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MEDIATION AND ADJUDICATION, DISPUTE RESOLUTION AND IDEOLOGY: AN IMAGINARY CONVERSATION

*Robert A. Baruch Bush **

I

This essay started out as an informal talk to a number of dispute resolution colleagues concerning what I believe is a neglected and important perspective on our field.¹ My goal here is to bring some attention to that perspective, at two levels. First, I want to show that there is an underlying ideological dimension to the ongoing controversy over adjudication and mediation that accounts for a lot of the heat, if not a lot of the light, that goes on in the discussion of these and other dispute resolution processes.² Second, I want to dig a bit deeper than I think most of us have dug so far to try to say what that ideological dimension is, what the positions are that are being staked out and struggled over. I am especially interested in clarifying what I see as the ideological basis of the mediation side of the argument, where I think there has been little clarity to date.³

Instead of approaching these goals through a formal or abstract analysis, however, I intend to pursue them through imagining a story or conversation which, as it were, gives voices to the different positions taken in the controversy over mediation and adjudication. I invite the reader to listen and respond to this conversation—as I myself will do later on.

The setting for the conversation is as follows. A judge has been empowered by a state statute to refer cases from his civil docket to mediation.⁴ The statute says that he can, in his discretion, refer any and all cases; the decision is his, and the parties cannot refuse mediation without showing good cause. The judge can send all his cases to mediation on a blanket basis, or certain categories of cases, or individual cases on a case by case basis, whichever he decides. This is what the statute empowers him to do, and the Supreme Court has set up rules enabling him and other judges to do it. The problem is that the judge is uncertain how to exercise this new power. He has no clear idea which cases, if any, he should refer to the mediation process.

So, he picks six representative cases from his civil docket: a divorce case with a custody question, a complex commercial litigation, a landlord-tenant case, a discrimination suit, a consumer case, and a personal injury litigation. He sends copies of the case files, with names deleted, to four individuals who are friends or associates: his law clerk, his court administrator, his former law professor, and a practicing mediator who is a friend of his. The judge asks each of them for their advice. Should he send

any of these cases to mediation? All of them? None of them? What should he do?

He is a bit startled when he gets back the results of this survey, because he gets four completely different recommendations. From the law professor, he gets the recommendation that he should send no cases to mediation; all the cases should stay in court. The law clerk gives him a more complex recommendation. He says that the discrimination case, the consumer case, and the personal injury case should be kept in court, but the divorce, the landlord-tenant, and the commercial cases should go to mediation. The court administrator says he should send them all to mediation, unless both parties to the dispute object; if both parties object, he shouldn't refer them to mediation, whatever the type of case. Finally, the mediator tells him that he should send all the cases to mediation, whether or not the parties object.

The judge is puzzled by this set of responses. Why the divergence in the recommendations; what's going on here? What is the argument that these people obviously must have among one another in order to give him these very different recommendations? Do they have some kind of factual or technical argument about the feasibility of sorting out cases, and referring some to court and some to mediation?⁵ Or do they have some kind of ideological argument over the importance and universality of different dispute resolution goals and processes? Clearly, all his advisors think that his decision shouldn't simply be arbitrary, that whatever he does will have important consequences. But, what are they? What is at stake in the decision that he and other judges have to make as to which, if any, of these disputes to refer to mediation?⁶

II

Faced with these questions, the judge does what judges are very good at doing. He calls all four advisors and says, "I'd like you to argue this out in front of me. I want to hear what you have to say in the presence of one another. That way you can present the reasons for your recommendations, and I can hear some kind of response from you towards one another."

So, the four advisors come together with the judge in an informal meeting over lunch. The court administrator goes first. "Judge," she begins, "I'll tell you the reason for my recommendation. As far as I'm concerned, the most important goal we have here is saving time and money. That's the main goal that we want to keep in mind in using your powers under this new mediation statute. I suspect that was the legislature's main reason for enacting this law. The courts are heavily backlogged, delay is epidemic, and adding new judges and courtrooms appears fiscally—and politically—impossible. Settlements are the only solution. Settling cases is going to save public and private expense. It's also going to increase public satisfaction with the system."⁷ Now, since all cases have some potential to settle," she continues, "and we don't know which ones will and which ones

in adjudication. If mediation doesn't work, if there's no resolution, then the parties can go back to court. But, in the first instance, achieving superior results is the most important goal to strive for in every single case. And mediation is the best vehicle we have for doing this. That's why I recommended referring all your cases to mediation, without exceptions."

Finally the law professor speaks. "Your Honor," he begins, "I'm sorry to have to disagree. But all of your other friends here have missed the point. I say this because they're all talking about goals that don't really pertain to your function, the function of a court. A court is a public institution, and the goal of a court as a public institution is not to save time and money; nor is it to help private parties secure private benefits in individual cases. Your goal as a public institution is to promote important public values.¹² That ought to be your primary concern: the promotion and the securing of important public values through the dispute resolution process. That is what distinguishes your function from that of a mere private arbitrator, and justifies the public support—legal and fiscal—given uniquely to the courts.¹³

"I submit to you, your Honor, that the most important public values at stake in dispute resolution are basically four. There may be others; but I think that these four have widely been recognized as the most important ones.¹⁴ First is the protection of the fundamental civil rights of the parties as individuals. Second is the pursuit of substantive or social justice, as between different classes represented by the parties in the case, and especially as between rich and poor, strong and weak, haves and have-nots. Third is the promotion of what the economists call efficiency—that is, the greatest possible level of aggregate societal welfare—through encouragement of activities that make the best use of our limited societal resources. And fourth is the establishment and articulation of public values that give us a sense of social solidarity in our society as a whole, which is of course a very pluralistic one and therefore requires the cement of shared values. To repeat, your Honor, the public values a court must concern itself with are: protection of fundamental individual rights, provision of social justice, promotion of economic welfare, and creation of social solidarity.

"Your Honor," the professor continues, "adjudication serves every one of these values. It does so because it operates by using and generating both procedural and substantive rules—using them in the instant case, and generating them for future cases.¹⁵ Indeed the rules themselves are often related to and based upon these values. Substantive rules promote economic welfare by signalling economic actors how to use resources efficiently.¹⁶ Substantive and procedural rules promote social justice by reducing the advantage of the powerful, in the aggregate and in the individual case.¹⁷ Procedural rules protect directly against violations of fundamental civil rights.¹⁸ And substantive rules foster solidarity by giving meaning to shared, public values.¹⁹ Therefore, the rule-based, public adjudication process is an excellent—an unparalleled—instrument for accomplishing these values. Mediation, on the other hand, weakens and undermines every single one of

these values. Why? Because, simply, it neither uses in the instant case nor generates for the future rules, whether procedural or substantive, based on these values or any other values. Mediation rests solely on the expedient of compromise.²⁰ Therefore it cannot help but undermine all of these important, rule-dependent values.

"This brings me to the heart of my argument, your Honor," says the professor. "First, we can't sacrifice public values of this stature solely to save time and money. Certainly, we can't do so as a matter of public policy. If, as a matter of necessity, the courts can't handle all cases, that's one thing. But to adopt a public policy saying that values like rights protection and social justice are less important than saving money and judicial economy would be inexcusable. Second, there's no way of neatly dividing up cases on the basis that some involve these public values and others do not."²¹ That simply isn't true. All six of the kinds of cases that you submitted to us involve one or more of these public values. Indeed, most of them involve several. The same would be true for any other disputes we might examine." Here the professor went into a lengthy analysis of how this was so, which for the sake of brevity we will not reproduce.²² "Therefore," he concluded, "'channelling' of different cases to different processes is undesirable.

"Finally, you cannot, as the mediator suggested, consider the value of better results for the parties in the individual case superior to these *public* values. You cannot do so, your Honor, as a matter of public policy. Why not? Because this would be to put private benefit over public values, over the public good, and as a public servant you cannot legitimately do so."²³ And I'm sure you would not want to. Therefore, even if results are superior in mediation in individual cases, that is no basis for a public policy of mandating cases to mediation. In fact, I would say the same about referrals, incentives, or any other form of public encouragement of this mediation process. The arguments I've made cut against any kind of public support for mediation. If private parties want to go to a mediator, let that be their decision as a matter of private choice.²⁴ I'm not sure how I feel about that, but in any event that's not the issue here. As a matter of public policy, we cannot put private benefit over the public good. Therefore, your Honor, I say all of these cases should remain in court, unless perhaps a petition is submitted by both parties to adjourn pending voluntarily initiated settlement discussions or mediation."

The judge pauses to digest the different comments, and then replies by, as it were, thinking out loud. "You know," he says, "the professor's 'public values' argument is very persuasive to me as a judge. It does seem that for a public servant, which is ultimately what I am, the choice between adjudication and mediation is either a question of public values versus expediency, or public values versus private benefit to individual disputants. Unless, of course, we can split the cases up in some rational way. In other words, do we really have to take a unitary approach, or can we somehow take a pluralistic approach and rationally assign cases to different processes? The professor argues that it is probably very difficult, if not impossible, to identify

cases where no public values are involved. Right now, I'm inclined to agree with him. So, I'm really persuaded by the professor's argument, on all three points: Public values have to prevail, only adjudication can achieve them, and since all cases involve public values, they all should be handled in court rather than through mediation."

Before the judge has a chance to adjourn and consider the arguments more thoroughly, however, the mediator asks the judge for one more minute. "Judge," she says, "I have another point to make. The reason I didn't make it before is that it's a little hard to articulate. But I see I will have to try. The truth is that the concern for better results in individual cases is not all that makes mediation important, in my view, even though I admit that most advocates of mediation emphasize this as the primary advantage of mediation. But there's more involved, and it goes far beyond expediency and private benefit. When I say mediation ought to be used in all these cases, my reason is also based on promoting public values, public values which are important to all of the cases you sent us, public values different from and more important than the ones that the professor mentioned. In other words, like the professor's argument for adjudication, my argument for mediation is also a public values argument, but it is based on a different view of public values than the view he presented.

"Now, my problem is that it is hard to articulate clearly what these different public values are. I think they're evoked or implied by concepts like reconciliation, social harmony, community, interconnection, relationship, and the like.²⁵ Mediation does produce superior results, as I argued earlier. But it also involves a non-adversarial process that is less traumatic, more humane, and far more capable of healing and reconciliation than adjudication. Those are the kinds of concerns that make me feel that these cases ought to be handled in mediation, not for private benefit reasons and not for expediency reasons, but because of these reconciliatory public values promoted by mediation."

Before the judge can comment, the law professor responds, "At least you recognize the priority of public values; but your argument is incomprehensible!²⁶ Exactly what are you talking about here, with terms like 'reconciliation', 'harmony', 'relationship'? All of them seem connected to cases with ongoing relationships, but we've already said that such relationships don't exist in all these cases. In any event, preserving such relationships is not really a public value; it is a private benefit to the parties, so you're back to the private benefit argument. Even if preserving relationships can somehow be considered a public value, do you really mean to suggest that it is more important, in all these cases, than all of the rest of these public concerns combined? That is quite a remarkable claim!"

The judge concurs, "Yes, it is an extraordinary claim, and not at all clear. What exactly is this public value underlying mediation, if it is in fact a public value, and why is it so important that you think it outweighs all these well-recognized values put forth by the professor?"

III

Let us pause for a minute from this story. The conversation to this point should be familiar to many readers as a parallel to the state of the adjudication/mediation debate today. You can probably identify for yourself in the conversation the voices of the various participants in this debate. For example, the law professor is the voice of judges and academics, such as, for example, Owen Fiss, Judith Resnik, Harry Edwards, all of whom take positions similar in one respect or another to those taken by the professor in this conversation.²⁷ I call them the adjudication advocates, or the adjudication orthodoxy.²⁸ The administrator in this story gives voice to another group composed primarily of judges and judicial administrators. The most famous of these is probably former Chief Justice Warren Burger, but many others are found in the literature.²⁹ I call them the judicial economy advocates, or more succinctly, the pragmatists. The law clerk, who probably took an alternative dispute resolution (ADR) course in law school, represents the voice of a number of academics and ADR practitioners, such as Frank Sander, Eric Green, Carrie Menkel-Meadow, among others, whom I call the "process pluralists".³⁰ These are people who say, "You can and should match different processes with different disputes; you must simply be clever enough to figure out a rational way to do it." Of course, none of these people are one-dimensional, like the law clerk here, in their analysis of relevant choice factors, focusing only on the relationship factor. Their approach is more careful and systematic. Finally, the voice of the mediator represents the voice of some practitioners and a few academics as well, for example Andrew McThenia, Thomas Shaffer, and myself.³¹ I call this group the mediation advocates, or the mediation orthodoxy. I also note that, just as the mediator spoke with two voices, one stressing private benefit and one public values, a similar dualism can be seen in mediation advocates.³²

As for the present status of the debate among these groups in the actual field, it is closely reflected in the story up to this point: First, the adjudication orthodoxy thus far remains unshaken in theory. No one has advanced a good theoretical argument against the public values argument of the adjudication orthodoxy.³³ Nor has anyone, despite theoretical efforts, constructed a sound and practicable method of channelling cases to processes.³⁴ Second, notwithstanding this theoretical impregnability, the adjudication orthodoxy is failing in practice. Despite the persuasive public value arguments in favor of adjudication, mediation and ADR are spreading anyway, and they are spreading primarily because of the reasons of the pragmatists, namely expediency.³⁵ Third, there is a small, hesitant, and not very clear voice being raised to argue for mediation on a public value basis, although this argument has been summarily dismissed by the adjudication orthodoxy and simply ignored by most others.³⁶

Given the state of the debate right now, what are the prospects for the immediate future in the use of adjudication and mediation? What are judges like the one in the story here likely to do? I think there are three possible scenarios. First—and most likely, despite the good intentions of the judge in our story—expediency and private interest may rule. Mediation will be used widely, and perhaps indiscriminately, to reduce court caseload and to satisfy private disputants' individual needs. Second, and less likely, if expediency and private benefits are rejected as justifications for ADR, then the public values argument could lead to rejection of mediation generally and retrenchment back to adjudication in court as the primary way of resolving disputes. Mediation may be used, but limited and controlled, as a necessary evil, and more resources would be spent on improving and increasing access to justice, meaning access to court.³⁷ Third, and least likely, if a clear and persuasive public value argument can be articulated on behalf of mediation, then in all likelihood mediation will spread more widely—but perhaps in a different form than the private-benefit/expediency version.³⁸

The present debate over adjudication and mediation therefore has two dimensions. One is the public-value versus private-benefit/expediency dimension. In this dimension, adjudication represents important public values and mediation represents private self-interest and public expediency. No one doubts the seriousness of this clash, but it is a clash over whether the public good matters, not what the public good is. It is not the heart of the matter. The second dimension is the public-value versus public-value dimension, and it is reflected in the conflict between the adjudication orthodoxy and the mediation orthodoxy—here, between the professor and the mediator, given the mediator's second, public-value argument (to be explored further below). In this dimension, both adjudication and mediation represent public values, and the question is which public values are more important. This is a clash over what the public good is, a clash of social vision or ideology.³⁹ It is this dimension that I believe accounts for the passion on both sides of the argument. This is the dimension of the debate that I am most interested in, and to which the conversation started above is about to proceed.

The suggestion of that conversation is, quite correctly I think, that the burden of persuasion is now on the mediation orthodoxy—the mediator. Why? Because the law professor's argument is a very clear argument. The values he presents are well-articulated, and they are well-discussed in the larger field. The mediator's public-value arguments, on the other hand—in this story and in the field at large—have been rather vague up to this point, and therefore unpersuasive. In short, in our conversation, and in the field at large, the judge's question to the mediator stands: "What is the specific claim that you're making on behalf of some important public value supported by mediation? And why is that value, if it exists at all, superior to the kind of public values that the professor was referring to as supported by the adjudication process?" This is the dimension of the debate which must now be more clearly addressed. However, instead of addressing it in the abstract, let us again turn to our story.

IV

The judge repeats his question to the mediator: "What exactly is this public value underlying mediation, if it is in fact a public value, and why is it so important that you think it outweighs all these well-recognized values put forth by the professor?"

In response, the mediator says something that I think many mediation advocates have said, at least privately, but which they have not said clearly enough or strongly enough in public discussion. She replies, "Judge, I can't answer that question in a vacuum. I can't answer that question abstractly sitting here in this room. Instead, I would like you and the professor to come and observe a mediation with me. In that context, I'm going to be able to answer your question, I'm sure."⁴⁰

"Is this really necessary?" the professor asks. "We all know what mediation is."

"Well," responds the mediator, "that's just it, Professor. Mediation isn't monolithic. There are a number of quite different kinds or versions of mediation being practiced; and my argument—my public value argument—rests squarely on one of those versions. I could certainly describe this kind of mediation to you."⁴¹ But what I want to convey to you is not so much how it works, but what its effects are—because that's where the public value lies. And I think the best way to convey those effects to you is to show you an actual mediation."

So that's what they do. All three of them go, and somehow—although the logistical difficulties of this are quite staggering—observe the mediation. To be specific, they observe the landlord-tenant case that the judge had recently pulled from his files. It involved a dispute about rent owed or not owed, repairs that had or had not been made, the landlord's desire to have the tenant vacate the premises, claims of "harassment" on both sides, and so on.⁴² In the course of a 2 1/2-hour mediation session, the case is ultimately resolved, with an agreement to pay some but not all of the money by the tenant, an agreement to fix some but not all of the repairs by the landlord, an agreement on how much time the tenant could stay before he would voluntarily vacate the apartment, and an agreement on how the parties would communicate with one another in the meantime. After the parties and the mediator of the case leave, then our mediator, the judge, and the professor sit down together.

Before the mediator can say a word, the professor jumps in: "Look, you don't have to say anything! What we just saw proved my point! In this session every single one of the public values that I have talked about was undermined. The landlord, who had the economic advantage to start with, was able to take advantage of the concessions that have to be made in this kind of a process, to increase the inequities between himself and the tenant. In other words, the rich got richer, and the poor got poorer. So social justice

was undermined in this case; and it will be undermined in the future, because all landlords are going to take advantage of this kind of thing. The landlord was also able to escape having to obey clear laws which articulate public policies about maintaining housing stock—who should be responsible for repairs, who can more effectively and economically keep housing in good repair, and so on. He doesn't have to obey any of those laws. Why? Because he can come to a process like this. He can do it today, and he can do it in the future, and other landlords can do the same. Therefore the goal of husbanding of our scarce resources for maximum social welfare is also undermined here.

"Procedurally, neither the landlord nor the tenant, as I saw it, knew what was going on here. The mediator was meeting separately with each party in 'caucuses', without the other party present. Who knows what was said? Who knows whether confidentialities were disclosed? Whatever the mediator said, the parties didn't have attorneys; there were no rules of evidence. The rights of both parties could easily have been violated in this case by the manipulations of the mediator in an unsupervised and secret process, so the goal of rights protection was undermined. Finally, whatever happened here, you certainly have to say it was private, it was secret. If there was some important public principle that emerged here, no one will ever know about it. It offers no basis for building a sense of shared public values, and therefore undermines the goal of creating social solidarity."⁴³

"So, as far as I'm concerned, what we just saw here makes my case open and shut. This was true in this case. It would be just as true in all the others. None of these cases—nor any other—belongs in this kind of a process."

The mediator takes this in for a few minutes, and the judge is waiting for her response. Finally, the mediator says, "Professor, you're right. Everything that you say happened here, I will agree, happened as you say. I could argue with you about it—or about what might have happened in court instead. But, I don't want to get into that argument, at least not today."⁴⁴ So let's say that I agree with you completely. However—and here's my whole point—what you described is not all that happened here. I saw some other things happen here that you apparently didn't see, or that you didn't see as being important, even if you did see them."⁴⁵

"For example," the mediator continues, "I saw that at some point in this process each party, the landlord and the tenant, realized that he could do something for himself regarding the problem that brought him into the dispute. In other words, the parties realized their own power to do something for themselves about their situation, even if it was not exactly what their rights would be legally. The landlord saw that he could, in fact, get his premises back so that he could rent to somebody else. The landlord saw that he could in fact get some economic return, whereas at the moment he was getting nothing from the tenant's use of his premises. The tenant, on the other hand, saw that he could get a substantial amount of time to find

another place to live, which he wanted because he did not want to move immediately. And the tenant also saw that he could have the premises made somewhat more habitable in the meantime by getting certain repairs done. Both parties realized, during this process, that they could accomplish all these things through their own mutual efforts and agreements, without having to appeal to or rely upon any outside institution.

“Second, I saw that at some point in the session, possibly even at several points, each party, having come to this realization or increased awareness of his own power, was able to let go of his preoccupation with his own individual concerns and to go beyond those concerns. Each was able to transcend his narrow self-interest, to realize and recognize—even if only fleetingly—some element of legitimacy in the other side’s position, some element of common humanity with the other party.

“For example, at a certain point it was obvious that the landlord suddenly realized that the tenant was not a cheat, not irresponsible, as the landlord originally charged, but was in fact needy and deserving of the help he was asking for. Whether or not the landlord felt that he could respond and meet those needs, he saw that they were not unfounded and frivolous requests. The tenant, on the other hand, saw that the landlord, however cruel he may have sometimes appeared in the past, was not really vindictive, but was in fact frustrated himself, and pressured by various kinds of external forces that had nothing to do with the tenant. Therefore, the tenant realized something of the landlord’s situation, even if it was not something he was responsible for or could do anything about.

“And one more thing. The parties had apparently communicated very poorly in the past, with each regarding the other as being abusive. But in today’s session I saw each party realize that the other wasn’t necessarily being abusive after all, but might simply have been reacting to the pressures of the situation, or communicating in a style that the other fellow wasn’t used to. So, in all these ways, I saw each party let go of his focus on himself and instead recognize the other party’s situation as having some basic human legitimacy.

“Now all this may have helped to accomplish the resolution that occurred here,” the mediator goes on, “but that’s not my point. My point is that both parties were transformed by what went on in this session, in two ways: in terms of their level of self-awareness and capacity for self-determination, and in terms of their level of other-awareness and their capacity for consideration and respect for others. And that itself is the public value that mediation promotes. In other words, going through this mediation was, for both parties, a direct education and growth experience, as to self-determination on the one hand and consideration for others on the other. But, your Honor, I’m not focusing on any private benefit the parties may have derived from this. As a matter of fact, if it came to that, the parties probably wouldn’t have chosen this ‘education’ as a matter of private benefit if they had

been offered it in the first place.⁴⁶ My point is the public value involved here.

“How can I define this public value? Simply put, it is the value of providing a moral and political education for citizens, in responsibility for themselves and respect for others.⁴⁷ In a democracy, your Honor, that must be considered a crucial public value and it must be considered a public function.⁴⁸ As far as I’m concerned, there’s the potential for that kind of direct and experiential education in every single one of these cases that you sent to us; and that potential can only be realized in mediation.⁴⁹ It cannot be accomplished in adjudication. In adjudication, the things the professor saw here might not have occurred; but, neither would any of the things I have just described. In my view, this civic education value is more important than the values that the professor is concerned about. Therefore, even if those other values were sacrificed here—which I have allowed for the sake of argument, though I might dispute that too—it was worth it. It was worth it for the unique civic education, so essential in a democracy, that the parties were given. And, by the way, your Honor, even if the parties had reached no agreement in mediation, that education could still have occurred anyway. The case could then have gone back to court where those other values could have been dealt with as secondary matters.

Finally, I just want to clarify an important connection between my argument here and our earlier discussion. On reflection, I’ve realized that the ‘superior results’ argument that I mentioned at our first meeting is also based, at least in part, on the public value I’m talking about here. That is, many of us place value on the integrative, ‘win/win’ solutions that mediation helps produce precisely because such solutions embody in concrete terms the kind of respect for others that is the essence of the civic education value. So the ‘superiority’ of results we speak of is not only, or primarily, that the results better serve the individual interests of the parties—a private benefit—but that they express each individual’s considered choice to respect and accommodate the other to some degree—a democratic public value. In short, both the experience of the mediation process and the kind of results it produces serve the public value of civic education in self-determination and respect for others.⁵⁰

“Your Honor, thanks for coming to watch the mediation, and for hearing me out. That’s my case.”

At the conclusion of the mediator’s words, the judge and the professor are, one might say, shocked into silence for a moment. The professor is the first to regain his voice. He responds, “What are you talking about? How is this education a public value? This is just more of the same thing: better results, moral education, personal transformation. That’s fine for the parties! But what about the public? I don’t see how this education, even assuming it occurred, is a public benefit. And even if it is, why is it more important than social justice, than the protection of rights? You’ve given us no different and

more important public values here; you've only given us more private interest, however refined it may be."⁵¹

V

With the argument at a full stop for the moment, the judge calls an end to the meeting, and all depart. After the meeting, while the judge is thinking this all out, he happens to meet another friend of his at a conference. This friend is also a judge, from a European country, over in the States for the conference. The two judges go out to dinner. Naturally, our judge regales his friend with the whole story recounted above, leading up to and concluding with the episode of the mediation and the mediator's last argument. And then he asks her, "What do you make of that?"

The European judge sips on her coffee and answers, "Well, I see the mediator's point. But I think I also see why you don't see it. To see her point, my friend, you have to move yourself out of your own American perspective, your legal tradition as the comparativists call it.⁵² The professor is really speaking from the heart of that tradition; and his goals, which are your tradition's goals, are all based upon a certain underlying premise. The premise is that autonomous individual choice, and therefore the freedom of the individual to accomplish his own self-fulfillment, defined in his own terms, is the highest value in the social enterprise.⁵³ All of the other public values he's talking about serve that ultimate highest value of individual autonomy and self-fulfillment. Fundamental rights are important because they protect the individual's autonomous choice against the state. Social justice is important because it protects the individual's autonomous choice against other possibly more powerful individuals or groups. Maximizing social welfare is intimately connected with autonomy, because it equates individual autonomous choice with the public good. That's the whole concept of efficiency in classical economics: the equation of self-interest with the public good that occurs through the operation of private markets. Finally, solidarity is crucially important in this system, because something has to hold the whole structure together in the presence of so much individual autonomy. Solidarity is the cement that holds everything together.

"The professor's public values," she continues, "are therefore crucial for the promotion of individual choice and fulfillment, which is the ultimate value of the enterprise. This is why they are public values, given the individualist premise. Given the same premise, moral development—the mediator's value—is not crucial at all. Moral development is simply one private vision of the good, which individuals ought to be able to choose or reject, as they see fit. It's certainly not a public good. The public value is protection of the individual's right to choose that private vision of the good or to reject it. That's the logic of the professor's argument and his critique of the mediator's case. It makes perfect sense—given its premise.

“Now the value the mediator mentions—education in self-determination and consideration for others (we might also call it self-transcendence)—is perhaps not as familiar a value in your tradition as in ours. In any event, it seems to me that it is based on a completely different underlying premise. That premise is that the highest values of the social enterprise are these two: first, the fulfillment of the individual’s capacity for moral development, for going beyond self-interest and being concerned with others; and second, the discovery of a common good beyond any private vision of the good, through the encounter between self and others in shared political discourse and action.⁵⁴ Education in self-determination and consideration for others—the mediator’s value—is crucial for the promotion of individual moral development and the shared search for a common good. From this perspective, it is therefore clearly a public value. You see, my friend, the mediator’s argument also makes sense, given this different premise.”

The European judge pauses to let her point sink in. Then she continues, “Now, these different premises about the ultimate value of the social enterprise go very, very deep. As a matter of fact, it seems to me that they rest on entirely different views of the nature of the individual and the nature of society.⁵⁵ On the one hand, there is the view that the individual is an agent of will, free to satisfy himself in any terms he chooses, without any external standard of judgment, and that society is merely a neutral facilitator (or referee) of that process of individual satisfaction. On the other hand, there is the view that the individual is an agent of reflection, challenged by some implicit common standard to enlarge himself by connecting to and serving others, and that society is an encouraging educator in that developmental process.

“To repeat my earlier point, given the second view of the nature of the individual and society, self-determination and self-transcendence, the mediator’s values, are crucial public values in the dispute resolution system and in the social enterprise generally.⁵⁶ This is so for two reasons. First, private choice is almost certainly insufficient to further those values. Education of this kind is almost always a necessarily public function.⁵⁷ Second, and more important, the whole purpose of the state or society, by this vision, is not simply to facilitate individual choice and satisfaction but to produce moral individuals and to find the common good. That’s the purpose of the whole enterprise. If so, then promoting self-determination and self-transcendence is a public value because these qualities are needed in order to achieve that ultimate social purpose. A public, not a private, motive underlies the mediator’s case, as well as the professor’s.

“In explaining ‘moral and political education of citizens in self-determination and self-transcendence’ as a public value,” the European judge adds, “let me clarify that I’m not talking about a religious function here—unless it is what has been called the civil religion of the traditional civic virtues that is now being rediscovered in many quarters.”⁵⁸

I am aware that this ideological argument has been presented here as an either/or choice, at both the large and small levels. The mediator and the professor imply that we can have one set of public values or the other, but not both. The European judge poses a similar choice between the relational and individualistic visions in toto. Such stark choices may seem unnecessary and even false; it may instead seem possible and preferable to integrate the visions and processes in question. However, even if this may eventually be possible, I think it is difficult at present to imagine and articulate what such an integration would look like. In the meantime, my belief is that by highlighting the contrast between the alternatives—the two processes and visions—each can be more fully understood. It will be far easier to envision an integration if we have a deep grasp of each of the elements to be joined. So I see a need now for sharp definition and distinction, for clarification of what each side of the argument stands for. What we learn from this will help us discover whether integration is possible, and if so how.⁶⁶

To return to and conclude our conversation, what are the practical implications of this ideological reading of the mediation/adjudication debate? In particular, what additional advice does this reading suggest we might want to offer the judge in our story? In answer to this question, I want to exercise a little poetic license and jump into the conversation myself, to speak directly to this judge.

VII

Based on what we have heard from the others so far, I would say, “Judge, you’re asking what kind of choice you should make, as between keeping cases in court and referring them to mediation. But it’s clear to me and I hope it’s clear to you that you have a deeper choice to make here: a choice between different social visions. If you accept the prevailing individualist vision, Judge, then you should reject mediation completely, or limit it very severely, to ensure that public values like those advocated by the professor are not undermined. Therefore, don’t refer cases to mediation, if that’s your position; or refer them to a legalized or controlled version of mediation that is not going to undermine these values, one that has protections for the parties, objective standards to evaluate settlement results, and so on.⁶⁷ On the other hand, if you accept the relational vision, then you should not merely use mediation; you should expand it to ensure the accomplishment of the most important public values under that vision. Therefore, you should refer all your cases to mediation, but with an important proviso that I’ll mention in a minute.⁶⁸

“But, whatever you do, your Honor, you as a public servant should not use mediation at all, if you’re going to use it simply as a tool for saving time and satisfying private litigants’ individual interests, because this will undermine both of the contending visions.⁶⁹ So your decision is not just a dispute resolution decision; it is an ideological decision. Should a judge be

making such a decision? I don't know. But you've been given the power, and in fact you are going to make it whatever you decide to do.

"I also want you to realize that you're going to make this decision right now in a context which includes little if any reflection on this level of the decision-making process in the mediation referral question. No one is seriously considering the ideological dimension. That is why the conversation we've heard here exploring this dimension is, indeed, just an imaginary conversation at this point. In reality, the general trend today is a blind run to mediation for mere expediency reasons;⁷⁰ that's what prevails, and that's the tide you're going to be fighting, if you do anything different. At the same time, there's also a blind reaction against this trend, which demands a retrenchment to the courts, a refusal to mediate cases, a reassertion of the superiority of adjudication by restricting or legalizing mediation.⁷¹ In short, mediation—as the mediator presented it to you—is either being co-opted or rejected entirely. No real attention has been given to the relational vision, and the potential of mediation as a transformative instrument, a means of civic education.

"Despite these trends, my recommendation to you is that you explore this alternative vision, that you consider it very seriously. You may ask, what would this look like, this educational vision of mediation—and society—that I'm suggesting to you?

"Actually, there is an example I can give you of a system that adopts this approach, a very ancient example. It is sometimes cited by dispute resolution scholars today; but it is not always very well understood or grasped by them. It is the traditional principle of the rabbinical court system on choosing dispute resolution processes, as regulated by the Talmud. According to the Code of Maimonides, the rabbinical court must, in every civil case, try to persuade the parties to agree to a compromise settlement rather than seek formal adjudication of the case.⁷² The procedure used by the rabbinical court to effectuate a settlement is, in its essence, a mediation process, with the court itself taking the role of mediator.⁷³ This principle is not limited by any type of case or by any types of parties. It is a universal principle of preference for mediation over adjudication as a means of resolving disputes.⁷⁴

"The fact that it is a universal principle, Judge, and the commentaries on this provision in the code, suggest that one of the primary rationales behind it in that system is very close to the one the mediator offered when she spoke to you. It is based on the value of encouraging individuals to expand their narrow self-centeredness and reach out to a level of consideration for others: self-transcendence as a key form of moral education.⁷⁵ As for sacrificing other values like social justice, societal welfare, and so on—values that are indeed important in that Talmudic system too—the implication is that those values are nevertheless secondary. Like the adjudication process that secures them, they are fallbacks to be sought when self-transcendence cannot be directly accomplished in the mediation process. Or maybe more accurately, they are less direct and slower ways of accomplishing the ultimate

goal of self-transcendence: they force people to behave as if they have concern for others, so that they will ultimately come to a point where they genuinely have concern for others more than or as much as for themselves.⁷⁶

“This sort of approach,” I would tell the judge, “is what the mediator is calling for—preference for mediation over adjudication across the board, because of its civic education value. I support this approach. I support your trying to use it. But I don’t minimize the fact that it means major changes. It means changing completely the terms of reference in this discussion. It means regarding mediation as a primary dispute resolution process, not an ‘alternative’ dispute resolution process. It means that mediation is presumptively applicable—and preferable—in every case, unless some cogent argument can be presented as to why it should not be used, because it is the surest path to self-determination and self-transcendence. It also means ensuring access to court as a last resort, so that—as in the example I cited—some instrument is always available to serve the ultimate goal.”⁷⁷ For there will of course be cases where the parties cannot reach an agreement in mediation, and where this happens there must be some secondary process available to resolve the matter. However, turning to adjudication in such cases does not mean that we abandon the relational values of self-determination and self-transcendence and return to the individualist values of the professor’s vision.

“Therefore, adopting the mediator’s approach also means changing the basis of the rules of law that courts use. In other words, if we change our choice of dispute resolution processes to conform to a different, relational vision of society, we also have to change our theory of law to conform to that vision of society. Otherwise, we would have a system at ideological war with itself, fostering relational values in mediation and individualist values in adjudication. In fact, interestingly enough, such changes in legal theory are already emerging. Alternative theories of law based upon a relational or communitarian theory of society are currently being written and talked about.”⁷⁸ Taking the mediator’s approach means considering these theories much more seriously within the judicial process itself.

“Finally, your Honor—and most important—if you are going to explore this vision of mediation, it means making sure that mediation as practiced is in fact an opportunity for self-determination and self-transcendence on the part of the parties, and not simply a tool of expediency. The only way to do that is to ensure that mediators are trained and professionally committed to these goals, and not simply to using the process as a kind of a fast-track settlement conference.”⁷⁹

“These are very large changes in the way that things are being done today, your Honor. I’m asking a lot from you. Still, if you’re ready for those changes, then I would say to you: Keep mediation; refer cases to mediation. Indeed, as the mediator recommended, refer all your cases to mediation. Because on one point the professor persuades me. I agree with him that you cannot come up with a sound and practical screening process to sort out cases

previous tradition of educational mediation, then I want you to make that decision not only because of the efficiency and private benefits claims, but also—and primarily—because of the education claim. I want that included up front. I don't deny the importance of the efficiency and private benefits arguments for mediation; but for all the reasons given above, I think the civic education, public value argument is far more important.

"Some people may ask: If I support mediation, then why should I care what the reasons are for expanding it? Why should I insist on doing it only for 'the right reasons'? Let's expand it first, and worry later about clarifying the reasons. Well, I disagree. If we argue for mediation now solely on the grounds of efficiency and private benefits, then even if mediation succeeds in these dimensions, the educational dimension may never fully develop. That is the danger of adopting these arguments as the primary rationales for public policy. In the private sector, different versions of mediation can compete on an equal footing, and the educational vision has at least a chance. But I am afraid that publicly sponsored, court-connected mediation oriented towards efficiency and private benefits alone, would crowd out other versions and reduce the chance for the educational vision to develop.

"So, your Honor, if you are not interested in the educational dimension, leave mediation to the private sector. I do believe that mediation has the potential to play an important role in, perhaps even revitalize, our public justice system—but only if it is taken seriously.⁸⁵ If not, I'd recommend that you leave it alone. I don't know if there's anyone out there in the private sector who is interested in looking upon mediation in the way it's been presented here; but there may be. There may be people who are interested in mediation, not just for the better results it offers us as individuals, but for the better lives it offers us as fellow citizens. I still have some hope that, whether as a public policy in court or as a private choice in the market, mediation can fulfill its potential to help change our moral vision and change ourselves. I hope your decision will help make that possible, your Honor. But at least, I hope it won't make it impossible."

That is what I would say to the judge—for now, at least. And that is where I close this installment of the conversation. And I throw it open to you, reader. For other voices are surely needed to continue this conversation. After all this, what would you say?

ENDNOTES

* Associate Professor of Law, Hofstra Law School. B.A., Harvard University, 1969; J.D., Stanford Law School, 1974. This essay grows out of a talk originally presented at the Center for Negotiation and Conflict Resolution (CNCR), Rutgers University, in 1988, and then given in abridged form at the National Conference on Peacemaking and Conflict Resolution (NCPCR), Montreal, in 1989. I want to express special thanks to Sanford Jaffe and Linda Stamato of CNCR for their support, encouragement and collaboration

other ADR processes as well. Despite very significant differences between mediation and, for example, arbitration and negotiation variants like mini-trial, there are also important similarities. Most important for this essay is the point that all these processes, in different ways, make the parties responsible for important process or outcome decisions and require the parties explicitly or implicitly to find and accept compromise solutions. Brunet summarizes the literature regarding these general characteristics of ADR processes. See Brunet, *Questioning the Quality of Alternative Dispute Resolution*, 62 Tulane L. Rev. 1, 11-14 (1987). Thus, to some extent mediation serves in this essay as a surrogate for ADR processes generally.

4. See Fla. Stat. Sec. 44.302 (1987); Tex. Civ. Prac. & Rem. Code Ann. Secs. 154.021-.023 (Vernon 1987). Both of these statutes empower judges to order mediation in any civil case. Other statutes restrict this power to certain types of cases, such as divorce or malpractice. See generally, Standing Committee on Dispute Resolution, Amer. Bar Ass'n., *State Legislation on Dispute Resolution* (1988). See also *infra* note 6.

5. See *infra* notes 22, 30-34 and accompanying text.

6. Note that although the conversation here assumes that the choice between the two processes is to be made by a judge under a mandatory ADR statute, this scenario is representative of the broader problem of making public policy choices between different dispute resolution processes. The questions facing our judge are also faced, for example, by judges when ADR agreements or statutes are challenged in litigation, and by legislators and administrators when statutes or regulations mandating or encouraging ADR are proposed in the first place. In all these cases, public decision-makers must choose between different processes on public policy grounds. Thus, the arguments expressed later in this conversation apply equally to all these decisionmakers, and the choices facing them also have the ideological dimension discussed here.

7. Both of these propositions are voiced by commentators. See, e.g., Burger, *Isn't There*

a Better Way?, 68 A.B.A. J. 274, 276 (1982); Fox, *Settlement: Helping Lawyers to Fulfill Their Responsibility*, 53 F.R.D. 129, 142 (1971); Galanter, *The Emergence of the Judge as a Mediator in Civil Cases*, 69 *Judicature* 257 (1986) [hereinafter Galanter, *Emergence*]; Mnookin & Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 *Yale L.J.* 950, 956-57 (1979). However, empirical research has raised questions about the cost-saving effectiveness of mediated settlements. See, e.g., Galanter, " . . . A Settlement Judge, not a Trial Judge": *Judicial Mediation in the United States*, 12 *J. L. & Soc'y* 1, 8-10 (1985) [hereinafter Galanter, *Judicial Mediation*]; Menkel-Meadow, *For and Against Settlement: Uses and Abuses of the Mandatory Settlement Conference*, 33 *U.C.L.A. L. Rev.* 485, 493-98 (1985).

8. This proposition is frequently expressed by commentators. See, e.g., Delgado,

Fairness and Formality: Minimizing the Risk of Prejudice in Alternative Dispute Resolution, 1985 *Wis. L. Rev.* 1359, 1387-89; Fiss, *Settlement, supra*

supra note 3 (stressing civil rights and social solidarity). *See generally*, Bush, *supra* note 3, at 347-53 and nn. 33-34.

15. *See* Brunet, *supra* note 3, at 15-27, for this argument.

16. This argument derives from law and economics theory. *See, e.g.*, Posner, *supra* note 14; Posner, *A Theory of Negligence*, 1 J. Legal Stud. 29, 32-34 (1972).

17. Many authors so argue. *See, e.g.*, Delgado, *supra* note 8, at 1367-75, 1385-91; Fiss, *Settlement*, *supra* note 2, at 1076-78, 1085-87, 1089-90; Nader, *supra* note 2, at 1018-21.

18. The foremost exponent of this argument is probably Professor Resnik. *See* Resnik, *supra* note 2, at 545-46; Resnik, *Appeals*, *supra* note 3, at 609-11.

19. Professor Fiss makes this point most clearly, but others also suggest it. *See* Fiss, *Forms*, *supra* note 3, at 1-5, 28-36; Fiss, *Foundations*, *supra* note 3, at 124-28; Resnik, *Due Process*, *supra* note 3, at 413-14, 417-20.

20. The conventional wisdom is that rule application and articulation are very muted in mediation and other ADR processes. *See, e.g.*, Brunet, *supra* note 3, at 13-14. Still, the professor's argument here is probably a bit exaggerated, for argumentative effect. Most scholars acknowledge that substantive rules do get considered in ADR processes, even if they are not determinative. A few even argue that ADR processes like mediation can generate rules for future application. *See, e.g.*, Mnookin & Kornhauser, *supra* note 7; Eisenberg, *Private Ordering Through Negotiation: Dispute Settlement and Rulemaking*, 89 Harv. L. Rev. 637, 649-53 (1976). Still, the professor's remark is fairly close to the conventional view.

21. The feasibility of sorting and channelling cases is a key assumption of many who favor mediation for certain types of disputes, but is as yet unproven. *See infra* notes 30 & 34 and accompanying texts. The argument that the assumption is unsound has been voiced by various ADR critics. *See, e.g.*, Fiss, *Settlement*, *supra* note 2, at 1087-89. If the assumption is unsound, then mediation advocates must find a justification for preferring mediation to adjudication across the board. This is what the mediator does in this conversation.

22. Consider the three types of cases the law clerk would refer to mediation. Regarding landlord-tenant disputes, see *infra* text accompanying notes 42-43, for the professor's account of how such disputes can include all four of the key public values. As for divorce disputes, these were perhaps the first non-labor cases to be considered suitable for mediation. Lon Fuller, in his seminal 1971 article on mediation, points specifically to family disputes as the heartland of mediation's "jurisdiction". *See* Fuller, *supra* note 9, at 330-34. Since then, divorce mediation has steadily grown, on the assumption that it serves the relationship-centered goals that are important in those cases. *See, e.g.*, Folberg, *Divorce Mediation—A Workable Alternative, in Alternative Means of Family Dispute Resolution* 43 (Amer. Bar Ass'n. 1982); Winks, *Divorce Mediation: A Non-adversary Procedure for the No-Fault Divorce*, 19 J. Fam. L. 615 (1981). Yet, as critics have long noted, divorce cases frequently involve

Levin & Colliers, *Containing the Cost of Litigation*, 37 Rutgers L. Rev. 219 (1985); Peckham, *A Judicial Response to the Cost of Litigation: Case Management, Two-Stage Discovery Plan, and Alternative Dispute Resolution*, 37 Rutgers L. Rev. 253 (1985).

30. This position is by far more popular today than either of the orthodoxies. See, e.g., S. Goldberg, E. Green & F. Sander, *Dispute Resolution* 7-13 (1985); L. Riskin & J. Westbrook, *Dispute Resolution and Lawyers* 452-54 (1987); Fuller, *supra* note 9, at 307, 333-39; Goldberg, Green & Sander, *supra* note 11, at 295-97; Menkel-Meadow, *supra* note 7, at 486, 498-506; *Paths*, *supra* note 9, at 8-16 & Table 5; Sander, *supra* note 9, at 130-33. Despite the growing popularity of this approach, I am unaware of anyone who has actually succeeded in developing a realistic and effective method for screening and matching different types of cases to different processes. For a critique of the feasibility of rational process matching, see Esser, *Evaluations of Dispute Processing: We Do Not Know What We Think and We Do Not Think What We Know*, 66 Den. L. Rev. 499 (1989). For this reason, although I myself advocated a pluralist approach at one time and even proposed a fairly detailed model for effectuating it, see Bush, *supra* note 24, I have since come to question both the feasibility and the appropriateness of this approach. See Bush, *supra* note 3, at 370-74.

31. See, e.g., Bush, *supra* note 3, at 374-79; McThenia & Shaffer, *supra* note 2. Some commentators take the pluralist position explicitly, but still express what might be called an orthodox spirit—i.e., a strong sense of the unique value of mediation in many different types of cases. My colleague Leonard Riskin is one example. See *supra* note 30; Riskin & Westbrook, *Integrating Dispute Resolution into Standard First Year Courses: The Missouri Plan*, 39 J. Legal Educ. 509 (1989); Riskin, *Mediation*, *supra* note 3, at 35; Riskin, *Standards*, *supra* note 3, at 330. In my own work, there has been a gradual evolution towards an orthodox mediation position, culminating in this essay. See Bush, *supra* note 24, at 968-71, 995-1004, 1026-32; Bush, *supra* note 3, at 370-79.

32. This may be so simply because, as the mediator here admits, it is hard to articulate clearly the public values argument, and because the private benefit argument is much easier to sell.

33. *But see infra* note 36 and accompanying text.

34. See Esser, *supra* note 30; Menkel-Meadow, *supra* note 7, at 505-06; *supra* note 30.

35. See Brunet, *supra* note 3, at 1-2, 11-12, 17, 27; Bush, *Efficiency and Protection, or Empowerment and Recognition?: The Mediator's Role and Ethical Standards in Mediation*, 41 Fla. L. Rev. 253, 259-60 (1989); Riskin, *Mediation*, *supra* note 3, at 41-42, 51.

36. See, e.g., McThenia & Shaffer, *supra* note 2; Riskin, *Mediation*, *supra* note 3; Riskin, *Standards*, *supra* note 3. For an example of how the argument is summarily dismissed, see Fiss, *Eden*, *supra*, note 2.

37. This is the direction urged, for example, in Nader, *supra* note 2.
38. See Bush, *supra* note 35, for a detailed treatment of what this different version of mediation might look like.
39. See Bush, *supra* note 3, at 370-79; Esser, *supra* note 30, at 534-43; Riskin, *Mediation, supra* note 3, at 56-57. I note that some writers explicitly reject the notion that the choice between adjudication and mediation represents a choice between fundamentally different values or ideologies. See Menkel-Meadow, *Dispute Resolution: The Periphery Becomes the Core*, 69 *Judicature* 300, 301 (1986).
40. Professor Menkel-Meadow noted in her remarks at one dispute resolution conference that criticisms of mediation often come from individuals who have never observed or experienced the process. Remarks of Carrie Menkel-Meadow, Workshop on Identifying and Measuring the Quality of Dispute Resolution Processes and Outcomes, Univ. of Wisconsin-Madison (July 13-14, 1987). I took from this the implication, with which I strongly agree, that direct experience of mediation helps to provide answers to questions raised about the process. This notion, and Menkel-Meadow's remarks, suggested to me the idea of imagining mediation advocates and critics observing the process together and comparing their interpretations of what they saw.
41. The version or approach to mediation that our mediator advocates is one in which ". . . the mediator's role is to encourage the parties' exercise of their autonomy and independent choice in deciding whether and how to resolve the dispute, and to promote their mutual recognition of each other as fellow human beings despite their conflict." Bush, *supra* note 35, at 258. I have called this the "empowerment-and-recognition" approach to mediation and described its operation in some detail; I have also argued that it is the most coherent and responsible approach for mediators to take. See Bush, *supra* note 35, at 270-73, 277-83. Other mediation theorists also describe and endorse this approach to mediation. See, e.g., Folberg, *supra* note 22; Fuller, *supra* note 9; Riskin, *Standards, supra* note 3; J. Stulberg, *Taking Charge/Managing Conflict* (1987).

However, as our mediator notes, not all mediators presently take this approach; some employ approaches that focus on settlement per se as the goal, or protection of rights, or finding the "optimal" solution to the dispute. See Bush, *supra* note 35, at 259-62, 268 & n. 41; Folger & Bernard, *Divorce Mediation: When Mediators Challenge the Divorcing Parties*, *Mediation Q.*, Dec. 1985, at 5. Some of these approaches, like the "optimization" or "maximization" approach, see Riskin, *Standards, supra* note 3, at 358-59, implicitly share the empowerment and recognition approach's concern for encouraging mutual recognition, even if the mediator may take a more directive role. See *infra* note 50 and accompanying text. Later in the conversation here I call the empowerment and recognition and similar approaches "educational" mediation. See *infra* text accompanying notes 46-50, 67-79. The mediator's public value argument rests on the assumption that mediators in practice will follow an empowerment and recognition or

similar educational approach. See *infra* text accompanying note 79. The reason for this assumption is that other versions of mediation tend to further either private benefit or expediency goals, as the professor contends; they therefore cannot support a public value argument.

42. My use of this type of case as the vehicle for presenting the mediator's view of the process should not be taken to mean that this view applies only to landlord-tenant or "neighborhood" disputes like those typically mediated at community dispute resolution centers. The trivalization of mediation by assuming it has value only for a few types of cases is common but, in my view, wrong. See Fiss, *Eden*, *supra* note 2, at 1661-71. I believe that mediation could, in any of the types of cases first described, achieve the goals that the mediator sees as paramount. See *infra* notes 48-49 and accompanying text.

43. Professor Resnik's concern about the privacy of mediation seems based on this kind of argument. See Resnik, *supra* note 2, at 553-54; Resnik, *Due Process*, *supra* note 3, at 417-20.

44. I have arranged for the mediator to sidestep what I call the "effectiveness" argument, i.e., whether adjudication or mediation is more effective at achieving the public values the professor proffers. This argument is not part of the ideological dimension, for it assumes a single ideology, see *infra* text accompanying note 53, and simply asks which process serves it more effectively. However, as the mediator implies, there are numerous grounds on which to challenge the professor's reading of mediation as ineffective, and his implication of adjudication as effective, in this regard. See, e.g., Bush, *supra* note 24, at 978-86, 972-1004; Goldberg, Green & Sander, *supra* note 11, at 292-94.

45. The mediator's description of what she saw assumes that the mediator of the case took the empowerment-and-recognition or educational approach to the mediation process. See *supra* note 41 and accompanying text. As noted there, some mediators take different approaches focusing on settlement, rights protection, etc. If this case had been handled by a mediator taking one of these other approaches, our mediator would probably not have seen what she describes, and her argument would lose its factual foundation. Thus, her public value argument is valid only if mediators in practice follow an educational approach. See *infra* text accompanying note 79.

46. Economic theory maintains that where a large part of the benefit from a certain good is social benefit not exclusively enjoyed by the consumer—so-called "external benefit"—he will be less likely to purchase the good, or to purchase as much of it. The result is both underconsumption and underproduction of such "mixed goods" in private markets. See Bush, *supra* note 13, at 206-220. Education is a classic example of such a mixed good. See *id.* I have argued elsewhere that dispute resolution in general is also a mixed good. See Bush, *supra* note 24, at 1014-18. Where dispute resolution and education combine, as the mediator argues is the case in mediation, private economic actors are quite likely to undervalue the good and pass it by, despite potentially great public benefit. This helps to explain the

process per se, can still be seen as taking an educational approach. *See supra* notes 41 & 45.

51. *See* Fiss, *Eden*, *supra* note 2.

52. *See* J. Merryman, *The Civil Law Tradition* 1-6 (1969).

53. *See* Bush, *supra* note 3, at 374-75 & nn.73-74; Bush, *Between Two Worlds: The Shift from Individual to Group Responsibility in the Law of Causation of Injury*, 33 U.C.L.A. L. Rev. 1473, 1521-23 (1986); Murphy, *Liberalism and Political Society*, 26 Am. J. Juris. 125, 125-26, 130-41 (1981).

54. *See* Bush, *supra* note 3, at 340-41, 376-77; Bush, *supra* note 53, at 1540-41.

55. *See id.*, at 1521-23, 1532-39.

56. Also, in my view, these values are interconnected and stand in a certain priority relative to one another, in which self-transcendence is the higher value. Specifically, self-determination is a necessary first step in civic and moral development which prepares and gives the individual the opportunity for the ultimate step of transcending the self, in relation both to others and to the common good. *See* Bush, *supra* note 35, at 272 & n.52. Therefore, I see self-determination as ultimately a relational rather than an individualistic value, in the terms used later in the conversation. *See infra* text accompanying notes 60-63.

57. *See supra* note 46.

58. *See, e.g.*, R. Bellah, R. Madsen, W. Sullivan, A. Swidler, & S. Tipton, *Habits of the Heart: Individualism and Commitment in American Life* (1985) [hereinafter R. Bellah].

59. I have taken this view elsewhere, in connection with both dispute resolution theory and substantive legal theory. *See* Bush, *supra* note 3, at 370-79; Bush, *supra* note 53, at 1529-32, 1560-63.

60. *See, e.g.*, R. Dworkin, *Taking Rights Seriously* (1977); R. Nozick, *Anarchy, State and Utopia* (1974); J. Rawls, *A Theory of Justice* (1971). Of course, as Joseph Stulberg commented to me, there are sharp divergences in the account of individual rights offered by these three, and by others following their general tradition. In fact, some have considered these divergences so large as to call for separate identification of "libertarian" and "egalitarian" rights theory. *See, e.g.*, Sandel, *Morality and the Liberal Ideal*, *New Republic*, May 7, 1984, at 15, 16. Despite these divergences, all of these thinkers form a single tradition by comparison to the figures with whom they are contrasted in the text.

61. *See, e.g.*, R. Bellah, *supra* note 58; C. Gilligan, *In a Different Voice: Psychological Theory and Women's Development* (1982); A. Macintyre, *After Virtue: A Study in Moral Theory* (1981); M. Sandel, *Liberalism and the Limits of Justice* (1982); Macneil, *Bureaucracy, Liberalism and Community—American Style*, 79 Nw. U. L. Rev. 900 (1985).

62. Macneil, *supra* note 61, at 900 n.5.

63. *Id.*, at 937.

64. The ideological argument that I find implicit in dispute resolution discourse has, as the text notes, surfaced in many other arenas as well. In

the connection also runs the other way. Ideology also shapes institutions; and in the mixed environment of our society, relational ideology can support and strengthen the position and significance of relational structures. In this way, I believe, ideological awareness—on the judge's part and that of others involved with mediation—can indeed affect dispute resolution institutions.

66. The question of choice versus integration was raised by several participants in the original colloquium at Rutgers, particularly by Professor Nadine Taub. Related to this issue is another question raised at Rutgers by Professor J. Hyman. The view presented here is that each process is linked with one of the competing ideologies: mediation is inherently relational, and adjudication inherently individualist. The notion of a fundamental link between processes and underlying values is not new. Nevertheless, some see it as oversimplified. Hyman, for example, argues that individualist values like rights protection and social justice can be served in mediation, and relational values like self-transcendence in adjudication, depending on the role mediators and advocates adopt in these processes. Therefore, whatever our vision, we need *not* choose a single process to effectuate it. See J. Hyman, Letter to the author dated October 27, 1988; see also Hyman, *Trial Advocacy and Methods of Negotiation: Can Good Trial Advocates Be Wise Negotiators?*, 34 U.C.L.A. L. Rev. 863 (1987). I think this view is overly optimistic. While each process is adaptable, there are limits on that adaptability. Mediation can protect rights and social justice, but the more it does so the less likely it is to promote self-determination and self-transcendence. Advocacy in adjudication can seek to encourage self-transcendence, but the more it does so the less likely it is to protect rights and justice. These tradeoffs are at some level unavoidable: as we adapt each process to further different values, we reduce its capacity to further the values it originally served. Fuller's work on adjudication and mediation, and Fiss' and Resnik's on adjudication, seem to rest on a similar view. See Fiss, *Foundations*, *supra* note 3; Fiss, *Settlement*, *supra* note 2; Fuller, *supra* note 9; Fuller, *The Forms and Limits of Adjudication*, 92 Harv. L. Rev. 353 (1978); Resnik, *supra* note 2. Thus, while my either/or approach may seem too simple, it highlights a basic problem of choice or priority that other approaches tend to obscure.

67. For suggestions along these lines from various ADR critics, see Brunet, *supra* note 3, at 48-54; Delgado, *supra* note 8, at 1402-04; Edwards, *supra* note 27, at 678-82.

68. See *infra* text accompanying note 79.

69. The result could be to support instead what I have called a collectivist or corporate vision of society in which the greatest good is the collective welfare of society as a whole or some specific class within it. See Bush, *supra* note 3, at 375-76. See also Macneil, *supra* note 61, who posits another alternative to the individualist and community visions which he calls the "bureaucratic" vision.

70. See, e.g., Levin & Colliers, *supra* note 29, at 248-51; Peckham, *supra* note 29, at 274-77.

effecting a settlement is praiseworthy. . . ." Maimonides' Code of Jewish Law, *supra* note 72.

75. See *Role of the Judge*, *supra* note 74, at 82-83 (In compromise, ". . . both litigants give up something," and compromise ". . . brings peace by getting the litigants to retreat. The judge is changed from a magistrate to a teacher. The judge makes the litigants see that neither was totally right nor wrong. This is not merely a judicial decision—it is enlightenment."); Bush, *Traditional Jewish Ethics and Modern Dispute Resolution Choices, in Siyumei Rambam Celebrations* (1986). See also *supra* notes 47 & 56.

76. To put it differently, mediation offers parties the opportunity to choose to act selflessly—i.e., to show concern for others—in some manner. If agreement cannot be reached because one or both parties cling to their self-interest, then legal rules are applied to force parties to respect others. Both social-justice rules (e.g., the implied warranty of habitability) and societal-welfare rules (e.g., the negligence rule) can be viewed as rules compelling respect for others. If we assume that attitudes not only influence but are influenced by actions, then compelling respectful actions can eventually engender respectful attitudes. In a relational system, therefore, mediation and adjudication serve the same end. Mediation offers the chance to attain that end more directly and is thus preferable. But where it does not fully succeed, then adjudication steps in to pursue the end indirectly. See *infra* text accompanying notes 77-78.

77. See *supra* note 73. In the rabbinical court system, the court must, if mediation does not produce a settlement, render a decision.

78. See *supra* note 64.

79. See *supra* notes 41 & 45; Bush, *supra* note 35.

80. See *supra* text accompanying note 22; see also *supra* note 30.

81. I do not believe there is anything inherently contradictory about mandatory mediation. Coercion to get the parties into the room does not prevent voluntariness thereafter, nor does it seem to destroy mediation's potential for promoting self-determination and self-transcendence. See, e.g., McEwen & Maiman, *Small Claims Mediation in Maine: An Empirical Assessment*, 33 Me. L. Rev. 237 (1981). Moreover, some public compulsion or inducement may be necessary as a practical matter, both to overcome the parties' lack of information—and therefore suspicion—about the process, see Sander, *Family Mediation: Problems and Prospects*, *Mediation Q.*, Dec. 1983, at 3, 10-11, and to counteract the parties' inevitable tendency to ignore public benefits in making private decisions about dispute resolution. See *supra* notes 24 & 46 and *infra* note 82.

82. Indeed, if the mediator's public value argument is accepted, then public encouragement of mediation should extend not only to cases filed in court, which are the immediate subject of this conversation, but to disputes that have not yet and may never come to court. This would argue for some form of public support, subsidy, etc., for independent (i.e., non-court-connected) mediation services whose caseload consists of disputes brought to mediation

