> This avoidance of "values" issues inherently and unnecessarily limits discussions of justice.

What would be the practical implications of overtly declaring a "justice" agenda in mediation? Despite the heady nature of the conversation, our "family," to use Lela Love's characterization of the symposium panel in her introductory remarks, was unusually interested in concrete suggestions. I have several. First, and in true mediator fashion, it is all about the questions one asks. Mediators have come up with dozens of variations on "why."<sup>80</sup>

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<sup>77</sup> The conflict wheel to which Professor Welsh referred is the "Circle of Conflict: Causes and Interventions" contained in Christopher Moore's mediation treatise. See MOORE, *supra* note 48, at 60-61 (Figure 2.1). The "circle" posits that the causes of disputes can be divided into six categories (relationship conflicts; data conflicts; interest conflicts; structural conflicts; and values conflicts), each with a different set of possible mediator interventions. To my knowledge, virtually all introductory mediation trainings and academic courses include some reference to this conceptual framework, though often without attribution to Christopher Moore!

<sup>78</sup> Author's notes of Welsh oral comments at the Symposium.

<sup>79</sup> "Avoid defining problem in terms of value" is one of Moore's four proposed interventions for "values conflicts." MOORE, *supra* note 48, at 60-61. But in a wonderful example of theory being simplified in practice, it is the option most mediators and mediation trainers tend to rely on (foregoing the three other options: "allow parties to agree and to disagree; create spheres of influence in which one set of values dominates; search for superordinate goal that all parties share").

<sup>80</sup> For several excellent lists of "why" questions, see appendices A and C in John Barkai, *Teaching Negotiation and ADR: The Savvy Samurai Meets the Devil*, 75 NEB. L. REV. 704, 746-47, 751 (1996).

Generating a similar list of “justice-related” questions is certainly possible. As a starter, at the symposium, Carrie Menkel-Meadow suggested that mediators would do well to engage in more inquiry designed to explore party doubts about strongly held values.

Second, mediators might choose to change the way mediations begin. Isabelle Gunning observed during the Symposium that most mediators are quite comfortable declaring a process commitment to mutual respect and the value of conversation. Why not invite and/or declare a commitment to social equality and other fundamental aspects of justice as part of a mediation orientation?

Third, we could take a more “justice-friendly” approach in the second-generation codification of mediation ethical standards. Admittedly, drafting is a nightmare. But in my view, there is little harm (and much to gain) by Jon Hyman’s exhortation to craft ethical standards that, at a minimum, permit mediators to encourage parties to “consider” justice.

Finally, I come back to the suggestion of my presumptive Aragorn, Clark Freshman. He would replace the mediator who treats ideas equally through equal silence, with the mediator who “presents a variety of values and ideas and makes the argument for them.”<sup>81</sup> Does this require more of the mediator? Absolutely. But it is the challenge that the field must be ready to tackle.

### JOURNEY’S END

At the end of *The Lord of the Rings: The Return of the King*, Annie Lennox sings “Into the West.”<sup>82</sup> The lyrics both recall our past and point to a future resurrection:

Lay down your sweet and weary head  
 Night is falling, you have come to journey’s end.  
 Sleep now. Dream—of the ones who came before.  
 They are calling from across a distant shore.  
 Why do you weep?  
 What are the tears upon your face?  
 Soon you will see. All of your fears will pass away.

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<sup>81</sup> Freshman, *supra* note 10, at 1763. This “active neutrality” is not designed to secure particular results, but instead offered so that parties may “consider how such values, or some combination of them, might fit their needs; they may accept some, reject others, modify many, but they will do so with a sense of alternatives.” *Id.* at 1762.

<sup>82</sup> *Track 19, THE LORD OF THE RINGS: THE RETURN OF THE KING* (2003 Reprise Records), words and music by Fran Walsh, Howard Shore, and Annie Lennox.

Safe in my arms you're only sleeping.  
What can you see on the horizon?<sup>83</sup>

The quest for justice in mediation indeed requires a form of resurrection. It should honor the past, especially those early proponents who framed a true alternative vision for managing conflict. But on the horizon is the necessity of debating and articulating a new set of values to guide our practice. At a Fall 2003 Hamline Law School Symposium on Restorative Justice, Ronnie Earl, District Attorney, Travis County (Austin, Texas) articulated the following vision of justice:

The law in Texas says that it's the duty of every prosecutor not to convict but to see that justice is done. . . . I don't know what is it but I've arrived at a definition that I will share with you: [justice] is the fairness and balance that comes from healthy relationships. . . . There is no separation between community and justice. Community, I'll venture a definition since we're already on thin ice: community is a network of relationships that share joy and pain. And if the relationships are healthy they also share power and so the justice then flows from that.<sup>84</sup>

This vision, which requires the direct linking of justice and community, seems particularly right. If mediation is to move beyond the triumph of influence, values other than individual self-determination and a false neutrality of intervention must be forged. If so, we can together, in the words of Annie Lenox, "pass into the West" – not necessarily to the immortality destined for the heroes in *The Lord of the Rings: The Return of the King*, but to an equally desirable and much needed place of peace and purpose.

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<sup>83</sup> *Id.*

<sup>84</sup> Symposium Transcript, *supra* note 55.