

Seeking Justice in the Shadow of the Law

By *Ellen Waldman*

Family Background

The handwritten inscription on the title page of the autobiography *Labor Lawyer* reads, “To Dearest Ellen, my lovely granddaughter, with hope for a brilliant and happy life in a world of peace and justice.”

The book’s author, my father’s father, gifted it to me in 1971. I was nearly 10 years old.

Ellen Waldman is professor of law at Thomas Jefferson School of Law in San Diego, California, where she founded and supervises the school’s Mediation Program, which gives students an opportunity to mediate disputes in small claims court. She also teaches mediation and negotiation, aiming to introduce broader concepts and help students understand that mediation and negotiation skills are important in a wide variety of contexts and endeavors. She has taught mediation-related courses nationally and internationally and has published more than 25 articles and book chapters in the areas of alternative dispute resolution and bioethics. She has also edited *Mediation Ethics: Cases and Commentaries* (2011), an in-depth treatment of the difficult issues that can arise in mediation practice. Before joining Thomas Jefferson, Waldman clerked for the Hon. Myron Bright of the Eighth Circuit in Fargo, North Dakota, and practiced with a litigation firm in Washington, DC, specializing in insurance defense. While pursuing her LLM degree in Washington, Waldman was a fellow at the Institute of Law, Psychiatry, and Public Policy in Charlottesville, Virginia. Her current research focuses on mediation and social inequality, in particular on the increasing gap between the haves and have-nots in society and the effect of this on mediation practice.

Any story of how I came to mediation—and my particular slant on the craft—must begin with my family, and most particularly my grandfather. He was a larger-than-life character who left his imprint on the national political scene as well as the Waldman generations to follow.

I did not learn about his early life and career directly from him, but rather from his autobiographies and other historical sources. He makes a brief cameo in Philip Roth's counter-factual novel, *The Plot Against America*, as one of a group of prominent Jewish leftists taken into custody when the anti-Semite Charles Lindbergh ascends to power. In real life, my grandfather's activities were tracked and monitored in bulky FBI files, and his role protecting organized labor's right to strike is memorialized in Supreme Court briefs and white papers.

My grandfather's life is the tale of an immigrant who never quite lost his infatuation with the promise of America, in particular its commitment to democracy, social and economic opportunity, and the rule of law. My grandfather's tenacity was fueled by his optimism that the ideals embedded in the Constitution could be operationalized to advance the plight of the otherwise powerless. His fight was always a fight for the underdog, waged in the courtroom or on a political soapbox, but always according to the norms that he felt embodied the best of American society. An escapee from the land of pogroms, tsarist authoritarianism, and Bolshevik revolution, he was profoundly grateful for the opportunity to live in a country guided by social democratic ideals.

A short sketch of his life explains my abiding confidence that legal norms embody a rough form of justice, just as the details of my own life reveal a growing discomfort with the mechanisms by which those norms find expression.

The Roots of My Family Tree

My grandfather, an innkeeper's son, grew up in a small Ukrainian village. His family was poor but literate, and even at a young age, he nurtured the dream of becoming a lawyer. He left his village for America in 1909 at the age of 17. Upon arriving in New York, he followed the path of countless immigrants: by day he worked on the floor of a chandelier factory, while at night he studied English.

His interest in workers' rights was piqued by an early experience at the factory manning a metal stamping press. The work was arduous and unforgiving. Workers fed metal strips into a clattering machine at an ever-increasing pace. The workers had no control over how quickly the metal came at them, and the machines had no safety guards. The day started at 7 a.m. and ended at 6 p.m., with a half-hour break for lunch. When the nimble-fingered young girl working the adjacent machine lost her hand to the machine, the foreman came by to demand that all witnesses sign a paper certifying that it was the girl's fault. My grandfather refused, saying he did not believe his skillful machine-mate had done anything wrong. He was promptly fired. In his own words, he notes, "I had received my first lesson in labor relations" (Waldman, 1944: 25).

Moved by that experience, my grandfather became a cutter in the garment industry, joined the union, and took on the role of ensuring adherence to the collective bargaining agreement on the shop floor. He was further radicalized when 146 garment workers in a nearby non-union shop were incinerated in the Triangle Shirtwaist Factory fire of 1911. He was part of the horrified crowd who watched as girls stood atop the blazing building and jumped to their deaths below. The factory did not contain an on-site toilet, and "to prevent work interruptions," the doors to the hall and stairway were kept locked.

Joining other workers at a gathering to consider the fire and what should come next, my grandfather was introduced to the leading lights of the Socialist Party. He swiftly became a convert, was elected to the New York Assembly in 1917 on the Socialist ticket, and was to play a prominent role in the party for the next 20 years. He became one of the most prominent labor lawyers in the country, representing the International Longshoremen, the Transport Workers Union, and the Amalgamated Clothing Workers of America. Improving the lot of workers, both through legislative reform and legal advocacy, was to become the driving force of his professional life.

My grandmother, Belle Bernstein, was a woman with similar passions. When she and my grandfather met in 1924, she had been out of law school three years and was working as a trial lawyer for the National Desertion Bureau of New York City, an organization founded for the protection of indigent women who had been deserted by their husbands (Waldman, 1944: 162). Like my grandfather, she was a political animal whose sympathies lay far to the left. She was a skilled political hostess, campaign partner, and professional helpmate—and she brought her charm, poise, and encyclopedic knowledge of current affairs to the many gatherings staged at their town house in Brooklyn Heights.

My father went into the family business, joining my grandfather's practice. My earliest memory is of him sitting at the living room table, sharpened pencils and yellow legal pad arrayed before him. He was a talented and effective lawyer, dedicated to his craft and well-liked by colleagues and adversaries alike. What I remember best about my father was his capacity to put his own self-interest and personal emotions to the side and recognize the validity of opposing viewpoints. Even if he were being treated unfairly (as labor lawyers often were by hostile, business-oriented judges), he was able to tick off the legal reasons why the

other side might have prevailed. The same was true in his personal life. I never saw him lose his temper; never saw him behave in other than a generous and fair-minded fashion. He was, as I have written elsewhere, Aristotle's "man of virtue" and my idea of what a litigator was and did.

My mother also had a bent for law and public service. In 1947, she was one of approximately 10 women enrolled in Columbia Law School, spending long hours along with my father in the close confines of the law review staff cubicles. Family lore has it that my father—tall, handsome, and a ravishing tennis player—dated all the other women on the law review before taking out my mother. But seeing them together in law school photos, that bit of apocrypha seems unlikely. After graduation, my mother went to Washington, DC, and wrote Supreme Court briefs for the National Labor Relations Board. Within two years, she had married my father, moved back to New York, and begun work at Harlem Legal Services. While raising four children, she spent the bulk of her career heading up the Commission on Law and Social Action at the American Jewish Congress, where she worked on cases involving separation of church and state, discrimination, affirmative action, women's reproductive rights, and genetic testing.

The astute reader will note that this is a lot of lawyers crammed onto one bough of a family tree. I used to joke that chromosomal abnormalities stifled the creativity of those with Waldman DNA, making it impossible to contemplate a career outside of law. But sociology, not biology, was likely the root cause. In my family culture, the law was viewed as a mechanism for progressive social change, and lawyering was celebrated as a noble calling. Of course, as a kid, I knew that not every legal job worked toward the eradication of poverty, discrimination, and suffering. Still, from what I could see, lawyers were working on the posi-

tive side of the ledger, improving rather than degrading our individual lives and collective fortunes.

My Path

I don't know if this is true in other families, but in mine a subtle form of typecasting began early. My eldest brother, avid consumer of histories and biographies, became "The Intellectual." The second brother, a physically graceful and talented tennis player, was "The Athlete," and the third, a high-achieving utility player on the twin scholastic and athletic fronts, was "The Competitor." And me—well, I was the youngest and much-coveted "Only Girl."

Although I was held to the same high standards as my brothers, I felt free to craft a slightly different persona—more ethereal, less moored to the practical. Whereas my brother read histories, I read novels and imagined how characters plucked from my favorite books might interact if they found themselves at the same dinner party. I was interested in the prismatic power of literature; how events assume different contours when refracted through a character's idiosyncratic point of view. Narrators proved unreliable, protagonists displayed only partial insight, and relationships formed, strained, tore, and reconfigured in endless variety. Maybe it was this early attraction to the rich, layered, and multitudinous worlds conjured by the authorial imagination that propelled me toward immersion in literature and psychology and not the relentless logic of the law.

I chose to attend Brown University, which at that time was known for its academic rigor, lack of core requirements, and co-ed bathrooms. I thought that its easy embrace of diversity, not just racial and ethnic but intellectual and stylistic, would be a good fit for someone relatively unformed. Brown's campus made room for all types: econ bros, semiotics enthusiasts, aesthetes, engineering nerds, Timothy

Leary-type drug experimentalists, disciplined athlete-scholars and beautiful people like John-John Kennedy and his pre-Raphaelite girlfriends. And though it might have been simpler for like personalities to stick with like, most didn't, and it was possible to move seamlessly from group to group. It made for a stimulating and joyful four years.

I enjoyed my college adventure, but at the end, I wasn't sure of the next step. Maybe teaching. I had worked as a teaching assistant and found it rewarding. But would that be enough? I wanted to do serious work in the world, like my grandfather, grandmother, father, and mother. And though I knew a lot about literature, I didn't really know much about how our government, including the judiciary, was supposed to work and the corresponding obligations of citizenship. And what if teaching wasn't the answer? I needed options. So I applied to law school as a sort of finishing school—a way to gain a more in-depth understanding of the rules that govern our social interactions—and as a possible plan B.

I didn't intend to practice—at least not in any traditional sense. But in my family, to be a lawyer is to be a litigator, so I thought I needed to at least see what litigation was all about. I ended up at a small “boutique” litigation firm that heavily advertised its *pro bono* First Amendment practice but focused mainly on insurance defense work.

My first day at the firm presaged my date-stamped stay there. I arrived at 8:00 a.m. and was told I was being put on a “big case.” At 8:01, the file room clerks began bringing Redweld expandable binders into my office, one dolly at a time. By lunchtime, half of my office floor was covered. By 5 p.m., only a tiny bit of carpet around my desk was visible. The rest of the office floor was obscured by the red tide of binders. It was my job, with the Dictaphone that was given to me by my secretary, to read the contents of these

Redwelds, record the “highlights” into the Dictaphone, and capture the status of the case.

As it turned out, the case was a modern-day Jarndyce v. Jarndyce, the long-running inheritance case in Charles Dickens’s *Bleak House*.¹ Four other firms had been actively litigating portions of the dispute in three separate jurisdictions over the course of the prior two years. My firm was only the latest celebrant to the party.

Apparently, our client had issued an excess casualty insurance policy to a company that had already been the subject of a number of product liability claims. When, unsurprisingly, the company made a claim on the policy, we responded with a battery of defenses, including fraud in the inducement, as well as the usual contractual exclusion arguments. I worked on this case for nearly two years, and it never seemed that we got any closer to a resolution. At our firm alone, several partners and associates were being kept busy almost full-time on the case. The bills must have been enormous. It seemed to me, as a matter of simple math, that the amounts our client was paying its manifold defense counsel had to exceed the amount the client would have paid out on the policy, but simple math was not all that was involved. As I came to learn, our client did not want to garner a reputation as an “easy touch,” and so the reflex was to deny first and research legal grounds later.

Although as a young associate, relegated to relatively mundane tasks such as propounding discovery and writing research memos, I couldn’t begin to see the “big picture” strategy for this case, I began to wonder whether that picture was perhaps even worse than the one I could see through my tiny, micro-focus lens. Decisions regarding whether to settle and for how much seemed to be made by division heads who were more interested in the budgetary health of their own particular silo than the larger welfare of the company. I also began to wonder whether the entire

litigation project had taken on some sort of propulsive life of its own. No one among the phalanx of lawyers, claims adjusters, or corporate decision-makers involved in the case seemed to question whether this litigation constituted a sensible expenditure of time or money. What really was the end game here?

My befuddlement over this adversarial quicksand led me to think more deeply about conflict, how it arises and escalates, and what to do about it. Surely, if the insurance company and its policyholder had been visited, like Ebenezer Scrooge, by the ghost of Christmas future, replete with eve-of-holiday sanctions motions, discovery requests, and exorbitant sunk costs, they would have found some alternative solution. In my off-hours (say, midnight to 6 a.m.), I started to research alternative approaches to conflict and came to learn that the city in which I was working had an evening training program for those wishing to learn more about mediation. The Center for Dispute Settlement, founded by mediation pioneer Linda Singer, offered citizens of all professional (and non-professional) backgrounds training in exchange for a commitment to provide *pro bono* mediation services to the court for a year following completion of the training. My initial inquiries to the center were rebuffed because, in the words of the intake person, “we already have too many lawyers.” Although from my vantage point, I could hardly imagine that was the case, I vowed to take a battering-ram approach to the problem and simply called the center every week thereafter until they agreed to let me in.

I’d like to say that the training I took was transformative and that I was a natural. But it wasn’t, and I wasn’t. It wasn’t transformative because I had already come to many of the course’s conclusions about conflict and human nature through my litigation activities at the law firm. And I wasn’t a natural because I had already, as a young associ-

ate, taken on many of the characteristics that impede lawyers' capacities to mediate. I was better at speaking than listening, at formulating judgment than facilitating conversation, and at identifying the "sensible solution" than letting the parties come to their own conclusions at their own pace. It took a while to break those habits.

After the training concluded, I happily began fulfilling my "debt" to the center by mediating court-referred cases in the evenings. Almost without exception, the people who came to the center left more peaceful and satisfied than when they entered. Neighbors, consumers, ex-lovers, and estranged business partners all had an opportunity to explain their grievances, attain a broader perspective of "the problem," and collaborate on solutions that would help heal old wounds and prevent the emergence of new ones. For one starved as I was for some assurance that my actions, if not by day in the law firm then at night at the center, were improving people's lives, the immediacy of those positive impacts was intoxicating. And the more cases I did, the more obvious became the need for delicacy and nimbleness of thought to truly excel at the craft.

In addition to appreciating the simple joy of feeling useful, I liked the fact that mediation practice seemed to inhabit the psychologically lush universe of the literary imagination. Mediation made vivid the contradictory, protean, and endlessly surprising aspect of human nature. Individuals who come to mediation are not flattened into one-dimensional stick-figures, rendered bland and indistinct by the labels of "plaintiff" and "defendant." Disputant appetites—their rage, lust, hubris, regret, and grace—are on full display, and mediation makes a place for them in the process. Narrative lines and fragments flow, intersect, and diverge, and while the mediator works to ensure that all the threads remain visible, like any clever reader, she does not regard any one voice as authoritative. Mediation

invites its participants to exchange the arid factual staccato of the legal brief for a subtler, more raucous tale of adventure and misadventure. Perhaps in mediation, I found not just a more sensible way of approaching disputes but a “legal tool” that at the same time embraced the psychological and narrative complexity of human conflict.

Within two years or so of the training, I had left the law firm and was studying mediation full-time. Part of my study involved an internship at the Community Mediation Center (now the Fairfield Center) in Harrisburg, Virginia, servicing the Shenandoah Valley, a rural corner of Virginia. The Mediation Center was just beginning to fold divorce mediation into its stable of services and struggling with how to treat couples with a history of domestic violence. Should they be offered mediation, or should they be excluded? If they were included, what sorts of modifications to the process should be made to ensure that the process did not inflict harm on the vulnerable spouse?

At that time, domestic violence experts were beginning to note that violence in families did not take just one form and that different patterns of violence probably called for different interventions. At the same time, mediation theorists were partnering with psychologists to devise sophisticated screening devices designed to ascertain whether victims of marital violence nonetheless retained sufficient capacity for self-assertion to participate effectively and safely in the mediation process.

The Mediation Center’s solution to the conundrum of what to do with couples who were seeking a mediated divorce but reported past relationship violence was to hand off those cases to the only volunteer lawyer in the vicinity: me. Most of the women I dealt with had left the marital home. They were living in shelters and working with counselors. Most, however, did not have the resources to hire an attorney. What they wanted from me, beyond a safe space to

negotiate with their spouse, was information. They wanted to avoid court and to resolve their dispute informally. But they were desperate to learn the general outlines of what divorcing spouses in Virginia were entitled to. They wanted to know what the Virginia legislature had determined was a fair child support award, what constituted marital property, how spousal support is calculated and debts divided up. With information, most of the women I dealt with proved capable, indeed formidable, negotiators. Moreover, the process of negotiating their post-marital relationship with their former abuser did appear to be empowering. But this was only because, in the first phase of the process, I laid out in joint session my understanding of how judges in the couple's jurisdiction, following legislative mandates, would divide their property and determine child and spousal support had they chosen to have the terms of their divorce entirely determined by the court.

So my experiences on the ground were teaching me that information about the legal landscape was an important backdrop to successful mediation—at least in the divorce context. And these same experiences highlighted how many disputants were going into mediation (and court) unrepresented—and counting on mediation providers to fill that informational gap. At the same time, my dive into the divorce mediation literature indicated that mediation scholars and theoreticians were moving away—not toward—the notion of mediator as information provider. Indeed, the field as a whole seemed to be adopting an “anti-law” bias that struck me as unhelpful and potentially destructive (Marlow, 1985).

For my LLM thesis, I began writing a long paper (ultimately published as a law review article) entitled “The Role of Legal Norms in Divorce Mediation: An Argument for Inclusion” in which I argued that mediators—and mediation theory—were heading in the wrong direction. Where-

as early family mediation pioneers assumed that educating parties regarding the legal norms implicated by their dispute would be part of the mediator's task, second-generation thinkers were arguing that mediators should limit their involvement with the law and urge disputants to seek the advice and input of outside counsel. If disputants chose to disregard that advice, that was none of the mediator's affair.

To my mind, this was irresponsible. Even early in the 1990s—when I wrote the paper—the number of self-represented litigants was huge and growing. Existing data at the time revealed that between 25 percent and 50 percent of couples entering into mediation were doing so without the benefit of counsel. And yet the emergent “best practices” would have mediators eschew all discussion of legal norms, delegating that function to a chimera. The first iteration of the Model Standards for Mediators, published one year after my paper, cautioned that although self-determination was a foundational principle, mediators “could not assure informed consent” but should advise parties of the importance of consulting outside professionals. Along the same lines, the standards warned that “mixing the role of mediator and other professional providing advice was problematic” and that mediators who, “upon the request of parties, assume other dispute resolution roles” will be held to have undertaken additional responsibilities and obligations and will be held to the standards of other professions (Joint Committee of Delegates from the American Arbitration Association, the American Bar Association, and the Society of Professionals in Dispute Resolution, 1994: Standard VI). If lawyer-mediators were found to have acted like lawyers in providing legal information, then they would, the Model Standards proclaimed, be subject to the tort standards applicable to practicing attorneys.

In other words, the Model Standards cautioned against straying into an advisory role. In doing so, they sent a chilling message to those who might wish simply to provide information and offered support for those who would circumscribe the mediator's task to facilitating negotiations, removing from the mediator's role any educational or protective element. Certainly, there was nothing in the standards that would justify providing information about relevant legal norms and serving as a backstop against grossly unfair or unconscionable agreements. I became more and more worried that the field was closing its eyes to a real and growing problem.

But why, one might ask, was my romance with informal dispute resolution so quickly complicated by worry that the mediation field was not sufficiently attuned to what disputants knew or did not know about their legal rights? Was this some atavistic pull, some reversion to the Waldman lawyerly mean?

Unlike many in the mediation field, my move into mediation did not entail a rejection of legal norms. Whereas many of my colleagues see legal rules as rigid, formalistic impediments to a more individually responsive, organic version of justice, I see something more sheltering and redemptive. Like Thomas More in Richard Bolt's *A Man for All Seasons*, I would not "cut a great road through the law to get after the Devil? ... for when the law was down, and the Devil turned round ... where would [we] hide, the laws all being flat?" (Bolt, 1990: 66).

My father and grandfather faced More's dilemma head-on. Their push for labor's rights often faced overt judicial hostility. Injunctive relief, derived from the medieval chancellor's powers of equity to right existing wrongs, was frequently used to stymie labor's quest for safer working conditions and fairer wages. And yet they both had an abiding faith in the essential fairness of the larger system

in which they functioned. They would not cut the laws flat, despite their imperfections—and neither, it turns out, would I.

Into Academia

When I left my LLM program, I was offered a teaching job out in San Diego. Part of my job was to reinvigorate the law school's anemic mediation clinic, pulling the students out of clerical roles at a local mediation center and into the role of mediator at small claims court. To maintain my skills, I signed up to serve on the Superior Court's mediation roster. Two of my early cases made an impression because they reinforced for me how class and education matter, even in the supposedly egalitarian mediation environment, and how the mediator has more power than our rhetoric sometimes suggests.

My first case involved a personal injury claim brought by a gardener against a golf course. The details of the plaintiff's injury and the numbers discussed have long since faded. But what I remember was the scene that greeted me when I arrived to introduce myself to both parties and their attorney. The plaintiff and his wife were huddled close together on one waiting-room sofa, staring off into space. Across the room, the defendant golf course owner, his attorney, *and the plaintiff's counsel* were discussing their favorite holes on the golf course in question, their strengths and weaknesses as golfers, and their preferred time of day to play. The plaintiff clearly did not play golf, did not have his weekends free for recreational sports, and probably could not have afforded the greens fee even if he did.

I did my best in those initial few minutes to tend to the plaintiffs, offering them coffee and making small talk, but I'm sure they must have felt as if they had entered into a members-only clubhouse where they didn't belong.

Throughout the mediation, the plaintiff's attorney urged them to settle for numbers that I thought seriously undervalued the claim. What was my role in this dynamic, when I couldn't help but conclude that the gardener's lawyer would rather have been putting with a nine iron than trying to make his client whole? I endeavored to "sow seeds of doubt" as we mediators are trained to do, but the seeds didn't sprout and the defendant, no doubt influenced by the plaintiffs' uncertainty and the plaintiff counsel's disinterest, held firm. In this case, as with others to follow, I experienced the strictures imposed by the neutral role as a constraint on my impulse to provide coaching to the weaker party.

The second case stays with me for different reasons. It was a breach of contract claim, and although the liability claim had some merit, the damages were speculative. Messy, messy facts. The plaintiffs, a husband and wife, published a magazine with racy content. As a result of the defendant's actions, the magazine failed, the plaintiffs suffered significant losses, and, according to the wife, the stress of the failing business led to a medically complicated miscarriage.

The defendants emphasized both in joint session and caucus that the sexually provocative nature of the magazine would not play well in front of a conservative San Diego jury. They also planned to bring as much of the plaintiffs' bohemian lifestyle into the courtroom as possible. The plaintiffs were unrepresented at the mediation, and the wife was still distraught about the miscarriage. There was no way the defendants would be held legally responsible for the wife's emotional distress or medical bills, but the wife could not take in that information without feeling that her suffering was being diminished and dismissed.

The defendants were reasonable and sympathetic, and there were limits to what they would pay. After several

hours of discussion, they asked point-blank what number I thought the case should settle at. I had no idea. There were so many imponderables, including the unconventional nature of the magazine and the possibility that a finder of fact would conclude that the plaintiffs' livelihood made them morally unsympathetic and thus legally unworthy of relief. Today, I would have dodged the question or at least limited my guesswork to a range. Back then, I thought for a minute and made up a number. The discussions continued for another hour or two and then ... they settled at that number.

Why that number? There was no reason other than that it was the number that had come out of my mouth. Our words have a weight that often is diminished or downplayed in policy discussions. When it is suggested that a mediator's duty to avoid conflicts of interest should mirror those of an arbitrator or judge, many counter that such duties are excessive, given that the mediator has no power of decision. Indeed, mediator qualities that might suggest an inability to maintain impartiality are waved away with the reminder that "mediators don't decide anything." This may be technically true, but my experience was a discomfiting reminder that while disputants may maintain decisional authority in a formal sense, they are likely to be enormously influenced by mediator assessments, not to mention proposals for settlement. What follows is that mediators should not enter into such assessments flipantly or in an ill-informed fashion. We influence decision-making more than we might like to acknowledge.

Looking Backward and Forward

Mediation has changed enormously since the late 1980s, when I first became intrigued with the idea of litigation alternatives. What began as a social movement has morphed into a hybrid craft/profession and then into (for

some) a lucrative business. What began as an antipode to the adversary system has now been institutionalized within that system and functions as a routine part of many courts' and government agencies' dispute processes. I don't see this as necessarily bad.

But just as the field has changed, I find my relationship to it shifting over time. I find myself often in the critic's role, seeking to temper what I perceive as overblown claims or breezy endorsements. Mediation has the potential to be a therapeutic intervention, delivering both procedural and substantive justice. But like any tool in human hands, it has the potential to harm. When we become enthralled with the notion of "party-driven outcomes" without adequately interrogating party capacity in choosing those outcomes, we do harm. When we ignore the role financial incentives play in mediator behavior and the repeat player effect in David-Goliath face-offs, we do harm. When we assume that merely providing access to dispute resolution solves the "access to justice" problem, we do harm.

Mediation's novelistic elements retain their attraction. I love how the process opens the door to the full scope and variety of the human condition and how the story line proceeds on multiple levels. But, as the philosopher Martha Nussbaum reminds us, the best novels are more than mere entertainment; they are paradigms of moral activity (Nussbaum, 1990). They expand our moral imagination to encompass situations far beyond the limits of our own experience and seed empathic connection with the imperfect inner lives of others. Mediation, like literature, plunges us—the neutral reader—into the acute particulars of human life, into its "context-embeddedness" (Nussbaum, 1990: 38), inviting us to explore ethically demanding scenarios from a place of safety. But in that exploration, how can we avoid thinking deeply about what is required of us, the safe and neutral spectator? For me, that thinking led

me back to the centrality of the norms that guide our social interaction and the certainty that people should be educated about those norms when facing decisions of import.

My grandfather, after a half-century serving as “the champion of unpopular causes,” continued to believe that “the courts, with regrettable lapses, still serve as the primary bulwark of our liberties” (Waldman, 1975). I inherited his respect for the common law, for the gradual evolution of legal norms as ancient principles bump up against new social facts and problems, and for the democratic ideal of impartial, transparent, judicial, and legislative decision-making. My own experience with litigation tarnished my view of many aspects of the adjudicatory process, but not for the rule of law.

I find myself, then, in the curious position of being both an enthusiast for mediation and an admirer of legal norms—not necessarily because disputants should always end up adopting them as the basis of their agreement but rather for use as a benchmark, as some measure of what society deems fair in any particular circumstance. And, unsurprisingly, as an academic and the product of a family culture where nothing was valued quite so highly as education and the power that knowledge brings, I continue to push for mediation models and ethical cannons that focus attention on the knowledge base available to disputants when they are called upon to forge their own solutions—and on the mediator’s responsibility for avoiding unconscionable outcomes. I value party autonomy and the liberation that party choice brings—but that choice must be educated and considered. And, as mediators take their place amid a long and storied group of professionals devoted to managing societal disruption, I hope we keep our eyes on those twin goals my grandfather wished for me—a world of peace *and* justice.

Notes

¹ Charles Dickens's discussion of Jarndyce v. Jarndyce in *Bleak House* makes clear that the litigation is mired in adversarial inertia. It has gone on for many years and will probably continue long into the future, enriching advocates and depleting litigants' spirit and resources—a plague on society generally.

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