



# Do You Believe in Magic?: Self-Determination and Procedural Justice Meet Inequality in Court-Connected Mediation

Nancy Welsh

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# DO YOU BELIEVE IN MAGIC?: SELF-DETERMINATION AND PROCEDURAL JUSTICE MEET INEQUALITY IN COURT- CONNECTED MEDIATION

Nancy A. Welsh\*

## ABSTRACT

*Proponents of the “contemporary mediation movement” promised that parties would be able to exercise self-determination as they participated in mediation. When courts began to mandate the use of mediation, commentators raised doubts about the vitality of self-determination. Though these commentators also suggested a wide variety of reforms, few of their proposals have gained widespread adoption in the courts.*

*Ensuring the procedural justice of mediation represents another means to ensure self-determination. If mediation provides parties with the opportunity to exercise voice, helps them demonstrate that they have considered what each other had to say, and treats them in an even-handed and dignified manner, it is more likely that the parties will share information that will lead to a result that actually represents the exercise of their self-determination.*

*Recent research, however, counsels that status affects procedural justice perceptions, voice is not always productive, and parties who are marginalized or lower status may neither expect nor desire to exercise voice. Further, research indicates that even those parties in mediation who value voice may not value participating in the back-and-forth or bargaining process that is required to arrive an agreement.*

*After reviewing this and other research, the Article proposes the following reforms to enhance the likelihood that mediation will provide all parties with voice, trustworthy consideration and real, substantive self-determination: increasing the inclusivity of the pool of mediators; training all mediators to acknowledge and address implicit bias; training mediators to engage in pre-mediation caucusing that focuses on developing trust; institutionalizing systems for feedback and quality assurance; training mediators to model reflective listening; adopting online technology that provides parties with pre-mediation information they need to engage in informed deci-*

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*sion-making and the opportunity for self-analysis and self-reflection; and perhaps even identifying additional areas of mediation practice in which mediators would be required to take affirmative steps to avoid unconscionable unfairness or coercion.*

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## I. INTRODUCTION

REAMS and noble intentions, at least in part, inspired the “contemporary mediation movement.”<sup>1</sup> Many mediation advocates<sup>2</sup> urged—and continue to urge<sup>3</sup>—that mediation should be embraced and institutionalized because it is an inclusive process and can enable people to find paths that allow them to exercise meaningful self-determination in resolving their disputes. This promise of self-determination has dimmed, however, as courts and agencies have focused on efficiency as a primary reason to institutionalize mediation,<sup>4</sup> as lawyers and repeat players have come to dominate the issue framing and negotiations occurring within mediation,<sup>5</sup> and as research has revealed that a significant percentage of parties do not possess the temperament or desire to fashion their own unique resolutions.<sup>6</sup>

As self-determination has lost luster, some mediation advocates have emphasized mediation’s potential to provide an “experience of justice.”<sup>7</sup> Drawing on the vast social–psychological literature regarding procedural justice, these mediation advocates have urged that the process offers important opportunities for “voice,” “trustworthy consideration,” and “even-handed and respectful treatment,” in marked contrast to the processes used to resolve the vast majority of litigated civil matters—i.e., default, lawyers’ bilateral negotiation, and dispositive motions.<sup>8</sup> This Article, in part, represents a reminder regarding mediation’s potential to

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1. ROBERT A. BARUCH BUSH & JOSEPH P. FOLGER, *THE PROMISE OF MEDIATION: RESPONDING TO CONFLICT THROUGH EMPOWERMENT AND RECOGNITION* 1 (1st ed. 1994).

2. This includes the author of this Article.

3. See, e.g., ADVISORY COMM. ON ALT. DISPUTE RESOLUTION, JOINT STATE GOV’T COMM’N, *ALTERNATIVE DISPUTE RESOLUTION IN PENNSYLVANIA: REPORT OF THE ADVISORY COMMITTEE ON ALTERNATIVE DISPUTE RESOLUTION* 12 (2017) (advocating for institutionalization of mediation in state courts and agencies and in private sector).

4. See Nancy A. Welsh, *The Thinning Vision of Self-Determination in Court-Connected Mediation: The Inevitable Price of Institutionalization?*, 6 HARV. NEGOT. L. REV. 1, 22 (2001) [hereinafter Welsh, *The Thinning Vision*].

5. See Leonard L. Riskin & Nancy A. Welsh, *Is That All There Is?: “The Problem” in Court-Oriented Mediation*, 15 GEO. MASON L. REV. 863, 865–66 (2008) [hereinafter Riskin & Welsh, *Is that All There Is?*]; Nancy A. Welsh, *Making Deals in Court-Connected Mediation: What’s Justice Got to Do with It?*, 79 WASH. U. L.Q. 787, 789 (2001) [hereinafter Welsh, *Making Deals*]; Welsh, *The Thinning Vision*, *supra* note 4.

6. See Donna Shestowsky, *How Litigants Evaluate the Characteristics of Legal Procedures: A Multi-Court Empirical Study*, 49 U.C. DAVIS L. REV. 793, 828 (2016) (reporting research regarding *ex ante* litigation preferences, specifically that “maintaining veto power over a third-party suggestion was as much decision control that litigants desired and they were indifferent between having this type of power and delegating decision-making authority to a third party or group of third parties.”).

7. See Nancy A. Welsh, *Stepping Back Through the Looking Glass: Real Conversations with Real Disputants About Institutionalized Mediation and Its Value*, 19 OHIO ST. J. ON DISP. RESOL. 573, 671 (2004) [hereinafter Welsh, *Stepping Back Through the Looking Glass*]; Nancy A. Welsh, *The Current Transitional State of Court-Connected ADR*, 95 MARO. L. REV. 873, 884 (2012) [hereinafter Welsh, *The Transitional State*]; Nancy A. Welsh, *The Place of Court-Connected Mediation in a Democratic Justice System*, 5 CARDOZO J. CONFLICT RESOL. 117, 143 (2004) [hereinafter Welsh, *The Place of Mediation*].

8. See Welsh, *Making Deals*, *supra* note 5, at 788; Welsh, *The Transitional State*, *supra* note 7.

provide self-determination and procedural justice and then considers the fate of proposals that have arisen to reclaim this potential.

But this Article also examines more recent research raising questions regarding the appropriateness of expecting mediation to deliver self-determination or procedural justice. In particular, the Article examines research indicating that people's societal identity and status can and does affect the likelihood that they will perceive procedural justice in mediation, their ability and willingness to exercise voice in mediation, and even their ability and willingness to demonstrate trustworthy consideration. Members of society who feel marginalized or isolated—or who know that they exercise no power due to their disadvantageous place within an extreme hierarchy—are less likely to be willing or able to embrace opportunities to express themselves in mediation. To do so represents an unacceptable risk. Meanwhile, members of society who are powerful—or who know that they exercise privilege due to their superior place within an extreme hierarchy—are less likely to be willing or able to embrace opportunities to hear and acknowledge what other parties have said in mediation. If mediation lacks participants' voice and trustworthy consideration, it is difficult to understand how the process can provide either procedural justice or a meaningful version of self-determination. In other words, as self-determination and procedural justice meet inequality in mediation, these noble intentions are found wanting.

It is at this point that it becomes tempting to question the value of mediation—to label mediation as an innovation that looked promising but has ended in failure. It is also at this point that the question (and song title) *Do You Believe in Magic?* comes to mind. Of course, the answer to such a question must be “No!” Only a fool believes in magic. But as is so often true, the lyrics of the song are much more nuanced than the title would lead us to believe. The lyrics urge us to “believe in [the] magic in a young girl's heart” and that music can “free your soul.” The lyrics also acknowledge that talking about this form of magic is “like trying to tell a stranger ‘bout-a rock and roll.”<sup>9</sup>

In other words, it is the hope and creativity in music that are “magic,” and they must be experienced in order to be felt. There is no doubt that both of these assertions can be true. Music can overcome all sorts of barriers, inhabiting both the space outside and inside us,<sup>10</sup> reaching beyond the rigorously rational and into the hopefully emotional. It can unlock individuals' previously-unacknowledged abilities for expression and freedom,<sup>11</sup> and when we make music together—or dance together—we can feel the power of coming together to create something good. Music defi-

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9. THE LOVIN' SPOONFUL, *Do You Believe in Magic?*, on DO YOU BELIEVE IN MAGIC (Kama Sutra 1965).

10. See KAREN ARMSTRONG, *A HISTORY OF GOD* (1993).

11. See Daoud Tyler-Ameen & Lars Gotrich, *On Film and Stage, Jonathan Demme Looked into the Heart of the Song*, NPR (Apr. 29, 2017, 8:00 AM), <http://www.npr.org/sections/therecord/2017/04/29/526017323/on-film-and-stage-jonathan-demme-looked-into-the-heart-of-the-song> [perma link unavailable].

nitely has a power, a language, a connecting force—a magic—that can help us overcome barriers and inhibitions that would otherwise divide us. So, the answer to the question “Do you believe in magic?” really has to be *both* “yes” and “no.”<sup>12</sup> It depends.

And so it is with mediation. “It depends” must be the appropriate response to the question of whether we should continue to believe in the potential power of mediation to foster dialogue, procedural justice, and self-determination. Therefore, this Article will *not* end with the conclusion that mediation represents a failed experiment, unable to overcome the negative effects of inequality, bias, and prejudice. Instead, this Article will call for more realistic expectations of the process, the establishment of conditions that make achievement of its potential more likely, and reforms to increase the inclusivity and safety of the process—thus fostering all people’s ability to find and express their own voices, find and exercise their abilities to consider the voice of the other, and arrive at their own voluntary (self-determined) agreements. There is work to be done.

## II. MEDIATION AND SELF-DETERMINATION

The field of “alternative” dispute resolution is grounded in the concept of self-determination.<sup>13</sup> Oxford defines this concept as “[t]he process by

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12. I am reminded of Professor Andrea Schneider’s recent remarks when accepting the ABA Section of Dispute Resolution’s award for scholarship:

[W]hen I stepped back to think about what negotiation and ADR and international law and ethics all have in common, it is that they look for the best in people. It is the ideal of how people and countries, should behave toward one another with the recognition that ongoing interaction and communication inevitably includes conflict. It’s not that we can eliminate conflict—it’s that we can handle it better. I also think that these classes are optimistic. Why bother teaching them if you don’t believe that you can change the world for the better? And I think that is something that most of us have in common—we are optimists. We do this work because we believe. We believe that behavior can change, we believe that people can learn, we believe that most leaders want what is best for their country and not just themselves. This optimism has, of course, been labeled as naive over the years. It has been particularly tested this year. But, seriously, if we didn’t think that we could make a difference, most of us would have found another career a long time ago!

This work also takes patience and persistence since we know people and situations do not change easily. So . . . for better or worse, I tend to view the answer “no” as “not now.” And I will come back around to ask again. I also think that when we view learning as an invitation—let’s do this together—we are more likely to effectuate the change we want in our students, in our schools, and in our communities. I think that what has worked for me is to own this optimism and invite others along for the ride.

Andrea Kupfer Schneider, Speech for the ABA Section of Dispute Resolution Award for Outstanding Scholarly Work (Apr. 22, 2017) (transcript available at <http://www.indisputably.org/?p=10644> [<https://perma.cc/E8WE-ZN6A>]). See also Welsh, *The Transitional State*, *supra* note 7, at 880 (observing that ADR proponents possess “a certain sort of faith, grounded in the principle of self-determination [and] . . . believe in providing people with the opportunity and tools to be their best, enabling them to take responsibility for making serious decisions in a deliberative, thoughtful manner”).

13. Although arbitration advocates and mediation advocates sometimes are portrayed as people with very different norms (see, e.g., S.I. Strong, *Clash of Cultures: Epistemic Communities, Negotiation Theory, and International Lawmaking*, 50 AKRON L. REV. 495

which a person controls their own life.”<sup>14</sup> Merriam-Webster defines it as “free choice of one’s own acts or states without external compulsion.”<sup>15</sup> The Free Dictionary defines it as “[d]etermination of one’s own fate or course of action without compulsion; free will.”<sup>16</sup> All of these definitions evince a faith in people’s desire and ability to control their own lives.<sup>17</sup> For those of us who believe in the dignity and capacity of every human being, there is some degree of magic in this concept of self-determination.

Importantly, self-determination is *not* familiar to most lawyers and judges.<sup>18</sup> Instead, it is a concept that finds its home in the worlds of diplomacy and nation building.<sup>19</sup> Nonetheless, mediators in the United States have long embraced self-determination. For example, the *Model Standards of Conduct for Mediators* adopted by the American Bar Association (ABA) Section of Dispute Resolution, the American Arbitration Association, and the Association for Conflict Resolution (formerly the Society of Professionals in Dispute Resolution) in 1994 placed self-determination first among the standards. The 1994 *Model Standards* described self-determination as “the fundamental principle of mediation.”<sup>20</sup> Standard I of the 2005 *Model Standards*, meanwhile, provides: “A mediator shall conduct a mediation based on the principle of party self-determination. Self-determination is the act of coming to a voluntary, uncoerced decision in which each party makes free and informed choices as to process and outcome.”<sup>21</sup> The vision of self-determination contained in this standard is not quite as inspirational as those referenced earlier, but the basic message remains the same: resolution of disputes in mediation shall occur only if the people involved in the dispute choose resolution on their own and without anyone forcing their hands.

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(2016)), they/we share this commitment to providing people with the real opportunity to resolve disputes in the manner that they choose. See Nancy A. Welsh, Introduction, 5 Y.B. On Arb. & Mediation v (2013).

14. *Self-determination*, OXFORD ENGLISH DICTIONARY ONLINE, <https://en.oxforddictionaries.com/definition/us/self-determination> [<https://perma.cc/4F6F-PEK3>].

15. *Self-determination*, MERIAM-WEBSTER ONLINE DICTIONARY, <https://www.merriam-webster.com/dictionary/self-determination> [<https://perma.cc/L6WN-X68P>].

16. *Self-determination*, THE FREE DICTIONARY (citing AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE (5th ed. 2016)), <http://www.thefreedictionary.com/self-determination> [<https://perma.cc/98GR-TFG9>].

17. See Welsh, *The Transitional State*, *supra* note 7, at 878.

18. See Welsh, *The Thinning Vision*, *supra* note 4, at 60.

19. See Daniel Thürer & Thomas Burri, *Self-Determination*, MAX PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW, <http://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e873> [<https://perma.cc/NX7F-4MZ9>] (last updated Dec. 2008) (asserting that the origin of the modern concept of self-determination derives from the U.S. Declaration of Independence, particularly the provision that governments “derive[ ] ‘their just powers from the consent of the governed’ and that ‘whenever any Form of Government becomes destructive of these ends, it is the Right of the People to alter or to abolish it’”).

20. Am. Arb. Ass’n, *Model Standards of Conduct for Mediators*, 17 J. NAT’L ASS’N OF ADMIN. L. JUDICIARY 323, 324–25 (1997).

21. MODEL STANDARDS OF CONDUCT FOR MEDIATORS Standard I (AM. ARB. ASS’N, AM. BAR ASS’N DISPUTE RESOLUTION SECTION & ASS’N FOR CONFLICT RESOLUTION 2005).

Largely due to concerns about declining access to justice—specifically, concerns that litigants were experiencing unacceptable delay and increased costs due to burgeoning civil and criminal court filings and litigation inefficiencies—federal and state courts institutionalized mediation for the resolution of all sorts of civil matters. Respect for parties' self-determination was not a guiding principle. When insufficient numbers of litigants voluntarily elected to try mediation to resolve their cases, courts began making mediation mandatory. As lawyers became more involved in the process, their voices and framing of issues dominated the discussions occurring in mediation, thus marginalizing their clients' participation. The lawyers also chose mediators who were experienced litigators or judges with relevant subject-matter expertise. They sought mediators who would provide reality testing.<sup>22</sup> In some types of cases, lawyers counseled their clients not to attend the mediation.<sup>23</sup> Increasingly today, lawyers urge mediators to avoid joint sessions that would allow the parties to talk directly with each other. Instead, many lawyers prefer private conversations with the mediator (caucuses) and shuttle diplomacy.<sup>24</sup>

All of these adaptations have occurred while many courts continue to describe mediation in a manner that harkens back to the early days of the contemporary mediation movement and as judges express a preference for mediation because they believe that it involves the parties more

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22. See Bobbi McAdoo & Nancy A. Welsh, *Look Before You Leap and Keep on Looking: Lessons from the Institutionalization of Court-Connected Mediation*, 5 NEV. L.J. 399, 400, 420 (2005) [hereinafter McAdoo & Welsh, *Look Before You Leap*]; Riskin & Welsh, *Is That All There Is?*, *supra* note 5, at 420; Welsh, *Making Deals*, *supra* note 5, at 846; Welsh, *The Thinning Vision*, *supra* note 4, at 8–9. I have even raised concerns that lawyers are using mediation—specifically, the mediation privilege—to protect themselves from potential malpractice suits arising out of the settlement of cases. See Nancy A. Welsh, *Musings on Mediation, Kleenex, and (Smudged) White Hats*, 33 U. LA VERNE L. REV. 5, 13 (2011) [hereinafter Welsh, *Musings on Mediation*].

23. See TAMARA RELIS, PERCEPTIONS IN LITIGATION AND MEDIATION: LAWYERS, DEFENDANTS, PLAINTIFFS AND GENDERED PARTIES 86–125 (2009).

24. See Lynne S. Bassis, *Face-to-Face Sessions Fade Away: Why is Mediation's Joint Session Disappearing?*, DISP. RESOL. MAG., Fall 2014, at 33; Jay Folberg, *The Shrinking Joint Session: Survey Results*, DISP. RESOL. MAG., Winter 2016, at 19; Eric Galton & Tracy Allen, *Don't Torch the Joint Session*, DISP. RESOL. MAG., Fall 2014, at 25–27; Thomas J. Stipanowich, *Insights on Mediator Practices and Perceptions*, DISP. RESOL. MAG., Winter 2016, at 7. I pointed out the reduced use of joint session nearly twenty years ago. See Welsh, *Making Deals*, *supra* note 5, at 789–91; Welsh, *The Thinning Vision*, *supra* note 4, at 20–21. Meanwhile, it is important to note that caucusing has been part of mediation for a very long time. Researchers found that caucus was used in about two-thirds of the community mediations studied; about 35% of disputants' statements occurred in caucus as compared to joint session; and

[i]n cases that employed a caucus, disputants used more persuasive arguments, made fewer requests for reaction to an alternative, and generated fewer new alternatives. Mediators employed more negative evaluations of the parties' behavior and less positive evaluations of their positions during these cases. These findings suggest that mediators tend to call caucuses when disputants are taking a contentious, as opposed to problem-solving, approach.

Gary L. Welton et al., *The Role of Caucusing in Community Mediation*, 32 J. CONFLICT RESOL. 181, 199 (1988).



directly in the resolution of their disputes.<sup>25</sup> The United States District Court for the Eastern District of New York, for example, defines mediation as

a process in which parties and counsel agree to meet with a neutral mediator trained to assist them in settling disputes. The mediator *improves communication across party lines, helps parties articulate their interests and understand those of the other party*, probes the strengths and weaknesses of each party's legal positions, and identifies areas of agreement and helps generate options for a mutually agreeable resolution to the dispute. In all cases, mediation provides an *opportunity to explore a wide range of potential solutions and to address interests that may be outside the scope of the stated controversy or which could not be addressed by judicial action. A hallmark of mediation is its capacity to expand traditional settlement discussions and broaden resolution options, often by exploring litigant needs and interests that may be formally independent of the legal issues in controversy.*<sup>26</sup>

When parties seek to set aside agreements they have reached in mediation, however, courts generally do not try to determine whether there was "communication across party lines," articulation and understanding of the parties' interests, "explor[ation of] a wide range of potential solutions," options that "address interests . . . outside the scope of the stated controversy or which could not be addressed by judicial action," and—ultimately—the exercise of self-determination.<sup>27</sup> Rather, courts look for the other extreme, trying to determine whether any participant in the process engaged in behaviors or threats so overwhelming that they could be classified as "coercion."<sup>28</sup> Courts rarely find coercion in mediation.<sup>29</sup>

25. See Bobbi McAdoo, *All Rise, The Court Is in Session: What Judges Say About Court-Connected Mediation*, 22 OHIO ST. J. ON DISP. RESOL. 377, 398–99 (2007) (reporting that one of the top reasons that judges order parties into mediation is because they believe it will get clients more directly involved in discussing their case and its resolution); McAdoo & Welsh, *Look Before You Leap*, *supra* note 22, at 410; see also Jennifer W. Reynolds, *Judicial Reviews: What Judges Write When They Write About Mediation*, 5 Y.B. ON ARB. & MEDIATION 111, 142–143 (2013) (observing that when judges write about mediation, their perspective and goals for the process depend upon whether they are focusing on their obligation to process cases or serve as mediators themselves and care about the "fit" between the social role of the courts and mediation).

26. S.D.N.Y. & E.D.N.Y. Local Civ. R. 83.8. (emphasis added). Interestingly, the definition of mediation on the court's website varies slightly from the definition in its local rules. There, mediation is defined as

a confidential process in which parties and counsel meet with a neutral third party who is trained in settling disputes. The mediator assists in improving communication across party lines, identifies areas of agreement, and helps parties to generate a mutually agreeable resolution to the dispute. Mediation provides an opportunity to explore a wide range of potential solutions and to address interests that may be outside the scope of the stated controversy or which could not be addressed by judicial action.

*Mediation*, E.D.N.Y., <https://www.nyed.uscourts.gov/mediation> [<https://perma.cc/F4XB-5HUZ>].

27. S.D.N.Y. & E.D.N.Y. Local Civ. R. 83.8.

28. See Welsh, *The Thinning Vision*, *supra* note 4, at 47.

29. See Nancy A. Welsh, *Reconciling Self-Determination, Coercion, and Settlement in Court-Connected Mediation*, in *DIVORCE AND FAMILY MEDIATION: MODELS, TECHNIQUES, AND APPLICATIONS* 420 (Jay Folberg, Ann L. Milne & Peter Salem eds., 2004);

This standard of self-determination as “not coercion” represents a very thin vision of self-determination indeed. But it is important to recall that (1) the courts exist in order to produce resolution of disputes; (2) they do not exist to foster citizens’ self-determination; (3) they have an interest in the disposition of cases; and (4) they are constantly facing legislative calls for increased efficiency, budget cuts, and competition from administrative courts, private dispute resolution, and even international tribunals.<sup>30</sup> Nonetheless, over the years, there has been no shortage of proposals to reinvigorate self-determination in court-connected mediation.

Working under the assumption that courts will continue to mandate parties’ participation in mediation, Leonard Riskin and I have urged that courts should provide for a pre-mediation consultation with the parties to determine the issues that the parties hope to address and their preferred mediation model.<sup>31</sup> Similarly assuming the continuation of mandatory mediation, Jaqueline Nolan-Haley has called long and consistently for parties to have access to information regarding their legal rights and remedies so that their consent to any agreements in mediation is sufficiently informed.<sup>32</sup> Jennifer Reynolds has advocated for law schools to commit themselves to educating members of the public regarding their legal rights and the skills needed to participate in mediation.<sup>33</sup> Stephen Landsman has proposed that state-appointed lawyers should accompany parties

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Welsh, *The Thinning Vision*, *supra* note 4, at 47; *see also* 1 SARAH R. COLE ET AL., § 7:9. *Contract Defenses—Duress*, in *MEDIATION: LAW, POLICY AND PRACTICE* (Dec. 2016 Update) (“Traditional duress principles would provide a pressured party no relief if the ‘threats’ come from the party’s lawyer and the mediator, and not from the adverse party. Furthermore, if both the mediator and the lawyer believe the settlement is fair, the settlement likely is within the range of settlements the courts would find acceptable.” (footnotes omitted)).

30. *See* McAdoo & Welsh, *Look Before You Leap*, *supra* note 22, at 414–15; Nancy A. Welsh, *Mandatory Predispute Consumer Arbitration, Structural Bias, and Incentivizing Procedural Safeguards*, 42 SW. L. REV. 187, 228 (2012) [hereinafter Welsh, *Incentivizing Procedural Safeguards*]; Welsh, *The Place of Mediation*, *supra* note 7, at 140; Welsh, *The Transitional State*, *supra* note 7, at 884–85; *see also* NATIONAL CENTER FOR STATE COURTS, *Call to Action: Achieving Civil Justice for All: Recommendations to the Conference of Chief Justices by the Civil Justice Improvements Committee* (2016); NATIONAL CENTER FOR STATE COURTS, *Civil Justice Initiative: The Landscape of Civil Litigation in State Courts* (2016); Corina D. Gerety & Brittany K.T. Kauffman, *Summary of Empirical Research on the Civil Justice Process: 2008-2013* (2014).

31. *See* Riskin & Welsh, *Is That All There Is?*, *supra* note 5, at 920–21. As noted in the article, staff mediators at the U.S. District Court for the Northern District of California and the Ninth Circuit provide such consultations.

32. *See* Jacqueline Nolan-Haley, *Informed Consent in Mediation: A Guiding Principle for Truly Educated Decisionmaking*, 74 NOTRE DAME L. REV. 775, 799–823 (1998); *see also* McAdoo & Welsh, *Look Before You Leap*, *supra* note 22, at 413–15 (regarding concerns about ordering self-represented litigants into mediation); Welsh, *The Thinning Vision*, *supra* note 4, at 5 (describing one vision of self-determination that focuses on ensuring parties have relevant information about rights, remedies, and usual settlements).

33. *See* Jennifer W. Reynolds, *Luck v. Justice: Consent Intervenes, but for Whom?*, 14 PEPP. DISP. RESOL. L. J. 245, 306–07 (2014) [hereinafter Reynolds, *Luck*] (examining the meaning of consent and calling for law schools to engage in public education regarding the law relevant to landlord-tenant, income tax, family, immigration, Social Security, and workers compensation and to improve people’s skills in negotiation, mediation, and contract-reading; also providing examples of law schools that offer “people’s law schools” and clinics that conduct outreach as well provide direct client service).

in mediation,<sup>34</sup> while Kristen Blankley has urged that lawyers should use limited scope agreements to provide legal representation to clients in mediation.<sup>35</sup> Omer Shapira has focused on mediators' ethics, calling for revision of the *Model Standards of Conduct for Mediators* to require mediators to foster parties' real, substantive self-determination rather than permitting formal, illusory self-determination to suffice.<sup>36</sup> Alone and

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34. See Stephan Landsman, *Nothing for Something? Denying Legal Assistance to Those Compelled to Participate in ADR Proceedings*, 37 *FORDHAM URB. L.J.* 273, 277 (2010); see also Jean R. Sternlight, *Lawyerless Dispute Resolution: Rethinking a Paradigm*, 37 *FORDHAM URB. L.J.* 381, 416–17 (2010) (reporting on one legal services office that largely limits its lawyers' time to representation of clients on the day of mediation, with strikingly good results).

35. See Kristen M. Blankley, *Adding by Subtracting: How Limited Scope Agreements for Dispute Resolution Representation Can Increase Access to Attorney Services*, 28 *OHIO ST. J. ON DISP. RESOL.* 659, 661–62 (2013). Interestingly, Dr. Roselle Wissler has observed that people participate less and express less satisfaction with their participation when represented by lawyers in mediation. She also provides several possible reasons for this. Roselle L. Wissler, *Representation in Mediation: What We Know from Empirical Research*, 37 *FORDHAM URB. L.J.* 419, 446–47 (2010).

36. See Omer Shapira, *A Critical Assessment of the Model Standards of Conduct for Mediators (2005): Call for Reform*, 100 *MARQ. L. REV.* 81, 125–27 (2016). Omer Shapira has recently examined the concept of self-determination in some detail:

[T]he exercise of self-determination requires the convergence of three accumulative elements: competency to make decisions, voluntariness and lack of coercion at the time of decision-making, and the availability and understanding of the information relevant to the decision-making. It will be helpful in the following discussion to distinguish between the factual observation that an *autonomous* decision has been made, and its *value* or *quality*. An autonomous decision must satisfy the first two conditions of self-determination: it must be made with competence, and be voluntary and uncoerced. An autonomous decision need not satisfy the third condition of self-determination, and could be based on inadequate information. However, such a decision would be of low quality. To put it differently, an uninformed decision is an exercise of *formal* self-determination, while a decision made with awareness of information relevant to the decision is an exercise of *substantive* self-determination.

... The more the elements of self-determination are present and realized, the more likely it is that the decision is the product of substantive rather than formal self-determination. The exact point that separates substantive self-determination from formal self-determination might sometimes be blurred. However, it seems to me that the legitimate expectation of mediation parties is for "true," i.e., substantive, self-determination, not formal self-determination. This expectation of a real, substantive exercise of rights is sometimes described as an expectation of fairness or justice.

....

... for a decision to be the product of "real," *substantive* self-determination, as opposed to illusory, formal self-determination, each of the elements of self-determination must be of high quality: a high degree of *competence* in the sense of a high capacity to perceive and process information, as opposed to a low degree of competence following, for example, mental stress, confusion, or exhaustion; a high degree of *voluntariness* in the sense of a decision-making process free of coercive attempts, as opposed to a low degree of voluntariness following coercive acts and pressures that leave the decision-maker with feelings of helplessness and lack of choice; and decisions that are based on information *relevant* to the decision and understood by the decision-maker, as opposed to decisions that are based on inadequate information or on a misunderstanding of the information and its implications. When one or more of the elements of self-determination are of low quality, we will

with others, I have urged courts to establish mechanisms to monitor mediation or provide parties with post-mediation opportunities to submit feedback regarding their experience with the mediation process and the mediators.<sup>37</sup> I have also advocated for a “cooling off” period to be applied to mediated settlement agreements, which would allow parties to rescind their agreements at will as long as such rescission occurred relatively promptly after the agreement was reached.<sup>38</sup> I have urged that courts should be sure that court-connected mediation is supplemented with other alternatives so that parties are ordered to participate in the process that is most appropriate for their dispute—rather than expecting mediation to be all things to all people.<sup>39</sup>

Of course, other means to protect and foster parties’ self-determination would be to end courts’ mandatory imposition of mediation, make use of mediation only presumptive, or mandate something less than mediation. Jacqueline Nolan-Haley has urged very recently that courts should never

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consider the decision-making process as reflecting the exercise of *formal* self-determination, and tend to treat it as unfair or unjust.

OMER SHAPIRA, *A THEORY OF MEDIATORS’ ETHICS: FOUNDATIONS, RATIONALE, AND APPLICATION* 137–38, 141–42 (2016).

37. See Welsh, *The Place of Mediation*, *supra* note 75, at 139–140; see also Bobbi McAdoo & Nancy Welsh, *Court-Connected General Civil ADR Programs: Aiming for Institutionalization, Efficient Resolution, and the Experience of Justice*, in *ADR HANDBOOK FOR JUDGES* (Donna Stienstra & Susan M. Yates eds., 2004) [hereinafter McAdoo & Welsh, *Aiming for Institutionalization*]; McAdoo & Welsh, *Look Before You Leap*, *supra* note 22, at 427, 430; Nancy A. Welsh, *Magistrate Judges, Settlement, and Procedural Justice*, 16 *NEV. L.J.* 983, 990 (2016) [hereinafter Welsh, *Magistrate Judges*] (description of survey and attachment); Nancy A. Welsh, Donna Stienstra & Bobbi McAdoo, *The Application of Procedural Justice Research to Judicial Actions and Techniques in Settlement Sessions*, in *THE MULTI-TASKING JUDGE: COMPARATIVE JUDICIAL DISPUTE RESOLUTION* (Tania Sourdin & Archie Zariski eds., 2013); Nancy A. Welsh & Bobbi McAdoo, *Eyes on the Prize: The Struggle for Professionalism*, *DISP. RESOL. MAG.*, Spring 2005, at 15 [hereinafter Welsh & McAdoo, *Eyes on the Prize*]. The ABA Dispute Resolution Section’s Certification Task Force addressed credentialing organizations’ responsibility in this area, concluding that they should “[p]rovide an accessible, transparent system to register complaints against credentialed mediators.” *ALT. DISP. RESOL. SEC. OF THE AM. BAR ASSOC. TASK FORCE ON MEDIATOR CREDENTIALING, FINAL REPORT* 4 (2012) [hereinafter *Mediation Research Task Force Report*]. The Task Force also noted that “[a] majority of the Task Force believes organizations should have a process to monitor the performance of credentialed mediators, such as periodic requests for feedback [while a] minority believes such monitoring is not feasible.” *Id.*

38. See Welsh, *The Thinning Vision*, *supra* note 4, at 87–89. This approach has been adopted by Minnesota for debtor-creditor matters, Florida in family matters, and California in insurance matters. See Minn. State 572.35(2) (providing for 72 hours to rescind mediated settlement agreement between debtor and creditor); Fla. Family L. R. P. 12.74(f)(1) (providing for ten-day cooling-off period for agreements reached in family mediation, if attorneys do not accompany parties); Cal. Ins. Code 10089.82(c) (providing a three-day cooling-off period for insured to rescind mediated agreement reached regarding earthquake insurance dispute, provided that insured was not accompanied by counsel at the mediation and the settlement agreement is not signed by her counsel). See also Reynolds, *Luck*, *supra* note 33, at 309 (expressing great skepticism regarding the likelihood that parties will exercise such opt-out rights).

39. See Nancy A. Welsh, *You’ve Got Your Mother’s Laugh: What Bankruptcy Mediation Can Learn from the Her/History of Divorce and Child Custody Mediation*, 17 *AM. BANKR. INST. L. REV.* 427, 455–56 (2009).

be permitted to make mediation mandatory in the first place.<sup>40</sup> Bobbi McAdoo and I have urged, separately and together, that if courts make mediation mandatory it should be for only a short time—perhaps two years so that lawyers have enough time to experience it—and then its use should be made voluntary.<sup>41</sup> Bobbi McAdoo and I have also advocated for allowing parties to opt out of mandatory mediation at will, without any required showing whatsoever.<sup>42</sup> Some courts specifically provide for such opt-outs.<sup>43</sup> Often, however, such permission is conditioned upon a sufficient showing by at least one of the parties or a screening by the mediator.<sup>44</sup> Andrea Schneider and I have endorsed proposals to mandate only the parties' participation in pre-mediation meetings to educate the parties regarding the mediation process.<sup>45</sup> Jacqueline Nolan-Haley has suggested that courts could create incentives to encourage parties' participation in mediation—i.e., in cases involving fee-shifting provisions, courts could determine whether a party's refusal to voluntarily participate in mediation should be punished by refusing to shift all or a portion of the fees that they would otherwise be entitled to receive.<sup>46</sup>

Most of these proposals have fallen on barren soil in American courts and thus have borne no or little fruit. The only real exception is the option of allowing parties to opt out, usually conditioned upon a sufficient showing. This exception exists primarily in court-connected family media-

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40. See Jacqueline M. Nolan-Haley, *Judicial Review of Mediated Settlement Agreements: Improving Mediation with Consent*, 5 Y.B. ON ARB. & MEDIATION 152, 158 (2013).

41. See McAdoo & Welsh, *Look Before You Leap*, *supra* note 22, at 413; Welsh, *The Place of Mediation*, *supra* note 7, at 137–39; see also Frank E. A. Sander, *Another View of Mandatory Mediation*, DISP. RESOL. MAG., Winter 2007 at 16 (describing mandatory mediation as “a kind of temporary expedient, a la affirmative action”).

42. See McAdoo & Welsh, *Look Before You Leap*, *supra* note 22, at 427; Welsh, *The Place of Mediation*, *supra* note 7, at 130–32.

43. See, e.g., Donna Shestowsky, *The Psychology of Procedural Preference: How Litigants Evaluate Legal Procedures Ex Ante*, 99 IOWA L. REV. 637, 695–96 (2014).

44. See McAdoo & Welsh, *Aiming for Institutionalization*, *supra* note 37; McAdoo & Welsh, *Look Before You Leap*, *supra* note 22, at 414; Welsh, *The Place of Mediation*, *supra* note 7, at 131–32; see also Robin H. Ballard et al., *Detecting Intimate Partner Violence in Family and Divorce Mediation: A Randomized Trial of Intimate Partner Violence Screening*, 17 PSYCHOL. PUB. POL'Y & L. 241, 242 (2011) [hereinafter Ballard]; Viktoria Pokman et al., *Mediator's Assessment of Safety Issues and Concerns (MASIC): Reliability and Validity of a New Intimate Partner Violence Screen*, 21 ASSESSMENT 529 (2014) [hereinafter Pokman]; Kelly Browe Olson, *Screening for Intimate Partner Violence in Mediation*, DISP. RESOL. MAG., Fall 2013, at 25 [hereinafter Olson].

45. See Nancy A. Welsh & Andrea Kupfer Schneider, *The Thoughtful Integration of Mediation into Bilateral Investment Treaty Arbitration*, 18 HARV. NEGOT. L. REV. 71, 134–35 (2013). I (alone, with Andrea Schneider, and with Bobbi McAdoo) have also examined even less intrusive mandatory options—e.g., mandating that lawyers inform their clients about mediation or mandating that lawyers consult with their clients about ADR and then advise the court regarding their parties' preferences). See Nancy A. Welsh & Andrea K. Schneider, *Becoming “Investor-State Mediation”*, 1 PENN ST. J.L. & INT'L AFF. 86, 92–93 (2012); Welsh, *The Thinning Vision*, *supra* note 4, at 81–82; McAdoo & Welsh, *Aiming for Institutionalization*, *supra* note 37, at 17; Nancy A. Welsh & Bobbi McAdoo, *Alternative Dispute Resolution (ADR) in Minnesota—An Update on Rule 114*, in COURT-ANNEXED MEDIATION: CRITICAL PERSPECTIVES ON SELECTED STATE AND FEDERAL PROGRAMS 203, 206–207 (Edward Bergman and John Bickerman, eds., 1998).

46. See Jacqueline M. Nolan-Haley, *Is Europe Headed Down the Primrose Path with Mandatory Mediation?*, 37 N.C. J. INT'L L. & COM. REG. 981, 1005–06 (2012).

tion and represents an acknowledgement of the unfortunately widespread reality and likely effects of intimate partner abuse.<sup>47</sup>

At this point, then, it is difficult to muster up faith in the reality of the magic of self-determination as applied to court-connected mediation, especially mandatory court-connected mediation. The courts, certainly, are not going to act as the optimizers or guarantors of self-determination.

As a result, this Article will now turn from the concept of self-determination to the social–psychological concept of procedural justice. This is because assuring procedural justice in mediation may serve as a reasonable link between achieving the courts’ mission of case disposition and providing a meaningful measure of self-determination in mediation.

### III. MEDIATION AND PROCEDURAL JUSTICE: THE USUAL STORY

Many people use the social–psychological term “procedural justice,” but a smaller number actually ground their understanding in the vast social–psychological empirical literature regarding the subject.<sup>48</sup> This literature reveals that people tend to perceive a process as fair or just if it includes the following elements: (1) “voice” or the opportunity for people to express what is important to them;<sup>49</sup> (2) “trustworthy consideration” or a demonstration that encourages people to believe that their voice was heard by the decision-maker or authority figure;<sup>50</sup> (3) a neutral forum

47. See, e.g., Ballard, *supra* note 44, at 241–243, 253; Pokman, *supra* note 44, at 529–31; Olson, *supra* note 44. It is relatively easy to comprehend why an abused intimate partner would not feel the presence of self-determination in a mediation if he or she has been harmed by an abusing partner and fears being harmed again. Others have suggested—legitimately—that an individual who has suffered harassment, discrimination, retaliation, or has been the victim of abuse or a hate crime could feel quite similarly in mediation. However, the courts generally have not established opt outs for these types of cases.

48. Meanwhile, there is also a vast empirical literature regarding related concepts—organizational justice, interactional justice, informational justice, etc. See Lisa Blomgren Bingham, *Designing Justice: Legal Institutions and Other Systems for Managing Conflict*, 24 OHIO ST. J. ON DISP. RESOL. 1, 26–46 (2008) (cataloguing the many different categories of justice that have been identified); Lisa Blomgren Amsler et al., *Dispute Systems Design: Preventing, Managing and Resolving Conflict* (unpublished manuscript) (on file with author).

49. See E. ALLAN LIND & TOM R. TYLER, THE SOCIAL PSYCHOLOGY OF PROCEDURAL JUSTICE 211–12 (1988) [hereinafter LIND & TYLER, SOCIAL PSYCHOLOGY]; E. Allan Lind, *Procedural Justice, Disputing, and Reactions to Legal Authorities*, in EVERYDAY PRACTICES AND TROUBLE CASES 177, 187 (Austin Sarat et al. eds., 1998) [hereinafter Lind, *Procedural Justice, Disputing, and Reactions*]; Tom R. Tyler, *Social Justice: Outcome and Procedure*, 35 INT’L J. PSYCHOL. 117, 121 (2000) [hereinafter Tyler, *Social Justice*] (describing voice as the opportunity for people to present their “suggestions” or “arguments about what should be done to resolve a problem or conflict” or “sharing the discussion over the issues involved in their problem or conflict” and also noting that voice effects have been found even when people know they will have little or no influence on decision makers); Nourit Zimerman & Tom R. Tyler, *Between Access to Counsel and Access to Justice: A Psychological Perspective*, 37 FORDHAM URB. L.J. 473, 488–89 (2010) (reporting that voice “shapes evaluations about neutrality, trust, and respect” and has the “strongest influence, followed respectively by neutrality, trust, and respect”).

50. Theories regarding “social exchange,” heuristics, and “group value” explain the importance of this perception. In part, at least, people care about voice—and trustworthy consideration—because they wish to know that the decision-maker is fully informed re-

that applies the same objective standards to all and treats the parties in an even-handed manner;<sup>51</sup> and (4) treatment that is dignified.<sup>52</sup> If people believe that they were treated fairly in a decision-making or dispute resolution procedure (i.e., the process was “procedurally just” or “procedurally fair”), they are more likely to (1) perceive that the substantive outcome is fair—even when it is adverse to them;<sup>53</sup> (2) comply with the outcome;<sup>54</sup> and (3) perceive that the sponsoring institution is legitimate.<sup>55</sup>

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garding their perspective, in hopes that this will influence the outcome. See Lind, *Procedural Justice, Disputing, and Reactions*, *supra* note 49, at 179. But people care about procedural fairness even when they have been told their voice will not influence the outcome. Procedural justice researchers now theorize that procedural fairness serves as a fairness “heuristic.” See E. Allan Lind et al., *Individual and Corporate Dispute Resolution: Using Procedural Fairness as a Decision Heuristic*, 38 ADMIN. SCI. Q. 224, 225–26 (1993); Robert J. MacCoun, *Voice, Control, and Belonging: The Double-Edged Sword of Procedural Fairness*, 1 ANN. REV. L. & SOC. SCI. 171, 185–86 (2005); Kees van den Bos et al., *How Do I Judge My Outcome When I Do Not Know the Outcome of Others? The Psychology of the Fair Process Effect*, 72 J. PERSONALITY & SOC. PSYCHOL. 1034, 1034–36 (1997). According to the “group value” or “relational” theory, meanwhile, people also care about the opportunity for voice and sincere consideration because these procedural elements signal the individual’s value and social standing within the relevant social group. See Donald E. Conlon et al., *Nonlinear and Nonmonotonic Effects of Outcome on Procedural and Distributive Fairness Judgments*, 19 J. APPLIED SOC. PSYCHOL. 1085, 1095 (1989); Tom R. Tyler, *Psychological Models of the Justice Motive: Antecedents of Distributive and Procedural Justice*, 67 J. PERSONALITY & SOC. PSYCHOL. 850, 858 (1994) [hereinafter Tyler, *Psychological Models*].

51. See Tom R. Tyler, *Does the American Public Accept the Rule of Law? The Findings of Psychological Research on Deference to Authority*, 56 DEPAUL L. REV. 661, 664 (2007) [hereinafter Tyler, *American Public*] (“Transparency and openness foster the belief that decisionmaking procedures are neutral.”); see also Steven L. Blader & Tom R. Tyler, *A Four-Component Model of Procedural Justice: Defining the Meaning of a “Fair” Process*, 29 PERSONALITY & SOC. PSYCHOL. BULL. 747, 749 (2003) (distinguishing between “formal” or “structural” aspects of groups that influence perceptions of process fairness, such as group rules, and the “informal” influences that result from individual authority’s actual implementation of the rules).

52. See E. Allan Lind et al., *In the Eye of the Beholder: Tort Litigants’ Evaluations of Their Experiences in the Civil Justice System*, 24 LAW & SOC’Y REV. 953, 958 (1990); Tyler, *Social Justice*, *supra* note 49, at 122; Tom R. Tyler, *The Psychology of Procedural Justice: A Test of the Group-Value Model*, 57 J. PERSONALITY & SOC. PSYCHOL. 830, 831 (1989). While dignified or respectful treatment is described here as an essential element of procedural justice, it has also been described as an element of interactional justice, and even of distributive justice. See Robert J. Bies, *Are Procedural Justice and Interactional Justice Conceptually Distinct?*, in HANDBOOK OF ORGANIZATIONAL JUSTICE 85, 85–86 (Jerald Greenberg & Jason A. Colquitt eds., 2005).

53. See Lind & Tyler, *SOCIAL PSYCHOLOGY*, *supra* note 49, at 66–70; Tyler, *Social Justice*, *supra* note 49, at 119.

54. See Lind, *Procedural Justice, Disputing, and Reactions*, *supra* note 49, at 192; Tyler, *American Public*, *supra* note 51, at 673–74 (describing procedural justice findings generally and research that has identified procedural justice and trust as the key antecedents of the willingness to defer to legal authorities); Tyler, *Psychological Models*, *supra* note 50, at 857; Tyler, *Social Justice*, *supra* note 49, at 119.

55. See Lind & Tyler, *SOCIAL PSYCHOLOGY*, *supra* note 49 at 209; Lind, *Procedural Justice, Disputing, and Reactions*, *supra* note 49, at 188. This perception is obviously important to courts. See DAVID B. ROTTMAN, ADMIN. OFFICE OF THE COURTS, TRUST AND CONFIDENCE IN THE CALIFORNIA COURTS: A SURVEY OF THE PUBLIC AND ATTORNEYS 24 (2005); TOM R. TYLER, WHY PEOPLE OBEY THE LAW 94–108 (1990); Tyler, *American Public*, *supra* note 51, at 665; Tom R. Tyler, *Citizen Discontent with Legal Procedures: A Social Science Perspective on Civil Procedure Reform*, 45 AM. J. COMP. L. 871, 885–86 (1997) (suggesting that the influence of procedural justice judgments supports the idea “that the

This is the usual story, the generally true story. It is not the whole story, but the Article will return to that a bit later.

For now, it is important to notice the potential relationship between a procedurally just process and one that provides some measure of self-determination. If a person truly has and takes advantage of the opportunity for voice<sup>56</sup>—i.e., if she truly says what she wants and needs to say—she has engaged in an act of procedural self-determination. Her expression of voice also makes it more likely that she will have significant input into the outcome (even though she cannot entirely control that out-

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public has a very moral orientation toward the courts” and “[t]hey expect the courts to conform to their moral values,” especially regarding “the fairness of the procedures by which the courts make decisions”).

56. I need to distinguish here between voice and participation. They are related but not the same. Dr. Roselle Wissler has conducted research indicating that people’s perceptions of procedural justice in mediation are strongly influenced by their perception that they had voice—i.e., the opportunity to tell their views of the dispute. *See* Wissler, *Representation in Mediation*, *supra* note 35, at 448 n.136, 450. Interestingly, the relationship between perceptions of procedural justice and voice is much stronger than the relationship between perceptions of procedural justice and the amount of time people spent talking during (i.e., participating directly in) the mediation. *See id.* at 452 (“Parties’ sense that they had a chance to tell their views was more strongly related to favorable assessments of mediation than was how much they participated. Thus, ensuring that parties feel they have a chance to fully express their views appears to be more important to their experience in mediation than how much they participate directly.”). Indeed, although there is a relationship between people’s perception of voice and the amount of time they talked in the mediation, many people felt they had voice even when they spoke very little or not at all. *See id.* at 448–49, 451 (“Thus, although talking a lot virtually guaranteed that parties felt they had voice, not talking at all, or having a lawyer who talked a great deal, did not prevent a substantial number of parties from feeling they had a chance to tell their views. These findings suggest that parties can feel they have voice through their lawyers. It is not clear, however, why some parties who did not talk in mediation felt they had voice while others did not; perhaps it made a difference whether parties preferred not to talk and wanted their lawyer to speak for them, or whether they were ‘shut down’ by their lawyers, the mediator, or the other side.” Rather, people can feel they had voice even if they spent little time talking in mediation or if their lawyer dominated the conversation.). Consistent with some of the original procedural justice research conducted by Walker, Thibaut, and others, it appears that many people perceived they had voice as a result of their lawyers’ participation. *See* Welsh, *Making Deals*, *supra* note 5, at 841–43 (describing early studies by Walker, Thibaut, LaTour, and Lind).

It also appears that those who felt they had voice but did not talk a lot were less likely to feel pressured to settle. In contrast, those who spoke more in both domestic relations and civil mediation sessions were more likely to feel pressured to settle. *See* Wissler, *Representation in Mediation*, *supra* note 35, at 449–50; *see also* Roselle L. Wissler, *An Evaluation of the Common Pleas Court Civil Pilot Mediation Project* viii (Feb. 2000) (unpublished manuscript) (on file with author). Meanwhile, “parties who said their lawyer talked more felt less pressured to settle than did parties who said their lawyer talked less.” Wissler, *Representation in Mediation*, *supra* note 35, at 451.

Wissler’s research suggests, to me at least, that the opportunity for voice is not the same thing as the opportunity to engage in the give-and-take of negotiation. *See* Welsh, *Stepping Back Through the Looking Glass*, *supra* note 7, at 654–58 (observing that while parents in special education mediation sessions valued the opportunity for voice, they did not particularly value the opportunity to negotiate or problem-solve with school officials). Further, Wissler’s findings appear consistent with other research suggesting that people value having their lawyers serve as “buffers” who reduce the need to engage directly in unpleasant interpersonal conflict. *See* Stephen LaTour et al., *Procedure: Transnational Perspectives and Preferences*, 86 *YALE L.J.* 258, 274 (1976).



come),<sup>57</sup> and the opportunity to share this information may open up a new path toward both relational and instrumental resolution. It is important to notice as well the ways in which trustworthy consideration, a neutral forum, and even-handed and dignified treatment may create a greater likelihood that both parties will be able to *hear* and *share* information that may surprise or enlighten them, that such information may create new opportunities for resolution, that the parties may experience enhanced trust, and that this trust and the expanded exchange of information thus may produce both an integrative solution and a changed relationship.<sup>58</sup>

All of this potential is entirely consistent with the tantalizing promise of substantive self-determination. Long ago, Isabelle Gunning highlighted such potential and its particular promise for otherwise-disadvantaged people who need the opportunity to express “their authentic voices and experiences.”<sup>59</sup> Mediation seemed to offer such people a forum in which “ideas about equality are [or at least could be] defined and redefined.”<sup>60</sup> Thus, a procedurally just mediation process had the potential to bring different people together in a safe space,<sup>61</sup> break through preexisting stereotypes and behaviors that continue to mar negotiations,<sup>62</sup> and model

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57. See Nancy A. Welsh, *Disputants' Decision Control in Court-Connected Mediation: A Hollow Promise Without Procedural Justice*, 2002 J. DISP. RESOL. 179, 187 (2002) [hereinafter Welsh, *Hollow Promise*].

58. See Nancy A. Welsh, *The Reputational Advantages of Demonstrating Trustworthiness: Using the Reputation Index with Law Students*, 28 NEGOT. J. 117, 133–34, 136 (2012) (observing the correlations that have been found among behaviors associated with procedural justice perceptions, enhanced perceptions of trustworthiness, enhanced information sharing, and enhanced likelihood of capturing available integrative potential) (citing Morton Deutsch, *Conflict Resolution: Theory and Practice*, 4 POL. PSYCHOL. 431, 438 (1983); Rebecca Hollander-Blumoff, *Just Negotiation*, 88 WASH. U. L. REV. 381 (2010)).

59. Isabelle R. Gunning, *Diversity Issues in Mediation: Controlling Negative Cultural Myths*, 1995 J. DISP. RESOL. 55, 67 (1995).

60. *Id.* at 67, 86.

61. This is consistent with one of the interventions recommended to combat implicit bias. See Andrew J. Wistrich & Jeffrey J. Rachlinski, *Implicit Bias in Judicial Decision Making: How It Affects Judgment and What Judges Can Do About It*, in ENHANCING JUSTICE: REDUCING BIAS 87 (Sarah Redfield ed., 2017) (describing exposure to stereotype-incongruent models as one means to combat implicit bias directly).

62. There are many examples of empirical research that demonstrate racial discrimination in the selection of potential negotiation partners and the negotiation process itself. See, e.g., Ian Ayres & Peter Siegelman, *Race and Gender Discrimination in Bargaining for a New Car*, 85 AM. ECON. REV. 304 (1995) (experiment involving more than 400 visits to 200 car dealerships in Chicago); Ian Ayres et al., *Race Effects on eBay*, 46 RAND J. ECON. 891 (2015) (experiment involving sale of baseball cards in eBay auction held by light-skinned versus dark-skinned hand with payment of 20% less if card was held by a dark-skinned hand—even though that card was actually more valuable); Benjamin Edelman, Michael Luca & Dan Svirsky, *Racial Discrimination in the Sharing Economy: Evidence from a Field Experiment*, 9 AM. ECON. J. 1 (2017) (rental of home to “guests”—8% more likely to accept queries from Caucasian-seeming names than African-American-seeming names; the exception was that African-American females did not discriminate against African-American females, but both Caucasians and African-Americans discriminated against African-Americans generally); Marianne Bertrand & Sendhil Mullainathan, *Are Emily and Greg More Employable Than Lakisha and Jamal? A Field Experiment on Labor Market Discrimination*, 94 AM. ECON. REV. 991 (2004) (resumes for those with white-sounding names 50% more likely to get callbacks than those with African-American-

the respect, responsibility, and dialogue that “fair and equal” people could and should extend to each other.<sup>63</sup> However, as this Article has already indicated, there is a “rest” of the procedural justice story. The Article turns to this now.

#### IV. PROCEDURAL JUSTICE MEETS INEQUALITY

##### A. THE POTENTIAL FOR “SHAM” PROCEDURAL JUSTICE

First, and unfortunately, something called “sham” procedural justice exists. A process may include all of the elements listed above—with the implicit message that people’s voice has the potential to affect the outcome. However, the mediator or the parties may have absolutely no intention of allowing themselves to be affected by what they have heard or seen. This situation is most likely to occur when the mediator or the other party has a vested interest in the outcome.<sup>64</sup> Under these circumstances, the mediator or the other party may be using the lessons of procedural justice research simply to seduce compliance.<sup>65</sup> Not surprisingly, people’s trust can plummet if they learn that they were misled and unwittingly

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sounding names); Marc-David L. Seidel, Jeffrey T. Polzer & Katherine J. Steward, *Friends in High Places: The Effects of Social Networks on Discrimination in Salary Negotiations*, 45 ADMIN. SCI. Q. 1 (2000) (members of racial minority groups negotiated significantly lower salary increases from hiring managers’ initial offers); see also MAX H. BAZERMAN & ANN E. TENBRUNSEL, *BLIND SPOTS: WHY WE FAIL TO DO WHAT’S RIGHT AND WHAT TO DO ABOUT IT* (2011).

63. See Jonathan R. Cohen, *Let’s Put Ourselves Out of Business: On Respect, Responsibility, and Dialogue in Dispute Resolution*, 108 PENN ST. L. REV. 227, 230 (2003); see also Nancy A. Welsh, *I Could Have Been a Contender: Summary Jury Trial as a Means to Overcome Iqbal’s Negative Effects upon Pre-Litigation Communication, Negotiation and Early, Consensual Dispute Resolution*, 114 PENN ST. L. REV. 1149, 1153 (2010) [hereinafter Welsh, *I Could Have Been a Contender*] (arguing that people have to be motivated to have this kind of conversation; that fear of litigation, discovery, and trial may provide such motivation to otherwise-dominant players; and that trial procedures aspire to model a fair and equal dialogue that overcomes the preexisting power relations between the litigating parties).

64. See LIND & TYLER, *SOCIAL PSYCHOLOGY*, *supra* note 49, at 179–84.

65. See Eric Miller, *Thanks for Inviting Me*, PRAWFSBLAWG (Sept. 8, 2017, 3:25 PM), <http://prawfsblawg.blogs.com/prawfsblawg/2017/09/thanks-for-inviting-me.html> [https://perma.cc/486V-4ZJZ] (describing the “sociological theory [of procedural justice as] . . . not a theory of justice, but of what makes for effective psychological coercion” and observing in the context of police-citizenry interactions that “[i]f we give the police credit for engaging in non-violent psychological coercion of the folks they encounter, are we giv[ing] them—and ourselves—too much credit for promoting ‘just’ policing[?]”); see also Avram Bornstein et al., *Tell It to the Judge: Procedural Justice and a Community Court in Brooklyn*, 39 POLAR 206 (2016) (citing to MacCoun and describing potential for procedural justice to produce “false consciousness”; also describing behavior of judge and problem-solving court in Red Hook court—demonstrating respect, compassion, interest in person, helpfulness, ability to access resources—and describing such behavior as fairer than what is provided by other courts); Keith G. Allred, *Relationship Dynamics in Disputes: Replacing Contention with Cooperation*, in THE HANDBOOK OF DISPUTE RESOLUTION 83, 92–93 (Michael L. Moffitt & Robert C. Bordone eds., 2005) (noting the paucity of empirical data but observing that his “experience as a mediator suggests that manipulative uses of procedural justice are on the rise in both the public and private sectors” as well as overly simplistic application of procedural justice principles; specifically citing examples involving a Fortune 500 aerospace company and the Forest Service).

participated in a sham procedure.<sup>66</sup> They may perceive the outcome of this sham procedure to be *less* fair than the identical outcome of an *obviously* unfair process.<sup>67</sup>

Importantly, however, this “frustration effect” has been found to occur quite rarely—e.g., when the apparent procedural justice of a process is relatively weak, the evidence of bias is strong, or a colleague points out the inequity of the outcome. E. Allan Lind and Tom Tyler have concluded that frustration effects “will occur only when there is overwhelming social or factual support for the supposition that the procedure is corrupt.”<sup>68</sup> The marginalized and vulnerable are most likely to bear the brunt of a sham procedure—and recent decades have seen worrisome growth in the gap between “haves” and “have-nots” around the world.<sup>69</sup> Unfortunately, the marginalized and vulnerable also may be least likely to detect that they were the victims of a sham procedure.<sup>70</sup>

#### B. STATUS AND ITS EFFECTS ON THE PERCEPTIONS AND INFLUENCE OF PROCEDURAL JUSTICE

There is also research indicating that even if a process is authentic and conducted in a procedurally just manner, individuals’ roles or social statuses affect the extent to which their judgments regarding procedural justice will influence their perceptions of substantive justice. Some of this research involves mediation directly. *The Metrocourt Project*, for example, reported that Hispanic-American litigants were more likely than Whites to be satisfied with the mediation process and its outcomes, even though Hispanic-Americans’ mediation outcomes were neither as favorable as Whites’ mediation outcomes nor as favorable as the out-

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66. People are aware of their vulnerability to manipulation and if they perceive evidence of unfair treatment or perceive “false representations of fair treatment,” they respond with “extremely negative reactions.” Lind, *Procedural Justice, Disputing, and Reactions*, *supra* note 49, at 187; see Tom R. Tyler et al., *Influence of Voice on Satisfaction with Leaders: Exploring the Meaning of Process Control*, 48 J. PERSONALITY & SOC. PSYCHOL. 72, 73–74 (1985) (explaining that, under certain conditions, voice without decision control heightens feelings of procedural injustice and dissatisfaction with leaders, a result described as the “‘frustration’ effect”). Note that what seems to matter here is the falsity of the explicit or implicit representation that people’s voice will have the potential to influence the outcome. In somewhat surprising contrast, there is substantial research demonstrating that if people are told in advance that their voice will not or cannot influence the outcome, they are nonetheless more likely to judge a process as procedurally just if the process includes an opportunity for voice. See Welsh, *Making Deals*, *supra* note 5, at 821–22 (describing these studies).

67. See LIND & TYLER, *SOCIAL PSYCHOLOGY*, *supra* note 49, at 180.

68. *Id.* at 183–84. Recent research has found an interesting and very strong relationship between people’s perceptions of the existence of the rule of law and the absence of corruption. See Mila Versteeg & Tom Ginsburg, *Measuring the Rule of Law: A Comparison of Indicators*, 42 LAW & SOC. INQUIRY 100, 117–118 (2017) (discussing the overwhelming correlation between Transparency International’s Corruption Perceptions Index and the Rule of Law indicators of the Heritage Foundation, World Bank, World Justice Project and Freedom House).

69. See Ellen Waldman & Lola Akin Ojelabi, *Mediators and Substantive Justice: A View from Rawls’ Original Position*, 30 OHIO ST. J. ON DISP. RESOL. 391, 398–400 (2016); Reynolds, *Luck*, *supra* note 33.

70. See Reynolds, *Luck*, *supra* note 33.

comes Hispanic-Americans received in adjudication.<sup>71</sup> Interestingly, women of color expressed the highest level of satisfaction with mediation, while white women were the least satisfied and least likely to perceive the mediation process as fair even though they experienced the most favorable outcomes.<sup>72</sup>

Recent research in the Netherlands regarding the mediation of labor disputes similarly indicates that people's place in a hierarchy affects the influence of their procedural justice perceptions upon their perceptions of substantive outcomes. In this study, researchers found that supervisors were more likely than subordinates to judge mediation as effective even when the supervisors perceived low levels of procedural justice. Meanwhile, subordinates' perceptions of mediation's procedural justice determined their perceptions of the process's effectiveness. Especially if subordinates perceived low levels of procedural justice, they perceived mediation to be ineffective.<sup>73</sup> Supervisors also were more likely than subordinates to perceive mediation as procedurally just. Thus, in this research, those with higher status in the hierarchy of the workplace were *more* likely than those lower in the hierarchy to judge mediation as procedurally just and effective and *less* likely to find that low levels of procedural justice undermined the effectiveness of the mediation process.

Other research, not involving mediation, also suggests the relevance of status to procedural justice perceptions and their power.<sup>74</sup> Substantial research has been conducted regarding the effect of procedural justice per-

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71. See Michele Hermann, *New Mexico Research Examines Impact of Gender and Ethnicity in Mediation*, in THE CONFLICT AND CULTURE READER 91, 91–92 (Pat K. Chew ed., 2001) [hereinafter Hermann, *New Mexico Research*]; MICHELE HERMANN ET AL., THE METRO COURT PROJECT FINAL REPORT: A STUDY OF THE EFFECTS OF ETHNICITY AND GENDER IN MEDIATED AND ADJUDICATED SMALL CLAIM CASES AT THE METROPOLITAN COURT MEDIATION CENTER, BERNALILLO COUNTY, ALBUQUERQUE, NEW MEXICO: CASES MEDIATED OR ADJUDICATED SEPTEMBER 1990–OCTOBER 1991 viii–xvii (1993) [hereinafter HERMANN, METRO COURT].

72. See Hermann, *New Mexico Research*, *supra* note 71, at 92.

73. Katalien Bollen, Heidi Ittner & Martin C. Euwema, *Mediating Hierarchical Labor Conflicts: Procedural Justice Makes a Difference—for Subordinates*, 21 GROUP DECISION & NEGOT. 621, 621–36 (2012). It appears that the researchers defined “effectiveness” largely in terms of settlement. See Roberto Martinez-Pecino, Lourdes Munduate, Francisco J. Medina & Martin C. Euwema, *Effectiveness of Mediation Strategies in Collective Bargaining*, 47 IND. RELATIONS 480, 481 (2008) (pointing to a 30% difference in total settlements achieved as evidence that mediation interventions are more effective in interest conflicts than in rights conflicts).

74. See Welsh, *I Could Have Been a Contender*, *supra* note 63, at 1169–70 (citing Jody Clay-Warner, *Perceiving Procedural Injustice: The Effects of Group Membership and Status*, 64 SOC. PSYCHOL. Q. 224, 232–33 (2001); Kristina A. Diekmann et al., *Does Fairness Matter More to Some Than to Others? The Moderating Role of Workplace Status on the Relationship Between Procedural Fairness Perceptions and Job Satisfaction*, 20 SOC. JUST. RES. 161, 163 (2007); Jan-Willem Van Prooijen et al., *Procedural Justice and Intragroup Status: Knowing Where We Stand in a Group Enhances Reactions to Procedures*, 41 J. EXPERIMENTAL SOC. PSYCHOL. 644, 645 (2005); Jan-Willem Van Prooijen et al., *Procedural Justice and Status: Status Salience as Antecedent of Procedural Fairness Effects*, 83 J. PERSONALITY & SOC. PSYCHOL. 1353, 1359 (2002)); see also Eric J. Miller, *Encountering Resistance: Contesting Policing and Procedural Justice*, 2016 U. CHI. LEGAL F. 295 (arguing that procedural justice is dangerous, a psychological ploy to get people to comply and cooperate and reveal information that may land them in a criminal proceeding; “voice” should

ceptions on people's perceptions of substantive justice when they interact with police. In general, that research has shown that when police behave in a manner consistent with procedural justice, people are more likely to perceive substantive outcomes as fair even when they are adverse. In other words, the provision of procedural justice can reduce the impact of outcome favorability on perceptions of substantive fairness.<sup>75</sup> Other research has shown, meanwhile, that in making judgments about procedural fairness, people of color "place[d] significantly greater weight on evidence about their social standing than did White group members."<sup>76</sup> The researchers measured social standing by asking respondents "whether the authorities had been polite to them" and "had shown respect for their [respondents'] rights."<sup>77</sup>

More recent research suggests that in interactions between lower status and higher status people in negotiations or the workplace, the lower status persons are more likely to desire future interactions with higher status persons if they perceive that the higher status persons behaved in a procedurally just manner—even when those interactions produced disappointing outcomes for the lower status persons. In contrast, the higher status persons (which would tend to include more powerful parties and dominant repeat players) were less likely to be influenced by procedural fairness. Indeed, when lower status persons treated them in a procedurally just manner, those with higher status were more likely to perceive outcomes as fair only if those outcomes were consistent with what they expected or knew themselves to be entitled to receive.<sup>78</sup>

These findings regarding the interaction between status and the composition and influence of procedural justice perceptions may be explained by the notion that procedural justice is more important and more influential for those who are lower status. Many studies have shown that people's perceptions of outcome fairness are affected primarily by their expectations or comparison to others' outcomes.<sup>79</sup> Lower status persons,

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not just be about compliance with authority but also about challenging the legal or political basis of authority).

75. See Ya-Ru Chen et al., *When is It "a Pleasure to Do Business with You?": The Effects of Relative Status, Outcome Favorability, and Procedural Fairness*, 92 *ORG. BEHAV. & HUM. DECISION PROCESSES* 1, 4 (2003).

76. Tom R. Tyler, *The Psychology of Procedural Justice: A Test of the Group-Value Model*, 57 *J. PERSONALITY & SOC. PSYCHOL.* 830, 835 n.4 (1989).

77. *Id.* at 833. These two measures were averaged to form a Standing scale. *Id.*

78. See Chen et al., *supra* note 75, at 1; JANE W. ADLER ET AL., *SIMPLE JUSTICE: HOW LITIGANTS FARE IN THE PITTSBURGH COURT ARBITRATION PROGRAM* 76, 83 (1983) ("Unlike the unsophisticated individual litigants, . . . institutional litigants" who made extensive use of the arbitration program "appear[ed] to care little about qualitative aspects of the hearing process" and "judge arbitration primarily on the basis of the outcomes it delivers.").

79. See Chen et al., *supra* note 75; Roselle L. Wissler, *Mediation and Adjudication in the Small Claims Court: The Effects of Process and Case Characteristics*, 29 *LAW & SOC'Y REV.* 323, 346–47 (1995) (reporting that disputants' satisfaction with outcomes was influenced primarily by outcome measures and, to a lesser but significant degree, by process evaluations; noting that these results are "consistent with theories that maintain that outcome satisfaction is influenced more by one's assessment of the outcome compared with expectations or with others' outcomes than by the absolute outcome received").

however, are less likely to be confident regarding what they are entitled to receive, more concerned about the potential for exploitation, and thus more likely to need to determine how much they can trust a higher status person.<sup>80</sup> For lower status people, attending to procedural cues represents a coping mechanism to help them deal with uncertainty regarding outcome fairness. As a result, for these people, strong procedural justice reduces the influence of outcome favorability upon their perceptions of substantive justice.

There is even biological support for the value of using the assessment of procedural justice as a coping mechanism. Being treated in a manner that is dignified, feels safe, and reduces stress has been shown to have a positive physiological effect that enhances people's cognitive ability and decision-making.<sup>81</sup> Thus, it makes sense that procedural justice will be particularly important for those dealing with vulnerability or uncertainty.<sup>82</sup> It also makes sense that the provision of procedural justice will exercise less influence upon the judgments of those who do not expect to experience vulnerability or uncertainty.<sup>83</sup> In fact, there is research suggesting that when higher status persons perceive that they have received

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80. See Joel Brockner, Batia M. Wiesenfeld & Kristina A. Diekmann, *Towards a "Fairer" Conception of Process Fairness: Why, When and How More May Not Always be Better than Less*, 3 ACAD. MGMT. ANNALS 183, 183–216 (2009) (those who are certain of outcomes have less need for procedural fairness and thus do not notice it as much).

81. See Jill S. Tanz & Martha K. McClintock, *The Physiologic Stress Response During Mediation*, 32 OHIO ST. J. ON DISP. RESOL. 29, 51–53 (2017) (discussing the "sweet spot" in cortisol production for problem solving and decision-making and how mediators can and should address disparities between mediating parties in the extent to which stressors may affect them); see also Keith G. Allred, *Relationship Dynamics in Disputes: Replacing Contention with Cooperation*, in THE HANDBOOK OF DISPUTE RESOLUTION 83, 92 (Michael L. Moffitt & Robert C. Bordone eds., 2005) (noting that perceptions of fair process lead to more trust and loyalty).

82. See Rebecca Hollander-Blumoff & Tom R. Tyler, *Procedural Justice in Negotiation: Procedural Fairness, Outcome Acceptance, and Integrative Potential*, 33 LAW & SOC. INQUIRY 473, 477 (2008) (citing E. Allan Lind, *Fairness Judgments as Cognitions*, in THE JUSTICE MOTIVE IN EVERYDAY LIFE 416 (Michael Ross & Dale T. Miller eds., 2002); Kees van den Bos & E. Allan Lind, *Uncertainty Management by Means of Fairness Judgments*, 34 ADVANCES EXPERIMENTAL SOC. PSYCHOL. 1, 26–30 (2002)); see also Nancy A. Welsh & Barbara Gray, *Searching for a Sense of Control: The Challenge Presented by Community Conflicts over Concentrated Animal Feeding Operations*, 10 PENN ST. ENVTL. L. REV. 295 (2002).

83. See Kees van den Bos et al., *When Do We Need Procedural Fairness? The Role of Trust in Authority*, 75 J. PERSONALITY & SOC. PSYCHOL. 1449, 1452 (1998) (reporting research showing that procedural justice information was not as necessary when the authority had a trustworthy reputation while there was heavy reliance on procedural justice information when no reputational information was provided). Procedurally just treatment has also been found to be more important to, and more influential for, those who define and evaluate themselves based on their relationships with others or believe that social interactions should affirm basic moral values. See Joel Brockner et al., *The Influence of Interdependent Self-Constraint on Procedural Fairness Effects*, 96 ORG. BEHAV. & HUM. DECISION PROCESSES 155, 155 (2005). There is also research that is beginning to demonstrate that people's roles correlate to the heightened importance of certain elements of procedural justice. For example, one field study (in Germany) has found that observers of court procedures are much more likely to focus on dignified treatment than on voice, consideration, or even-handed treatment. See Susanne Beier et al., *Influence of Judges' Behaviors on Perceived Procedural Justice*, 44 J. OF APPLIED SOC. PSYCHOLOGY 46 (2014).

high procedural justice from a lower status person, they are likely to focus even more strongly on outcome favorability in deciding whether to judge the outcome as fair.<sup>84</sup> For them, procedural justice does not soften the blow of an adverse outcome. Rather, procedural justice may *sharpen* the blow because the occurrence of an adverse outcome as a result of a procedurally fair process calls into question the higher status person's self-conception.<sup>85</sup>

Finally, there is somewhat counter-intuitive research suggesting that people with low self-esteem and those who are highly committed to avoiding unfavorable outcomes but are certain they are going to lose actually do not prefer procedurally just processes. Indeed, they prefer procedurally *unjust* processes because they can then blame the processes for adverse outcomes. If the process were procedurally just, these individuals would have to blame themselves for not doing all they could to win—while they were sure they were going to lose.<sup>86</sup>

### C. STATUS AND ITS EFFECTS ON THE DESIRE AND ABILITY TO EXERCISE VOICE

There is also an increasing amount of research focusing on the element of voice, and some of this research is particularly problematic in considering how inequality, bias, and prejudice may undermine the potential of mediation to offer procedural justice and a forum in which people's authentic voices and experiences can be expressed.

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84. See Chen et al., *supra* note 75, at 1 (finding in experiments—one involving negotiation between higher status and lower status parties and a second involving the allocation of rewards between customer service representatives and supervisors—“high procedural fairness *heightened* the positive relationship between outcome favorability and desire for future interaction”). These researchers explain that higher status people “are more self-focused” than lower status people and use procedural fairness information (in conjunction with outcome favorability) more than lower status people do to determine how much they will be able to maintain existing conceptions of their status. On the one hand, social encounters that combine favorable outcomes and fair procedures on the other's part enable higher status individuals to maintain their existing self-perceptions. Consequently, higher status people will strongly desire future interaction with other parties under such conditions. On the other hand, social encounters that combine unfavorable outcomes and fair procedures on the other's part will be unwelcomed by higher status people insofar as these conditions threaten their existing self-perceptions. *Id.* at 6 (citing Dacher Keltner et al., *Power, Approach, and Inhibition*, 110 *PSYCHOL. REV.* 265 (2003)).

85. See *id.* at 6. On the other hand, prospect theory indicates that those who believe themselves entitled to a procedurally just process are quite likely to notice if they *fail* to receive such treatment. See Heather Pincock & Timothy Hedeon, *Where the Rubber Meets the Clouds: Anticipated Developments in Conflict and Conflict Resolution Theory*, 30 *OHIO ST. J. ON DISP. RESOL.* 431, 436 (2016) (discussing prospect theory). This research suggests that there is no particular advantage to providing a procedurally just process when dealing with higher status parties, but negative consequences may follow from the failure to provide a procedurally just process.

86. See Brockner, Wiesenfeld & Diekmann, *supra* note 80, at 188–90, 194–98 (describing research showing that people with lower self-esteem “felt significantly more self-verified [and their need for consistency was met] when told the event was handled with lower process fairness” while their level of commitment to an institution and its authorities was not affected by low process fairness).

### 1. *Voice That Affects Perceptions of Procedural Justice*

As noted earlier, the expression of voice is central to both procedural justice and self-determination.<sup>87</sup> It is important, however, to identify the particular aspects of voice that are valuable in mediation. Roselle Wissler has conducted important research on this topic. First, she has found that people perceive that they have experienced the opportunity for voice and a procedurally just process in mediation if their lawyers speak on their behalf. Second, she has found that people's perceptions of voice are even stronger if they have the opportunity to "tell their stories" themselves. Third, Wissler has found a distinction between voice and "participation." In her research, while people's perceptions of procedural justice are strongly related to their perception that they had a sufficient opportunity for voice, their perceptions of procedural justice are much less strongly related to the extent of their direct participation in the mediation.<sup>88</sup> Indeed, Wissler found that those who spoke more in both domestic relations and civil mediation sessions were more likely to feel pressured to settle.<sup>89</sup> This research suggests a disconnect between the voice that is important to procedural justice and the sort of participation that is often<sup>90</sup> associated with self-determination—i.e., the opportunity to participate directly in the back-and-forth or bargaining of negotiation and mediation. I conducted qualitative research similarly suggesting that, in hierarchical systems, those with less power are quite likely to value the opportunity to express what is important to them while not valuing the opportunity to participate in the bargaining or negotiation process.<sup>91</sup>

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87. Voice also is central to procedural due process and, some would argue, rule of law. See Rebecca Hollander-Blumoff & Tom R. Tyler, *Procedural Justice and the Rule of Law: Fostering Legitimacy in Alternative Dispute Resolution*, 2011 J. DISP. RESOL. 1, 10 (2011) ("Because the legal system in the United States is adversarial and relies on parties to present their own evidence, this in turn links voice and an opportunity to be heard with principles of rule of law."); Welsh, *Hollow Promise*, *supra* note 57, at 187 (observing that while voice and procedural due process certainly apply to adjudicative procedures, it is much more difficult to apply them to consensual procedures).

88. See Wissler, *Representation in Mediation*, *supra* note 35, at 447–52 (distinguishing between clients' direct participation and indirect participation as their lawyers negotiated on their behalf); Roselle L. Wissler, *Party Participation and Voice in Mediation*, DISP. RESOL. MAG., Fall 2011, at 20; see also Lind et al., *In the Eye of the Beholder*, *supra* note 52, at 969, 972 (finding that in a variety of dispute resolution processes other than mediation, tort litigants' sense of control over the way their case was handled was strongly related to procedural fairness judgments, while how much they felt they "participated in the process of disposing" of their case was not).

89. See Wissler, *Representation in Mediation*, *supra* note 35, at 449–50; see also Wissler, *Common Pleas*, *supra*, note 56, at viii.

90. Importantly, the exercise of self-determination does not require participation in the back-and-forth of negotiation. People can also exercise meaningful (although perhaps thinner) self-determination in choosing among predetermined options or in choosing to veto a single proposed solution. See Welsh, *The Thinning Vision*, *supra* note 4, at 44–46 (describing this definition of self-determination).

91. Parents participating in special education mediation sessions generally expressed a desire for, and appreciation of, the opportunity to express themselves but were much less likely to anticipate or value the opportunity to listen and try to understand school officials or negotiate with them. See Welsh, *Stepping Back Through the Looking Glass*, *supra* note 7, at 581.



Meanwhile, voice is not always pretty or easy to hear. Voice can be angry, aggressive, and cause discomfort, both for the person expressing it and the person listening to such expression.<sup>92</sup> Such voice, with a strong emotional content, is often called “venting” in mediation.<sup>93</sup> Although mediation commentators acknowledge venting as valuable when new information is being shared (including revealing emotional impacts and needs),<sup>94</sup> they increasingly criticize the notion that venting is valuable for its own sake. There is physiological evidence, for example, that allowing a party to vent too much is not effective in helping with the release of difficult feelings and instead has the opposite effect. Continued venting, particularly in the presence of the other party, can result in heightened cortisol levels, which can then lead to greater entrenchment in negative feelings such as anger, as well as distorted perceptions that can inhibit problem-solving and decision-making.<sup>95</sup> Thus, unrestrained venting can

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92. Being evaluated negatively and not having a sense of control are reported to be among the most serious psychological stressors that exist, leading to heightened levels of cortisol that then affect perceptions and attributions. See Tanz & McClintock, *supra* note 81, at 37 (citing Sally S. Dickerson & Margaret E. Kemeny, *Acute Stressors and Cortisol Responses: A Theoretical Integration and Synthesis of Laboratory Research*, 130 *PSYCHOL. BULL.* 355 (2004)). This research appears to be consistent with findings from other research regarding the fundamental attribution error. This research has established that situational influences strongly affect our judgments. See Lee Ross, *The Intuitive Psychologist and His Shortcomings: Distortions in the Attribution Process*, in 10 *ADVANCES IN EXPERIMENTAL SOCIAL PSYCHOLOGY* 173, 184–87 (Leonard Berkowitz ed., 1977); Michael W. Morris, Richard P. Larrick & Steven K. Su, *Misperceiving Negotiation Counterparts: When Situationally Determined Bargaining Behaviors Are Attributed to Personality Traits*, 77 *J. PERSONALITY & SOC. PSYCHOL.* 52, 53 (1999); Keith G. Allred, *Anger and Retaliation in Conflict: The Role of Attribution*, in *THE HANDBOOK OF CONFLICT RESOLUTION: THEORY AND PRACTICE* 236, 240–41 (Morton Deutsch et al. eds., 2d ed. 2006) (noting that “research indicates that in observing a person at an airport yelling at an airline agent, one tends to over-attribute the behavior to bad temper and underattribute it to circumstances, such as having recently been the victim of recurring unfair treatment by the airline”). We are more likely to take into account situational factors to explain our own behavior. Edward E. Jones & Richard E. Nisbett, *The Actor and the Observer: Divergent Perceptions of the Causes of Behavior*, in *ATTRIBUTION: PERCEIVING THE CAUSES OF BEHAVIOR* 79, 80 (Edward E. Jones et al. eds., 1972). Research further indicates that we are even more likely to attribute negative behaviors to a person’s character or disposition if that person is not a member of our own social group. Meanwhile, venting strong emotions in front of an adversary in a mediation session also can represent a stressor that raises cortisol levels. See Tanz & McClintock, *supra* note 81, at 37, 45.

93. See Tanz & McClintock, *supra* note 81, at 59–60.

94. *Id.* at 59.

95. *Id.* at 60, 66 (citing Brad J. Bushman et al., *Chewing on It Can Chew You Up: Effects of Rumination on Triggered Displaced Aggression*, 88 *J. PERSONALITY & SOC. PSYCHOL.* 969, 974 (2005); Kenneth F. Dunham, *I Hate You, but We Can Work It Out: Dealing with Anger Issues in Mediation*, 12 *APPALACHIAN J.L.* 191 (2013); Tammy Lenski, *Venting Anger: A Good Habit to Break*, *MEDIATE.COM* (May 2011), <http://www.mediate.com/articles/LenskiTb120110516.cfm> [<https://perma.cc/Y3NT-6AMK>]; Dominik Mischkowski et al., *Flies on the Wall Are Less Aggressive: Self-Distancing “in the Heat of the Moment” Reduces Aggressive Thoughts, Angry Feelings and Aggressive Behavior*, 48 *J. EXPERIMENTAL SOC. PSYCHOL.* 1187, 1187–91 (2012)). Tanz and McClintock note that there may be a difference between men and women in their response to negative emotions, with women being more likely than men to inhibit such emotions and begin problem-solving. *Id.* at 49–51. Tanz and McClintock also report that women are more likely to respond to stress with a tend-and-befriend intervention, thus increasing social ties and resources. *Id.* at 68–69 (citing Shelley E. Taylor et al., *Biobehavioral Responses to Stress in Females: Tend-*

chill communications that are likely to be productive in terms of producing settlement in mediation.<sup>96</sup>

At the very least, this research regarding the physiological effects of venting suggests that there can be a “right” and a “wrong” sort of voice in mediation.<sup>97</sup> At this point, it is not clear who is more likely to exercise the wrong sort of voice in mediation, but this research raises legitimate concerns that mediators who seek to place restrictions on venting ultimately could chill the expression of righteous anger and fear by those feeling the effects of inequality, bias, and prejudice.<sup>98</sup>

## 2. *Status and the Willingness to Exercise Voice*

Research also reveals that we cannot assume that those who perceive that they have been ignored, excluded, or disrespected will be willing or able to exercise their voice at all. Robert Rubinson has written quite passionately about the difficulties facing low-income participants who are required to participate in court-connected mediation. They may not be able to get child care. Their reliance on public transportation could make it difficult for them to travel to the courthouse. They may have to forego hourly wages and may fear the loss of their jobs if they fail to turn up for work in order to participate in mediation.<sup>99</sup> These difficulties make it unlikely that people will be able to afford the luxury of voice.

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*and-Befriend, Not Fight-or-Flight*, 107 *PSYCHOL. REV.* 411 (2000)). Stressed men are likely to become more cognitively rigid and entrenched and engage in tend-and-befriend only with those they already know and trust. *Id.* at 60, 69 (citing Bernadette von Dawans et al., *The Social Dimension of Stress Reactivity: Acute Stress Increases Prosocial Behavior in Humans*, 23 *PSYCHOL. SCI.* 651, 658 (2012)). See also Welton et al., *The Role of Caucusing*, *supra* note 24, at 183–85 (describing in some detail how presenting in front of the other disputant is problematic); Pincock & Hedeem, *supra* note 85, at 436 (asserting the need to revise theory positing that disputants have the emotional and mental capacity to “transition rather abruptly from . . . describing their conflict to solving their problem through generating ideas and forecasting their utility”) (citing Richard Birke, *Neuroscience and Settlement: An Examination of Scientific Innovations and Practical Applications*, 25 *OHIO ST. J. ON DISP. RESOL.* 477, 510–12 (2010)).

96. In the context of online dispute resolution, eBay and Paypal structured their platform to avoid soliciting consumers’ open-ended text answers—instead requiring them to choose from a predetermined list—due to the likelihood that the consumers’ responses would be negative and thereby chill productive negotiation with merchants. See AMY SCHMITZ & COLIN RULE, *THE NEW HANDSHAKE: ONLINE DISPUTE RESOLUTION AND THE FUTURE OF CONSUMER PROTECTION* 36–39 (2017).

97. See Lucie E. White, *Subordination, Rhetorical Survival Skills, and Sunday Shoes: Notes on the Hearing of Mrs. G.*, 38 *BUFF. L. REV.* 1, 44–51 (1990) (examining how White’s client’s voice during their counseling session was quite different from the voice she used when meeting with the caseworker; discussing restrictions on voice, its relationship to participation, power disparity, and safety).

98. In a related vein, Professor Carrie Menkel-Meadow has suggested that in focusing on individual negotiators’ behaviors or even the interactions between negotiators, we have perhaps “been naïve about the social structural conditions under which integrative negotiation can most optimally occur” and that we need to identify the “socioeconomic and political conditions [under which we can] actually get to yes by negotiating fairly, equitably, and wisely to achieve joint and mutual gain.” Carrie Menkel-Meadow, *Why Hasn’t the World Gotten to Yes? An Appreciation and Some Reflections*, 22 *NEGOT. J.* 485, 499 (2006).

99. See Robert Rubinson, *Of Grids and Gatekeepers: The Socioeconomics of Mediation*, 17 *CARDOZO J. CONFLICT RESOL.*, 873, 891–92 (2016).

Recent research also has demonstrated that people's willingness or ability to exercise their voice will depend, in large part, upon their identification with the relevant social group. In this research, the more people felt themselves to be part of a social group, the more they desired and expected voice in matters relevant to group membership. The less they identified with the social group, however, the less they desired and expected voice. Thus, despite the centrality of voice in the procedural justice literature, we cannot assume that everyone will always and uniformly have a high desire for voice.<sup>100</sup> Those who do not feel part of the relevant social group—i.e., those who are marginalized or perceive that others are prejudiced against them—are likely to be less willing to exercise voice. Indeed, they are likely to be aware that their exercise of voice could subject them to heightened attention and negative consequences.<sup>101</sup> People with higher status and greater identification in a social group, meanwhile, are more likely to exercise voice—and more likely to *expect* to exercise more voice.<sup>102</sup> Interestingly, researchers noted that this may mean that people with higher status may actually be willing to trade their voice for something they want even more—i.e., a favorable outcome:

[L]ower-status individuals or groups might demand voice precisely for its instrumental properties. At the same time, higher-status individuals and groups—particularly *legitimately* higher-status individuals and groups—may feel sufficiently confident in their positions that they would be willing to forgo voice (i.e. express a relatively low desire for voice) in favour of alternative rules such as unbiased decision-making, *precisely because the unbiased decision maker ought to recognize their legitimately higher status and afford them the material benefits normatively associated with it.*<sup>103</sup>

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100. See Michael J. Platow et al., *Social Identification Predicts Desires and Expectations for Voice*, 28 SOC. JUST. RES. 526, 527 (2015). These researchers also observed, however, that people's *desire* for voice generally is greater than their *expectations* regarding whether they will have voice. *Id.* at 545.

101. See, e.g., Doron Dorfman, *Re-Claiming Disability: Identity, Procedural Justice, and the Disability Determination Process*, 42 LAW & SOC. INQUIRY 195, 214–15 (2017) (describing how persons with disabilities who identify with the medical-individual model of disability do not necessarily want or need voice while those who identify with the social model of disability appreciate voice but also fear negative consequences of exercising voice in the disability determination process); Welsh, *Stepping Back Through the Looking Glass*, *supra* note 7, at 653–54 n.337 (suggesting this dynamic for parents of children with special needs); James A. Wall, Jr. & Suzanne Chan-Serafin, *Do Mediators Walk Their Talk in Civil Cases?*, 28 CONFLICT RESOL. QUARTERLY 3, 16 (2010) (finding that mediators tended to use evaluative or pressing strategies even when they said they would employ a neutral style, and such strategies were used most often with plaintiffs engaging in behavior the mediators perceived as too demanding or competitive); see also Welsh, *I Could Have Been a Contender*, *supra* note 63, at 1168–71 (citing research demonstrating that women who make demands and negotiate assertively are more likely than men to be judged harshly, parties who have suffered discrimination are particularly unlikely to bring claims, employer-respondents tend to refuse the EEOC's invitation to mediate discrimination matters, and status quo bias tends to favor dominant parties and disfavor marginalized parties).

102. See Platow et al., *supra* note 100, at 526–49.

103. *Id.* at 545–46.

Related research indicates that people's desire for, and expectation of, voice also is affected by the power distance culture of their national or organizational setting. In those nations with low power distance cultures<sup>104</sup> (i.e., more egalitarian cultures), voice is expected and its legitimacy is high. When people in these nations experience lower levels of voice, they react negatively. In nations with high power distance cultures<sup>105</sup> (i.e., more hierarchical cultures), people's reactions to "low voice" are less negative. The researchers noted that "[a] central premise of the procedural justice literature—based on studies conducted mainly in the United States—is that people react unfavorably when they have little voice in a decision-making process."<sup>106</sup> These studies show that people's desire for voice and their expectation that they will have voice are very likely to vary depending upon their culture, its power distance, and their placement in a relevant hierarchy.

Upon examination, it becomes clear that voice is neither a simple concept nor one that we can take for granted in the context of mediation. It is not magic. Rather, voice may be quite limited. Voice of the wrong sort can produce physiological effects that make it less effective in producing solutions. And people in a hierarchical setting who know they are marginalized may not expect voice or may choose not to exercise voice because they perceive, quite rationally, that it may cause them harm.<sup>107</sup>

#### D. STATUS AND ITS EFFECTS ON THE DESIRE AND ABILITY TO PROVIDE TRUSTWORTHY CONSIDERATION

As noted earlier, procedural justice research generally reveals that while people care about the opportunity for voice, they also care about whether their voice has been heard—i.e., whether their views were considered in a trustworthy manner. Most of the research focuses on whether an authority figure or decision-maker—e.g., a judge, police officer, or supervisor—has demonstrated trustworthy consideration. Notice that the people in these roles tend to be third parties, not engaged directly in the dispute. Indeed, researchers have long raised doubts about the ability of

104. The United States and Germany were the low power distance countries examined in this study.

105. China, Mexico, and Hong Kong were the high power distance countries examined in this study.

106. Joel Brockner et al., *Culture and Procedural Justice: The Influence of Power Distance on Reactions to Voice*, 37 J. EXPERIMENTAL SOC. PSYCHOL. 300, 301 (2001). The researchers determined the effect of low or high voice by examining the level of organizational commitment. *Id.* But see Stephen La Tour et al., *Procedure: Transnational Perspectives and Preferences*, 86 YALE L.J. 258, 281 (1976); E. Allan Lind et al., *Reactions to Procedural Models for Adjudicative Conflict Resolution: A Cross-National Study*, 22 J. CONFLICT RESOL. 218, 335 (1978); E. Allan Lind et al., *Procedural Context and Culture: Variation in the Antecedents of Procedural Justice Judgments*, 73 J. PERSONALITY & SOC. PSYCHOL. 767, 777 (1997).

107. This research is reminiscent of the story told in White, *supra* note 97, in which the client chose to tell one story—the real story—to her lawyer and then told another story—the one that would fit a stereotype and yield the result she needed—when dealing with her welfare officer.

the disputing parties involved in a mediation to truly listen to each other.<sup>108</sup> Relatively recently, however, researchers have discovered that the procedural justice perceptions of parties trying to resolve disputes in mediation depend very much on whether the other party—who *shares* decision-making authority in this consensual process—demonstrated trustworthy consideration.<sup>109</sup>

Trustworthy consideration is a concept that bears similarities to several others: active or reflective listening,<sup>110</sup> “looping,”<sup>111</sup> perspective taking,<sup>112</sup> open-minded listening,<sup>113</sup> testing for understanding,<sup>114</sup> and empathizing.<sup>115</sup> There are three key questions here: “Did the authority (or other) *listen* to what I said?” “Did the authority (or other) *understand* what I said?” “Did the authority (or other) *care* to understand what I said?” Research indicates that people tend to judge accurate procedures—i.e., those in which the decision maker or authority takes all relevant information into account in coming to a decision—as fairer than inaccurate procedures.<sup>116</sup>

As with voice, there is research indicating that inequality, bias, and prejudice can get in the way of listening to someone else’s perspective, accurately understanding what she has said, and caring to understand her perspective. Research regarding the fundamental attribution bias, for example, shows that when someone has hurt us and is not in our social

108. See, e.g., Welton et al., *The Role of Caucusing*, *supra* note 24, at 185 (“Joint sessions encourage disputants to simply repeat their official positions over and over rather than to explore these positions or listen to one another.”).

109. See Tina Nabatchi et al., *Organizational Justice and Workplace Mediation: A Six-Factor Model*, 18 INT’L J. CONFLICT MGMT. 148 (2007) (reporting, in the context of a transformative mediation program, the statistical significance of whether the other party heard and understood).

110. See Robert Dinerstein et al., *Connection, Capacity and Morality in Lawyer-Client Relationships: Dialogues and Commentary*, 10 CLINICAL L. REV. 755, 758–62 (2004).

111. See ROBERT H. MNOOKIN, SCOTT R. PEPPET & ANDREW S. TULUMELLO, BEYOND WINNING: NEGOTIATING TO CREATE VALUE IN DEALS AND DISPUTES 64–65 (2000); LEONARD I. RISKIN ET AL., DISPUTE RESOLUTION AND LAWYERS 83–84 (5th ed. 2013).

112. See Douglas N. Frenkel & James H. Stark, *Improving Lawyers’ Judgment: Is Mediation Training De-Biasing?*, 21 HARV. NEGOT. L. REV. 1, 34–41 (2015).

113. See Jonathan R. Cohen, “*Open-Minded Listening*”, 5 CHARLOTTE L. REV. 139, 142–43 (2014).

114. See NEIL RACKHAM, MODELS FOR EXPLAINING BEHAVIOR: INTERACTIVE SKILLS PROGRAM (1995) (unpublished manuscript) (on file with author).

115. See Jennifer Gerarda Brown, *Deeply Contacting the Inner World of Another: Practicing Empathy in Values-Based Negotiation Role Plays*, 39 WASH. U. J.L. & POL’Y 189 (2012); Robert H. Mnookin et al., *The Tension Between Empathy and Assertiveness*, 12 NEGOT. J. 217, 219 (1996); Andrea Kupfer Schneider, *Teaching a New Negotiation Skills Paradigm*, 39 WASH. U. J.L. & POL’Y 13, 29–30 (2012).

116. See Jan-Willem Van Prooijen et al., *Procedural Justice and Status: Status Salience as Antecedent of Procedural Fairness Effects*, 83 J. PERSONALITY & SOC. PSYCHOL. 1353, 1357 (2002) (describing manipulation of procedural accuracy in experiment and noting that it represented “an alternative way to study procedural fairness”); see also Chen et al., *supra* note 75, at 15 (describing a “high procedural fairness condition” as one in which the decision-maker wrote “I carefully scored the forms, and I saw that you did X percent of the work, so I thought it’d be fair to give you Y of the 10 tickets,” while in a “low procedural fairness condition,” the decision-maker wrote “I didn’t bother to score the forms, but X is my lucky number, so I’m giving you Y percent of the tickets”).

group, we are more likely to over-attribute her bad behavior to her essential character and under-attribute it to the situation in which she found herself. We are more forgiving of those in our in-group and even more forgiving of ourselves.<sup>117</sup> This psychological phenomenon is likely to impede our ability or desire to listen and really understand the voice of someone who is not in our social group.

There is also research showing that status can impede trustworthy consideration. Those who have higher status and greater power have been shown to be less likely to be trustworthy<sup>118</sup> and thus less likely to provide consideration that is trustworthy. Worryingly, there is even research suggesting that people naturally associate the failure to provide procedural justice with power and assume that someone who has behaved in a procedurally just manner is less powerful.<sup>119</sup> The failure of those with higher status and greater power to extend trustworthy consideration has been attributed to their reduced need for others' help. This phenomenon also may be self-protective. Bob Mnookin has suggested that one of the great challenges of a similar skill, empathizing, is that it seems to require sympathy, agreement, or even the assumption of responsibility and blame for another's pain—i.e., “the fear that I'm being asked to characterize my own decision as immoral.”<sup>120</sup>

This research demonstrates that placing two people in the same room in the presence of a mediator does not guarantee that either will provide the other with trustworthy consideration. Trustworthy consideration, like self-determination and voice, is not magic.

But can something be done to achieve many of the benefits of procedural justice while also recognizing that certain people—e.g., those who are lower status in a hierarchical system, those who have been marginalized within a social group, and ultimately those who are likely to be among the marginalized—may need assistance in exercising their voice, while other people—e.g., those who are higher status—may need assistance with demonstrating trustworthy consideration?

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117. Allred, *supra* note 92; Morris, Larrick & Su, *supra* note 92. See Ross, *supra* note 92.

118. See DAVID DESTENO, THE TRUTH ABOUT TRUST: HOW IT DETERMINES SUCCESS IN LIFE, LOVE, LEARNING, AND MORE 129–144 (2014) (summarizing research that has shown that trustworthiness is affected by context—e.g., an experience of increased status (even if temporary) leads to a reduced sense of needing others' help and an increased sense of self-reliance that then results in reduced trust, reduced trustworthiness, and increased lying; as social class goes up, trustworthiness also declines).

119. See Brockner, Wiesenfeld & Diekmann, *supra* note 80, at 157 n.2.

120. Jean R. Sternlight et al., *Making Peace with Your Enemy: Nelson Mandela and His Contributions to Conflict Resolution*, 16 NEV. L.J. 281, 306 (2016) (transcription of panelists Jean R. Sternlight, Andrea Schneider, Carrie Menkel-Meadow, Robert Mnookin, Richard Goldstone, and Penelope Andrews on Nov. 1, 2014 at the Saltman Center for Conflict Resolution, William S. Boyd School of Law, Thomas and Mack Moot Courtroom).

## V. POTENTIAL RESPONSES

The following potential responses represent just a beginning in trying to address the potential for inequality, bias, and prejudice to undermine mediation's potential to deliver procedural justice, substantive justice, and self-determination. The first response focuses on mediators, their commitment to procedural justice and self-determination, and the role that their social identities play in conveying a message of equal treatment, inclusivity, and the safety of a neutral forum. The second response focuses on the use of caucuses, primarily before the formal mediation session begins, in order to foster all parties' voice, their sense of belonging, trustworthy consideration by the mediator, and trust in the mediation forum. The third response examines the potential to enhance the parties' ability to provide each other with trustworthy consideration. The fourth response considers whether online technologies may be used to increase voice, trustworthy consideration, even-handed treatment, and respect—and also increase real, substantive self-determination and access to justice through access to important information. The fifth response asks whether mediators should have some responsibility to avoid patently unconscionable results.

## A. INCREASING THE INCLUSIVITY OF THE POOL OF MEDIATORS AND TRAINING ALL MEDIATORS TO ACKNOWLEDGE AND ADDRESS IMPLICIT BIAS

There is no doubt that courts and public and private dispute resolution providers must increase the inclusivity of their pools of mediators,<sup>121</sup> include underrepresented demographics (e.g., professional women and people of color) in the lists of potential mediators sent to parties,<sup>122</sup> and mentor and promote professional women and people of color as mediators.<sup>123</sup> The presence of such mediators will signal greater inclusiv-

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121. See Beth Trent, Deborah Masucci & Timothy Lewis, *The Dismal State of Diversity: Mapping a Chart for Change*, DISP. RESOL. MAG., Fall 2014, at 21, 21; see also Marvin E. Johnson & Maria R. Volpe, *The Color of Money: Compensation Opportunities and Barriers*, DISP. RESOL. MAG., Summer 2017, at 14; Susan D. Franck et al., *The Diversity Challenge: Exploring the "Invisible College" of International Arbitration*, 53 COLUM. J. TRANSNAT'L L. 429 (2015); Benjamin G. Davis, *Diversity in International Arbitration*, DISP. RESOL. MAG., Winter 2014, at 13, 13; Deborah Rothman, *Gender Diversity in Arbitrator Selection*, DISP. RESOL. MAG., Spring 2012, at 22; Marvin E. Johnson & Homer C. La Rue, *The Gated Community: Risk Aversion, Race, and the Lack of Diversity in Mediation in the Top Ranks*, DISP. RESOL. MAG., Spring 2009, at 17; Maria R. Volpe et al., *Barriers to Participation: Challenges Faced by Members of Underrepresented Racial and Ethnic Groups in Entering, Remaining, and Advancing in the ADR Field*, 35 FORDHAM URB. L.J. 119 (2008); F. Peter Phillips, *ADR Continental Drift: It Remains a White, Male Game*, NAT'L L.J. Nov. 27, 2006.

122. See Gina Viola Brown & Andrea Kupfer Schneider, *Gender Differences in Dispute Resolution Practice: Report on the ABA Section of Dispute Resolution Practice Snapshot Survey*, 47 AKRON L. REV. 975 (2015); Andrea Kupfer Schneider & Gina Viola Brown, *Gender Differences in Dispute Resolution Practice*, DISP. RESOL. MAG., Spring 2014, at 36.

123. See Noah Hanft, *Making Diversity Happen in ADR: No More Lip Service*, 257 N.Y.L.J. (2017) (reporting that "CPR saw an 81 percent increase in the selection of women and diverse neutrals in FY16, with women and minorities accounting for 26 percent of

ity and safety for all.<sup>124</sup> From the perspective of the procedural justice literature, increasing the diversity of the pool of mediators should enhance marginalized parties' willingness to perceive that they will be, and were, heard and understood, therefore increasing marginalized parties' willingness to exercise voice and increasing the likelihood of actual understanding and trustworthy consideration—which may then reduce the likelihood of unjustifiably disparate outcomes.<sup>125</sup> There are hopeful signs that public and private dispute resolution providers<sup>126</sup> and other organizations<sup>127</sup> are moving in this direction.

Carol Izumi has written comprehensively about the presence and influence of implicit bias in mediation<sup>128</sup> and is writing more for this sympo-

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selections”); *We Embrace Diversity*, JAMS, <https://www.jamsadr.com/diversity/> [<https://perma.cc/Y9J2-YUPL>] (last visited Aug. 5, 2017) (reporting “an overall composition of 22% female and 9% persons of color among our distinguished panelists”); *Putting Diversity into Practice*, AM. ARBITRATION ASS'N, [https://www.adr.org/sites/default/files/document\\_repository/AAA\\_ICDR\\_Diversity\\_Initiative.pdf](https://www.adr.org/sites/default/files/document_repository/AAA_ICDR_Diversity_Initiative.pdf) [<https://perma.cc/E4JB-WALM>] (reporting that the 2015 roster of arbitrators and mediators “[was] composed of 22% women and minorities”; also describing the AAA Higginbotham Fellows Program established “in 2009 to provide training, networking, and mentorship for up-and-coming diverse ADR practitioners”; and offering “to provide arbitrator lists to parties comprising at least 20% diverse panelists where party qualifications are met”); see also FINRA DISPUTE RESOLUTION TASK FORCE, *Final Report and Recommendations of the FINRA Dispute Resolution Task Force*, at 8–10 (December 16, 2015) (describing FINRA’s efforts to recruit and promote arbitrators who are women and people of color); Comments of ABA Section of Dispute Resolution for FINRA Dispute Resolution Task Force (May 1, 2015) (recommendation to increase and track use of arbitrators and mediators who are women, people of color, and people with disabilities).

124. See Lorig Charkoudian & Ellen Kabcenell Wayne, *Fairness, Understanding, and Satisfaction: Impact of Mediator and Participant Race and Gender on Participants' Perception of Mediation*, 28 CONFL. RESOL. Q. 23, 47 (2010) (based on empirical study urging the matching of mediators with disputants by gender (which may require use of co-mediators); regarding race and ethnicity, urging co-mediation or avoiding a mediator-participant match altogether in order to avoid isolating any disputant “who will feel outnumbered and disadvantaged in a process where the opponent and the neutral seem to have so much in common”).

125. See Gary LaFree & Christine Rack, *The Effects of Participants' Ethnicity and Gender on Monetary Outcomes in Mediated and Adjudicated Civil Cases*, 30 LAW & SOC'Y REV. 767, 789–90 (1996) (reporting no disparity in outcomes based on gender alone but that “both minority male and female claimants received significantly lower MORs [monetary outcome ratios]—even when we included the nine case-specific and repeat-player variables. Of greatest concern is the fact that this disparity was only present in cases mediated by at least one Anglo mediator. Cases mediated by two minorities [in a co-mediator team] resulted in lower MORs, regardless of claimant ethnicity . . . . Of particular importance is our finding of no significant ethnic disparities in cases mediated by two minority mediators.”); see also Daniel Klerman & Lisa Klerman, *Inside the Caucus: An Empirical Analysis of Mediation from Within*, 12 J. EMPIRICAL LEGAL STUD. 686, 689, 715 (2015) (reporting that “settlement rates [were] the same for male and female plaintiffs and lawyers” and that “[w]omen and men fared equally well in the mediations studied here, whether as plaintiffs or lawyers”).

126. See *supra* note 123.

127. See Letter from Nancy A. Welsh, Chair-Elect, ABA Section of Dispute Resolution, to Monica Jackson, Office of the Executive Secretary, Consumer Financial Protection Bureau 4-5 (July 29, 2016) (observing that ICANN’s publication of UDRP decisions “has permitted patterns of decision making and institutions’ repeat appointments of arbitrators to be highlighted”).

128. See Carol Izumi, *Implicit Bias and the Illusion of Mediator Neutrality*, 34 WASH. U. J.L. & POL'Y 71 (2010). Others have written about the influence of implicit bias upon



sium. In this Article, I will suggest only that requiring mediators to practice “considering the opposite” has been shown to be effective in reducing bias.<sup>129</sup>

B. PRE-MEDIATION CAUCUSING WITH PARTIES TO INCREASE THE LIKELIHOOD AND PRODUCTIVITY OF VOICE

Earlier, this Article expressed concerns regarding lawyers’ increasing tendency to avoid joint sessions in mediation and to request mediators whose mediation sessions occur entirely in caucus. Indeed, recent research has indicated that in certain contexts extensive caucusing does not necessarily increase the likelihood of settlement,<sup>130</sup> while it can reduce parties’ belief in their ability to work together.<sup>131</sup>

From a procedural justice perspective, however, targeted and careful use of caucus may have the effect of enhancing the voice of those who are hesitant to exercise it (i.e., those who are of lower status or who do not identify with the “social group” being served by the mediation). Targeted and careful use of caucus also may increase the likelihood that people feel and believe that their views received trustworthy consideration and respect. Thus, used appropriately, caucusing has the potential to help parties gain the benefits of procedural justice.

Several years ago, I conducted a small qualitative empirical research project involving special education mediation.<sup>132</sup> To my surprise, caucus emerged as very significant to the parents and school officials who participated in the mediation sessions. It was a potent tool. In some cases, the mediators chose to allow initial presentations in a joint session and then engaged in shuttle diplomacy. One participant expressed appreciation of this approach because he “—like many others—. . . valued the way in which caucus simultaneously permitted bargaining and buffered both the parents and him from the negative emotions often triggered by distribu-

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judges in the facilitation of settlement, motion practice and adjudication. *See, e.g.,* WISTRICH & RACHLINSKI, *supra* note 61; Jeffrey J. Rachlinski, *Processing Pleadings and the Psychology of Prejudgment*, 60 DEPAUL L. REV. 413, 428 (2011) (reporting that judges, like most human beings, make egocentric or self-serving judgments about their own abilities; for example, 97.2% of judges surveyed “indicated [that] they were better than the median judge” in avoiding bias in judging and 87% described themselves as “better than the median judge at facilitating settlements” (citing Chris Guthrie, Jeffrey J. Rachlinski & Andrew J. Wistrich, *The “Hidden Judiciary”: An Empirical Examination of Executive Branch Justice*, 58 DUKE L.J. 1477, 1519 (2009))).

129. *See* Frenkel & Stark, *supra* note 112, at 22–24; *see also* Phyllis E. Bernard, *What Some Theories Say; What Some Mediators Know*, DISP. RESOL. MAG., Spring 2009, at 6 (reporting on the effects of requiring mediators to reflect on the role of gender, race, and socioeconomic class and the inclusion of such opportunities for reflection in the Early Settlement Central Mediation Program in Oklahoma City).

130. *See* Mediation Research Task Force Report, *supra* note 37.

131. *See* ADMIN. OFFICE OF THE COURTS, COURT OPERATIONS, MD. JUDICIARY, *WHAT WORKS IN CHILD ACCESS MEDIATION: EFFECTIVENESS OF VARIOUS MEDIATION STRATEGIES ON SHORT- AND LONG-TERM OUTCOMES* (2016); Lorig Charkoudian, Deborah Thompson Eisenberg & Jamie L. Walter, *What Difference Does ADR Make? Comparison of ADR and Trial Outcomes in Small Claims Court*, 35 CONFLICT RESOL. Q. 7 (2017).

132. *See* Welsh, *Stepping Back Through the Looking Glass*, *supra* note 7, at 580.

tive negotiation tactics.”<sup>133</sup> Other school officials and parents similarly found that the use of caucus kept mediation from “get[ting] out of control,” “eliminated the arguments,” and allowed the parties to “take a deep breath, step back, take a look, and then come back to the table.”<sup>134</sup>

Some participants in this study also described how the use of caucus significantly enhanced their perceptions of procedural justice. For example,

both parents and school officials reacted positively to caucuses when mediators used the technique to provide disputants with a full opportunity to tell their stories or spent time in caucus ensuring that they understood what disputants were saying. . . . Mediators’ use of caucus also garnered positive reviews when the technique assisted the disputants in engaging in a thorough and dignified deliberative process. For example, when the mediator in one case did not challenge the disputants’ selection of a normative frame in caucus, but instead assisted the disputants in a more careful examination and application of the legal norms *they* had invoked, both the parent and the school official accepted and valued the mediator’s evaluative interventions.<sup>135</sup>

In other instances, however, the mediator’s use of caucus significantly harmed the parties’ perceptions of procedural justice. “When [the participants] were uncertain that the mediator truly understood what they had said and could not hear the mediator’s translation for themselves, they raised concerns about the accuracy of what the mediator communicated on their behalf” and “feared the potential effect of caucus on the quality of the substantive outcomes achieved in mediation.”<sup>136</sup> “The privacy of caucus also may have encouraged some mediators to engage quickly in more aggressive evaluative actions and statements, which disputants then described as ‘adversarial,’ ‘impatient,’ and ‘going over the edge.’”<sup>137</sup> For instance, “when mediators used the privacy of caucus to try to persuade disputants to accept the validity of the other side’s normative frame, both parents and school officials questioned the mediators’ impartiality.”<sup>138</sup> Finally, when mediators did not permit parents to make an initial presentation in joint session, did not disclose prior contact with school officials, or “spen[t] so much time” with school officials, some parents became very suspicious about the relationship between the school officials and

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133. *Id.* at 647.

134. *Id.* at 650–51.

135. *Id.* at 650.

136. *Id.* at 647–48.

137. *Id.* at 648 (footnotes omitted); *see also* Welsh, *Magistrate Judges*, *supra* note 37, at 989 (providing examples of aggressive evaluation by judges in ex parte meetings during settlement conferences).

138. Welsh, *Stepping Back Through the Looking Glass*, *supra* note 7, at 648. A Party’s reaction is likely to be quite different if the mediator expresses understanding and appreciation of the position being taken by that party. *See, e.g.*, Welton et al., *The Role of Caucusing*, *supra* note 24, at 200 (noting that “[c]aucusing allows mediators to take sides with one party in order to move the process along. Thus it appears that caucusing somewhat relieves the third party of the requirement of being strictly neutral between the two parties.”).

mediators.<sup>139</sup> Rather than experiencing a procedurally just mediation process that fostered free, equal, and respectful dialogue, some of these parents felt that they and their children had once again become marginalized “odd men out” with officials talking behind their backs.<sup>140</sup>

Based on these reactions from parents and school officials, I suggested that special education mediation could “borrow a page” from victim-offender mediation, which regularly provides for pre-mediation caucusing—generally conducted before the day of mediation, with the mediator visiting the victim and the offender separately to prepare both of them to participate in the mediation process.<sup>141</sup> The goal is to help both participants identify their goals for the mediation session and prepare to achieve those goals. In a very similar vein, Gary Friedman and Jack Himmelstein recommend meeting with parties individually to help them come to their own decisions about whether, why, and how they might use mediation. Friedman and Himmelstein describe their mediation model as “understanding-based” and also specify that it is a “non-caucus approach”—but their pre-mediation meetings with the parties also represent a sort of caucus, one in which the focus is on welcoming the parties’ voice and providing respectful and trustworthy consideration.<sup>142</sup>

In the last few years, other commentators have similarly urged the use of pre-mediation caucuses to enhance the quality of mediation sessions. Jill Tanz and Martha McClintock, who have raised concerns regarding the negative physiological effects of unrestrained venting in mediation, have encouraged the responsive use of early caucuses to build trust in the mediation process and the mediator, learn what each party hopes to achieve, gauge emotional levels, and plan. Such caucusing is designed to reduce stress and anger and instead enhance trust, focus, problem-solving, and decision-making.<sup>143</sup> Other researchers have also recommended the use of pre-mediation caucuses in order to build trust and specifically *not* to develop settlement proposals.<sup>144</sup> Still other commentators have recommended the use of pre-mediation caucuses to assist individuals claiming discrimination to prepare for the mediation process and place their expe-

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139. *Id.* at 649.

140. *Id.*

141. *Id.* at 658.

142. See GARY FRIEDMAN & JACK HIMMELSTEIN, CHALLENGING CONFLICT: MEDIATION THROUGH UNDERSTANDING xxxv-xxxvi (2008).

143. See Tanz & McClintock, *supra* note 81, at 55, 60, 62. Tanz and McClintock observe that mediators trying to determine whether parties are experiencing stress may watch for microaggressions (often targeted at women and people of color), which can signal that the aggressor is experiencing stress and then engaging in displaced aggression. *Id.* at 65. Such microaggressions then often cause stress in those who have been targeted. *Id.* Other researchers are focusing on other physiological factors that influence decision-making. See, e.g., Roy F. Baumeister et al., *The Glucose Model of Mediation: Physiological Bases of Willpower as Important Explanations for Common Mediation Behavior*, 15 PEPP. DISP. RESOL. L.J. 377 (2015); JEFFREY Z. RUBIN ET AL., SOCIAL CONFLICT: ESCALATION, STALEMATE, AND SETTLEMENT 78–79 (2d ed. 1994) (excitation transfer effect).

144. See Roderick Swaab & Jeanne Brett, *Caucus with Care: The Impact of Pre-Mediation Caucuses on Conflict Resolution*, IACM Meetings Paper at 2, 9 (2007).

rience within a larger context.<sup>145</sup> Finally, the researchers who examined the use of labor mediation in the Netherlands, described earlier, also have recommended pre-mediation caucusing, particularly with the subordinates who cared so much about procedural justice and outside the presence of the supervisor, in order to avoid triggering hierarchical relationships and dynamics.<sup>146</sup>

In all of these cases, the commentators and researchers have focused on the use of pre-mediation and early caucusing to enhance parties' trust in the mediator and the process,<sup>147</sup> affirm that each party is a valued member of the group engaged in mediation, and help parties prepare for their participation. It is noteworthy that these efforts also would have the effect of encouraging the productive expression of voice and providing evidence of trustworthy and respectful consideration by the mediator.

Of course, these recommendations also tend to assume that only good things will happen in caucuses. As noted earlier, mediators and parties generally use caucuses to move toward settlement.<sup>148</sup> When mediators focus too heavily or too quickly on settlement, however, they can undermine perceptions of procedural justice and self-determination. Some researchers observing the parties' behavior, meanwhile, have raised other concerns. For example, when the parties are in caucus they are more likely to speak quite strongly about their own cases and more disparagingly about the other party.<sup>149</sup> They also may use caucus to try to manipulate the mediator.<sup>150</sup>

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145. See Emily M. Calhoun, *Workplace Mediation: The First-Phase, Private Caucus in Individual Discrimination Disputes*, 9 HARV. NEGOT. L. REV. 187, 189–90 (2004).

146. See Bollen, Ittner & Euwema, *supra* note 73, at 632.

147. See Welton et al., *The Role of Caucusing in Mediation*, *supra* note 24, at 182 (discussing the importance of caucus for the early development of rapport between mediator and party).

148. See *id.* at 196 (noting the many positive consequences of using caucus: less direct hostility between the parties, increased disclosure of information, more ideas for solutions (perhaps because emotion and defensiveness are reduced and offering an idea is less likely to be seen as a sign of weakness), increased requests from the mediator for information (in contrast to joint session where such requests declined rapidly), more useful challenges by the mediator, providing a route into problem-solving; also noting that caucuses are used for different purposes at different stages of the mediation—e.g., greater likelihood of requests for other disputant's or mediator's reactions to ideas in middle and late stage caucus than in joint sessions; greater likelihood of mediator-generated alternatives in middle stage caucus and then in final stage joint session).

149. See *id.* at 199 (reporting that caucus was used in about two-thirds of the community mediations studied; about 35% of disputants' statements occurred in caucus as compared to joint session; and “[i]n cases that employed a caucus, disputants used more persuasive arguments, made fewer requests for reaction to an alternative, and generated fewer new alternatives. Mediators employed more negative evaluations of the parties' behavior and less positive evaluations of their positions during these cases. These findings suggest that mediators tend to call caucuses when disputants are taking a contentious, as opposed to problem-solving, approach.”).

150. See DWIGHT GOLANN, *SHARING A MEDIATOR'S POWER: EFFECTIVE ADVOCACY IN SETTLEMENT* 6–8, 50–52, 68–69, 83–87 (2013) (examples of lawyers' use of mediation and mediators to implement a distributive or competitive negotiation strategy); James R. Coben, *A Candid Look at Advocacy Strategies in Caucused Mediations*, 7 DISP. RESOL. MAG. 27 (Fall 2000); Welton et al., *The Role of Caucusing in Mediation*, *supra* note 24, at 193–94 (reporting research regarding community mediation, finding that in caucus dispu-

The lesson? Pre-mediation caucusing also is not magic. If it is used, its purpose should be clear and constrained. Mediators should be trained in how to use it to develop trust, and courts encouraging or ordering parties' use of mediation should institutionalize sufficient time for pre-mediation caucuses as well as systems that provide for feedback and quality assurance.<sup>151</sup>

C. REFLECTIVE LISTENING IN MEDIATION TO INCREASE THE  
LIKELIHOOD AND PRODUCTIVITY OF TRUSTWORTHY  
CONSIDERATION

As noted earlier, participants' inability or unwillingness to extend trustworthy consideration to each other also can hinder mediation's potential to foster procedural justice and self-determination. But people can learn the value of listening as a result of participating in mediation.<sup>152</sup> People also can learn at least the rudimentary components of active or reflective listening—e.g., allowing the other party to speak and then trying to summarize, accurately, what they believe the other party has said.<sup>153</sup> Interest-

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tants were more likely to engage in indirect hostile behavior (e.g., behavioral and character putdowns of the other disputant), self-enhancement, and other persuasive arguments to enhance their own position. "Though we cannot be sure from the data, it seems likely that many of these statements were less than truthful . . . . That such statements could nevertheless have an impact on the mediator is suggested by the finding that mediators tend to recommend solutions that favor the side that has been most vigorous in presenting his or her position"). The use of caucus raises additional procedural justice and due process concerns if it occurs in the context of "judicial mediation" or "med-arb;" if the mediator assumes an adjudicative function, her decision-making may be affected by confidential information she learned while in caucus—and there will not be the opportunity for the veracity of such information to be tested. See Welsh, *Magistrate Judges*, *supra* note 37; Tania Sourdin, *Why Judges Should Not Meet Privately with Parties in Mediation but Should Be Involved in Settlement Conference Work*, 4 J. ARB. & MEDIATION 91 (2013–2014); Ellen E. Deason, *Beyond "Managerial Judges": Appropriate Roles in Settlement*, 78 OHIO ST. L.J. 73. (2017).

151. See Welsh, *Magistrate Judges*, *supra* note 37, at 1035–1043, 1046–1060 (urging feedback for federal magistrate judges who facilitate settlements, providing examples of different means to provide feedback and opportunities for self-reflection, and providing a sample feedback form); Welsh & Schneider, *Thoughtful Integration of Mediation*, *supra* note 45, at 137–139 (describing courts' systems for assuring the quality of mediation); Welsh, et al., *The Application of Procedural Justice Research to Judicial Actions and Techniques in Settlement Sessions*, *supra* note 37 (presenting and explaining a questionnaire soliciting feedback from lawyers and parties regarding the procedural fairness and helpfulness of judicial facilitation of settlement); McAdoo & Welsh, *Aiming for Institutionalization*, *supra* note 37, at 39–43 (recommendations for assuring effectiveness and quality of court-connected dispute resolution programs and for resolving complaints about dispute resolution processes); McAdoo & Welsh, *Look Before You Leap*, *supra* note 22, at 430; Welsh, *The Place of Mediation* *supra* note 7, at 139–140 (expressing concerns regarding many courts' failure to monitor the quality of court-connected mediation programs).

152. For example, in the U.S. Postal Service's REDRESS program, supervisors who had participated in mediation reported that they had learned that it was important to listen, rather than immediately propose a solution or other response. See Jonathan F. Anderson & Lisa Bingham, *Upstream Effects from Mediation of Workplace Disputes: Some Preliminary Evidence from the USPS*, 48 LAB. L. J. 601, 607–08 (1997); Lisa B. Bingham, *Employment Dispute Resolution: The Case for Mediation*, 22 CONFLICT RESOL. Q. 145, 158 (2004).

153. It appears that these sorts of behaviors are likely to be perceived as collaborative and procedurally fair, are likely to increase trust, and are likely to result in the provision of

ingly, recent research also indicates that when a mediator models reflective listening (or trustworthy consideration), this can enhance parties' ability to do the same.<sup>154</sup> Other research, in the communications context, has found that when meetings are characterized by a substantial amount of checking for understanding of previous contributions, the incidence of attacking or defensive behaviors is low.<sup>155</sup> Meanwhile, people participating in meetings characterized by substantial testing for understanding tend to judge these meetings as fair.<sup>156</sup>

If the mediator has developed a trusting relationship with the parties and demonstrates that she cares very much about accurately understanding what each of the parties has to say, then it appears to be more likely that the parties will care about ensuring that they understand each other.<sup>157</sup>

#### D. ONLINE TECHNOLOGY TO INCREASE THE LIKELIHOOD AND PRODUCTIVITY OF VOICE, TRUSTWORTHY CONSIDERATION, AND REAL, SUBSTANTIVE SELF-DETERMINATION

Some have also suggested that those who are hesitant to exercise voice may be emboldened by the opportunity to participate in asynchronous online mediation.<sup>158</sup> There certainly is plenty of research and personal experience demonstrating that people's online voice can be different from their in-person voice. Research has indicated that lower-status individuals, for example, are more willing to participate in "lean media" like email and that social influence bias is reduced.<sup>159</sup> People can also take their time in composing messages, discerning the meaning of the messages they receive, and making decisions about how to respond. Indeed, a person's written facility with language under these circumstances may be quite different from her verbal facility with language in an in-person meeting.

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more information—thus making it more likely that parties will capture the integrative potential of a situation. See Welsh, *The Reputational Advantages*, *supra* note 58, at 119.

154. See Administrative Office of the Courts, *supra* note 131, at v–vi.

155. See NEIL RACKHAM, MODELS FOR EXPLAINING BEHAVIOR: INTERACTIVE SKILLS PROGRAM 56 (1995) (unpublished manuscript) (on file with author) (defining "testing understanding" as behavior that "explores understanding of previous contribution," "ties down and clarifies points which may be unclear or ambiguous," and "check[s] whether people are seeing things [in] the same way"); Nick Anderson, *Meetings Bloody Meetings*, THE CRISPIAN ADVANTAGE (Feb. 19, 2010), <http://thecrispianadvantage.com/meetings-bloody-meetings/> [<https://perma.cc/E5K4-7EHL>].

156. See NEIL RACKHAM, MODELS FOR EXPLAINING BEHAVIOR: INTERACTIVE SKILLS PROGRAM 56 (1995) (unpublished manuscript) (on file with author); Nick Anderson, *Meetings Bloody Meetings*, THE CRISPIAN ADVANTAGE (Feb. 19, 2010), <http://thecrispianadvantage.com/meetings-bloody-meetings/> [<https://perma.cc/E5K4-7EHL>].

157. See *supra* note 131. *But see* Wissler, *Representation in Mediation*, *supra* note 35 (reporting that mediation participants were less likely to indicate that they understood each other better when they were represented by lawyers; the reason is unclear).

158. See Bollen, Ittner & Euwema, *supra* note 73, at 631.

159. See Noam Ebner, Anita D. Bhappu, Jennifer Gerarda Brown, Kimberlee K. Kovach & Andrea Kupfer Schneider, *You've Got Agreement: Negotiating via Email*, in RE-THINKING NEGOTIATION TEACHING: INNOVATIONS FOR CONTEXT AND CULTURE 89, 96 (James R. Coben, Giuseppe DePalo & Christopher Honeyman eds., 2009).

Some dispute resolution organizations actually facilitate an online pre-mediation exchange of information between the parties by requesting that parties respond online to a series of questions and then allowing the parties to see each other's answers. Thus, these online providers facilitate a form of voice and trustworthy consideration.

Less dramatically, asynchronous online communication may play a helpful role as a component part of in-person mediation. For example, researchers have examined the effects of including an online intake procedure before face-to-face mediation (i.e., e-supported mediation) in the context of the workplace, with presumed hierarchical differences between supervisors and subordinates. The particular intake procedure that was examined "encourage[d] both parties to reflect on the issue at hand, the accompanying feelings, the underlying interests as well as potential solutions."<sup>160</sup> According to the researchers, these online tools "provide[d] parties with an opportunity to tell their side of the story via asynchronous typewritten messages (e-mails); [and] it help[ed] parties to get some insight into the situation at hand, and their needs and interests as well as the needs and interests of the other."<sup>161</sup> The researchers found that in the face-to-face mediations preceded by the online intake procedure, subordinates did not differ from superiors in their satisfaction with the mediation outcome or the mediation process. This was in marked contrast to face-to-face mediation that was not preceded by a preparatory online intake procedure, in which subordinates felt less satisfied with the mediation outcome and the mediation process.<sup>162</sup> This research suggests that an online intake procedure, with carefully-crafted questions, may be used to achieve some of the same goals as pre-mediation caucusing, described earlier.

In addition, online tools may help to ensure real, informed self-determination in mediation. There is research indicating that the widespread use of smartphones (in contrast to computers) is bridging the digital divide that has existed between men and women, between racial groups, and between rich and poor.<sup>163</sup> If this is so, then widespread online access to information—such as that regarding legal rights and defenses, available procedures, available dispute resolution providers, and outcomes in

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160. Katalien Bollen & Martin Euwema, *The Role of Hierarchy in Face-to-Face and E-Supported Mediations: The Use of an Online Intake to Balance the Influence of Hierarchy*, 6 NEGOT. & CONFLICT MGMT. RES. 305, 307 (2013).

161. *Id.*

162. *Id.* at 312.

163. See SCHMITZ & RULE, *THE NEW HANDSHAKE*, *supra* note 96, at 19 (citing to data from the Pew Research Center showing "smartphone usage has created new means for accessing the internet, especially for minority groups and those with lower economic means. For example, 10% of Americans do not have home broadband internet access, but they do own a smartphone. Smartphones also virtually eliminate the digital divide among races and ethnicities, with 80% of "White, Non-Hispanic," 79% of "Black, Non-Hispanic," and 75% "Hispanic" having some internet access through home broadband or a smartphone. Still, smartphones widen the digital divide between 18–29 year olds and those who are over age 65 (increasing from a gap of 37 percentage points in home broadband access to 49 percentage points when taking smartphones into account).").

comparable cases—may create the potential for both increased access to justice and more informed self-determination. Legal service providers in the United States already are experimenting with the provision of such information to their clients and self-represented litigants using artificial intelligence, online videos, online legal libraries, and many other tools.<sup>164</sup>

Online tools also may have an important post-mediation application. For example, online publication of information regarding numbers of mediated cases, settlement rates, procedural fairness perceptions and even aggregated substantive outcomes with status-based breakdowns, would provide some degree of transparency and contribute to trust in the procedural and substantive fairness of mediation and the avoidance of systemic but under-the-radar discrimination.<sup>165</sup>

More generally, many are now advocating for online dispute resolution (ODR) in order to increase access to justice by reducing costs and time to disposition.<sup>166</sup> Thus, ODR may be in the process of becoming the “new” mediation,<sup>167</sup> just as mediation has become the new arbitration<sup>168</sup> and arbitration has become the new litigation.<sup>169</sup> Like the processes that came before it, however, ODR is very likely to need to embrace procedural safeguards and transparency in order to assure people of both procedural and substantive justice.<sup>170</sup>

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164. The Legal Service Corporation’s annual Technology Initiative Grants Conference provides an opportunity to explore all of these futuristic options. *See also* ETHAN KATSH & ORNA RABINOVICH-EINY, *DIGITAL JUSTICE: TECHNOLOGY AND THE INTERNET OF DISPUTES* 157–158 (2017).

165. *See* Nancy A. Welsh, *Class Action Barring Mandatory Pre-Dispute Consumer Arbitration Clauses: An Example of (and Opportunity for) Dispute System Design?*, 13 U. ST. THOMAS L.J. 381, 430–431 (2017) (imagining an online dispute resolution process for business-to-consumer disputes that provided consumers with access to information about their rights and defenses, substantive and procedural safeguards, aggregated information regarding consumers’ perceptions of fairness and substantive results, and impressive compliance with results).

166. *See* Rebecca Love Kourlis, Natalie Anne Knowlton & Logan Cornett, *A Court Compass for Litigants* (INSTITUTE FOR THE ADVANCEMENT OF THE AMERICAN LEGAL SYSTEM, July 2016) (proposing use of technology and ODR for family disputes); ABA COMMISSION ON THE FUTURE OF LEGAL SERVICES, *REPORT ON THE FUTURE OF LEGAL SERVICES IN THE UNITED STATES* 6 (2016) (calling for the piloting and expansion of court-annexed online dispute resolution systems); SCHMITZ & RULE, *THE NEW HANDSHAKE*, *supra* note 96; Katsh & Rabinovich-Einy, *Digital Justice*, *supra* note 165, at 158–165; *see also* Zena Zumeta, *Profiles in ADR: Douglas Van Epps*, *DISP. RESOL. MAG.*, Spring 2017, (foreseeing the use of ODR for small monetary disputes, but continued use of in-person procedures like mediation for disputes involving relational or emotional issues).

167. Interestingly, Ethan Katsh and Orna Rabinovitch-Einy are referring to ODR as the “new new courts.” *See* Orna Ravbinovich-Einy & Ethan Katsh, *The New New Courts*, 67 AM. U. L. REV. 165 (2017).

168. *See* Jacqueline Nolan-Haley, *Mediation: The “New Arbitration”*, 17 HARV. NEGOT. L. REV. 61 (2012).

169. *See* Tom Stipanowich, *supra* note 23.

170. *See* Nancy A. Welsh, *ODR: A Time for Celebration and the Embrace of Procedural Safeguards*, Conference Presentation at the 2016 International Forum for Online Dispute Resolution, The Hague (May 2016) [hereinafter Welsh, *Time for Celebration*] (transcript available at [www.adrhub.com/profiles/blogs/procedural-justice-in-odr](http://www.adrhub.com/profiles/blogs/procedural-justice-in-odr)) [<https://perma.cc/8NNA-VETM>] (calling for algorithmic audits and alternative forums for those who do not have access to, or facility with, online options); *see generally* Noam Ebner & John Zeleznikow, *Fairness, Trust and Security in Online Dispute Resolution*, 36 HAMLINE J. PUB.



E. EMPOWERING MEDIATORS TO AVOID UNCONSCIONABLE  
UNFAIRNESS OR COERCION

Ellen Waldman, Lola Akin Ojelabi, Jennifer Reynolds, and other scholars increasingly express concern that even if mediation sessions provide for voice, trustworthy consideration, even-handed treatment, and respect, they also have the potential to produce unconscionable outcomes. Waldman and Ojelabi do not urge that mediators should therefore impose their own solutions and definitions of fairness upon the disputants. However, they do advocate for mediators' ethical responsibility to assist the "have-nots" and at least question outcomes that are so lopsided that they appear unconscionable or patently unfair.<sup>171</sup> This is likely the most controversial suggestion contained in this Article, but there is precedent for imposing some ethical obligation upon mediators to avoid extreme substantive unfairness in specified contexts.<sup>172</sup> It is also relatively easy to

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L. & POL'Y 143 (2015); Noam Ebner & John Zeleznikow, *No Sheriff in Town: Governance for Online Dispute Resolution*, 32 NEGOT. J. 297 (2016); Carrie Menkel-Meadow & Robert Dingwall, *Negotiating with Scripts and Playbooks: What To Do When Big Bad Companies Won't Negotiate*, in THE NEGOTIATOR'S DESK REFERENCE (Christopher Honeyman & Andrea Kupfer Schneider eds., 2d ed. forthcoming); Orna Rabinovich-Einy & Ethan Katsh, *Digital Justice: Reshaping Boundaries in an Online Dispute Resolution Environment*, 1 INT'L J. ONLINE DISP. RESOL. 5, 28 (2014); Anjanette H. Raymond & Scott J. Shackelford, *Technology, Ethics, and Access to Justice: Should an Algorithm be Deciding Your Case?*, 35 MICH. J. INT'L L. 485 (2014); Amy J. Schmitz, *Secret Consumer Scores and Segmentations: Separating "Haves" from "Have-Nots,"* 2014 MICH. ST. L. REV. 1411(2014); Suzanne Van Arsdale, *User Protections in Online Dispute Resolution*, 21 HARV. NEGOT. L. REV. 107, 128–29 (2015); SCHMITZ & RULE, THE NEW HANDSHAKE, *supra* note 96 (noting: "[O]ur enthusiasm for building these new dispute resolution mechanisms should not overshadow our focus on principles of justice and ethical judgment. Those concerns must remain paramount. Indeed, justice and fairness must be at the core of not only the design phase of THE NEW HANDSHAKE, but also the ongoing evolution of these systems.").

171. See Ellen Waldman & Lola Akin Ojelabi, *Mediators and Substantive Justice: A View from Rawls' Original Position*, 30 OHIO ST. J. ON DISP. RESOL. 391, 420–30 (2016) (using Rawls' "veil of ignorance" as well as ethical codes that permit mediators to withdraw due to concerns regarding unconscionability).

172. In some settings, for example, mediators are obligated to avoid unconscionable settlements. See Wissler, *Representation in Mediation*, *supra* note 35, at 435 (citing MODEL STANDARDS OF CONDUCT FOR MEDIATORS, §§ I.A, II, VI.A. (AM. ARB. ASS'N ET AL. 2005); ABA MODEL STANDARDS OF PRACTICE FOR FAMILY AND DIVORCE MEDIATION §§ I, IV (2001) [hereinafter ABA MODEL DIVORCE MEDIATION STANDARDS]; MODEL RULE FOR THE LAWYER AS THIRD-PARTY NEUTRAL ¶. 4.5.3, 4.5.6 & cmts. (CPR-GEORGETOWN COMM'N ON ETHICS AND STANDARDS IN ADR); NAT'L STANDARDS FOR COURT-CONNECTED MEDIATION PROGRAMS §§ 8.1.f, 11.1 & cmts. (CTR. FOR DISPUTE SETTLEMENT, INST. FOR JUDICIAL ADMIN); Jacqueline M. Nolan-Haley, *Informed Consent in Mediation: A Guiding Principle for Truly Educated Decisionmaking*, 74 NOTRE DAME L. REV. 775, 787 (1999); Leonard Riskin, *Toward New Standards for the Neutral Lawyer in Mediation*, 26 ARIZ. L. REV. 329, 349, 354 (1984); Welsh, *The Thinning Vision*, *supra* note 4, at 15, 78–84; see also ABA MODEL DIVORCE MEDIATION STANDARDS, §§ XI, 25.4 ("A family mediator shall suspend or terminate the mediation process when . . . the participants are about to enter into an agreement that the mediator reasonably believes to be unconscionable."); Robert A. Baruch Bush, *The Dilemmas of Mediation Practice: A Study of Ethical Dilemmas and Policy Implications* 13–19 (1992); John Lande, *How Will Lawyering and Mediation Transform Each Other?*, 24 FLA. ST. U. L. REV. 839, 878 (1997); Craig A. McEwen et al., *Bring in the Lawyers: Challenging the Dominant Approaches to Ensuring Fairness in Divorce Mediation*, 79 MINN. L. REV. 1317, 1332–33, 1397–98, 1405–06 (1995); Nolan-Haley, *supra*, at 811, 836; Pincock & Hedeem, *supra*, note 85, at 444–47 (discussing

understand how such an obligation would make it more likely that marginalized parties would perceive the mediation process as offering at least minimal assurance that they and their claims will be treated in an even-handed and dignified manner.

## VI. CONCLUSION

This Article began by recounting the dreams and noble intentions that inspired many of those who advocated for the institutionalization of mediation. Of course, powerful dissenting voices arose at the time. Richard Delgado was chief among them,<sup>173</sup> and he continues to raise legitimate concerns that must be addressed. Indeed, this Article has examined the ways in which mediation has fallen short of achieving aspirational self-determination and how and why inequality can undermine the ability of mediation to assure a procedurally just process. Much of the research reviewed here is consistent with the social science research that Professor Delgado and his co-authors invoked as the basis for their concerns regarding mediation. Thus, mediation has fallen prey to the same social and economic problems that have afflicted (and continue to afflict) civil and criminal litigation, administrative adjudication, and arbitration.<sup>174</sup>

This Article, though, is for those who have valued and continue to value mediation for its potential to offer self-determination and procedural justice—its potential for a certain sort of magic—even while admitting its shortcomings and acknowledging the need for reform. The research described here, particularly regarding procedural justice, reveals that we can and should take steps to increase the likelihood and productivity of all participants' voice, trustworthy consideration and real, substantive self-determination by: increasing the inclusivity of our pool of mediators; training all mediators to acknowledge and address implicit bias; training mediators to engage in pre-mediation caucusing that focuses on developing trust; institutionalizing systems for feedback and quality assurance; training mediators to model reflective listening; adopting online technology that provides parties with the information they need to engage in informed decision-making and the opportunity for self-analysis and self-reflection; and perhaps even identifying additional areas of mediation practice in which marginalized parties' safety requires mediators to take affirmative steps to avoid unconscionable unfairness or coercion.

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theoretical developments regarding bullying, the related concepts of harassment and discrimination, and the potential responsiveness of restorative justice).

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

174. See Michael Mofitt, *Three Things To Be Against ("Settlement" Not Included)*, 78 FORDHAM L. REV. 1203, 1245 (2009) ("We should celebrate the beauty in each process's internal narrative of justice, of truth, of efficiency, of predictability, and even of morality. . . . Both settlement and litigation fail on each of these measures with some reliability . . .").

It turns out that achieving the illusion of magic demands commitment from us, and quite a lot of work. But it is work that can and should be done.