CONCEPTIONS AND PERCEPTIONS OF FAIRNESS IN MEDIATION

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I. INTRODUCTION

Fairness is considered a fundamental principle of mediation. As one author noted, "Fairness is a predominant concern in the mediation community. Few commentators would disagree that it is the normative standard governing mediation. Determining what constitutes fairness, however, is a difficult question."[1]

The reader of mediation literature and codes of conduct for mediators may be overwhelmed by the numerous aspects of fairness referred to and may wonder what these aspects of fairness have in common and what mediation academics and the code drafters have intended by the use of fairness terminology. Additionally, in the absence of a defined meaning of fairness, it is difficult to evaluate the strength of fairness-based arguments that commentators make. If, for example, a commentator argues that a particular action of the mediator is unfair, how can we evaluate his claim

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[1] Jacqueline M. Nolan-Haley, *Informed Consent in Mediation: A Guiding Principle for Truly Educated Decisionmaking*, 74 NOTRE DAME L. REV. 775, 778 n.12 (1999); *see also id.* at 787 n.57 ("There is little dispute that fairness is the fundamental goal of any dispute resolution process including mediation."); Ellen Waldman, *Values, Models, and Codes*, *in* MEDIATION ETHICS 1, 3 (Ellen Waldman ed., 2011).

without first understanding the meaning of fairness? How can we determine whether the process of mediation is fair—or whether a mediation outcome is unfair—without a good understanding of the meaning of fairness?

Only a few commentators have attempted, with limited success, to provide a coherent theory of fairness in mediation. This Article offers a new and innovative approach for understanding mediation fairness. Drawing on literature from philosophy, morality, professional ethics, jurisprudence, and mediation, it identifies several perspectives of fairness that clarify its meaning. The Article's main thesis is that an understanding of fairness through these perspectives can contribute to a more coherent discussion of fairness issues in mediation and enable practitioners to evaluate fairness-based arguments that are so common in mediation literature.

Part II of this Article reviews the meaning of fairness according to mediation literature and the codes of conduct for mediators. It shows that fairness in mediation has many meanings, that the connection between the numerous aspects of fairness is unclear, and that a plain account of mediation fairness is needed. Part III identifies conceptions and perceptions of fairness in mediation drawing on literature from philosophy, morality, professional ethics, jurisprudence, and mediation, and illustrates them with examples from mediation literature. Part IV discusses in more detail the potential contribution of these perspectives of fairness to the field of mediation. Using these perspectives the Article examines possible interpretations of mediators' duty of impartiality, articulates a workable definition of outcome fairness in mediation, and identifies the rationale and the extent of mediators' accountability for unfair outcomes. Part V summarizes the main arguments of the Article.

II. FAIRNESS ACCORDING TO CODES OF CONDUCT AND MEDIATION LITERATURE

A. Codes of Conduct for Mediators

Codes of conduct for mediators often use fairness terminology,[2] though it is rare to find an independent standard of fairness in a code of conduct.[3] A

2. *See, e.g.*, STANDARDS OF PRACTICE FOR CALIFORNIA MEDIATORS pmbl. (Cal. Dispute Resolution Council 2011), http://www.cdrc.net/adr-practice/mediator-standards/#stdspreamble [hereinafter CALIFORNIA STANDARDS]; RULES FOR CERTIFIED & COURT-APPOINTED MEDIATORS, *in* ADR RESOURCE HANDBOOK §§ 10.230(c), 10.300, at 96 (Fla. Dispute Resolution Ctr. 2012), http://www.flcourts.org/gen_public/adr/bin/RulesForMediators.pdf [hereinafter FLORIDA RULES]; STANDARDS OF CONDUCT FOR NEW YORK STATE CMTY. DISPUTE RESOLUTION CTR. MEDIATORS 4 cmt. 2 (Office of Alt. Dispute Resolution & Court Improvement Programs 2009), http://www.courts.state.ny.us/ip/adr/Publications/Info_for_Programs/Standards_of_Conduct.pdf

few codes do not mention fairness at all.[4] The following review of selected codes of conduct aims to illustrate the numerous and bewildering meanings of fairness in the codes and the difficulty of finding a unifying rationale for these meanings.

Fairness according to the codes of conduct is connected to the mediator's competence to conduct the mediation[5] and the duty to "exercise diligence in scheduling the mediation."[6] Fairness requires the mediator to remain impartial,[7] to avoid conflicts of interests,[8] and to avoid unfair influence that results in a party entering a settlement agreement.[9] Fairness is connected to the quality of the process[10] and its integrity.[11] Fairness requires that parties have an opportunity to participate,[12] that their participation is

[hereinafter NEW YORK STANDARDS]; CORE STANDARDS OF MEDIATION PRACTICE § III, at 3 (Or. Mediation Ass'n 2005), http://www.omediate.org/docs/2005CoreStandardsFinalP.pdf [hereinafter OREGON STANDARDS]; STANDARDS OF ETHICS & PROF'L RESPONSIBILITY FOR CERTIFIED MEDIATORS § K.1, K.4, at 7–8 (Judicial Council of Va. 2011), http://www.courts.state.va.us/courtadmin/aoc/djs/programs/drs/mediation/soe.pdf [hereinafter VIRGINIA STANDARDS]; MODEL STANDARDS OF CONDUCT FOR MEDIATORS § VI (2005), http://www.abanet.org/dispute/documents/model_standards_conduct_april2007.pdf [hereinafter MODEL STANDARDS]; *see also infra* notes 5–31 and accompanying text.

3. *But see* ETHICAL STANDARDS FOR MEDIATORS § IV, at 30 (Ga. Comm'n on Dispute Resolution 2012), http://www.godr.org/files/APPENDIX%20C,%20CHAP%201,%206-1-2012.pdf [hereinafter GEORGIA STANDARDS].

4. *E.g.*, CODE OF CONDUCT FOR MEDIATORS (ADR Inst. of Can., Inc., 2011), http://www.adrcanada.ca/resources/documents/Code_of_Conduct_for_Mediators_2011April15.pdf; ETHICAL GUIDELINES FOR MEDIATORS (Law Council of Austl. 2006), http://www.nswbar.asn.au/docs/professional/adr/documents/LawCouncilEthicalGuidelinesforMediators.pdf [hereinafter AUSTRALIA GUIDELINES].

5. *E.g.*, GEORGIA STANDARDS, *supra* note 3, § V, at 32.

6. *E.g.*, *id.*

7. *E.g.*, OREGON STANDARDS, *supra* note 2, § III, at 3.

8. *E.g.*, NEW YORK STANDARDS, *supra* note 2, § III.B, at 5.

9. *E.g.*, MEDIATOR CODE OF ETHICS § 4(b) (Ala. Ctr. for Dispute Resolution 1997), http://alabamaadr.org/web/roster-documents/med_Code_Ethics.php [hereinafter ALABAMA CODE].

10. *See* FED. INTERAGENCY ADR WORKING GRP. STEERING COMM., A GUIDE FOR FEDERAL EMPLOYEE MEDIATORS § VI, at 9–11 (2006), http://www.adr.gov/pdf/final_manual.pdf; MODEL STANDARDS, *supra* note 2, § VI; VIRGINIA STANDARDS, *supra* note 2, § K.1, at 7.

11. *See* GEORGIA STANDARDS, *supra* note 3, § IV, at 30–32; REVISED STANDARDS OF PROF'L CONDUCT FOR MEDIATORS § V.E, at 5 (N.C. Dispute Resolution Comm'n 2011), http://www.nccourts.org/Courts/CRS/Councils/DRC/Documents/StandardsConduct.pdf [hereinafter N.C. STANDARDS]; VIRGINIA STANDARDS, *supra* note 2, § K.4, at 8.

12. *E.g.*, CAL. R. CT. 3.857(b), *available at* http://www.courts.ca.gov/documents/title_3.pdf; JAMS, MEDIATORS ETHICS GUIDELINES § V, at 2 (2013), http://www.jamsadr.com/mediators-ethics/ (follow "PDF" hyperlink) [hereinafter JAMS GUIDELINES].

meaningful,[13] and that they have an opportunity to speak, be heard,[14] and articulate their needs, interests, and concerns.[15]

Fairness demands that parties make voluntary,[16] uncoerced decisions[17] without undue influence[18] on the basis of knowledge[19] or informed consent[20] and have an opportunity to consider the implications of their decision.[21] In a fair mediation, the parties may terminate the mediation at any time.[22] The fairness of mediation is preserved when participation is not to gain an unfair advantage,[23] when manipulative or intimidating negotiating tactics are not used,[24] and when the parties avoid nondisclosure or fraud.[25] Fairness is violated when the agreement is grossly[26] or fundamentally[27] unfair, illegal,[28] or impossible to execute,[29] and when the parties do not understand the agreement and its implications on themselves[30] and on nonparticipants (third parties).[31]

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13. *E.g.*, FAMILY MEDIATION CAN., MEMBERS CODE OF PROF'L CONDUCT art. 9.3, at 2 (2013), http://www.fmc.ca/pdf/CodeProfessionalConduct.pdf [hereinafter FAMILY MEDIATION CANADA CODE].

14. *E.g.*, *id.* art. 9.2.

15. *E.g.*, *id.*

16. *E.g.*, *id.* art. 9.1.

17. *E.g.*, CAL. R. CT. 3.857(b), *available at* http://www.courts.ca.gov/documents/title_3.pdf.

18. *E.g.*, FAMILY MEDIATION CANADA CODE, *supra* note 13, art. 9.1, at 2.

19. *See, e.g.*, GEORGIA STANDARDS, *supra* note 3, § IV.A Recommendation, at 31.

20. *E.g.*, MCI PROF'L STANDARDS OF PRACTICE FOR MEDIATORS § III.E (Mediation Council of Ill. 2009), http://www.mediationcouncilofillinois.org/sites/default/files/MCI%20Professional%20Standards%20of%20Practice.pdf [hereinafter ILLINOIS STANDARDS]; FAMILY MEDIATION CANADA CODE, *supra* note 13, art. 9.1, at 2.

21. FAMILY MEDIATION CANADA CODE, *supra* note 13, art. 9.5, at 2–3; GEORGIA STANDARDS, *supra* note 3, § IV.A Recommendation, at 31; ETHICAL GUIDELINES FOR THE PRACTICE OF MEDIATION § 1.3 (Wis. Ass'n of Mediators 2011), http://www.wamediators.org/publication/ethical-guidelines-practice-mediation.

22. *E.g.*, GEORGIA STANDARDS, supra note 3, § V, at 33.

23. *E.g.*, MODEL STANDARDS OF PRACTICE FOR FAMILY & DIVORCE MEDIATION § XI.A.6 (Ass'n of Family & Conciliation Courts 2000), http://www.afccnet.org/Portals/0/PublicDocuments/CEFCP/ModelStandardsOfPracticeForFamilyAndDivorceMediation.pdf [hereinafter FAMILY MEDIATION MODEL STANDARDS].

24. *E.g.*, FAMILY MEDIATION CANADA CODE, *supra* note 13, art. 9.4, at 2.

25. *E.g.*, N.C. STANDARDS, *supra* note 11, § V.E, at 5; VIRGINIA STANDARDS, *supra* note 2, § K.4, at 8.

26. *E.g.*, N.C. STANDARDS, supra note 11, § V.E, at 5.

27. *E.g.*, GEORGIA STANDARDS, supra note 3, § IV.A Commentary, at 30.

28. *E.g.*, *id.*

29. *E.g.*, *id.*

30. *E.g.*, FAMILY MEDIATION CANADA CODE, *supra* note 13, art. 9.6, at 3; GEORGIA STANDARDS, *supra* note 3, § IV.A Recommendation, at 31.

31. *E.g.*, GEORGIA STANDARDS, supra note 3, § IV.A Recommendation, at 31.

The numerous contexts in which fairness is used in codes of conduct indicate the importance which is attached to fairness concerns. Yet the question remains: What precisely is the meaning of fairness in mediation? What is common to all those aspects of fairness?

B. Mediation Literature

Issues of fairness and justice have received much attention in mediation literature. In this Article, like other writers in the field, I use the terms *fairness* and *justice* interchangeably.[32] Mediation literature often distinguishes between procedural fairness relating to the process of mediation, and substantive fairness relating to the outcome of mediation.[33]According to the literature, a mediator acts fairly when the mediation is conducted impartially,[34] without bias,[35] evenhandedly,[36] and indiscriminately,[37] though the mediator is expected to take account of the parties' differences[38] and power inequalities.[39] A fair mediator treats the

32. *See, e.g.*, Jacob Bercovitch, *Mediation Success or Failure: A Search for the Elusive Criteria*, 7 CARDOZO J. CONFLICT RESOL. 289, 291 (2006); Jonathan M. Hyman, *Swimming in the Deep End: Dealing with Justice in Mediation*, 6 CARDOZO J. CONFLICT RESOL. 19, 19 (2004) ("For purposes of understanding what mediators do, justice might more easily be understood as 'fairness.'"); *id.* 20–21 ("From a mediator's point of view, fairness and justice are similar enough to support the use of the term 'justice' to describe the inquiry."); *see also* Nolan-Haley, *supra* note 1, at 778 n.12; Joseph B. Stulberg, *Mediation and Justice: What Standards Govern?*, 6 CARDOZO J. CONFLICT RESOL. 213, 215 n.8 (2005).

33. *See, e.g.*, Joan Dworkin & William London, *What Is a Fair Agreement?*, 7 MEDIATION Q. 3, 5 (1989) ("There are two broad categories of fairness: procedural and substantive. Procedural fairness relates to the question of whether the *process* of reaching an agreement was fair. Substantive fairness relates to the issue of whether the *content* of the agreement or the *outcome* of the mediation is fair."); Joseph B. Stulberg, *Fairness and Mediation*, 13 OHIO ST. J. ON DISP. RESOL. 909, 911–12 (1998); Nancy A. Welsh, *Making Deals in Court-Connected Mediation: What's Justice Got to Do with It?*, 79 WASH. U. L. Q. 787, 817 (2001).

34. Dworkin & London, *supra* note 33, at 5.

35. Sarah E. Burns, *Thinking About Fairness & Achieving Balance in Mediation*, 35 FORDHAM URB. L.J. 39, 41 (2008); Stulberg, *supra* note 33, at 945.

36. Bercovitch, *supra* note 32, at 292, 293; Welsh, *supra* note 33, at 823.

37. *Cf.* Burns, *supra* note 35, at 53 ("[A]spects of minority members' behavior will be perceived and remembered where the same behavior by a majority group member goes entirely unobserved.").

38. Allan Edward Barsky, *Issues in the Termination of Mediation Due to Abuse*, 13 MEDIATION Q. 19, 26 (1995).

39. LAURENCE BOULLE & MIRYANA NESIC, MEDIATION: PRINCIPLES PROCESS PRACTICE 454–55 (2001); *see* Judith L. Maute, *Mediator Accountability: Responding to Fairness Concerns*, 1990 J. DISP. RESOL. 347, 354 ("Relative parity in bargaining power largely avoids the public concern for fair resolution of essentially private disputes."); *see also* Trina Grillo, *The Mediation Alternative: Process Dangers for Women*, 100 YALE L.J. 1545, 1550 (1991) (addressing power inequalities based on gender); Richard Delgado et al., *Fairness and Formality: Minimizing the Risk of Prejudice in Alternative Dispute Resolution*, 1985 WIS. L. REV. 1359, 1375–83 (addressing power inequalities of minorities).

parties with dignity and respect,[40] considers their views and concerns,[41] and does not pressure or coerce them to settle.[42] According to mediation literature, fairness requires the presence of parties in mediation sessions,[43] party control of process,[44] and that the parties have an opportunity for expression[45] and voice.[46] In a fair process, party decisions are voluntary,[47] informed,[48] based on adequate information,[49] and the parties have access to independent legal advice.[50] In a fair mediation, there are no significant power inequalities between the parties,[51] the parties treat each other with dignity and respect[52] and avoid intimidation and abusive behavior.[53]

Procedural fairness thus seems to have numerous aspects. Authors tend to focus on one (or several) of these aspects and explore them in detail. Jacqueline Nolan-Haley, for example, argued for an informed consent principle in mediation and described informed consent as an aspect of fairness.[54] Richard Delgado et al. noted the dangers of mediation to minority groups by focusing on prejudices and biases as aspects of fairness,[55] and Joseph Stulberg argued that mediation parties have a right to be treated with dignity and respect on the basis of a principle of fairness.[56] Other authors explore procedural fairness concerns through empirical research on the factors that make participants in conflict resolution

40. Welsh, *supra* note 33, at 820; Stulberg, *supra* note 33, at 912–13.

41. Welsh, *supra* note 33, at 820.

42. Note, *Mandatory Mediation and Summary Jury Trial: Guidelines for Ensuring Fair and Effective Processes*, 103 HARV. L. REV. 1086, 1098 (1990).

43. *Id.* at 1096; *see also* Stulberg, *supra* note 33, at 922–23 ("[E]ngaged participation by parties to the controversy holds the best hope for . . . advancing fairness.").

44. Bercovitch, *supra* note 32,**Error! Bookmark not defined.** at 292.

45. *Id.*

46. Welsh, *supra* note 33, at 820.

47. Dworkin & London, *supra* note 33, at 5.

48. BOULLE & NESIC, supra note 39, at 454, 456; Barsky, *supra* note 38, at 24; Susan Nauss Exon, *How Can a Mediator Be Both Impartial and Fair?: Why Ethical Standards of Conduct Create Chaos for Mediators*, 2006 J. DISP. RESOL. 387, 400; Nolan-Haley, *supra* note 1, at 778.

49. Maute, *supra* note 39, at 367 ("A party cannot evaluate the fairness of an option without minimally adequate information . . . .").

50. Dworkin & London, *supra* note 33, at 6; Stulberg, *supra* note 33, at 944–45 (arguing for the inclusion of a provision ensuring a "non-waivable right to counsel" in a uniform mediation statute).

51. Delgado et al., *supra* note 39, at 1402–03 ("ADR should be reserved for cases in which parties of comparable power and status confront each other.").

52. Maute, *supra* note 39, at 349.

53. *Id.*; *see also* Barsky, *supra* note 38, at 19–20 (discussing abuse in the context of family dispute resolution).

54. Nolan-Haley, *supra* note 1, at 787 ("In mediation practice, the principle of informed consent is not an end in itself but is a means of achieving the fundamental goal of fairness.").

55. *See, e.g.*, Delgado et al., *supra* note 39, at 1375–83.

56. Stulberg, *supra* note 33, at 912–13.

processes perceive procedures as fair.[57] Nancy Welsh, for example, imported the findings of that research into mediation discourse to influence the way court-connected mediations are conducted[58] and to enhance our understanding of the principle of self-determination.[59] Welsh also applied procedural fairness theory to mediators' training and evaluation programs,[60] while Paula Young suggested using procedural fairness considerations in the design of mediator complaint systems.[61]

Scholarship on outcome fairness in mediation is also extensive. Mediation literature has suggested numerous parameters for evaluating outcome fairness. These include equity,[62] unconscionability,[63] the legality of the agreement,[64] the effect on third parties,[65] the benefit to the parties in comparison with their position at the beginning of the mediation,[66] the information on which the parties based their decision to accept the agreement,[67] success at reaching an agreement, compliance with the agreement, cost of the agreement, efficiency of the process, agreement stability, access to justice, others' needs, relational development, satisfaction with the agreement, and psychological effects.[68] These parameters also include whether the agreement involves the alienation of a basic interest that most human beings believe should not be subject to

57. See Diane Sivasubramaniam & Larry Heuer, *Decision Makers and Decision Recipients: Understanding Disparities in the Meaning of Fairness*, 44 CT. REV. 62 (2007), for an overview of research and theories on the psychology of fairness.

58. *See* Welsh, *supra* note 33, at 838–58.

59. *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, 7–8, 16 (2001).

60. *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, 663 (2004) ("[P]rocedural justice and resolution represent the dual cornerstones of mediation's value to disputants—and thus should become the cornerstones for mediator . . . training[] and evaluation.").

61. *See* Paula M. Young, *Take It or Leave It. Lump It or Grieve It: Designing Mediator Complaint Systems that Protect Mediators, Unhappy Parties, Attorneys, Courts, the Process, and the Field*, 21 OHIO ST. J. ON DISP. RESOL. 721, 784, 899–900 (2006).

62. *See* Bercovitch, *supra* note 32, at 292, 293.

63. Kevin Gibson, *Mediator Attitudes Toward Outcomes: A Philosophical View*, 17 MEDIATION Q. 197, 207–09 (1999).

64. John W. Cooley, *A Classical Approach to Mediation—Part I: Classical Rhetoric and the Art of Persuasion in Mediation*, 19 U. DAYTON L. REV. 83, 130 (1993).

65. Gibson, *supra* note 63, at 203–04 ("One way disputants can resolve their difficulties is to shift the burden of a decision or act onto a third party . . . .").

66. Stulberg, *supra* note 33, at 911.

67. *See* Gibson, *supra* note 63, at 202 ("The effect of . . . poor advice will be that . . . such a settlement might represent an unfair outcome.").

68. Kent E. Menzel, *Judging the Fairness of Mediation: A Critical Framework*, 9 MEDIATION Q. 3, 6–16 (1991).

irretrievable waiver, whether the agreement violates or ignores a significant dimension of a person's human dignity, whether the agreement terms are inconsistent with fundamental values of the concept of a person that is embraced by the larger community.[69] Finally, they include whether the agreement restores some balance and harmony among the parties, increases the likelihood of understanding and better relationship between the parties, achieves more Pareto-efficient resolutions, saves time and money (and perhaps aggravation and stress), enhances communication and harmony in communities, and sets social precedents for better ordering of relationships.[70]

There have been attempts to offer a coherent account of outcome fairness in mediation. Some authors have argued that the fairness of mediated agreements is an issue for the parties to decide. Jonathan Hyman and Lela Love (Hyman & Love), for example, argued that "justice in mediation comes from below, from the parties";[71] and Stulberg (following Hyman & Love) suggested a thesis according to which a mediation outcome agreed upon by the parties may be considered a just outcome.[72] Other authors argued that fairness requires that mediated agreements withstand additional tests beyond the parties' acceptance. Judith Maute, for example, argued that "[t]he benchmark for evaluating fairness is whether the agreement approximates or improves upon the probable adjudicated outcome";[73] and Kevin Gibson argued that mediated settlements should withstand an external review to ensure that the outcome is not socially

69. Stulberg, *supra* note 32, at 222–27. See *infra* Part IV.B.2(b) for a discussion of Stulberg's parameters of outcome fairness.

70. Jonathan M. Hyman & Lela P. Love, *If Portia Were a Mediator: An Inquiry into Justice in Mediation*, 9 CLINICAL L. REV. 157, 186 (2002). See *infra* Part IV.B.2(a) for a discussion of Hyman & Love's parameters of outcome fairness.

71. Hyman & Love, *supra* note 70, at 160–61 ("The rules, standards, principles and beliefs that guide the resolution of the dispute in mediation are those held by the parties. The guiding norms in mediation may be legal, moral, religious or practical. In mediation, parties are free to use whatever standards they wish, not limited to standards that have been adopted by the legislature or articulated by the courts. Consequently, justice in mediation comes from below, from the parties." (footnote omitted)). Hyman & Love compared mediation to court proceedings, which represent "justice from above," arguing that adjudication is a process whose fairness is determined according to its adherence to external norms which are imposed on the case. *Id.* at 160. See *infra* Part IV.B.2(a) for further discussion of Hyman & Love's account of fairness.

72. Stulberg, *supra* note 32, at 216. See *infra* Part IV.B.2(b) for further discussion of Stulberg's account of fairness.

73. Maute, *supra* note 39, at 368; *see also* Ellen Waldman, *The Concept of Justice in Mediation: A Psychobiography*, 6 CARDOZO J. CONFLICT RESOL. 247, 263 (2005) ("Social Norm Theorists [such as Isabelle Gunning, Trina Grillo, and Jeffery Stempel] . . . . have greater confidence that the inclusion of legal norms in private ordering will bring notions of justice into play. . . . [They] have some (though, oft-times limited) faith that the [public] norms brought to bear on a private dispute will push discussion toward more equitable solutions.").

unacceptable.[74]The different accounts of fairness have led writers to take contradictory approaches to the question of mediators' accountability for mediation outcomes. Some scholars, such as Stulberg, argued that mediators are not accountable for the outcome because it is controlled by the parties.[75] Others, such as Lawrence Susskind, Maute, and Gibson, argued that mediators are accountable for the outcome.[76]

This brief and illustrative review of aspects of fairness in mediation literature serves to show the complexity of the issue and the confusion that surrounds it. Again, one wonders: What is the connection between the many meanings attached to fairness? What does fairness in mediation mean?

III. THE THEORY: CONCEPTIONS AND PERCEPTIONS OF FAIRNESS IN MEDIATION

A careful reading of mediation literature and provisions in codes of conduct for mediators that refer to fairness considerations reveals two general meanings attached to fairness. First, a normative meaning of fairness, i.e., an understanding of fairness as a concept that describes a norm of behavior that ought to be followed; second, an understanding of fairness as a *perception* that describes an experience of fairness perceived by various people. Without arguing that the following are the only possible perspectives of fairness in mediation, this part describes two normative conceptions of fairness and three perceptions of fairness that can make order in the confusing jungle of fairness aspects found in the field of mediation.

A. Normative Conceptions

1. A Formal Conception of Fairness: An Expectation to Play by the Rules of the Game

The numerous contexts in which fairness is used to describe mediation and mediators are overwhelming. As we have seen, a biased mediator is described as unfair, a mediator who puts pressure on the parties to settle acts unfairly, and the mediation is unfair if the parties are not treated with

74. *See* Gibson, *supra* note 63, at 198, 209.

75. *See* Joseph B. Stulberg, *The Theory and Practice of Mediation: A Reply to Professor Susskind*, 6 VT. L. REV. 85, 88–91 (1981).

76. *See* Gibson, *supra* note 63, at 209 (arguing that mediators sometimes have a duty to question the mediated agreement); Maute, *supra* note 39, at 358 ("[T]he mediator is accountable for the quality of private justice . . . ."); Lawrence Susskind, *Environmental Mediation and the Accountability Problem*, 6 VT. L. REV. 1, 14–18 (1981) (arguing that mediators of environmental disputes should ensure that mediated agreements take into account the interests of third parties).

dignity and respect, as is a mediation which results in an illegal agreement.[77] What we learn from all this is that fairness serves as a means to describe unworthy behavior. In fact, any conduct that is inconsistent with a mediation rule might be described, under this approach, as unfair. As a result, the choice to describe the breach of a particular rule as unfair is arbitrary in the sense that breaking *any* rule is considered unfair. Fairness according to this approach reflects an expectation of adherence to all the rules that apply to mediation, each of these rules being an aspect of fairness.

This conception of fairness is similar to the basic sense of fairness that the philosopher Bernard Gert described as "playing by the rules"[78] and that Brad Hooker called formal fairness.[79] A person who argues that he has been treated unfairly intends to say that he has not been treated according to the rules; therefore, his rights have been violated.[80] Thus, following the rules is considered fair, and breaking the rules is considered unfair. As a result, fairness in its basic sense does not have a content of its own; it requires following the rules, but the rules change according to the social game that is considered, and with them the meaning of fairness changes as well.

Mediation is also a game with rules. We often identify the rules of mediation with the help of codes of conduct for mediators and mediation literature. When scholars in the field of mediation use fairness terminology, they usually intend to say that breaking rule X is unworthy and that it is unworthy because it is against the rules. For example, Stulberg, in his article on fairness and mediation, argued that treating the parties with dignity and respect is an aspect of procedural fairness in mediation.[81] From a normative conception of fairness perspective we would say that Stulberg assumes that there is a mediation rule according to which parties have a right to be treated with dignity and respect, and since fairness requires adherence to the rules, Stulberg comes to the conclusion that breaking that rule is unfair. This is, of course, merely one example of fairness because

77. *See* discussion *supra* Parts II.A–B.

78. BERNARD GERT, MORALITY: ITS NATURE AND JUSTIFICATION 196 (rev. ed. 2005) ("To talk about a person being fair presupposes that she is participating in some practice with rules that everyone in that practice is required to follow.").

79. Brad Hooker, *Fairness*, *in* 8 ETHICAL THEORY & MORAL PRAC. 329, 329 (2005) ("It is often thought that there is a kind of minimal fairness that involves interpreting and applying rules consistently—i.e., applying the same rules impartially and equally to each agent. Call this *formal* fairness.").

80. *See, e.g.*, Robert G. Bone, *Agreeing to Fair Process: The Problem with Contractarian Theories of Procedural Fairness*, 83 B.U. L. REV. 485, 507–08 (2003) ("Being made worse off is *unfair* only when a party has a right or other claim to be treated better. In other words, it is not the bare fact of a welfare loss that triggers unfairness; it is that fact coupled with a reason why the loss is one that the party *should not have to bear*.").

81. Stulberg, *supra* note 33, at 912–13; *see also* Maute, *supra* note 39, at 349.

fairness in its basic, formal sense simply demands the following of rules. Thus, undignified treatment of a mediation party is indeed unfair but so is—it is argued—disclosure of confidential information by the mediator, use of mediation information for the personal benefit of the mediator, preference of one of the parties based on prejudice, and so forth, all being valid examples of aspects of procedural fairness.

Every game has its own rules—rules that are not necessarily similar to the rules of other games. If we compare, for example, mediation with court proceedings, we would say that mediation has one set of rules and court proceedings have another. That is why, according to a conception of fairness in the sense of adherence to rules, mediation fairness will differ from the fairness of court proceedings. In fact, a similar approach is taken by Stulberg and Hyman & Love, who differentiate between legal fairness and mediation fairness.[82] The rationale behind their argument is exposed by the conception of fairness as adherence to rules: if mediation has different rules than legal proceedings, then mediation fairness cannot be the same as legal fairness. For example, it is possible that a mediation outcome is fair according to the rules of mediation (the agreement reflects the parties' informed choices about what they need), though it is unfair according to the rules of court proceedings (the agreement does not reflect the legal rights of the parties, and a court would have reached a different outcome). Similarly, a legal outcome might be considered unfair according to a mediation conception of fairness because it is imposed on the parties and does not address what they consider right.

All social games are part of a larger game: the grand game of living together in a society. A society has its own rules that apply to all members of society and to all the social games they participate in. There are two types of obligatory social rules that members of society must not ignore (normatively speaking): (1) moral rules, which derive their normative obligatory status from considerations of reason,[83] impartiality,[84] and

82. *See* Hyman & Love, *supra* note 70, at 160–61; Stulberg, *supra* note 32, at 215–16; Stulberg, *supra* note 33, at 910.

83. *See, e.g.*, JAMES RACHELS & STUART RACHELS, THE ELEMENTS OF MORAL PHILOSOPHY 13 (6th ed. 2010) ("Morality is, at the very least, the effort to guide one's conduct by reason—that is, to do what there are the best reasons for doing—while giving equal weight to the interests of each individual affected by one's decision. . . . [M]ost theories of morality incorporate the minimum conception, in one form or another.").

84. *See, e.g.*, DAVID E. COOPER, ETHICS FOR PROFESSIONALS IN A MULTICULTURAL WORLD 33 (2004) ("Before we can convince people about the legitimacy of universal moral claims, we all have to reach a consensus about an appropriate moral point of view from which to judge the validity of the reasons used to support broad universal claims. In ethics there is a general consensus that *the moral point of view* from which to judge and make claims has to be *a standpoint that is impartial*.").

rationality;[85] and (2) legal rules, which derive their normative obligatory nature from morality[86] and from the authority of law and its coercive nature.[87]There are, of course, other social rules that attempt to prescribe how people should behave (for example, religious rules and rules of grammar), but moral rules and legal rules have a unique position because they reflect fundamental ground rules that apply to all members of society, and as a result, to the participants of all social games.[88] Following H.L.A. Hart, the moral rules that I refer to here are not necessarily the norms actually accepted in a given society (positive morality), but those norms which can be rationally and impartially justified (critical morality).[89] What I shall call here a *narrow* normative conception of fairness focuses on a particular game and on the special rules that apply in that game. Hyman & Love's discussion of fairness in mediation as "justice from below" illustrates a narrow conception of fairness because it considers mediation as a process in which the parties are free to choose the rules and standards to be applied to their case.[90]

On the other hand, some scholars stress the point that mediations are held in a social context.[91] Thus, the rules of mediation are part of a larger system of social rules that regulates all aspects of social life and takes care of general social interests that go beyond the private interests of the players in a particular game. This shall be called here a *wide* conception of fairness. This conception of fairness entails a public feature, with the result that a violation of moral and legal rules that harms public interests is considered unfair. What occupies scholars who manifest this conception of fairness in their work is not only the relationship between the participants in the game but also the question of whether the participants' conduct is (normatively) fair to nonparticipants.[92] For example, Gibson and Joan Dworkin and William London (Dworkin & London) argue, on the basis of fairness

85. *See, e.g.*, BERNARD GERT, COMMON MORALITY 17 (2004) ("[G]iven agreement on the facts, a moral philosopher can show that a moral decision or judgment is mistaken if he can show that the moral decision or judgment is incompatible with the moral decisions or judgments that would be made by any impartial rational person.").

86. On the moral duty to obey the law see, for example, *id.* at 47–49; JOSEPH RAZ, THE AUTHORITY OF LAW 233–49 (2d ed. 2009); M.B.E. Smith, *Is There a Prima Facie Obligation to Obey the Law?*, 82 YALE L.J. 950, 951 (1973).

87. *See* HANS KELSEN, PURE THEORY OF LAW 33–37 (Max Knight trans., 2d ed. 1967).

88. *See* H.L.A. HART, THE CONCEPT OF LAW 86–87, 169–70 (2d ed. 1994).

89. H.L.A. HART, LAW, LIBERTY, AND MORALITY 20 (1963) (distinguishing "positive morality," the "morality actually accepted and shared by a given social group," from "critical morality," the "general moral principles used in the criticism of actual social institutions including positive morality").

90. *See* Hyman & Love, *supra* note 70, at 160–61; *see also* discussion *infra* Part IV.B.2(a).

91. *See, e.g.*, Maute, *supra* note 39, at 358.

92. *See, e.g.*, Gibson, *supra* note 63, at 203–04.

considerations, that mediators should consider the impact of the parties' decisions on third parties and on society at large in deciding whether and how to intervene in the process.[93] In other words, these writers see external social norms as applicable to mediation and therefore consider violations of those external norms to be unfair. A wide conception of fairness in mediation points to the limitations on mediation parties' freedom of choice. In this conception of fairness, justice from below is not without limitations, and mediation parties are not free to make any decision they wish to make.

The narrow and wide conceptions of fairness are not necessarily in competition. It is quite possible that a specific game incorporates into its rules some or all of the rules of law and morality, thus creating a full or partial overlap with the rules of the grand game—an overlap between the narrow and the wide conceptions. This is the case where, for example, codes of conduct for mediators expressly direct mediators to follow the law in the conduct of mediation.[94] I argue that the involvement of the mediator in the process of mediation results in the narrow and wide conceptions of fairness being intertwined to the effect that the rules of law and morality become an integral part of the rules of mediation.[95]

An account of fairness that requires adherence to both law and morality must acknowledge cases of conflict between law and morality. Is it fair, for example, to follow a legal but immoral rule? This Article will not discuss the complex question of conflicts between morality and law. I shall assume, for the purposes of this Article, that the fairness of actions from a wide perspective of fairness or from a narrow perspective of fairness in a game that incorporates law and morality into its rules (as opposed to the fairness of actions from a narrow perspective in a game which did not adopt the rules of law and morality) ultimately rests on compliance with morality.[96] Writers such as Greg Bognar and Hooker recognized a sense of

93. *See* Dworkin & London, *supra* note 33, at 12 ("There must be a regard for client self-determination, but at the same time, an ecological perspective acknowledges the boundaries of self-assertion and therefore interdependence with the larger system."); Gibson, *supra* note 63, at 203–04.

94. *See, e.g.*, FLORIDA RULES, *supra* note 2, § 10.360(a), at 100 (stating that mediator confidentiality does not apply to disclosure required by applicable law); MODEL STANDARDS, *supra* note 2, § V.A (stating the same).

95. *See infra* Part IV.B.3(c)–B.5.

96. I note that sometimes morality would justify following an immoral legal rule. *See, e.g.*, ST. THOMAS AQUINAS, THE SUMMA THEOLOGICA pt. II(I), question 96, art. 4 (Fathers of the English Dominican Province trans., Benziger Bros. ed. 1947), *available at* http://dhspriory.org/thomas/summa/FS/FS096.html#FSQ96A4THEP1 ("[A]s Augustine says (De Lib. Arb. i, 5), 'a law that is not just, seems to be no law at all.' Wherefore such laws do not bind in conscience, except perhaps in order to avoid scandal or disturbance . . . ."); Raymond Bradley, *The Relation Between Natural Law and Human Law in Thomas Aquinas*, 21 CATH. LAW. 42, 50 (1975) (explaining Aquinas as saying that "[t]here are occasions, however, when the apparent law

fairness—which I treat here as the wide conception—that goes beyond rigid adherence to the rules and resorts to the ground rules of morality that apply to the game.[97] Thus, from a narrow perspective, a game could be played in a fair manner if it is played by its rules notwithstanding the fact that these rules are immoral or illegal or produce immoral or illegal results. The same actions or results would be considered unfair from a wide perspective because they fail to comply with the rules of the grand game—i.e., the rules of law and morality. In the event that morality and law conflict, the fairness of these actions would ultimately depend on justifying the action or the result on moral grounds.

2. A Substantive Conception of Fairness: An Expectation to Play by the Rules According to the Purpose and Spirit of the Game

Rules can be understood, construed, applied, and enforced literally, formally, and without regard to circumstances, context, and changing reality. This Article refers to such an approach as a *formal* approach to rules. Alternatively, rules can also be understood, construed, applied, and enforced flexibly, accommodating circumstances, context, and reality, and in accordance with the nature of the game and its spirit. I shall refer to this as a *substantive–realist* (antiformalist) approach to rules.

Formalism and realism are well-known theories in the field of jurisprudence. Legal realism evolved in the United States at the beginning

(which in fact is unjust and hence no law at all) can be and should be obeyed. This obedience to unjust laws should be practiced in situations where by so doing one may avoid scandal or disturbance" (citing AQUINAS, *supra*, question 95, art. 4)); JOHN FINNIS, NATURAL LAW AND NATURAL RIGHTS 360 (1980) ("[I]t should not be concluded that an enactment which itself is for the common good and compatible with justice is deprived of its moral authority by the fact that the act of enacting it was rendered unjust by the partisan motives of its author.").

97. *See* Greg Bognar, *Impartiality and Disability Discrimination*, 21 KENNEDY INST. ETHICS J. 1, 15 (2011) ("[F]airness requires the *impartial application* of a rule, which means applying the rule consistently in each relevant situation and with regard to each person who is affected, taking into account only the morally relevant features of the situation and the affected persons. These are, however, only necessary conditions of fair choice. For it is possible to apply an unfair rule impartially: a rule that tells you never to keep your promises if doing so causes inconvenience for you can be applied consistently and impartially, but this does not make the breaking of promises fair. A fair choice is based on the impartial application of an appropriate rule. Thus, on this approach, the fairness of a choice depends on at least two components. First, the rule that is used to arrive at the choice must itself be morally justified. Second, the rule must be applied impartially." (footnote omitted)); *see also* Hooker, *supra* note 79, at 330 (discussing the meaning of a substantive sense of fairness: "[E]ven if we are unsure what substantive fairness is constituted by, we must distinguish between formal and substantive fairness. For, even if we cannot say what substantive unfairness is constituted by, we can tell that certain rules are substantively unfair. This is true, for example, of rules discriminating against people because of their religious, ethnic, or racial group."). I reserve "substantive fairness" for another purpose and refer to it as a wide conception of fairness. *See infra* Part III.A.2.

of the twentieth century as a reaction to the formalism in the court system and in law schools.[98]Realist literature suggested a distinction between what judges say they are doing and what they do in fact,[99] between legal rules in law books and the way legal rules are applied in reality,[100] and between theoretical legal education and practical and clinical legal education.[101]Across the ocean, English law developed the law of equity to redress the harshness of the common law, thereby empowering judges to prefer, in some instances, substance over form.[102]

Professional literature in areas other than mediation has recognized a connection between fairness and the preference of substance over form[103]and between fairness and equity.[104] This substantive approach is sometimes described as essential fairness in search of the truth.[105]

98. *See, e.g.*, Karl N. Llewellyn, *Some Realism About Realism—Responding to Dean Pound*, 44 HARV. L. REV. 1222, 1223 (1931) ("[W]hen law deals with words, they want the words to represent tangibles which can be got at beneath the words, and observable relations between those tangibles. They want to check ideas, and rules, and formulas by facts, to keep them close to facts. They view rules, they view law, as means to ends; as only means to ends; as having meaning only insofar as they are means to ends. They suspect, with law moving slowly and the life around them moving fast, that some law may have gotten out of joint with life.").

99. *See, e.g.*, Jerome Frank, *What Courts Do in Fact* (pt. 1), 26 ILL. L. REV. 645, 647–648 (1932) ("[A] knowledge of the so-called legal rules and principles is of less value in the job of prophesying what courts will do than is commonly supposed.); *id.* at 653 ("[T]alks with candid judges have begun to disclose that, whatever is said in opinions, the judge often arrives at his decision before he tries to explain it.").

100. *See, e.g.*, KARL N. LLEWELLYN, JURISPRUDENCE: REALISM IN THEORY AND PRACTICE 21–22 (1962).

101. *See, e.g.*, Jerome Frank, *Why Not a Clinical Lawyer-School?*, 81 U. PA. L. REV. 907, 907–13 (1933) (discussing the shortcomings of traditional legal education); Jerome Frank, *A Plea for Lawyer-Schools*, 56 YALE L.J. 1303, 1303–07 (1947).

102. *See, e.g.*, P.M. Spink & C.A. Ong, *Substance Versus Form: Anglo-Australian Perspectives on Title Financing Transactions*, 63 CAMBRIDGE L. J. 199, 199–200 (2004) ("The venerable doctrine of substance over form . . . is well-known in English law. In abstract construction, the doctrine confirms the prevalence of equitable principles of justice and fairness over conflicting provisions of the common law . . . . Equity traditionally looks to the substance, rather than the pedantic form, of a transaction, whereas the common law, in contrast, is generally blind to circumstantial issues in giving precedence to the latter." (footnotes omitted)).

103. *See, e.g.*, John A. Miller, *Indeterminacy, Complexity, and Fairness: Justifying Rule Simplification in the Law of Taxation*, 68 WASH. L. REV. 1, 14 (1993) ("The central fairness or unfairness of the tax is measured by whether it reaches past the form to the substance of the transaction or other taxable event."); *id.* at 15 ("[T]he rule maker exalts substance over form as the embodiment of fairness."); *id.* at 70 ("[F]airness cannot be achieved mechanically through the use of unbending rules.").

104. Carol Bohmer & Marilyn L. Ray, *Notions of Equity and Fairness in the Context of Divorce: The Role of Mediation*, 14 MEDIATION Q. 37, 37–38 (1996) (using the terms fairness and equity interchangeably and noting the connection between the term *equity* and the English courts of equity).

105. *See, e.g.*, Miller, *supra* note 103, at 19 n.74 ("[I]n an attempt to provide certainty, the regulations can lead to unfair results that do not reflect economic reality." (quoting Am. Bar Ass'n Section of Taxation Task Force on Passive Losses, *Preamble to the Comments on Activity Regs*,

Philosopher Craig L. Carr described this aspect of fairness as "fidelity to the game."[106] A preference for substance over form does not mean following the rules of the game no matter what; it means following the rules in a way that fulfills the purpose and spirit of the game,[107] and refraining from conduct that is in accordance with the rules but results in an outcome that is inconsistent with the purpose of the game.

A substantive approach to rules can be applied to the norms of mediation with the result that substance over form is preferred in the understanding and application of mediation norms. This approach can be applied to any principle of mediation: party self-determination, informed consent, impartiality, mediator competence, and so forth. As we shall see, several scholars in the field of mediation and the drafters of the codes of conduct for mediators make a link, sometimes unconsciously, between a substantive approach to principles of mediation and mediation fairness.[108] I shall refer to this sense of fairness as a *substantive* conception of fairness to be distinguished from a formal conception of fairness. For the sake of clarity, it should be noted that a substantive conception of fairness is not substantive fairness in a sense of outcome fairness,[109] but in a sense of substantive interpretation of mediation rules that apply both to the process and outcome of mediation.

Mediation scholars who use fairness in its substantive sense (without noting the difference between that sense of fairness and formal fairness) try in fact to argue in favor of choosing the interpretation of a mediation rule

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44 TAX NOTES 1277, 1278–79 (1989))); *see also* MINN. CT. R. 102, *available at* https://www.revisor.mn.gov/court_rules/rule.php?name=ev-102 ("These rules shall be construed to secure fairness in administration, elimination of unjustifiable expense and delay, and promotion of growth and development of the law of evidence to the end that the truth may be ascertained and proceedings justly determined."); *id.* committee cmt. ("*The rules should not be read narrowly but with a view for accomplishing essential fairness, with a minimum of formality and procedural obstacles in the search for the truth. The rules provide for a great deal of flexibility and discretion.* [R. 102] *urges that such discretion and flexibility be exercised to accomplish the stated purpose.*").

106. Craig L. Carr, *Fairness and Political Obligation—Again: A Reply to Lefkowitz*, 30 SOC. THEORY & PRAC. 33, 44 (2004) ("As I understand fairness, this is what fair play should require; fidelity to the game means making sure things go as they should even when the rules might work in the other direction. It seems . . . that sometimes insisting upon a strict adherence to rule can actually constitute a form of unfair play.").

107. *E.g.*, WORLD FLYING DISC FED'N, WFDF RULEBOOK R. 103, at 2 (11th ed. 1998) [hereinafter WFDF RULES], *available at* http://www.wfdf.org/sports/rules-of-play/cat_view/26-rules-of-play/68-wfdf-rulebook (follow "WFDF Rulebook - Article I GENERAL" hyperlink) ("Any rule set forth in Articles II through VIII shall be construed in accordance with the purpose for the rule, in a manner of consistency and fairness, exercising substance over form, with due regard to the spirit and gamesmanship fundamental to disc sports . . . .").

108. *See* discussion *infra* Part IV.A.

109. See Dworkin & London, *supra* note 33, at 5, for a discussion of substantive fairness as outcome fairness.

that best promotes the purpose of the rule or the purpose of mediation rules as a whole.[110] Fair behavior according to the substantive conception of fairness would correspond with the true meaning of the rules, a meaning that derives from the purpose of the rules and the spirit of the game.[111] When a scholar in the field of mediation feels that a particular interpretation of a mediation rule or the particular conduct of the mediator or of one of the parties does not correspond with the purpose or spirit of mediation she would describe it as an aspect of unfairness. For example, when Stulberg discussed the procedural aspects of mediation fairness he argued that "[b]eing sensitive to how differences in conversational styles between women and men or between persons of different ethnic backgrounds are permitted to play out in a mediated conversation is an important indicator of fairness."[112] It seems that Stulberg applied a substantive, antiformalist approach to the principle of party self-determination and described its product as fairness. What he is really saying is that true self-determination can only materialize in circumstances in which the parties have a real opportunity to choose what to say and how to say it, and that this interpretation of self-determination is an aspect of fairness. In a more recent article on justice and mediation Stulberg considered the voluntariness of the parties' decisions as a feature of fairness and distinguished between formal consent, which results in an unfair outcome, and substantive consent, which results in an outcome that could be considered fair.[113] Again, it seems that Stulberg applied a substantive approach, which he considered as a condition of fairness, to the principle of party self-determination.[114]

Nolan-Haley, in her article on informed consent in mediation, demonstrated what a substantive conception of fairness is.[115] Nolan-Haley argued that informed consent is an essential aspect of party self-determination[116] and fairness,[117] and that "[w]ithout it, mediation's promises of autonomy and self-determination are empty."[118] In construing the meaning of informed consent she distinguished between illusory and real

110. *See id.* at 4 ("The fairness of mediated agreements . . . must be seen in the relationship to the good of the entire . . . system . . . .").

111. *See* Carr, *supra* note 106, at 44 (arguing for an interpretation of the rules of a game that reaches an equitable result); *see also* WFDF RULES, *supra* note 107, R. 103, at 2.

112. Stulberg, *supra* note 33, at 915 (footnotes omitted).

113. *See* Stulberg, *supra* note 32, at 222 ("I believe that any outcome that results from coercion is troublesome, for we would not be confident that the terms of agreement reflected what each party was *actually* willing to do." (emphasis added)).

114. *See* Stulberg, *supra* note 33, at 915.

115. Nolan-Haley, *supra* note 1.

116. *Id.* at 789.

117. *Id.* at 787.

118. *Id.* at 840.

consent, and advocated a substantive, realist understanding of consent and decision-making in mediation.[119] In other words, she equated a substantive approach to the construction of mediation principles with fairness.[120]

B. Perceptions of Fairness

Alongside the treatment of fairness as a normative conception, which describes how mediation *ought* to be conducted, a close reading of mediation literature and the codes of conduct for mediators reveals that fairness is also considered as a perception, which describes how people *view* mediation. In the rest of this part I shall discuss three perceptions of fairness.

1. A Personal Perception: The Experience of Participants in the Game

For Hyman & Love, the key measure to assess mediation fairness is the parties' experience of the process.[121]Like other writers, they present mediation fairness as a subjective issue dependent on personal views and judgments. On this approach, fairness is a vague term that reflects the personal preferences of participants; therefore, it is quite possible that what is perceived to be fair in the eyes of Participant *A* would be experienced as unfair in the eyes of Participant *B*.[122]

This kind of writing reflects a personal perception of fairness: fair conduct and fair outcomes are those actions and outcomes that the parties

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119. *See id.* at 778–79 ("[T]he state of informed consent in mediation today is often more illusory than real. . . . I argue . . . against a 'thin' conception of the principle of informed consent, one that is satisfied with signed forms to indicate that disclosures have been provided and that individual consent is freely given." (footnote omitted)).

120. *Cf.* Jacqueline M. Nolan-Haley, *Court Mediation and the Search for Justice Through Law*, 74 WASH. U. L.Q. 47, 87 (1996). Nolan-Haley connects between real, substantive understanding of rules and fairness when she discusses the ties between self-determination and justice in court-connected mediation: "Even mediation's most favored virtue, self-determination, may be of limited value as an indicator of the justice of court mediation. Without knowledge of their legal rights, the exercise of self-determination is simply a feel-good process." *Id.* (footnote omitted).

121. *See* Hyman & Love, *supra* note 70, at 164 ("For our discussion, the parties' own views of justice, not the views of judges and lawyers, become the key measure of justice in mediation.").

122. *See* Hyman, *supra* note 32, at 22 ("Differences about what is fair stem from different perceptions about the facts, different expectations for the future, and different experiences and assumptions about what people are like, and not from differences about abstracted logic."); *see also* Kevin Gibson, *The Ethical Basis of Mediation: Why Mediators Need Philosophers*, 7 MEDIATION Q. 41, 46 (1989) (explaining that different personal ethical theories lead to different views of satisfaction in negotiations); Kevin Gibson, Leigh Thompson & Max H. Bazerman, *Shortcomings of Neutrality in Mediation: Solutions Based on Rationality*, 12 NEGOT. J. 69, 75 (1996) ("What is considered fair by one party may differ dramatically from what is considered fair by another, with both points of view equally convincing, yet conflicting.").

view as fair. Obviously the mediator has a personal perception of fairness that is not necessarily similar to the parties' perception of fairness.[123]However, mediators are commonly expected to play down their perceptions of fairness and give priority to the parties' perceptions of fairness. This expectation derives from the normative rules of mediation, which direct mediators to conduct the mediation on the basis of party self-determination and avoid conduct that might jeopardize their neutral, impartial position.[124]

2. An Average or Psychological Perception: The Experience of Participants in Similar Games

Another perception of fairness that mediation literature refers to describes, on the basis of empirical research, the subjective experience of participants (in terms of procedural fairness and outcome fairness) in conflict resolution processes. This research is a growing field that is sometimes termed "the psychology of fairness."[125] Relying on the findings of that research, Professors Welsh and Young argued that participants are more likely to perceive mediation as a fair process where (1) they had an opportunity to express themselves, tell their story, and control its presentation, (2) the mediator considered their story, (3) the mediator treated them with dignity and respect, and (4) the mediator treated them evenhandedly.[126] Mediation authors such as Professors Welsh and Nolan-Haley have been influenced by these studies, have applied them to mediation, and have advocated ensuring procedural fairness in order to

123. *See* Dworkin & London, *supra* note 33, at 5 (discussing mediator and mediation parties' definitions of fairness); *see also* Hyman, *supra* note 32, at 21 ("This article discusses . . . whether and how the parties and the mediator deal with their own senses of justice and fairness as they mediate . . . .").

124. *E.g.*, MODEL STANDARDS, *supra* note 2, §§ I, II.

125. Sivasubramaniam & Heuer, *supra* note 57, at 62.

126. Welsh, *supra* note 33, at 792 ("Procedural justice research indicates clearly that disputants want and need the opportunity to tell their story and control the telling of that story; disputants want and need to feel that the mediator has considered their story and is trying to be fair; and disputants want and need to feel that they have been treated with dignity and respect." (footnotes omitted)); Young, *supra* note 61, at 782–83 ("Research on procedural justice has found that it has essentially four parts. First, parties need to feel that they have sufficient time and opportunity to tell their stories about the dispute, voice their concerns, and offer evidence in support of their views. They need to have some control over the presentation of this information. The literature has called this component of procedural justice 'voice.' Second, parties need to feel that the third-party—whether a judge, an arbitrator, or a mediator—has considered those stories, concerns, and the evidence. Third, disputing parties need to feel that the third-party has treated the parties even-handedly. Finally, parties must feel that the third-party treated them politely and with respect and dignity.").

enhance the perception of mediation as a fair process.[127] I call this perception of fairness an average or psychological perception of fairness, because unlike the personal perception of fairness, it does not describe the actual perceptions of specific participants in a particular process, but rather the aggregated experiences of participants in similar processes.

Since the phrase *procedural fairness* is common in mediation literature and in the codes of conduct for mediators it is important to be aware of its dual meaning: procedural fairness in the sense of an average or psychological perception of fairness, which is based on empirical research; and procedural fairness in the sense of a normative conception of fairness, as in the codes of conduct that promise procedural fairness[128]and determine how mediation ought to be conducted. This observation emphasizes that while mediation practice can benefit from procedural fairness research by learning how to promote parties' experiences of fairness, noncompliance with the conditions of fairness identified in procedural fairness research[129] does not necessarily mean that the process is unfair in a normative sense.

A perception and conception of procedural fairness are not necessarily the same for several reasons. One reason is that one could wrongly believe that he has been mistreated in violation of the rules even though this has not been the case. For example, a mediation party might wrongly suspect the mediator's conduct to be biased or disrespectful, thus perceiving the mediation as unfair, though normatively the mediator might have conducted himself in accordance with the rules (i.e., impartially and with dignity and respect) and in that case, the process cannot be said to be normatively unfair.

Another reason is that parties could decide to waive one of the features identified in research as part of procedural fairness. According to fairness research, a party who participated actively in the process and told his story would tend to perceive the process as fairer than a passive party who did not attend mediation or left active participation to his representatives.[130] In fact, the situation is more complicated than that. A party who attended mediation but chose not to participate actively would still perceive the mediation to be fair if he had a good relationship with his representative and he felt that the latter understood him and presented his story accurately.[131]These are important issues if one is interested (as one should

127. *See* Nolan-Haley, *supra* note 120, at 90 ("Procedurally, parties should experience the functional equivalent of having their day in court."); Welsh, *supra* note 33, at 838–58; Welsh, *supra* note 59, at 7–8, 16.

128. *E.g.*, MODEL STANDARDS, *supra* note 2, § VI.

129. *See supra* notes 125–26 and accompanying text.

130. *See* Welsh, *supra* note 33, at 792.

131. *Id.* at 844–46.

be) in improving the perception of the fairness of mediation among parties. It is desirable from this point of view to involve parties in the mediation, and if they prefer their lawyer to speak on their behalf, it would be helpful if there is a sound relationship between lawyer and client. But note that these factors do not determine the fairness of mediation from a normative perspective. Normatively, the manner of party participation is regulated by the mediation norm of party self-determination. Thus, it is the parties' decision whether to tell their story directly or not. A decision of a party to waive the right to participate actively in mediation would be an exercise of self-determination in accordance with the rules of mediation, and thus the mediation would not be considered unfair in a normative sense. From a normative conception of fairness perspective, a mediation in which a party does not speak and willingly leaves active participation to his lawyer would be a fair process as long as that party exercised self-determination.[132] Of course, in order for that determination to be *real* and not illusory it must stand a substantive test: a party should make that decision with an understanding of the advantages of active participation and without pressures from mediators or lawyers who might be tempted to dominate the process for efficiency or convenience reasons. With this test satisfied, that party might perceive the process as less fair than a process the party would have participated in actively, but from a normative conception of fairness perspective, the mediation cannot be considered unfair.

3. A Public Perception: The Experience of the Public

A third perception of fairness that mediation literature and the codes of conduct for mediators refer to focuses on the experience of the general public of the fairness of mediation. Writing that reflects a public perception of fairness assumes that the public's experience of a particular process as fair or unfair affects public trust in that process.[133] Thus, public trust in the process of mediation is viewed as dependent on the propriety of mediation events such as the conduct of the participants, the conduct of mediators, and the content of mediation outcomes. It further assumes that mediation conduct and outcomes that are perceived by the public as fair will promote public confidence in mediation. For example, the Model Standards of Conduct for Mediators (Model Standards) prohibit mediators to conduct mediation when the "mediator's conflict of interest might reasonably be viewed as undermining the integrity of the mediation . . . regardless of the

132. *See supra* notes 115–19 and accompanying text.

133. *See, e.g.*, JAMS GUIDELINES, *supra* note 12, § V, at 2 ("A mediator should withdraw if a conflict of interest exists that casts serious doubt on the integrity of the process.").

expressed desire or agreement of the parties to the contrary."[134] Thus, the Model Standards prefer to adopt a public perception of fairness over the personal perception of fairness of the parties.

The public perception of fairness differs from the personal and average perceptions of fairness[135] on several grounds. First, the public perception is *external* to the process because the public does not participate in the process. While the personal perception reflects the point of view of the parties who participate in the mediation and asks what is fair in the parties' view, and the average or psychological perception focuses on participants who had participated in mediations and asks what parties *usually* perceive as fair, the public perception of fairness adopts the point of view of the general public and asks what is likely to be perceived as fair in the public's eye.

Second, the public perception of fairness is based on information that is more limited than the information available to the participants in a conflict resolution process.[136] In mediation, as opposed to the majority of court proceedings, the public would usually not be aware of the manner in which the mediation had been conducted or of its outcome. Despite that, in those instances in which the public has learned from different sources about a mediation or its outcome it might perceive the process as fair or unfair. It would be accurate to observe that the public perception of fairness is of a more speculative nature than the other perceptions because of the difficulties in assessing public views. Practically, however, these views may be measured empirically (for example, through polls) or evaluated by other means—such as a reasonableness test, for example, which asks how a reasonable person would likely perceive the process.

Finally, in comparison with the other perceptions of fairness, the public perception of fairness takes into account a wider range of considerations that might cause an experience of unfairness.[137] While the public would probably be influenced in forming its view of mediation by the social implications of the procedure and its outcome, the parties might be more interested in satisfying their own private interests, even when the latter come at the expense of public interests. Thus, while the parties are likely to perceive the fairness of the process (i.e., form a personal

134. MODEL STANDARDS, *supra* note 2, § III.E.

135. *See* discussion *supra* Parts III.B.1, III.B.3.

136. *See* Gibson, *supra* note 63, at 197 ("Typically mediation operates in an atmosphere of confidentiality and without routine oversight, and hence there are few ways to judge the quality of outcomes . . . ."); *see also* MODEL STANDARDS, *supra* note 2, § V.A ("A mediator shall maintain the confidentiality of all information obtained by the mediator in mediation . . . .").

137. *See* Gibson, *supra* note 63, at 203–04 (discussing the public externalities of mediated outcomes).

perception of fairness) according to the extent their personal interests are met, the public would probably pay attention to the impact of the mediation on societal interests. For example, the public might form its opinion on the fairness of a mediation outcome on considerations such as the agreement's implications on third parties, on the environment, and on public health. The parties, on the other hand, might be content in their evaluation of the fairness of the agreement because of the fact that it satisfies their personal needs and interests. While it is not easy to identify the precise content of the public perception of outcome fairness because "the public" is an amorphous body and we do not have exact information about its "opinion," the question that this perception poses—what is fair in the public's view—is clearly independent and capable of producing different answers from the questions the other perceptions of fairness raise: what is fair in the parties' view (personal perception), and what is fair in the eyes of parties who had participated in mediations (average or psychological perception).

IV. THE THEORY'S CONTRIBUTION TO MEDIATION DISCOURSE

The purpose of this part is to demonstrate how the different perspectives of fairness can contribute to mediation discourse. For reasons of space, I shall focus on three issues: should mediators address power imbalances, and if they should, how could this directive be reconciled with the principle of mediator impartiality? What is a fair mediation outcome? And are mediators accountable for the fairness of mediation outcomes?

A. Impartiality and Power Imbalance Between Parties: A Formal and Substantive Reading

In 1991, Professors Janet Rifkin, Jonathan Millen, and Sara Cobb published an innovative article on mediation neutrality.[138] The article showed how neutrality, which is central to mediation discourse, leads mediators to dilemmas in the practice of mediation.[139] On the basis of empirical examination of mediation sessions they argued that neutrality has two aspects: impartiality and equidistance.[140] According to Rifkin, Millen & Cobb, "[i]mpartiality . . . refers to the ability of the mediator (interventionist) to maintain an unbiased relationship with the disputants. In

138. Janet Rifkin, Jonathan Millen & Sara Cobb, *Toward a New Discourse for Mediation: A Critique of Neutrality*, 9 MEDIATION Q. 151 (1991); *see also* Sara Cobb & Janet Rifkin, *Practice and Paradox: Deconstructing Neutrality in Mediation*, 16 LAW & SOC. INQUIRY 35 (1991) (offering an alternative definition of neutrality).

139. Rifkin, Millen & Cobb, *supra* note 138, at 152.

140. *Id.*

other words, the mediator should handle the case without favoring or supporting one party for the sake of the group. Impartiality demands an unbiased approach to mediating."[141] Equidistance has been described as:

> [T]hose practices by which mediators support or encourage the disclosure of the disputants. Equidistance works to the extent that the mediator can assist each person equally. In contrast to impartiality, where neutrality is understood as the ability to suspend judgment, equidistance is the active process by which partiality is used to create symmetry.[142]

Rifkin, Millen & Cobb suggested that the tension between these aspects of neutrality was responsible for the difficulties that mediators experience when they attempt to preserve neutrality.[143]

Codes of conduct for mediators rarely use the terms *neutrality* and *equidistance*. Instead, they refer to a duty of the mediator to act impartially;[144] thus, I focus on the meaning of that term. Following Part III, the mediator's duty to act impartially can be understood through two normative approaches: a formalist, literal approach and a substantive, antiformalist approach. On a formalist, literal approach, circumstances in which a mediator treats one of the parties differently would be considered an improper favoritism in violation of the principle of impartiality. This approach reflects a concept of *formal* equality that ignores the differences between parties and focuses on the obligation to treat them similarly.[145] This seems to be the way Rifkin, Millen & Cobb defined impartiality. Another commentator, Alison Taylor, referred to this conception of impartiality as strict neutrality.[146]

Alternatively, the duty of impartiality can be looked at through a substantive, realist lens. This approach recognizes that mediation parties might have different intelligence, skills, knowledge, economic resources, social status, and so forth. With this in mind, acknowledging that parties are different, the substantive approach adopts a concept of *substantive* equality, according to which the same treatment in circumstances in which the parties are not equal is, in itself, an improper favoritism—or partiality—of the

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141. *Id.*

142. *Id.* at 153.

143. *Id.*

144. *E.g.*, FLORIDA RULES, *supra* note 2, § 10.330(a), at 98; MODEL STANDARDS, *supra* note 2, § II.A; FAMILY MEDIATION MODEL STANDARDS, *supra* note 23, § IV; ALABAMA CODE, *supra* note 9, § 5(A); GEORGIA STANDARDS, *supra* note 3, § III, at 27.

145. *See, e.g.*, Rifkin, Millen & Cobb, *supra* note 138, at 152 (stating that the core tenet of impartiality is a lack of bias); Alison Taylor, *Concepts of Neutrality in Family Mediation: Contexts, Ethics, Influence, and Transformative Process*, 14 MEDIATION Q. 215, 225 (1997) (referring to impartiality as "having to do to one side what you do to or for the other").

146. *See* Taylor, *supra* note 145, at 226–27 (describing the concept of strict neutrality).

stronger party.[147] Thus, taking this approach to impartiality, mediators may (and in fact must) consider the relevant differences between the parties, and a different treatment would, in these circumstances, be considered a legitimate preference.[148] This approach seems to correspond to what Rifkin, Millen & Cobb referred to as equidistance and to what Taylor termed expanded neutrality.[149]For example, if one party is incapable of understanding the mediator or other parties, the party should receive assistance in various forms, such as translation, slower talking, or additional time for expressing himself, even though this would mean that he received a different treatment. To ignore the differences between the parties in such circumstances and insist on treating the parties in the same manner would in fact favor the stronger party.

How should mediators choose between these competing conceptions of impartiality? Provisions on impartiality in codes of conduct for mediators do not choose between them,[150] and thus leave the mediator without proper guidance. I do not intend to provide a comprehensive set of arguments for adopting one conception over the other. My aim is merely to illustrate the contribution of a coherent theory of fairness to the discussion.

If we understand fairness as adherence to the rules of mediation without passing judgment on the content of these rules—fairness in a formal sense—[151]then in the absence of convincing argument to the effect that the correct interpretation of the rule on impartiality requires in certain circumstances different treatment, mediators who adopted the formal conception of impartiality might argue that they acted fairly

147. *See supra* notes 103–07 and accompanying text.

148. For scholarship supporting mediator intervention in situations of imbalance of power between the parties see, for example, Grillo, *supra* note 39, at 1592 ("Mediation literature has addressed the problem of unequal bargaining power between the parties by suggesting that the mediator use a variety of techniques to 'balance the power.'"); Robert A. Baruch Bush, *The Dilemmas of Mediation Practice: A Study of Ethical Dilemmas and Policy Implications*, 1994 J. DISP. RESOL. 1, 25–26 (discussing situations of an imbalance of power in which "mediators often feel impelled to intervene in a directive way"); James B. Boskey, *The Proper Role of the Mediator: Rational Assessment, Not Pressure*, 10 NEGOT. J. 367, 367 (1994) ("[The] view, often expressed in the family and community dispute mediation communities . . . is that one of the primary purposes, if not the primary purpose, of mediation is to balance the power between the parties to insure that a 'fair' agreement results."); Michael Coyle, *Defending the Weak and Fighting Unfairness: Can Mediators Respond to the Challenge?*, 36 OSGOODE HALL L.J. 625, 649 (1998) ("[M]any mediation practitioners advocate efforts by the mediator to . . . empower the weaker party.").

149. Rifkin, Millen & Cobb, *supra* note 138, at 152; Taylor, *supra* note 145, at 226–27, 233 (discussing a concept of expanded neutrality which allows for party empowerment and power balancing).

150. *E.g.*, MODEL STANDARDS, *supra* note 2, § II; GEORGIA STANDARDS, *supra* note 3, § III, at 27.

151. *See supra* Part III.A.1.

notwithstanding the fact that the parties were in a state of power imbalance. There are, however, a number of reasons in support of the view that these mediators would be wrong to do so.

First, quite often the codes of conduct guide mediators—in provisions other than the standard of impartiality—to conduct the mediation in a manner which results in different treatment of one of the parties. For example, the Model Standards provide that "[i]f a party appears to have difficulty comprehending the process, issues, or settlement options, or difficulty participating in a mediation, the mediator should explore the circumstances and potential accommodations, modifications or adjustments that would make possible the party's capacity to comprehend, participate and exercise self-determination."[152] The Mediation Council of Illinois Professional Standards of Practice for Mediators provides that "[t]he mediator . . . must attempt to defuse any manipulative or intimidating negotiating techniques utilized by either of the parties";[153] and the Model Standards of Practice for Family and Divorce Mediation direct mediators in mediations involving domestic abuse to "take appropriate steps to shape the mediation process accordingly."[154] These guidelines can only make sense if one is willing to adopt a substantive understanding of impartiality. In addition, some codes use terms like *evenhandedness* or *balanced negotiation* and other language that indicates a license to depart from strict or formal impartiality.[155] If this is the case, then a mediator who wishes to act fairly in a formal sense of fairness—in the sense of following the rules—must adopt a substantive conception of impartiality. On the other hand, some codes of conduct require mediators to avoid conduct that gives an appearance of partiality.[156] One might think that such a provision

152. MODEL STANDARDS, *supra* note 2, § VI.A.10; *see also* N.C. STANDARDS, *supra* note 11, § IV.C, at 4.

153. ILLINOIS STANDARDS, *supra* note 20, § VI.C.

154. FAMILY MEDIATION MODEL STANDARDS, *supra* note 23, § X, at 8; *see also* ILLINOIS STANDARDS, *supra* note 20, § I.F.; MODEL STANDARDS, *supra* note 2, § VI.B.

155. *E.g.*, FAMILY MEDIATION CANADA CODE, *supra* note 13, art. 9.4, at 2 ("The mediator has a duty to ensure balanced negotiations and must not permit manipulative or intimidating negotiating tactics. While mediators must be impartial towards the participants, impartiality does not imply neutrality on the issue of procedural fairness."); FLORIDA RULES, *supra* note 2, § 10.410, at 103 ("A mediator shall conduct mediation sessions in an even-handed, balanced manner."); ILLINOIS STANDARDS, *supra* note 20, § IV.A ("Impartiality is not the same as neutrality in questions of fairness. Although a mediator is the facilitator and not a party to the negotiations, should parties come to an understanding that the mediator finds unconscionable or grossly unfair, the mediator is not obligated to write up a mediation agreement."); OREGON STANDARDS, *supra* note 2, § III, at 3 ("Mediators demonstrate Impartial Regard throughout the mediation process by conducting mediations . . . even-handedly . . . ."); *see also* AUSTRALIA GUIDELINES, *supra* note 4, § 2, at 3 ("A mediator may mediate only those matters in which the mediator can remain impartial and even handed.").

156. *See, e.g.*, MODEL STANDARDS, *supra* note 2, § II.B.

supports a formal sense of impartiality, encouraging mediators to treat parties exactly the same. But note that mediators can control, to some extent, the impressions the parties might have by conducting separate meetings, referring parties to external experts, and relying on the parties' lawyers. By doing so, mediators can address power imbalances and at the same time maintain an appearance of impartiality.

Second, even when a substantive meaning of impartiality cannot be implied from the language of a particular code of conduct, mediators who adopted a formal conception of impartiality would be criticized as unfair from a substantive fairness perspective and thus should prefer a substantive interpretation of impartiality. As we have seen, a substantive conception of fairness is not satisfied with strict adherence to rules. It evaluates the content of the rule and the actions of those who follow the rule according to the extent to which they fit the purpose and spirit of the rule and of the game as a whole, and according to the manner in which they interact with reality and context.[157] Some scholars in the field of mediation have expressly endorsed a substantive conception of fairness that they equated with substantive equality. Professor Trina Grillo, for example, argued that "[e]quating fairness in mediation with formal equality results in, at most, a crabbed and distorted fairness on a microlevel; it considers only the mediation context itself. There is no room in such an approach for a discussion of the fairness of institutionalized societal inequality."[158] Allan Barsky, discussing the termination of mediation due to abuse, noted that "[f]airness refers to the notion that individuals or groups ought to be treated in an equitable manner. Fair treatment does not necessarily mean equal treatment or treating everybody in the same way. Fairness takes the parties' differences into account."[159] This approach is by no means limited to mediation literature, and writers in other fields have also argued that fairness requires a substantive reading of the norm of equality,[160] naming such conception substantive fairness.[161]Thus, mediators who conduct the

157. *See supra* Part III.A.2.

158. Grillo, *supra* note 39, at 1569; *see also* Bohmer & Ray, *supra* note 104, at 45 (citing Grillo, *supra* note 39, at 1569).

159. Barsky, *supra* note 38, at 26.

160. *See, e.g.*, THE OXFORD COMPANION TO PHILOSOPHY 288 (Ted Honderich ed., 2d ed. 2005) [hereinafter OXFORD COMPANION] ("Fairness . . . requires that any two individuals be treated equally unless there is some morally relevant distinction between them.").

161. *See, e.g.*, Susan Sturm & Lani Guinier, *The Future of Affirmative Action: Reclaiming the Innovative Ideal*, 84 CALIF. L. REV. 953, 964 (1996) ("[Formal fairness], which we call fairness-as-sameness, emphasizes the importance of treating everyone the same, giving everyone the same formal opportunity to enter the competition for a position, and evaluating each person's results the same way."); *id.* at 981 ("[Substantive fairness] challenges the assumption that in all situations sameness equals fairness. It focuses on providing members of various races and genders

mediation on the basis of a formal conception of impartiality would be criticized as unfair on a substantive fairness account.

Third, a substantive conception of impartiality should be preferred to a formal conception of impartiality because it complements a substantive conception of self-determination, which is, as we have seen, an aspect of substantive fairness.[162] There is a strong connection between impartiality and party self-determination. The principle of party self-determination guarantees the central role of the parties in the decision-making process in mediation.[163] Mediators who adopt a formal conception of impartiality might not intervene in circumstances that jeopardize the ability of the parties to exercise a "real," substantive self-determination.[164] For example, a party who cannot express himself adequately due to poor command of language or because he is shy might have difficulty in participating meaningfully in the mediation sessions. A mediator who subscribes to formal conceptions of impartiality and self-determination would tend not to intervene:[165] at the end of the day, that party does not have to sign a settlement agreement and may withdraw from mediation at any stage. Alternatively, a mediator who abides substantive conceptions of impartiality and self-determination would take steps to enable that party to participate meaningfully in the process.[166] For example, the mediator might give him more time to talk, meet with him privately, and suggest he bring someone supportive to the mediation room. Thus, from a substantive conception of fairness perspective, mediators must be willing to abandon the formal conception of impartiality and adopt a substantive understanding of impartiality. This would enable them to conduct mediation fairly, on the basis of real (substantive) party self-determination.

Finally, a substantive understanding of impartiality could be supported by an average or psychological fairness perspective. Procedural fairness research has shown that participants in processes of conflict resolution are

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equivalent opportunities to demonstrate their capacities."); Charmaine de los Reyes, *Revisiting Disclosure Obligations at the ICTR and Its Implications for the Rights of the Accused*, 4 CHINESE J. INT'L L. 583, 595 (2005) ("[S]ubstantive equality and fairness should not require full reciprocal disclosure obligations of [the defense and the prosecution]. Although this would fulfil[l] the goal of formal fairness, substantive fairness would not be achieved."). "[R]equiring such disclosure would have the practical affect [sic] of the defen[s]e assisting the Prosecutor to make its case against the accused." *Id.*

162. *See supra* notes 112–13 and accompanied text.

163. *E.g.*, MODEL STANDARDS, *supra* note 2, § I; *see also* Omer Shapira, *A Theory of Sharing Decision-Making in Mediation*, 44 MCGEORGE L. REV. (forthcoming 2013) (manuscript at 4), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2102997.

164. *See supra* Part III.A.1.

165. *Id.*

166. *See supra* Part III.A.2.

not satisfied with impartiality of third parties who conduct the process; they expect third parties to act evenhandedly, and when the latter act that way the process is more likely to be perceived as fair.[167] This is not a normative argument in favor of a substantive understanding of impartiality, but it does indicate what mediation parties might wish the process to look like. Since mediation places much weight on the parties' preferences and choices, as reflected in the centrality of party self-determination in codes of conduct for mediators and in mediation literature in general, it seems that mediators should at least discuss with the parties their expectations of the mediator with respect to impartiality and not automatically adopt a formal conception of impartiality.

In conclusion, looking at the meaning of impartiality and the issue of power imbalance from the normative perspectives of fairness provides a justification for preferring a substantive rather than a formal meaning of the impartiality rule.[168] In other words, from a normative perspective of fairness mediators who treat unequal parties differently act impartially and fairly. However, fairness cannot provide the precise criteria for identifying the exact circumstances in which such treatment would be justified.[169] Establishing when a mediator's conduct that favors one party on the basis of power imbalance would be legitimate requires a much closer look at the principles of impartiality and self-determination than this Article can offer.[170]

B. Making Sense of Outcome Fairness and Mediators' Accountability for Unfair Outcomes

1. No Definition of Outcome Fairness in Codes of Conduct for Mediators

Codes of conduct for mediators do not provide a definition of a fair outcome. One can guess the meaning of outcome fairness from infrequent references to both fairness and mediated agreements in the same standard. One such rare example can be found in Georgia's Ethical Standards for Mediators, which provide in a standard of fairness that "[t]he mediator is

167. Welsh, *supra* note 33, at 820–21.

168. The mediator's duties towards the profession and the public, *see* discussion *infra* Part IV.B, can provide further support for legitimate preference in circumstances of inequality, but I shall not develop this argument here.

169. *See, e.g.*, OXFORD COMPANION, *supra* note 160, at 288 ("Fairness as the consistent, unbiased application of all and only morally relevant distinctions does not indicate which distinctions are morally relevant.").

170. *See, e.g.*, Susan Douglas, *Neutrality in Mediation: A Study of Mediator Perceptions*, 8 QUEENSL. U. TECH. L. & JUST. J. 139, 149 (2008) (suggesting a relative concept of neutrality which may be balanced with the principle of party self-determination).

the guardian of fairness of the process" and then note, in the following subsection, that

> [a] mediator should not be a party to an agreement which is illegal or impossible to execute. The mediator should alert parties to the effect of the agreement upon third parties who are not part of the mediation. The mediator should alert the parties to the problems which may arise if the effectiveness of the agreement depends upon the commitment of persons who are not parties to the agreement. A mediator may refuse to draft or sign an agreement which seems fundamentally unfair to one party.[171]

Thus, a possible interpretation of this provision would be that a fair agreement is an agreement that is not illegal, impossible to execute, or fundamentally unfair to one party; or an agreement in which the parties are aware of its effects on nonparticipants. It is clear, however, that even this rare exception cannot provide a workable definition of *outcome fairness* in mediation. It is also worth noting that the code addresses the fairness of the outcome indirectly in connection with the mediator's duty to prevent certain outcomes. In other words, the code does not simply determine that outcome X is inconsistent with the rules of mediation and thus unfair.[172] Instead it holds that outcome X should not be allowed by the mediator, thus making the mediator accountable for certain undesirable mediation outcomes. What is needed, therefore, is a clear statement on the meaning of outcome fairness and on the responsibility of mediators with respect to unfair outcomes.

2. No Coherent Theory of Outcome Fairness in Mediation Literature: Evaluating Selected Mediation Literature on Outcome Fairness

In sharp contrast, mediation literature has devoted much effort to discussing the fairness of mediation outcomes.[173] In the following sections I discuss Hyman & Love's article, *If Portia Were a Mediator: An Inquiry into Justice in Mediation*[174] and Stulberg's *Mediation and Justice: What Standards Govern?*,[175] to illustrate the confusion and complexity surrounding this topic, as well as the contribution the fairness perspectives

171. GEORGIA STANDARDS, *supra* note 3, § IV.A, at 30.

172. *See id.*

173. *See, e.g.*, Dworkin & London, *supra* note 33; Stulberg, *supra* note 33; Stulberg, *supra* note 32; Hyman & Love, *supra* note 70; Gibson, *supra* note 63; Bohmer & Ray, *supra* note 104; Bercovitch, *supra* note 32; *see also* Isabelle R. Gunning, *Know Justice, Know Peace: Further Reflections on Justice, Equality and Impartiality in Settlement Oriented and Transformative Mediations*, 5 CARDOZO J. CONFLICT RESOL. 87, 87 (2004) ("[A]s mediators we should have a concern for the justness of the outcome of the mediations in which we serve."); Donald T. Saposnek, *What is Fair in Child Custody Mediation?*, 1985 MEDIATION Q. 9.

174. Hyman & Love, *supra* note 70.

175. Stulberg, *supra* note 32.

described in Part III make to a better understanding of the meaning of a fair mediation outcome.

Hyman & Love listed in their article seven features of just mediated outcomes:

> [R]esolutions that (i) were viewed as fair—or at least acceptable—by all participants (who agreed to the outcome); (ii) restored some balance and harmony among them; (iii) may have increased the likelihood of understanding and better relationship between the parties (understanding that arguably had value even when the parties were strangers); (iv) achieved more *Pareto* efficient resolutions (placing the outcome closer to, at, or beyond what each party felt was adequate reparation for the harm); (v) saved time, money, and perhaps aggravation and stress (on both individual and institutional levels); (vi) seemed to enhance communication and harmony in communities (in neighborhoods, among businesses, in workplaces, and in larger communities); and (vii) set social precedents for better ordering of relationships.[176]

Stulberg, on the other hand, described six features of an unjust mediation outcome:

> 1. At least one party makes non-voluntary decisions.
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> . . . .
>
> 2. One party alienates a basic interest that most human beings believe should not be subject to irretrievable waiver.
>
> . . . .
>
> 3. Parties agree to settlement terms that violate that jurisdiction's positive law.
>
> . . . .
>
> 4. Agreement terms violate or ignore a significant dimension of a person's human dignity.
>
> . . . .
>
> 5. Agreement terms are accepted with "full knowledge" of the possible alternatives.
>
> . . . .
>
> 6. Agreement terms are inconsistent with fundamental values of the concept of a person that is embraced by the larger community.[177]

He then suggested six principles that are necessary to ensure a just mediation outcome:

> 1. Voluntariness.
>
> . . . .

176. Hyman & Love, *supra* note 70, at 186 (footnote omitted).

177. Stulberg, *supra* note 32, at 222–27.

2. Inalienability of interests.

. . . .

3. Publicity of outcomes.

. . . .

4. Dignity and respect.

. . . .

5. Informed decision-making.

. . . .

6. Toleration of conflicting fundamental values.[178]

These are different accounts of outcome fairness; is one of them correct and the other wrong? Are they both correct? Are they both wrong? How do they relate to each other? How can we possibly assess their value? And most importantly: Are we clearer on the meaning of outcome fairness after reading these theories or are we left in puzzlement? My purpose in the following discussion is to illustrate how the theory of fairness that has been described in this Article can assist in evaluating mediation literature on outcome fairness and can improve our understanding of this issue. I do so by employing the perception–conception and narrow–wide perspectives that were described in Part III.[179]

a. Distinguishing Between Perceptions and Conceptions of Outcome Fairness

I begin with Hyman & Love's article. This article serves as an example of the benefit of reading mediation literature on fairness with the perception–conception perspectives in mind. Clearly, the authors discuss the fairness of mediation outcomes primarily as an issue of perception.[180] For them "the parties' own views of justice, not the views of judges and lawyers, become the key measure of justice in mediation."[181] However, one who reads the list of aspects of a fair mediation outcome (except for the first one) might mistake those aspects for a suggestion of normative criteria of fairness.[182] A closer look proves this to be a wrong understanding. The

178. *Id.* at 227–28. In an earlier article, *Fairness and Mediation*, Stulberg suggested a different criterion of outcome fairness, arguing that we would criticize mediation outcomes as unfair if they "left some parties much worse off from their starting position than they would have been had they participated in any other dispute resolution process." Stulberg, *supra* note 33, at 911. Stulberg seems to have abandoned this criterion since it has not been mentioned in his more recent work on mediation and justice.

179. *See supra* Parts III.A–B.

180. *See* Hyman & Love, *supra* note 70, at 165 ("[J]ustice in mediation relies on each party's own private sense of justice . . . .").

181. *Id.* at 164.

182. *See id.* at 186.

authors' explanations of these aspects of fairness[183] and their application to four cases of mediation[184] focus on the views and feelings of the parties. The authors' main point seems to be that a mediation outcome that does not comply with the fairness aspects discussed in their work might not be perceived by the parties as fair, and thus they suggest that mediators discuss with the parties their perceptions of fairness and assist them in reaching an outcome that reflects their personal perceptions of fairness.[185] The authors note that:

> As teachers, we urge [our students who serve as mediators] to . . . follow the parties to find what outcome fits the parties' notion of justice. . . . Ultimately, the mediator acts as a catalyst to help the parties find an outcome which (at least) they can live with and (at best) comports with their highest notions of fairness and justice.[186]

In another place, Hyman & Love discuss different well-known categories of justice: reparative justice, retribution and revenge, distributive justice, relationships, and procedural justice.[187] Again, one might be tempted to see these categories as normative criteria for assessing mediation outcomes, but this is not the case. Hyman & Love seek to educate mediators on the possible perceptions of fairness parties *might* hold.[188] These categories of justice do not tell us how an identified mediation party in a particular mediation process would actually judge a specific outcome. They simply provide a working tool for mediators to speculate on the perception of fairness the parties might hold, though research on parties' perceptions of outcome fairness can help mediators in that speculation.[189] Thus, at the end

183. *See id.* at 169 ("A *Pareto* improved distribution would, at a minimum, be more efficient, and—since each party gets more (or closer to their notion of their 'just deserts') in a Pareto superior outcome—it will probably be *experienced* as more just." (emphasis added)); *see also id.* at 186 n.72 ("The waste in time, money, aggravation and stress in conflict scenarios are insults added to injuries, and, as they multiply, the *perception* of injustice increases." (emphasis added)).

184. *See id.* at 187–90.

185. *Id.* at 192.

186. *Id.*

187. *Id.* at 166–74.

188. *See id.*

189. *See, e.g.*, Nancy A. Welsh, *Perceptions of Fairness in Negotiation*, 87 MARQ. L. REV. 753, 754 (2004). Welsh summarizes "the criteria that lead people to feel that they have received their fair share of available benefits." *Id. But see id.* at 755–57 (noting that it is hard to predict, on the basis of these criteria, how a specific person would actually judge a specific outcome because these criteria conflict, because people might understand and apply them differently, and because people are affected in their choice between these criteria by numerous factors such as self-interests, social relationships, and social and cultural norms). *See also* Morton Deutsch, *Justice and Conflict*, *in* THE HANDBOOK OF CONFLICT RESOLUTION: THEORY AND PRACTICE 44–45 (Morton Deutsch et al. eds., 2006) (noting that our judgment of an outcome as fair is affected by comparisons we tend to make with outcomes other people have received in similar situations).

of the day, Hyman & Love's approach to outcome fairness considers a mediated outcome as fair on the basis of the parties' perceptions of the fairness of the outcome.

Hyman & Love's approach to outcome fairness does have a normative side. From a normative perspective, since their account of fairness treats the parties as the judges of fairness, it views outcome fairness as the exercise of self-determination by the parties. In other words, a fair outcome would be an outcome the parties have agreed upon. Hyman & Love express that notion when they note that "[t]he justice that pertains in mediation is the justice the parties themselves experience, articulate and embody in their resolution of the dispute."[190] Such a normative conception of fairness has been described in Part III as narrow because it focuses on a particular "internal" rule of mediation that regulates the relationship between the participants of the mediation—the rule of party self-determination (what the parties decide is considered fair, without concern for interests of nonparticipants).[191] But is that right? How can this account of fairness be reconciled, for example, with codes of conduct that impose constraints on the parties' right to agree on certain mediated outcomes, such as illegal agreements or agreements that are fundamentally unfair?[192] If these codes correctly represent special rules of mediation, then Hyman & Love's account of fairness is incomplete even from a narrow perspective of fairness. Their account is clearly inaccurate from a wide perspective of fairness, which considers the effect of the obligatory social norms of law and morality on mediation outcomes.

b. Distinguishing Between Narrow and Wide Conceptions of Outcome Fairness

While Hyman & Love focused primarily on the parties' perceptions of fairness and on the ways to enhance their experience of fairness, Stulberg's article primarily focuses on the normative aspects of outcome fairness and tries to identify criteria for evaluating mediation outcomes as normatively fair. In that article, Stulberg offered an ambitious theory that there are strong reasons to view mediation as a system of pure procedural justice with the result that any mediation outcome accepted by the parties could be considered just.[193]

190. Hyman & Love, *supra* note 70, at 164.

191. *See supra* text accompanying note 90.

192. *See* GEORGIA STANDARDS, *supra* note 3, § IV.A, at 30; *see also infra* notes 224–26 and accompanying text.

193. *See* Stulberg, *supra* note 32, at 241–42.

This is an interesting and provocative thesis, but a careful reading of Stulberg's arguments reveals that Stulberg is far from holding that any outcome the parties accept is fair.[194] In a confusing step, Stulberg constructs his normative project on the basis of Hyman & Love's idea of "justice from below," which he interprets as a normative claim according to which any mediation outcome approved by the parties is just.[195] He supports this claim with principles of voluntariness and informed decision-making, which are themselves features of the principle of party self-determination.[196] Thus, up to this point, Stulberg's account of fairness seems to be similar to Hyman & Love's account of outcome fairness: it considers fairness from the narrow perspective of adherence to the particular rules of mediation, and it treats self-determination as the only mediation rule that applies to outcome.

However, other principles that Stulberg discusses as part of his thesis reveal a different account of fairness which I have described in Part III as a wide conception of fairness.[197] In a wide conception of fairness, which in my view better reflects and explains Stulberg's analysis of outcome fairness, a mediation outcome must not violate external standards of law and morality to be considered normatively fair.[198] This wide conception of fairness gives weight not only to the interests of the participants in mediation but also to the interests of nonparticipants as well, making it possible to consider an outcome agreed upon by the parties normatively unfair.

Consider, for example, Stulberg's argument concerning the injustice of settlement terms that violate positive law.[199] What Stulberg argues is, in effect, that illegal mediated agreements are unjust because the parties have placed themselves in an advantageous position compared with their fellow citizens who obey the law.[200] In other words, everybody is expected to obey the law, and if one fails to do so while others continue to comply with the law, this constitutes an unfair practice.[201] This account of fairness does not

194. *See id.*
195. *Id.* at 216.
196. *Id.* at 227–28.
197. *See supra* text accompanying notes 91–93.
198. *Id.*
199. *See* Stulberg, *supra* note 32, at 223–24.
200. *Id.* at 224 ("In essence, the agreement 'works' because the parties are free-riders. They assume an entitlement to be treated differently . . . by the fact that everyone else must be law-abiding individuals while they are free to decide which laws they choose to comply with and which ones they can discard.").
201. *See, e.g.*, Carr, *supra* note 106, at 34–35 ("[F]airness concerns arise when a group of cooperators work together or join together within a social practice dedicated to the realization of some end or the pursuit of certain ideals. . . . To play, deal, or participate unfairly is to defect from a cooperative endeavor. Unfairness qua betrayal is blameworthy because it fails to honor one's commitment to specific others and consequently jeopardizes the success of the joint enterprise in

center on the parties' right to self-determination. On the contrary, it centers on fairness as following the rules that everybody in society has an obligation to follow. Thus, the rest of Stulberg's argument—that this fairness concern can be dealt with by a principle of publicity of outcomes[202] and that there are mediation practices and provisions in codes of conduct for mediators that are aimed to prevent parties from accepting illegal settlement terms[203]—is of less importance because the conclusion remains the same: illegal agreements are unfair even if they are acceptable to the parties. Stulberg may be right when he argues that mediation has safeguards to prevent such an outcome,[204] but the crucial point is that he agrees that the unfairness of that outcome is normatively determined *despite* the parties' acceptance of the outcome.[205] If he is right, and there are special mediation rules that disallow illegal mediated agreements, then such an outcome would be considered unfair from a narrow perception of fairness that incorporates the rules of law and morality into mediation and thus is not satisfied with parties' acceptability of outcomes as a sole criterion of fairness. If he is wrong, and in fact there are no mediation rules that prohibit illegal outcomes as the product of mediation, then an illegal mediated outcome would be considered unfair from a wide perspective of fairness that subordinates outcomes to the general rules of law and morality. In both cases Stulberg's conception of fairness goes beyond the parties' right to decide on the outcome.

Similarly, consider Stulberg's argument concerning the injustice of an agreement in which one party alienates a basic interest that most human beings believe should not be subject to irretrievable waiver.[206] If Stulberg were truly committed to a narrow conception of outcome fairness that is focused on party self-determination, he would have argued that if that party knowingly and willingly made that decision, the decision should be considered just. Instead, Stulberg agrees that if parties reach an unconscionable agreement, this agreement should not be enforceable, and the mediator should terminate the mediation or withdraw.[207] In other words, he endorses the wide conception of outcome fairness and imposes external

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which one participates as a fellow cooperator."); *see also* H.L.A. Hart, *Are There Any Natural Rights*, 64 PHIL. REV. 175, 185 (1955) (discussing the necessary mutuality of restrictions in conducting any "joint enterprise").

202. *See* Stulberg, *supra* note 32, at 233–34.

203. *Id.* at 243.

204. *See id.* ("Advocates representing parties would not commit terms to a written agreement that they know to be prohibited by law, and mediator ethical codes prevent the mediator from drafting an agreement . . . that contains unlawful terms.").

205. *Id.* at 222.

206. *Id.*

207. *Id.* at 242–43.

standards on the parties, or alternatively, adopts a narrow conception of fairness, which recognizes the existence of a mediation rule that prohibits unconscionable outcomes and overrides party self-determination in these circumstances.

This Article does not offer a full review of Stulberg's article, but I believe that this analysis shows, with the help of the narrow–wide prism, that Stulberg is far from the "justice from below" account of Hyman & Love. In addition, this analysis points to the weakness of the normative basis of Stulberg's six features of unjust mediation outcomes,[208] which the corresponding principles come to rectify.[209] Stulberg (relying on intuition)[210] says he believes that these are features of injustice,[211] but one could challenge his belief and intuition: Why these features and not others? Why six features, not more? What is the rationale behind these features? What makes them normative features of injustice rather than merely perceptions of injustice? In the absence of good answers to these questions, Stulberg's list of six features of injustice should be seen as illustrative and nonexhaustive.

The advantage of the fairness conceptions that I have discussed is that they offer a clearer rationale for claims of unfairness, and thus can assist in the evaluation of such claims made by others. These conceptions can help to evaluate the normative legitimacy of Stulberg's six features of outcome injustice.[212] Part III suggested that conceptions of fairness describe the commitment to rules of social games.[213] A narrow conception would refer to the rules of a specific social game; a wide conception would refer to the rules of the grand game of living in society. Applying this theory to Stulberg's features of unjust mediation outcomes would require asking, with respect to each proposed feature of injustice, whether there is an internal mediation rule or any other external obligatory rule—i.e., legal or moral rule—which prohibits such an outcome. If such rules exist, then Stulberg's account of fairness, which arguably lacks adequate justification, can be supported by the fairness theory offered in this Article. If there are no such rules, then Stulberg's claim of injustice would not be substantiated.

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208. *Id.* at 222–27.

209. *Id.* at 227–28.

210. *Id.* at 215 ("In Part II, I describe the elements of the mediation process that, when present, violate our intuitions regarding a fair result, even though the parties report that the outcome is acceptable to them." (footnote omitted)).

211. *Id.* at 222 ("I believe that the presence of any of the following six features would lead us to conclude that a mediation outcome is unjust, even if acceptable to the parties.").

212. *See id.* at 222–27.

213. *See supra* Parts III.A–B.

Stulberg's first and fifth features concern nonvoluntary agreements and agreements that are not accepted with "full knowledge" of the possible alternatives.[214] These proposed features of injustice can be supported by the narrow perspective of fairness because they reflect the internal mediation rule on party self-determination with respect to outcome.

Stulberg's third feature concerns illegal agreements.[215] Considering illegal mediated agreements as unfair can be supported by both the wide perspective of fairness, which imposes on mediation the rule of law, and the narrow perspective of fairness if it can be shown that there is a specific mediation rule that prohibits illegal mediated outcomes notwithstanding the parties' wishes.[216]

The fourth feature concerns agreements that "violate or ignore a significant dimension of a person's human dignity."[217] I am not sure what that means, and Stulberg's example (of the opera singer) does not make, in my view, a convincing case of outcome unfairness.[218] However, to the extent that this feature could be understood as a requirement to follow the moral rules that prohibit causing unjustifiable harm to others,[219] this aspect of injustice could be supported by the wide perspective of fairness, which sees any outcome which is inconsistent with morality as unfair.

The second feature concerning the alienation of basic interests and the sixth feature concerning agreements that "are inconsistent with fundamental values of the concept of a person"[220] require more elaboration and shall be discussed together because they raise a similar issue. I would argue that Stulberg is correct in treating these instances as features of unfair mediated outcomes, but he does not appreciate the actual reason for that, and thus reaches a wrong conclusion.

To illustrate his point of the injustice of agreements that are "inconsistent with fundamental values of the concept of a person that is embraced by the larger community," Stulberg asks us to "[p]resume that a Somalian father and mother living in the U.S. seek unsuccessfully to have a U.S. doctor perform a clitoridectomy and infibulation on the parents'

214. *See* Stulberg, *supra* note 32, at 222, 225.

215. *Id.* at 223.

216. *See supra* Part IV.B.1; *see also infra* Part IV.B.7(c), Part IV.B.9 (considering the possibility of a mediation rule which prohibits illegal mediated outcomes).

217. Stulberg, *supra* note 32, at 224.

218. *See id.* at 224–25.

219. *See, e.g.*, GERT, *supra* note 85, at 20–24, 29–40 (considering the rules of common morality that prohibit causing harms); *see also id.* at 21("Intentionally acting so as to significantly increase the risk that someone will suffer any harm also counts as a violation of these [moral] rules.").

220. Stulberg, *supra* note 32, at 222, 226.

fourteen year old daughter," and "[t]he dispute is referred to mediation."[221] He then argues:

> Irrespective of the legal status of the practice in a given jurisdiction, would the agreement of the doctors and parents to conduct the procedures be sufficient to make this a just outcome? The procedures are fundamentally criticized as unacceptable acts of female genital mutilation (FGM) that inflict irreversible injury in adolescent girls by causing substantial pain later in the girl's life and decreasing her capacity for sexual pleasure. But there certainly are competing claims about cultural norms and practices that have shaped a community's style of life for a sustained period that warrant respect. If the parties to the conversation agreed to go forward with the procedure, I believe the one clear concern, from a justice-perspective, that must be addressed is whether the person directly affected by the outcome—i.e. the daughter—had an opportunity to participate in the decision-making process. If we were convinced that the individual was sufficiently mature to participate thoughtfully in discussions regarding these practices affecting her body, we would be deeply troubled by her exclusion. But, absent that, I believe it is a much closer call to determine that one outcome is, on justice considerations, clearly warranted and the other prohibited.[222]

Applying the fairness theory suggested in this Article to this scenario, if this outcome is illegal or immoral, then clearly the outcome is unfair from the wide perspective of fairness, irrespective of the parties' acceptance of the outcome. However, assume for the sake of argument that the proposed outcome is not illegal or immoral. Could it then be said, as Stulberg seems to suggest, that the outcome would be fair if the daughter participated in the decision-making process?

I agree with Stulberg that a minimum requirement of fairness in this case would be to ensure that the daughter exercised self-determination and participated in the discussion. This would be a necessary step from a narrow conception of fairness perspective that focuses on party self-determination. But what is missing in Stulberg's analysis is a consideration of the potential effect of the proposed outcome on the *institution* of mediation in the United States: How would Americans react to the outcome had it been publicized? And what effect would the outcome have had on the institution of mediation? I would argue that an outcome that harms the institution of mediation by undermining public confidence in mediation is normatively unfair and that party self-determination cannot justify such outcome. In

221. *Id.* at 226–27.
222. *Id.* at 227 (footnotes omitted).

support of my argument I argue that there is a mediation rule that prohibits mediation outcomes that cause harm to the mediation process.

3. The Unfairness in Causing Harm to the Institution of Mediation

There are three reasons to hold an outcome that jeopardizes the institution of mediation as an outcome in breach of the rules of mediation and thus as normatively unfair.

a. A Reason from Nature

First, it is only natural that institutions would be based on rules that are aimed to secure their survival. To hold that conduct or an outcome that harms the institution without good reason is illegitimate is tantamount to reliance on a natural justification of self-defense. This self-defense rule has an enhanced moral force when the institution is voluntary, and people can decide to join the institution or withdraw from the institution at any time. The institutional rule in this case restricts the freedom of its members for a justifiable cause only as long as they continue their association with the institution, and they are free at any moment to disassociate themselves from the institution and regain their "unlimited" liberty. Mediation is such an institution; it is a voluntary institution and it seeks to survive. Mediation parties *choose* to mediate, and no one has authority to compel them to stay in mediation or to reach an agreement. The parties could have decided to negotiate an agreement by themselves, and in that case they would not have been subject to any of the rules of mediation that restrict their liberty, including the rule not to harm the institution of mediation. But once the parties have decided to resolve their differences in mediation and to sign a mediated agreement, the parties and their agreement must not violate that rule.

A rule that protects the institution of mediation is supported by considerations of public policy as well. It is in the public's interest that mediations are conducted in addition to other forms of conflict resolution.[223]A mediated outcome that jeopardizes the institution of mediation causes harm to an important public interest and thus should be

223. On the public interest in conducting mediations see, for example, Joshua D. Rosenberg, *In Defense of Mediation*, 33 ARIZ. L. REV. 467, 467 (1991) ("Mediated agreements are much more likely to satisfy the parties to a dispute than are court orders and are more likely to be followed than are court orders. Mediation also saves judicial resources and reduces court overloads."); *see also* ROBERT A. BARUCH BUSH & JOSEPH P. FOLGER, THE PROMISE OF MEDIATION 18–19 (1994) (describing the social justice story of mediation); *id.* at 20–21 (describing the transformative story of mediation which claims a capacity to transform individuals and society as a whole).

avoided. A mediation rule that prohibits outcomes that jeopardize the institution of mediation—i.e., mediation outcomes that might cause the public to lose confidence and faith in mediation— serves the public good and is a relatively small price to pay on the part of the mediation parties, who are free to negotiate or conclude the same agreement outside the mediation.

Note that this rule is not aimed at protecting the interests of the parties. Its purpose is the protection of the institution of mediation; its immediate beneficiaries are the general public and the mediation community whose interest is that mediation services be in demand. Thus, going back to Stulberg's example,[224] if there is a risk that on learning of the agreement between the hospital and the daughter and her parents people lose their faith and confidence in mediation—meaning that the institution of mediation would suffer harm—this outcome would violate the no-harm rule and would be considered normatively unfair, notwithstanding the participation of the daughter in the process and her acceptance of the outcome. This mediated outcome is unfair from the narrow perspective of fairness because it is inconsistent with the internal rules of mediation, irrespective of the illegality or immorality of the content of the agreement. Obviously, once it is established that the agreement is illegal or immoral the mediated outcome would be unfair from a wide perspective of fairness as well.

b. A Reason from Codes of Conduct for Mediators

The rule that prohibits mediated outcomes that might cause harm to the institution of mediation may be implied from provisions in the codes of conduct that direct mediators to take steps to prevent certain outcomes that (as I argue) are aimed to protect the institution of mediation. Although these provisions do not directly determine that a certain mediated outcome is prohibited, such a rule may be implied from the duty of intervention that is imposed on the mediator to prevent certain agreements. The result is, I argue, that some codes reveal this underlying no-harm rule whose breach makes such outcome unfair.

For example, the Florida Rules for Certified and Court Appointed Mediators provide that "[a] mediator shall . . . terminate a mediation entailing . . . unconscionability."[225] The Virginia Standards of Ethics and Professional Responsibility for Certified Mediators provide that "[t]he mediator shall terminate the mediation when, in the mediator's judgment,

224. *See* Stulberg, *supra* note 32, at 226–27.
225. FLORIDA RULES, *supra* note 2, § 10.420(b)(4), at 103.

the integrity of the process has been compromised."[226] Finally, the Nebraska *Manual of Standards and Ethics for ODR-Approved Mediation Center Mediators, Directors and Staff* provides that "[a] mediator shall not knowingly allow the parties to sign an illegal agreement."[227] These mediation rules impose a duty on the mediator to prevent an outcome that is unconscionable, that compromises the integrity of mediation, or is illegal. These outcomes are considered illegitimate in the context of mediation. They violate the rules of mediation and thus may be considered unfair. But what is meant by vague terms such as *unconscionability* and *integrity*?

I suggest that these terms, in the context of mediation, are intended to preserve the public's faith and confidence in the institution of mediation. They reflect the mediation rule that the conduct of mediation and its outcome should not harm the institution of mediation. They intend to mitigate the party self-determination rule in mediation and provide that even where the parties are satisfied that their interests are met in the process, other nonparties' interests should not be harmed as well.[228] One example mentioned earlier in another context described the Model Standards' approach to mediators' conflicts of interests in mediation: mediation parties cannot choose a mediator who suffers from a serious conflict of interest that might jeopardize the integrity of mediation in the public's view;[229] the interest in protecting public faith in mediation outweighs the interest in respecting the parties' right to self-determination. There are other provisions in the codes of conduct for mediators that clearly indicate the importance of public confidence in mediation.[230] Thus, both the conduct of the mediation and its outcome should promote public faith in the institution of mediation, and conduct and outcomes that jeopardize public confidence in mediation must be avoided. They would be normatively unfair.

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226. VIRGINIA STANDARDS, *supra* note 2, § K.4, at 8 ("For example, by inability or unwillingness of a party to participate effectively; gross inequality of bargaining power or ability; and unfairness resulting from nondisclosure, where there is a legal duty to disclose, or fraud, by a participant.").

227. MANUAL OF STANDARDS & ETHICS FOR ODR-APPROVED MEDIATION CTR. MEDIATORS, DIRECTORS & STAFF § III.E.3, at 8 (Neb. Office of Dispute Resolution 2001), http://www.supremecourt.ne.gov/5553/statutes-rules-policies-and-standards (follow "ODR Manual of Standards and Ethics" hyperlink).

228. *See* Shapira, *supra* note 163, at 38–40.

229. *See* MODEL STANDARDS, *supra* note 2, § III.E.

230. *See, e.g.*, N.C. STANDARDS, *supra* note 11, pmbl., at 1 ("These Standards are intended to instill and promote public confidence in the mediation process . . . . [M]ediation must be built upon public understanding and confidence."); CALIFORNIA STANDARDS, *supra* note 2, pmbl. ("In order for mediation to be effective, there must be broad public confidence in the integrity and fairness of the process.").

This "no-harm" rule provides a rationale for other situations that codes of conduct relate to unfairness. An illegal agreement, an agreement which is impossible to execute, and an agreement that is fundamentally unfair to one party[231] are examples of outcomes that are harmful to the institution of mediation and must be avoided even if the parties wish to accept them. I believe that this kind of reasoning led Robert Baruch Bush to comment that "if [the mediator] does nothing, he may bring mediation into disrepute if the illegal agreements are later discovered."[232]

The weakness of this argument is its dependence on relatively few code provisions that impose a strict obligation ("shall") on mediators to terminate agreements due to their content.[233] Often codes arguably make the rule of termination discretionary by using the more permissive term *should*,[234] and sometimes even *may*.[235] In these cases it might be argued that these agreements are not illegitimate—they are not in violation of mediation rules and thus cannot be considered unfair. My response to such an argument would be that the codes of conduct should be construed (or amended) whenever possible to declare that mediators are placed under a strict duty to terminate mediation in circumstances where the mediated outcome jeopardizes the institution of mediation.[236] I justify this argument next on the basis of role morality theory.

c. A Reason from Role Morality—A Duty Towards the Profession

Role morality provides a third reason to consider an outcome that causes harm to the institution of mediation to be a violation of the rules of mediation and therefore normatively unfair. I would argue that accepting the role of mediator comes with a duty to prevent harm to the institution of mediation. Thus, an outcome that jeopardizes the institution of mediation is illegitimate in the context of mediation, and a mediation rule that prohibits such mediated outcomes can be implied, with the result being that outcomes in breach of that rule would be considered unfair. This explanation remains

231. *See* GEORGIA STANDARDS, *supra* note 3, § IV.A, at 30.

232. Baruch Bush, *supra* note 148, at 24.

233. *See, e.g.*, *supra* notes 226–28 and accompanying text.

234. *E.g.*, GEORGIA STANDARDS, *supra* note 3, § IV.A, at 30 ("A mediator should not be a party to an agreement which is illegal or impossible to execute.").

235. *E.g.*, FAMILY MEDIATION CANADA CODE, *supra* note 13, art. 13.4, at 3 ("The mediator may withdraw from mediation when any agreement is being reached by the participants which the mediator believes is unconscionable."); *accord* AUSTRALIA GUIDELINES, *supra* note 4, § 6, at 7; FAMILY MEDIATION MODEL STANDARDS, *supra* note 23, § XI.A.4, at 9; ILLINOIS STANDARDS, *supra* note 20, § VI.A.

236. *Cf.* MICHAEL S. PRITCHARD, PROFESSIONAL INTEGRITY 87 (2006) ("Codes of ethics are hardly the last word in professional ethics."); ALABAMA CODE, *supra* note 9, § I ("This Code does not exhaust the moral and ethical considerations that should guide a mediator.").

valid even where no formal code of conduct exists or where an existing code neglects to provide for such duty.[237]

Role morality theory argues that occupying a role is accompanied by duties. Gert, for example, argued that there is a moral rule requiring a person "to do his duty," which entails "doing those actions that are a person's duty because of a special role, such as being a doctor, lawyer, parent, or teacher," and that "[m]ost roles have duties, more or less precise, attached to them."[238] Michael S. Pritchard, agreeing with Gert, noted that some "basic duties derive from professional roles or take on special significance because of those roles."[239] I argue that one important duty that mediators have is a duty to their profession to protect the institution of mediation.

The meaning of *profession* can be debated and so can the question of whether mediation has reached the stage of being a profession.[240] This Article assumes that the mediators whose duties are discussed here are those mediators who have participated in a mediators' training course and who are conducting mediations, whether for fees or not, according to common definitions of mediation practice.[241] For purposes of the following discussion, these mediation practitioners are professionals, and together, they form the profession of mediation.

My argument is that these mediators have duties to the profession of mediation and to each other. Professor Susskind argued that mediators have "an obligation to the mediation profession to ensure that . . . mediation [does] not only satisfy the interests of the parties at the table, but also seek to produce fairer, more efficient, more stable, and wiser results than would otherwise result from other ways of handling those disagreements."[242] He

237. *See* Kevin Gibson, *Contrasting Role Morality and Professional Morality: Implications for Practice*, 20 J. APPLIED PHIL. 17, 28 (2003) (distinguishing professional codes from the demands of morality).

238. GERT, *supra* note 85, at 50.

239. PRITCHARD, *supra* note 236, at 85.

240. *See* Carrie Menkel-Meadow, *Are There Systemic Ethics Issues in Dispute System Design? And What We Should [Not] Do About It: Lessons from International and Domestic Fronts*, 14 HARV. NEGOT. L. REV. 195, 196 (2009) ("The field of conflict resolution, broadly defined, is currently at what I would describe as a 'mid-point' in this quest for formal recognition as a profession."); Craig McEwen, *Giving Meaning to Mediator Professionalism*, 11 DISP. RESOL. MAG. 3, 3 (2005) (discussing the meaning of mediator professionalism and suggesting ways to promote it); Jacqueline M. Nolan-Haley, *Lawyers, Non-Lawyers, and Mediation: Rethinking the Professional Monopoly from a Problem-Solving Perspective*, 7 HARV. NEGOT. L. REV. 235, 243–45 (2002) (discussing professionalization of mediation).

241. *See, e.g.*, MODEL STANDARDS, *supra* note 2, pmbl.

242. Lawrence Susskind, *Expanding the Ethical Obligations of the Mediator: Mediator Accountability to Parties Not at the Table*, *in* WHAT'S FAIR: ETHICS FOR NEGOTIATORS 513, 516 (Carrie Menkel-Meadow & Michael Wheeler eds., 2004).

related this obligation to the need to promote the reputation of the profession.[243] I agree with Susskind but point to a more fundamental feature of the duty towards the profession: mediators must avoid conduct that would harm the profession, and one of the profession's most important aspects is an obligation to preserve the public's confidence in mediation. Codes of conduct acknowledge that mediators have duties towards the profession,[244] and a number of codes expressly recognize a mediator's duty to maintain the public's trust in mediation. For example, the North Carolina Standards of Professional Conduct for Mediators provide that "[a]s with other forms of dispute resolution, mediation must be built upon public understanding and confidence. Persons serving as mediators are responsible . . . [for] conduct[ing] themselves in a manner that will merit that confidence";[245] the Standards of Practice for California Mediators note that "[e]very mediator bears the responsibility of conducting mediations in a manner that instills confidence in the process, promotes trust in the integrity and competence of mediators, and handles disputes in accordance with the highest ethical standards."[246] When mediators are court-connected their obligation to preserve public confidence in mediation is enhanced because their conduct affects not only the reputation of mediation but also the reputation of the court.[247]

The duty to maintain public confidence in mediation can be supported with arguments from morality. All mediators have voluntarily chosen to become mediators and to associate themselves with the mediation community or profession. They have elected, by their actions, to take part in the joint enterprise of mediation. Moreover, being identified as members of the mediation profession provides them with benefits not enjoyed by nonmembers, such as social status, opportunities, and (sometimes) financial

243. *Id.* at 516–17.

244. *E.g.*, FLORIDA RULES, *supra* note 2, § 10.600, at 105 ("A mediator shall preserve the quality of the profession."); *see also* MODEL STANDARDS, *supra* note 2, § IX; OREGON STANDARDS, *supra* note 2, § X, at 7; ALABAMA CODE, *supra* note 9, § 12.

245. N.C. STANDARDS, *supra* note 11, pmbl., at 1.

246. CALIFORNIA STANDARDS, *supra* note 2, pmbl.; *see also* FLORIDA RULES, *supra* note 2, § 10.200, at 94 ("The public's use, understanding, and satisfaction with mediation can only be achieved if mediators embrace the highest ethical principles."); CAL. R. CT. 3.850, *available at* http://www.courts.ca.gov/documents/title_3.pdf ("For mediation to be effective, there must be broad public confidence in the integrity and fairness of the process. Mediators in court-connected programs are responsible to the parties, the public, and the courts for conducting themselves in a manner that merits that confidence.").

247. Wayne D. Brazil, *Continuing the Conversation About the Current Status and the Future of ADR: A View from the Courts*, 2000 J. DISP. RESOL. 11, 24–25 (noting that mediators in court-connected mediation are perceived by the public as representatives of the court and that public confidence in the courts might suffer if the fairness and integrity of mediation are not maintained).

remuneration. These circumstances give rise to a legitimate expectation from mediators not to harm the mediation profession which they have voluntarily joined, to reciprocate the benefits they enjoy by not harming the profession, and to restrict their freedom of action as other mediators do in order for the enterprise of mediation to survive.[248] Mediators who do not conduct mediation in a manner that preserves the public's confidence in the profession are cheating their colleagues and causing injury to the profession.

What follows from this analysis is that mediators have a duty to prevent mediation outcomes that might jeopardize the public's confidence in mediation. Without public trust, professionals cannot provide their services because they depend on the willingness of the public to seek their help and to cooperate with them.[249] Thus, a mediator is under an obligation to terminate the mediation if its outcome might jeopardize public faith in mediation, and since this obligation is towards the profession and not towards the parties, the parties cannot relieve the mediator of that responsibility by acceptance of the outcome. According to this reasoning, such a mediation outcome is illegitimate in mediation and thus normatively unfair.

4. Towards a Definition of a Normatively Fair Mediation Outcome

On the basis of the previous discussion we can arrive at a working definition of a normatively fair mediation outcome. A normatively fair mediation outcome must, at a minimum, comply with two mediation rules that apply to the outcome of mediation: (1) the outcome must have been accepted by parties who have exercised self-determination, and (2) the outcome does not jeopardize the institution of mediation by reducing public faith and confidence in mediation. This definition reflects the narrow conception of outcome fairness—fairness as adherence to the internal rules of mediation. Note that party decision-making cannot be considered as the single criterion of fairness even from a narrow perspective of fairness.

Theoretically, in the absence of mediation rules that prohibit illegal or immoral outcomes, any mediated outcome that satisfies the aforementioned conditions may be considered fair from a narrow perspective of fairness.

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248. *Cf.* Michael Davis, *Professionalism Means Putting Your Profession First*, *in* ETHICS AND THE LEGAL PROFESSION 166 (Elliot D. Cohen & Michael Davis eds., 2d ed. 2009) ("A profession is a cooperative undertaking. In exchange for putting herself under an obligation to do as those in her profession are doing, each member of the profession receives the benefits of being identified as a member of that profession.").

249. *See* MICHAEL D. BAYLES, PROFESSIONAL ETHICS 118 (1981); PRITCHARD, *supra* note 236, at 45 ("As for all professions, public trust is essential.").

However, to be considered fair according to a wide conception of fairness—fairness as adherence to the binding rules of society that are external to mediation—the outcome must also comply with the legal and moral rules that every member of society is legitimately expected to follow to the effect that the outcome is not (1) illegal and (2) immoral.

These accounts of fairness are not completely separate. In fact, the narrow and the wide perspectives of outcome fairness are closely connected in mediation. First, as has been noted, codes of conduct sometimes incorporate the wide perspective through the inclusion of provisions that indicate an acceptance of the rule of law as part of the rules of mediation.[250] Second, the effect of the second rule of the narrow conception of outcome fairness (which prohibits outcomes that jeopardize the institution of mediation) is that illegal and immoral outcomes, which are unfair according to the wide perspectives of fairness, become unfair on a narrow perspective as well if the outcome is such that the public might lose confidence in mediation. In these cases the illegal or immoral outcome jeopardizes the reputation of mediation and is unfair from both perspectives of fairness.

Consider, for example, Stulberg's second feature of outcome injustice; he argued that an agreement in which "[o]ne party alienates a basic interest that most human beings believe should not be subject to irretrievable waiver,"[251] such as an agreement to be another's slave, would be considered unjust. He later commented with respect to that injustice concern that "[c]ontract law typically addresses such situations by rendering unenforceable those contractual obligations that are deemed to be unconscionable."[252] The narrow and wide perspectives suggested in this Article provide the rationale for Stulberg's claim of injustice: from a narrow perspective such an outcome would be unfair because it violated the mediation rule that outcomes should not jeopardize the institution of mediation. It seems to me that people would lose trust in mediation and in mediators if mediation were to end with an agreement that results in one party being the other party's slave, and it would be unfair from a wide perspective as well because the agreement would violate the external norms of contract law.

Thus, the wide and narrow perspectives of outcome fairness in mediation are intertwined to the effect that in many cases they would produce the same result. However, they remain different on a crucial point.

250. *See, e.g.*, FLORIDA RULES, *supra* note 2, § 10.520, at 105 ("A mediator shall comply with all statutes, court rules, local court rules, and administrative orders relevant to the practice of mediation.").

251. Stulberg, *supra* note 32, at 222.

252. *Id.* at 242.

The wide perspective of fairness maintains that *any* illegality or immorality of the outcome makes that outcome unfair because the outcome is inconsistent with rules of law or morality. On the other hand, the narrow perspective of fairness maintains that only illegal or immoral outcomes that harm the institution of mediation are unfair because the outcome must violate the mediation rule that public confidence in mediation must not be undermined. As a result, it seems plausible that a mediator who operates under the narrow perspective of fairness might decide not to terminate the mediation when the illegality or immorality of the outcome is minor and she is satisfied that the public would not lose confidence in mediation. Moreover, if the mediator believes that the illegality or immorality can be kept secret so that the public would not ever be made aware of the outcome, then arguably, even a serious offense against law and morality would not be enough to trigger that mediator's duty to terminate the mediation because a secret agreement cannot harm the reputation of mediation.

However, there is another possibility to be considered that blurs the differences between the narrow and the wide perspectives to the extent that the narrow perspective might absorb the wide perspective and they become one. First, as a matter of interpretation, one might argue that any illegal or immoral outcome (however minor) that the public is aware of jeopardizes the institution of mediation, with the result that any known illegality or immorality is considered unfair from the narrow perspective as well as from the wide perspective. Second, continuing the argument from role morality, I would argue that the rules of mediation impose on mediators a duty towards the public that directs them to prevent illegal and immoral outcomes even when they do not jeopardize the institution of mediation. As a result, the internal rules of mediation should be understood as prohibiting illegal or immoral outcomes, with the effect that the narrow perspective of outcome fairness in mediation mirrors the wide perspective. The following discussion seeks to justify this argument.

5. Revising the Definition of a Normatively Fair Mediation Outcome—A Duty Towards the Public

Codes of conduct for mediators recognize that mediators have duties to the public. The Code of Professional Conduct for Labor Mediators, for example, provides that mediators "must be aware that their duties and obligations relate to . . . the general public."[253] Provisions in codes of

253. Code of Professional Conduct for Labor Mediators, 29 C.F.R. pt. 1400 app. (2012); *see also* CAL. R. CT. 3.850, *available at* http://www.courts.ca.gov/documents/title_3.pdf ("For mediation to be effective, there must be broad public confidence in the integrity and fairness of the process."); N.C. STANDARDS, *supra* note 11, pmbl., at 1; ETHICAL GUIDELINES FOR MEDIATORS

conduct reveal numerous mediator obligations towards nonparticipant members of the public: mediators have obligations to the parties' children in divorce cases,[254] to a person who has been threatened with violence by a party,[255] or to a person who might suffer a significant harm.[256] Mediators owe a duty to the general public when a party is using the mediation to further illegal conduct,[257] when mediators advertise and solicit for mediation,[258] and when mediators are required by law to disclose information from the mediation.[259]

Mediation literature has also acknowledged that mediators have responsibilities toward nonparticipants. Maute, for example, argued that mediators are "accountable for the quality of private justice and its effect on public interests,"[260] Laurence Boulle and Miryana Nesic described mediators as "trustees of public policy in respect of certain matters,"[261] and Susskind argued that mediators are accountable "to parties not at the table."[262]

I would argue that these provisions and academic comments are manifestations of a general duty that every mediator owes to the public: to conduct mediations in a manner that avoids harming important social interests such as the rules of law and morality. The justification for that duty comes from the fact that mediators perform a professional role with the public's permission, that that role places them in a position of social power and influence that affects the public, and that this position of power and responsibility comes with accountability.

Literature on professional ethics offers several explanations for the obligations of professionals to the public. First, it is argued that persons who occupy a professional role enjoy social benefits such as status,

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pmbl. (Advisory Comm. on Court-Annexed Mediations 2005), www.supreme.courts.state.tx.us/MiscDocket/05/05910700.pdf [hereinafter TEXAS GUIDELINES] ("Mediators should be responsible to . . . the public.").

254. *See* FAMILY MEDIATION MODEL STANDARDS, *supra* note 23, §§ VIII, IX, at 6–8; CALIFORNIA STANDARDS, *supra* note 2, § 3; ILLINOIS STANDARDS, *supra* note 20, § IV.C.

255. *See* FAMILY MEDIATION MODEL STANDARDS, *supra* note 23, § VII.C, at 6.

256. *See* CAL. R. CT. 3.857(i)(3), *available at* http://www.courts.ca.gov/documents/title_3.pdf.

257. *E.g.*, *id.* § 3.857(i)(1); FAMILY MEDIATION MODEL STANDARDS, *supra* note 23, § XI.A.5, at 9; MODEL STANDARDS, *supra* note 2, § VI.A.9; JAMS GUIDELINES, *supra* note 12, § VII, at 3.

258. *See* CAL. R. CT. § 3.858, *available at* http://www.courts.ca.gov/documents/title_3.pdf; FAMILY MEDIATION MODEL STANDARDS, *supra* note 23, § XII, at 10; MODEL STANDARDS, *supra* note 2, § VII.A.

259. *See* MODEL STANDARDS, *supra* note 2 § V.A.

260. Maute, *supra* note 39, at 358.

261. BOULLE & NESIC, *supra* note 39, at 459.

262. *See* Susskind, *supra* note 242, at 513; *see also id.* at 514–17.

opportunities, influence, and income, and thus, they are under an obligation to reciprocate with society and act in a manner that is beneficial to society.[263] Tom Beauchamp and James Childress, in discussing the duties of medical doctors for example, argued that "many physicians and health care professionals owe a large debt to society (e.g., for education and privileges)," and this gives rise to obligations of beneficence to society.[264] Second, it is argued that persons who occupy a professional role hold a position of social power and influence that stems from their specialized knowledge and expertise and from society's permission to provide professional services.[265] Holding this position of power has several implications: their decisions affect the lives of other people and society at large, and the influence over others creates moral responsibility.[266] Michael Bayles, for example, described professionals as social leaders and argued that because "they make many decisions that significantly affect others, they share responsibility for the realization of . . . values in society";[267] George DeMartino, discussing the ethics of economists, claimed that economists' social influence comes with accountability.[268] Some writers went on to suggest that the professional is placed in a trusteeship position in his relationship with the public. Lon Fuller and John Randall, while discussing lawyers' obligations to society for example, have argued that "[t]he lawyer's highest loyalty . . . runs, not to persons, but to procedures and institutions. The lawyer's role imposes on him a trusteeship for the integrity of those fundamental processes of government and self-government upon which the successful functioning of our society depends."[269]

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263. *See, e.g.*, TOM L. BEAUCHAMP & JAMES F. CHILDRESS, PRINCIPLES OF BIOMEDICAL ETHICS 206 (6th ed. 2009).

264. *Id.*

265. *See* BAYLES, *supra* note 249, at 93 ("The general argument for professional obligations to third parties stems from the role of professions in society. Professions are licensed or informally authorized to provide certain types of services . . . . The granting of a license and privilege in effect creates a trust for professionals to ensure that these activities are performed in a manner that preserves and promotes . . . values in society.").

266. *See* STEVEN LUKES, POWER: A RADICAL VIEW 56 (1974) ("The point . . . of locating power is to fix responsibility for consequences held to flow from the action, or inaction, of certain specifiable agents."); Andrew Schaap, *Power and Responsibility: Should We Spare The King's Head?*, 20 POL. 129, 130 (2000) ("To 'have' or 'exercise' power is to be morally and politically accountable for one's actions (including inactions) and their consequences on others.").

267. BAYLES, *supra* note 249, at 109.

268. *See* GEORGE F. DEMARTINO, THE ECONOMIST'S OATH 103–17 (2011) (explaining that the complex subject matter of economists' work increases their power, thus increasing the need for ethical economists).

269. Lon L. Fuller & John D. Randall, *Professional Responsibility: Report of the Joint Conference*, *in* ETHICS AND THE LEGAL PROFESSION 197, 207 (Elliot D. Cohen & Michael Davis eds., 2d ed. 2009).

I would argue that mediators satisfy both conditions. It is easier to establish that with court-connected mediators, but the connection to a court is not essential. Any person who occupies the role of a mediator, whether for a fee or not, and whether in connection to a court program or not, supplies a service to the parties. He is able to provide this service because society has not prohibited him from doing so. He enjoys, as a result of his practice, social benefits that come with that role: social recognition, opportunities, influence, potential for financial remuneration, personal satisfaction, and more. Court-connected mediators might be seen as the "long arm" of the court[270] and enjoy more benefits than say, a community mediator, in terms of legal immunity,[271] social status, and fees; but all mediators enjoy benefits beyond those enjoyed by an ordinary member of the public. In addition, all mediators, I believe, are viewed by the public as belonging to one mediation community or profession, and the conduct or misconduct of one mediator, irrespective of style or affiliation, would affect other mediators for better or worse. Thus, the benefits of court-connected mediators spill over to community mediators and vice versa. For example, the reputation of court-connected mediators might improve the reputation and attractiveness of mediation services in general, and as a result, the social status and the potential for financial remuneration for the profession as a whole might improve. On the first condition, then, I would argue that all mediators are in the fortunate position of receiving benefits from society due to their role and that in return they should at the very least perform their role in a manner that minimizes injury to important public interests.

Mediators satisfy the second condition as well. They are in a position of power and influence because people seek their assistance in doing things they cannot do themselves; because they have access to resources that these people do not have access to, such as special skills, expertise, and experience;[272] and because they occupy a role and provide services that society views as important and thus allows and encourages. Mediators' influence does not stop with the parties; it extends to nonparticipants and to the public at large as well. The reason for that is that mediators influence the process of mediation in numerous ways, thus affecting the content of

270. Elad Finkelstein & Shahar Lifshitz, *Bargaining in the Shadow of the Mediator: A Communitarian Theory of Post-Mediation Contracts*, 25 OHIO ST. J. ON DISP. RESOL. 667, 682–84 (2010) (suggesting that court-connected mediators serve a public function).

271. Arthur A. Chaykin, *The Liabilities and Immunities of Mediators: A Hostile Environment for Model Legislation*, 2 OHIO ST. J. ON DISP. RESOL. 47, 53 n.28 (1986).

272. *See* Omer Shapira, *Exploring the Concept of Power in Mediation: Mediators' Sources of Power and Influence Tactics*, 24 OHIO ST. J. ON DISP. RESOL. 535, 542–59 (2009) (describing mediators' sources of power).

mediation and its outcome.[273] The outcome of mediation often affects not only the parties but other people as well. For example, a dispute between two neighbors might affect their families, other neighbors living in the vicinity, and the community at large; a business dispute between a manufacturer and a client over a defective product might affect all potential clients, and a dispute between an employer and employee concerning an alleged sexual harassment claim might have implications for many other employees in addition to the rule of law. Some scholars have gone even further to suggest that mediation, with the help of mediators of course, can transform society into a better place to live.[274] Professor Susskind once wrote that mediation parties are social leaders, and as such, they have "the responsibilities of leadership."[275] It seems to me that mediators, not the parties as Susskind has suggested, should be seen as social leaders who have the responsibilities of leadership.[276] Since power and influence come with responsibility, mediators must conduct themselves accordingly and not use their power in a manner that harms those who might be affected by their conduct—parties as well as nonparties. And since mediators are responsible for conducting mediations and have the power to terminate them, they must exercise that power when it is necessary to avoid unjustifiable harm to the public. It is their duty towards the public.

Illegal and immoral agreements are harmful to members of the public, are contrary to the public's interest, and should not be the outcome of mediation. The mediation rule that imposes on the mediator a duty towards the public to prevent an illegal or immoral outcome implies that such outcome is illegitimate in the context of mediation—the outcome violates a mediation rule that prohibits such outcome and is therefore unfair. Thus, even from a narrow perspective an illegal or immoral mediated outcome could be considered unfair even though it is not serious enough to undermine the public's confidence in mediation.

This conclusion justifies a reformulation of the definition of a normatively fair mediated outcome. A normatively fair outcome, even from the narrow perspective of fairness that focuses on the internal rules of the

273. *See, e.g.*, Omer Shapira, *Joining Forces in Search for Answers: The Use of Therapeutic Jurisprudence in the Realm of Mediation Ethics*, 8 PEPP. DISP. RESOL. L.J. 243, 256–57 (2008) ("[M]ediator decisions on the process have effect on the content of mediation and its outcome as well."); Shapira, *supra* note 163, at 12 nn.60–61 (citing several sources stating the same).

274. *See, e.g.*, Robert A. Baruch Bush & Joseph P. Folger, *Mediation and Social Justice: Risks and Opportunities*, 27 OHIO ST. J. ON DISP. RESOL. 1, 19–21 (2012) (discussing literature on the potential of mediation to produce what the authors call "macro-level social justice").

275. *See* Susskind, *supra* note 242, at 515.

276. *Cf.* Fuller & Randall, *supra* note 269, at 211 ("Every calling owes to the public a duty of leadership in those matters where its training and experience give it a special competence and insight.").

mediation game, requires that mediated outcomes respect the rules of law and morality. A normatively fair mediation outcome must satisfy all of the following conditions: (1) the outcome must have been accepted by parties who have exercised self-determination, (2) the outcome does not jeopardize the institution of mediation by reducing public faith and confidence in mediation, (3) the outcome is not illegal, and (4) the outcome is not immoral.

6. Mediators' Accountability for Unfair Outcomes

The previous discussion of outcome fairness in mediation provides a solid basis for approaching the issue of mediators' accountability for unfair outcomes. Since codes of conduct for mediators and mediation literature do not provide an adequate account of the meaning of fairness in mediation, their treatment of mediators' accountability for unfair outcomes is necessarily unsatisfactory. One area of difficulty in mediators' accountability discourse is that some writers challenge the very idea that mediators could be held accountable for the mediation outcome. Stulberg, for example, argued that mediators are not accountable for the outcome of mediation because the responsibility for the outcome rests with the parties who have accepted that outcome.[277]On the other hand, writers such as Susskind, Maute, Cooley, and Gibson have argued that mediators are accountable for the outcome of mediation.[278] As a result, some scholars argued that mediators must take actions to ensure, for example, that the outcome does not harm nonparticipants or is not illegal.[279] Robert Baruch Bush and Joseph Folger have recently noted that "the dominant view in the field has moved in the direction of Susskind's 'accountability' view of best practices in mediation—that substantive fairness of outcome is indeed one

277. *See* Stulberg, *supra* note 75, at 88–91 (arguing that the noncompulsory nature of the mediation process ensures that parties control the mediated outcome).

278. For a discussion of mediators' responsibility towards nonparticipants see, for example, Gibson, *supra* note 63, at 209 (arguing that mediators sometimes have a duty to question the mediated agreement); Maute, *supra* note 39, at 358 (arguing that court-connected mediators are accountable for the effect of mediation on public interests); Susskind, *supra* note 76, at 14–18 (arguing that mediators of environmental disputes should ensure that mediated agreements take into account the interests of third parties); Susskind, *supra* note 242, at 513–17.

279. For literature justifying mediators' intervention in circumstances in which parties reach an illegal agreement see, for example, Cooley, *supra* note 64, at 130 (finding mediator intervention when an agreement may be perceived as unfair by nonparticipants); Maute, *supra* note 39, at 361 (advocating "further intervention" when the mediated agreement illegal or grossly unfair); Shapira, *supra* note 163, at 38–40 ("The justification for limiting the parties' right of self-determination in these cases lies in the acceptance of interests other than the parties' as worthy of protection . . . .").

of the mediator's key responsibilities."[280] What is still needed is a convincing justification for mediators' accountability that can support the "accountability view."

The current literature on mediators' responsibility for mediation outcomes does not offer a clear rationale for the existence of such responsibility. Maute, for example, argued that in court-connected mediation a mediator's responsibility to prevent unfair outcomes stems from the fact that "access to court is short-circuited, [thus] the mediator is accountable for the quality of private justice and its effect on public interests."[281] This, I believe, is not an adequate normative explanation of accountability, and it is limited to court-connected mediators. Gibson argued that "[w]here issues of harm to self or others are involved, the mediator cannot be neutral in the sense of disinterested; he or she has an affirmative obligation to make sure that some kinds of settlement are questioned."[282] However, Gibson did not reveal the normative reasoning that supports that suggested affirmative duty. He mentioned "policy reasons"[283] but did not elaborate. Susskind mentioned three "different justifications for holding mediators accountable to interests not at the table" while discussing mediators' accountability for outcomes.[284] First, he argued, "mediated agreements set informal precedents. [Thus], mediators would do well to remind the parties at the table that what they work out will have an impact on others in similar situations";[285] second, mediation parties have what he called "the responsibilities of leadership" and mediators "owe it to the parties in any mediation to assist them in meeting the responsibilities that fall to them in the leadership roles they have assumed";[286] and third, mediators have an obligation to the mediation profession to ensure that mediation produces quality agreements that promote the reputation of the profession.[287] The problem with the first two justifications is that they explain why the *parties* should be held responsible for the outcome, and it is less clear why the mediators should be accountable for the parties' decisions. Susskind does not explain why the fact that mediated agreements set informal precedents or the fact that mediation parties are in a leadership role creates a duty for mediators. I believe that Susskind's third justification

280. Baruch Bush & Folger, *supra* note 274, at 11.
281. Maute, *supra* note 39, at 358.
282. Gibson, *supra* note 63, at 209.
283. *Id.* at 205.
284. *See* Susskind, *supra* note 242, at 514.
285. *Id.* at 515.
286. *Id.* at 515.
287. *See id.* at 516–17.

is correct, but it is underdeveloped and does not make a strong enough case for mediators' accountability.[288]

My purpose in the following discussion is to show how the theory of fairness that has been described in this Article can improve our understanding of mediators' responsibility for unfair mediation outcomes. An unfair outcome, it has been argued, is an outcome that is inconsistent with those rules of mediation that apply to outcomes. Mediators would be accountable for an outcome to the extent that mediation rules or other external obligatory rules—i.e., rules of law and morality—require them to take an action with respect to a mediation outcome. I have identified four types of normatively unfair mediated outcomes, and I consider the mediator's accountability for these outcomes.

a. The Outcome Must Have Been Accepted by Parties Who Have Exercised Self-Determination—A Duty Towards the Parties to Conduct Mediation on the Basis of Party Self-Determination

I argued that a fair mediated outcome is an outcome the parties have decided upon in the exercise of self-determination. Thus, the duty of the mediator with respect to the fairness of the outcome is, on this aspect of outcome fairness, his duty towards the parties to conduct the mediation on the basis of the principle of party self-determination. Indeed, mediators' duty to conduct mediation on the basis of party self-determination is widely recognized in the field of mediation.[289]Following logically from the duty to conduct mediations on the basis of party self-determination is a duty to prevent an outcome that a party agrees to without exercising self-determination—a decision that is involuntary, coerced, uninformed, or made in a state of incapacity. Some codes of conduct for mediators expressly recognize this duty.[290] In fact, even Stulberg, who argued that mediators are not responsible for mediation outcomes, noted that mediators should take measures to ensure that parties truly exercise their right to self-determination and make voluntary and informed decisions.[291] In other

288. See *supra* Part IV.B.3(c) for a discussion of this justification (a duty towards the profession) in more detail.

289. *E.g.*, CAL. R. CT. 3.853, *available at* http://www.courts.ca.gov/documents/title_3.pdf; MODEL STANDARDS, *supra* note 2, § I.A; FLORIDA RULES, *supra* note 2, § 10.310(a), at 96.

290. *E.g.*, NEW YORK STANDARDS, *supra* note 2, § I cmt. 4, at 3 ("Where a power imbalance exists between the parties such that one or both parties cannot exercise self-determination, the mediator should postpone the session, withdraw from the mediation, terminate the mediation, or consult with center staff."); *see also* TEXAS GUIDELINES, *supra* note 253, § 13 (calling for postponement of the mediation when a party is "unable to participate meaningfully"); VIRGINIA STANDARDS, *supra* note 2, Standard I.3, at 7 (allowing for a mediator's withdrawal when a party does not understand the terms of a mediated agreement).

291. *See* Stulberg, *supra* note 32, at 242–43.

words, Stulberg holds mediators accountable to the parties for an unfair outcome when the unfairness stems from a defect in party self-determination.

Many fairness concerns in mediation can be met and avoided if mediators take steps to ensure that the parties exercise substantive self-determination, and if mediators terminate the mediation when a party is unable to do so. If, for example, the parties are about to reach an illegal agreement, an agreement which is impossible to execute, or an agreement that has severe implications on the parties or on third parties, it is quite possible that on learning these concerns the parties would arrive at a different agreement that does not raise these concerns. On the other hand, there will be cases in which the parties cannot be made aware of some of these concerns because of conflicting mediator duties such as impartiality or confidentiality. And in such circumstances (for example, where there is false information supplied by one party or bad faith bargaining), the mediator will have to terminate the mediation. It is also possible that the parties are well-informed of some fairness concerns—the illegality of the agreement or the fact that it is grossly unfair to one of the parties—yet they insist on proceeding with the agreement. In such a case, the mediator will have exhausted his responsibilities towards the parties and would have to consider his duties towards the profession and the public, which might instruct him to terminate the mediation notwithstanding the parties' wishes to proceed.[292] These instances are dealt with below.

b. The Outcome does not Jeopardize the Institution of Mediation—A Duty Towards The Profession to Maintain Public Faith and Confidence in Mediation

The second criterion of outcome fairness stems from mediators' obligation to the profession to prevent harm to the institution of mediation. This criterion links the normative fairness of outcomes with perceived fairness. The mediator's accountability for the mediation outcome is triggered by the public perception of outcome fairness—by the way we believe the public would experience the outcome of mediation. If the mediator suspects that the public would perceive the outcome as unfair, to

292. *Cf.* Cooley, *supra* note 64, at 130 ("Except in very narrow circumstances, mediator accountability does not encompass the mediator's concern for the fairness of the *outcome* of the mediation. . . . The narrow circumstances in which a mediator should evaluate the fairness of the outcome include situations where the mediator or nonparties perceive, or could perceive, the resulting agreement to be illegal, grossly inequitable, or based on false information. In such rare situations, the mediator must apprise the parties of the problem, redirect their efforts toward generating new, acceptable options, and, as a last resort, withdraw as mediator and terminate the mediation.").

the extent that the perception could harm the public's trust in mediation, then the mediator must prevent that mediated outcome. It is possible, therefore, that the mediator would have to prevent a mediated outcome that is moral (in a critical sense of morality) or legal but is divorced from common social norms (sometimes termed positive or social morality) to a degree that could undermine public confidence in mediation. The parties would be free, of course, to conclude such an agreement outside mediation, but the mediator must not allow such a mediated agreement because of his obligation towards the profession. In addition, the duty towards the profession would make the mediator accountable for illegal and immoral outcomes as well—to the extent that these outcomes jeopardize public confidence in mediation.

This is, I believe, the message that the codes of conduct for mediators try to deliver when they use terms such as *unconscionability*, *gross* or *fundamental* unfairness, and lack of *integrity* regarding the outcome of mediation.[293] And this reasoning explains the claims of mediation experts that "mediators and judges must prevent parties from signing agreements that would be unconscionable under contract doctrine,"[294] "mediation should not endorse [unconscionable] agreements that would not be sanctioned by society,"[295] and "the mediator must intervene to avoid patently unfair agreements."[296]

I would argue that this approach should be taken in the interpretation of the California Rules of Conduct for Mediators (California Rules), which, unlike other codes of conduct for mediators, state that "[a] mediator is not obligated to ensure the substantive fairness of an agreement reached by the parties."[297] The California Rules say nothing on the meaning of substantive fairness, so one can only guess their intention. However, the California Rules do recognize the mediator's duty to conduct the mediation in a manner that merits "public confidence in the integrity and fairness of the process."[298] Thus, it is argued that while the California mediator is not obligated to ensure any particular mediated outcome, he is obligated to prevent those few particular harmful mediated outcomes that jeopardize public confidence in mediation; and since he "must conduct the mediation

293. *See* GEORGIA STANDARDS, *supra* note 3, § IV.A, at 30; FLORIDA RULES, *supra* note 2, § 10.420(b)(4), at 103; VIRGINIA STANDARDS, *supra* note 2, § K.4, at 8.

294. *See* Note, *supra* note 42, at 1100.

295. Gibson, *supra* note 63, at 209.

296. Maute, *supra* note 39, at 349; *see id.* at 348 ("The mediator, however, should refuse to finalize an agreement . . . where the agreement is so unfair that it would be a miscarriage of justice.").

297. *See* CAL. R. CT. 3.857(b), *available at* http://www.courts.ca.gov/documents/title_3.pdf.

298. *See id.* § 3.850(a).

in a manner that supports the principles of voluntary participation and self-determination by the parties,"[299] he is also under a duty to prevent an outcome that a party agrees to without exercising self-determination.[300]

Note that the duty towards the profession to prevent harm to the institution of mediation encompasses, in some circumstances, the mediator's duties towards the parties. For example, if the mediator did not intervene to prevent a mediated outcome that was reached through coercion, fraud, or bad-faith bargaining, that outcome might jeopardize the institution of mediation and would be in breach of both the mediator's duty towards the parties to conduct the mediation on the basis of party self-determination and her duty towards the profession to prevent harm to the institution of mediation.

c. The Outcome Is Not Illegal or Immoral—A Duty Towards the Public Not to Harm Important Social Interests

Mediators' accountability for illegal or immoral outcomes has two sources: their duty to the public[301] and their duty to the profession.[302] The duty to the public requires mediators to conduct the mediation in a manner that does not inflict harm on important social interests, in particular the public's interest in preserving the rules of law and morality (in its critical sense), which all members of society are legitimately expected to follow. In addition, since the flourishing of mediation is in the public's interest, the duty to the public also directs them to conduct the mediation in a manner that does not harm the institution of mediation. Thus, the duty to the public and the duty to the profession overlap in that both duties instruct mediators to prevent mediation outcomes that jeopardize the institution of mediation. Still, there are two important differences between the two duties with respect to mediators' accountability for outcomes. First, while under a duty towards the profession, the mediator's obligation to prevent injury to public interests is merely an instrument to keep up with his main obligation—to avoid harm to the profession. Under a duty to the public, the mediator's main obligation is to prevent harm to public interests, and for this reason—the protection of public interests—an outcome that might harm the institution of mediation, and incidentally the mediation profession, should be avoided. Thus, the message to mediators is that they should be aware of their public duties and not be satisfied with their obligations to the profession.

299. *Id.* § 3.853.
300. *See supra* Part IV.B.6(a).
301. *See supra* Part IV.B.5 for a discussion of mediators' duty to the public.
302. *See supra* Part IV.B.3(c) for a discussion of mediators' duty to the profession.

Second, the duty to the public places a higher burden on mediators than their duty to the profession. Unlike the duty to the profession, which focuses on the public's expected reaction to the mediated outcome (on a public perception of outcome unfairness) and demands the mediator to intervene and prevent an outcome in the extreme case in which the outcome *might* jeopardize the public's confidence in mediation, the duty towards the public does not necessarily depend on the public's expected reaction and demands the mediator to intervene and prevent an outcome that harms the public's interest, even where the public is not expected to lose confidence in mediation. As a result, under the duty towards the public, mediators must not allow the mediation to conclude with an illegal or immoral agreement, even when there is no real prospect that the public will lose faith in mediation because the mediated outcome will never be disclosed or because the violation of law or morality by the outcome is not very serious. The duty towards the public is not triggered by the public's expected reaction to the outcome but by the commitment to the public's interests.

V. CONCLUSION

Fairness and justice have a high profile in mediation literature and in the codes of conduct for mediators. The understanding of these terms, however, is limited and their use is inconsistent. This Article has suggested several perspectives of fairness that can promote a clear, precise, and consistent discourse of fairness and justice in mediation: conceptions of mediation fairness, which includes formal and substantive senses of fairness, and perceptions of fairness, which includes personal, average, and public senses of fairness. These perspectives enable us to take a fresh look at codes of conduct and mediation literature on fairness, allow us to have a better understanding of what they mean when they make assertions of fairness or unfairness, and make it possible to evaluate the force of these assertions.

In addition to laying ground for a more coherent discussion of fairness in mediation, the Article has demonstrated the theory's contribution to mediation discourse on a number of issues. The substantive-fairness perspective has been applied to mediators' duty of impartiality in support of an interpretation that approves conduct that treats unequal mediation parties differently, the formal conception of fairness with its narrow and wide meanings has been applied to mediation literature on outcome fairness and has produced a clear definition of a fair mediation outcome, and the enhanced understanding of the meaning of outcome fairness has made it possible to clarify the extent of mediators' accountability for unfair outcomes.

This Article has also argued and defended several novel claims that have not received adequate attention in the current mediation literature: first, the claim that any conduct in the course of mediation, and any mediated outcome, that jeopardizes the institution of mediation is illegitimate in the context of mediation and should be considered normatively unfair; second, that any conduct in the course of mediation, and any mediated outcome, that is illegal or immoral (in the critical sense of morality) should be considered normatively unfair. Thus, for example, an illegal or immoral mediated agreement would be considered unfair. It is hoped that this Article will be of value to both scholars and practitioners in the continuing discussion of fairness in mediation and other fields.