I. Introduction

Mediation’s legacy as a prime technique for dispute resolution crosses the boundaries of cultures and societies over time.\(^1\) Even today, mediation continues its legacy as a primary form of Alternative Dispute Resolution (ADR) in the United States and abroad. Mediation is a process involving a mediator, a neutral third party, who assists disputants with crafting an agreement to resolve their conflict.\(^2\) Although the mediator facilitates the agreement, the terms of the agreement are ultimately decided by the parties in conflict. The role of the mediator remains confined to that of a facilitator who has no power to influence the outcome which is arrived at mutually by the disputing parties.\(^3\) In mediation, the obligation to align interests and produce results lies with the disputants,\(^4\) and frequently involves concessions made by both parties to the dispute. As a technique for resolving conflict, mediation sometimes falls short of attaining its lofty purpose of resolving disputes. This failure is frequently due to a combination of structural and individualized flaws with the mediation process. This article sets forth a normative framework for combatting these flaws and thereby improving the likelihood of a successful mediation process.

The literature review of the last decade reveals that mediation is advancing across many fields and specializations of both law and society. Mediation is advancing in, among other areas: international law, environmental law, education, divorce and family law, organizational disputes, consumer disputes, sexual harassment claims/employment law, mental health related disputes, debt collection matters, insurance disputes, general liability claims, contract disputes, malpractice disputes, victim-offender crises, tax claims, and inter-gang disputes.\(^5\) Mediation spans the spectrum of societal ills; it is utilized to resolve disputes across a broad range of legal and societal issues.

Authors identify many goals that a mediator should pursue when attempting to facilitate a dispute. These goals include reaching agreement,\(^6\) improving the parties’ relationship,\(^7\)

\(^{1}\) JEROLD AUERBACH, JUSTICE WITHOUT LAW (OXFORD UNIVERSITY PRESS 1983).
\(^{2}\) MARIAN LIEBMANN, MEDIATION IN CONTEXT (JESSICA KINGSLEY PUBLISHERS 2000).
\(^{6}\) Id. at 226; and Gregory Firestone, Empowering Parents in Child Protection Mediation: Challenges and Opportunities, 47 FAM. CT. REV. 98 (January 2009).
advancing social justice, attaining social transformation, reducing sex discrimination, reducing built up anger, preventing prospective conflicts, using speed and efficiency, resolving social problems, forestalling prospective problems, reducing prospective costs, reductions in violence, improving party communication, reductions in stress, integration of relationships, and overseeing compensation. During each mediation session, rarely does a mediator embrace all of these goals, but a mediator often chooses to utilize one or many of these goals as a strategy for facilitating agreement. Often, only the primary goal of the agreement is reached, leaving the parties with nothing more than an agreement without ameliorating the underlying conflict that gave rise to the dispute in the first place.

Resolving a dispute is undoubtedly the key end to a successful mediation process, but its other goals should not be overlooked. Unfortunately, authors and writers associate more goals with mediation than mediation can handle. They symbolize mediation as a “Swiss-army knife” that can resolve all kinds of conflict, and they forget that there are limits to mediation’s potential for achievement of this multiplicity of goals. Thus, the possibility of realization of these many laudable goals through mediation only flickers without much fire. The claims of modern mediation have resulted in a continuing dialogue between the critics and proponents of mediation. This essay aims to outline the criticisms of the mediation process, and to propose a method for resolving them. Section I explains the link between mediation and social justice. Section II identifies the structural flaws of mediation. Section III identifies the individualized flaws of mediation. Section IV constructs a framework for addressing the structural and

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individualized flaws; this framework, the “formalized reflective” approach, thwarts the flaws in favor of an improved, more reflective mediation process that promotes social justice.

II. Mediation and Social Justice

Mediation and social justice are inextricably linked insofar as each has the ability to contribute to the other. Social justice is a broad concept incorporating many views that are frequently inconsistent with each other. The visions of social justice by leading scholars such as John Rawls and David Miller, or even the views of Catholic Social Thought, are nuanced in their variant explications of what a just society requires. For the purposes of this essay, we shall not seek to develop a new framework of social justice, but instead shall focus on two of the core principles underlying most social justice theories (equality and vulnerability), how mediation can contribute to the promotion of these principles, and, conversely, how these principles can contribute to mediation.

The first principle of social justice is equality. Social justice ensures that regardless of the differences of citizens, all should have the “unlimited access to civil freedom resources and institutions” equally. Social justice prevails when the relative equality of conditions, including opportunities, are achieved for all the groups and classes of society. The core of inequality lies at structural levels, both social and organizational, and is reflected in the systemic building blocks of society like educational systems, housing markets, and employment markets, and does not solely depend on the behavior of individuals. Social justice requires a just societal structure, including procedural justice, to ensure that its ends are achieved and maintained. An absolute equality is not necessary for social justice to be achieved. Society will always be devoid of absolute equality due to, among other things, the immutable characteristics of individual human beings and the assets attained via variant preferences and skills. Yet, a generalized atmosphere wherein equality of opportunity and non-discrimination are embraced by the populace is necessary for social justice. Nonetheless, social injustice transpires through the societal systems when these systems differentiate and prioritize between social groups along the lines of race, wealth, religion, gender, ethnicity, color, national origin, or other classes. Social justice is advanced by taking measures to lessen this inequity, and to promote a generalized atmosphere of equality of opportunity and non-discrimination.

The second principle of social justice entails protecting the most vulnerable members of society and treating those members fairly. Social justice ensures that all citizens have access to their basic needs, including those most vulnerable and impoverished. Entailed in this principle is

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26 See generally Catechism of the Catholic Church, Part 3, Section 1, Chapter 2, Article 3, Social Justice, http://www.vatican.va/archive/ccc_css/archive/catechism/p3s1c2a3.htm.


the right to subsistence, that is, at least the minimum provision of resources necessary for a reasonably healthy life of normal duration. Social justice entails a minimum fair allocation of the resources of a community to all members of that community, with a minimal expectation that all have their basic needs satisfied. These basic needs may include adequate food, water, shelter, and health. Right theorists, such as Henry Shue, argue that provision of subsistence is necessary to the provision of many other rights, and without subsistence first being provided the enjoyment of other rights is undercut.\textsuperscript{29} Although not all social justice theories are rights-based, Shue’s argument holds true for the creation of a just society as well. Social justice cannot be achieved if individuals cannot live long enough to enjoy it. For this reason, society must protect and be fair to those who are most vulnerable.

Social justice may be advanced by promoting mediation processes aligned with equality and non-discrimination. Mediation is by its very nature an equalizing process whereby two parties come to the table under the umbrella of peaceful resolution in order to resolve their disputes regardless of which party may be wealthier or poorer, and regardless of class or ethnicity. Although individualized instances of bad faith may undermine this equalizing process, the theoretical underpinnings of mediation allow for either party, regardless of class, to equally make concessions, hold firm, walk away, or continue the dialogue towards resolution. Moreover, mediation may allow participants to reach resolution without the expenditure of the resources necessary to maintain their basic subsistence. Social justice may, under the proper circumstances, be advanced by engaging in the mediation process.

The converse is also true. Mediation may be advanced by promoting social justice within the mediation setting. By focusing a mediation upon principles of equality and vulnerability, as opposed to “winning” and “losing,” participants may be more inclined to negotiate, concede, and approach resolution. When focusing the mediation process upon a greater social good, as opposed to the relatively minute controversy of the participants (although seemingly important at the time), resolution may be facilitated by embracing the underpinning principles of social justice. If one party is seeking compensation for a harm done by the other party, appeals to social justice may move the parties temporarily away from their anger and self-interest, and towards resolution. Social justice principles may promote a more effective mediation process by embracing that during mediation the parties are equal, regardless of their wealth, power, or their strategic position in potential or accompanying litigation.

Social justice may thus be conceived from both macro and micro perspectives. On the micro level, or individual and group level, equal treatment in individualized settings, such as mediation, can promote macro level, or societal level, changes. It is similarly possible to perpetuate social injustice at the micro level by directing inequality to certain groups or individuals, which will, in turn, have negative repercussions at the macro level. Though the aim of social justice is macro level equality, the micro level dissemination of individual justice, when recurring over time, leads to macro level changes in the distribution of social justice.\textsuperscript{30} Having outlined the basics of social justice and its relationship to mediation, this essay next examines the structural and then individualized issues of mediation.

\section*{III. Structural Issues of Mediation}

\textsuperscript{29} Henry Shue, Basic Rights: Subsistence, Affluence, and U.S. Foreign Policy, 2nd Ed. (Princeton University Press 1996).

\textsuperscript{30} Bush & Folger, supra note 28.
Structural issues can be understood as those issues that directly affect the process of mediation and within which the process of mediation exists. The structure of a process defines its framework and provides guidelines to be followed. Authors identify privatization and informality as two of the underpinning structural flaws of the mediation process. Although these flaws are like two sides of one coin, each does forward different concerns. These concerns are detailed in the following paragraphs.

A. Privatization of the Mediation Process

Several commentators suggest that the private structure of mediation, its confidential nature, and the lack of transparency in the mediation process is a structural cause of unfair outcomes which leads to the cannibalization of social justice. Although these commentators perceive the confidential nature of mediation as a problem, it is often touted as one of the grand benefits of engaging in mediation. That is, individuals and businesses can avoid negative publicity and published legal decisions by engaging in confidential mediation. Nevertheless, according to these commentators, mediation can undermine social justice by keeping documents and proceedings private, thus letting the status quo prevail without the recourse of public acknowledgement and reaction to the often pernicious actions that give rise to the mediated dispute.\(^3^{1}\) The private nature of the mediation process allows mediation to exist in a partial social vacuum within which the outflow of information is specifically controlled.

The private process of mediation allows mediators to ignore legal rules, precedent, and even ethical norms when attempting to resolve disputes. Mediators may serve as a tool to further prevalent biases due to absence of scrutiny and legal rules that could protect the process from the vices of ignorance, injustice, and prejudice. This leads to the systemic failure of mediation. The extent to which mediators are sensitive to the demands of justice and how their biases shape their attitude toward a class or group in conflict cannot be checked and scrutinized if the process remains private, leading to an increasing possibility of unfairness.\(^3^{2}\) This leads to, at a minimum, the perception that mediation leads to reduced accountability and transparency.\(^3^{3}\)

Although mediation allows for an individualized approach to each case wherein the parties can craft an agreement, often by employing creative methods which would not typically be available through litigation, the risks of the unfettered ability to circumvent law and ethics in the process may result in the potential for unjust results outweighing the potential for customized, creative solutions. The promise of a mediated resolution thus edges on injustice rather than on creativity, particularly when a disadvantaged party is involved.\(^3^{4}\) Some commentators see the creative solutions of mediation as creating the potential for unfair settlements, which eventually victimizes social justice.\(^3^{5}\) Feminist critiques also put forward the

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concern that the privatization of the divorce negotiation process removes the scrutiny-providing functions of society and the courts\textsuperscript{36} and, pursuant to the private mediation process, men gain advantages.\textsuperscript{37} Thus, neutrality and the privacy of the mediation process hides the unfairness that leads to disempowerment of the same people it wishes to serve.\textsuperscript{38} According to these commentators, the balance weighs in favor of promoting social justice over privatization.

Even in the case when the mediated resolution is just, the effects of this justice remain confined to the confidentiality provisions of the case and thus fail to visibly add to the aggregate justice of society.\textsuperscript{39} The problem with mediation is that it fails to address the issue of structural injustice that leads to the aggregation of social inequality.\textsuperscript{40} In mediation, no application of equality promoting rules occurs and, moreover, no such rules are created. The mediators often look at the level of parties superficially, ignoring the structural inequities inherent in the mediation process. The mediation process may, at times, promote social justice within its social vacuum on the micro level, but, because of the privatization of the mediation process, it does not visibly add to macro level social justice.

\textbf{B. Informality of the Mediation Process}

Some commentators suggest that the informality of the mediation process is a structural cause of unjust results. Mediation is generally perceived as an informal process which, aside from confidentiality, does not entail many formal structural requirements prior to an agreement being reached. Mediators have significant leeway to tailor an individual mediation to the needs of the parties. In some high conflict cases, this may include the mediator separating the parties into different rooms while the mediator travels back and forth between the rooms to attempt to facilitate a resolution (in mediator parlance, these are sometimes referred to as “break-out sessions”). In these cases, the parties may not even speak directly to each other. In other cases, the parties may sit together at a table to attempt to reach resolution through discussion. Some mediators employ a combination of techniques, such as when the parties begin at the same table, and then “break-out” into separate sessions. This informal and flexible structure, according to some commentators, can lead to miscarriages of justice.

The informal structure of mediation involves an absence of the neutralizing authority of government, courts, judges, the often idiosyncratic procedural rules of a given jurisdiction, and mechanisms for enforcing substantive law. The prominent concern of critics is that mediation undermines legitimate authority by contracting and reaching agreements privately which, in turn,

\textsuperscript{36} SUSAN BOYD, CHILD CUSTODY, LAW, AND WOMEN'S WORK (OXFORD UNIVERSITY PRESS 2003); and Elizabeth Pickett, Familial Ideology, Family Law and Mediation: Law Casts More than a 'Shadow', 3 J. OF HUM. JUST. 27 (September 1991).
\textsuperscript{38} Hilary Astor, Mediator Neutrality: Making Sense of Theory and Practice, 16 SOC. & LEGAL STUD. 21 (2007).
\textsuperscript{39} Amy Cohen, Revisiting Against Settlement: Some Reflections on Dispute Resolution and Public Values, 78 FORDHAM L. REV. 1143 (2009).
\textsuperscript{40} BUSH & FOLGER, supra note 34.
undermines the authority and power of government. In industrial relations, mediation may allow parties to reach an agreement contrary to the national standards and employment laws in some countries. This gives rise to serious questions about the virtues of the flourishing mediation practice and the power it holds to harm the party who lacks knowledge of legal rights and duties.

Mediation involves parties engaging in informal discussions with the assistance of skilled facilitators (i.e., mediators) who frequently appeal to the needs and interests of the parties instead of formal legal rules. The absence of formal rules in mediation makes the process vulnerable to being used to the advantage of mediators who could pressurize parties to agree on something that is unfair to them simply to resolve the dispute. Although mediators are not likely always cognizant of this influence, the mediator’s desire for a resolution may lead to unjust results. The pursuit of settlement may take precedence over the concerns of fairness, and since mediators often belong to the class of ‘haves,’ they often show little sympathy to the unfairness of a settlement to the ‘have not’ party. The decision and discretionary power given to mediators due to the informality of the process systematically works against the disadvantaged parties. For these, and other reasons, mediation has the power to hurt, rather than help, minorities because of inequality of bargaining power and the informality of the process.

Some social scientists claim that litigation is preferable to mediation because of the structure and rules required by the courts. The rules of court, which attorneys and litigants must strictly follow, prevent the evocation of status or class-based differences, at least overtly. In ADR processes, legitimate grievances are buried in the sand of detailed or irrelevant information. Often legitimate claims are reduced, and thus, the objective to obtain justice is lost. Justice cannot be achieved until the lines are drawn, for the damage done to one party due to the informality of the process, results in the lines continuing to blur until they fall into oblivion, blinding both mediators and disputants. The recurrent and dominant ideologies, practices, and ideas are relabeled as justice by participants in this process. As one commentator notes, “ADR can by expanding disputes beyond recognition, cause them to lose their urgency and sharp edges.” As another commentator explains, ADR practices replace the rhetoric of justice and rights with feelings and compromise that appear ominously similar to the status quo. According

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41 Ridley-Duff & Bennett, supra note 31.
45 Bush & Folger, supra note 28.
48 Id. at 54.
to some commentators, litigation is superior to mediation because it champions rights in the provision of justice, and avoids these defects of the mediation process.  

Other commentators claim that deormalization is often pursued to maintain social order, but after a process is deormalized, the availability of justice may decrease. Deormalized justice is a technique employed to increase state power by dismissing and minimizing the opposition subtility and by directing towards bureaucratic or managerial objectives, and consolidating its values into social life. Yet, this agreement is reached without forcible consent that appears as a free choice by disputants and the social group they represent. The yardstick of success of deormalized justice is based on the satisfaction of the disputants regarding the outcome of the process. When a disputant is brought to the forum of ADR, the disputant has already faced the understated and obvious social pressures and biases; this ordeal lessens the disputant’s expectations even before an outcome is expected or obtained. These reduced expectations culminate in higher satisfaction. The deormalization thus, on its face gives the appearance of promoting justice, but often de facto results in injustice.

Mediation has been introduced especially in Western liberal democracies as a method of assisting ordinary and less powerful parties to reach just outcomes, but instead the informality and private nature of the mediation process mask its unfairness which results in the disempowerment of the same people that mediation aims to serve. Some commentators claim that the proliferation of mediation leads to miscarriages of social justice, that is, by undermining micro-level justice in mediations, macro-level social justice is undercut. Having discussed the structural flaws of mediation, privatization and informality, this essay next addresses the individualized flaws of mediation.

IV. Individualized Issues of Mediation

The individualized flaws of mediation are diverse and contingent largely upon those involved in a particular mediation (i.e., the parties and the mediator). Individualized issues arise because of the parties and/or mediator, either pursuant to the relationship between or among them, or pursuant to biases, relational difficulties, or other conflicts that are nurtured or supported by the actions of the parties during mediation. The extent to which any of the individualized flaws of mediation emerge (if at all), during mediation, depends largely upon the parties and the mediator. The three individualized issues of mediation, that vary circumstantially, are: contextualization of reality, power imbalances, and the neutrality of the mediator.

A. Contextualization of Reality

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50 Jones, supra note 46.
51 CHRISTINE B. HARRINGTON, SHADOW JUSTICE: THE IDEOLOGY AND INSTITUTIONALIZATION OF ALTERNATIVES TO COURT (GREENWOOD PRESS 1985).
52 Id.
53 HILARY ASTOR & CHRISTINE CHINKIN, DISPUTE RESOLUTION IN AUSTRALIA, 2ND ED. (LEXISNEXIS 2002).
54 Astor, supra note 38.
Mediation, as a negotiation paradigm, affirms human independence, but simultaneously creates a new reality within which the mediation process takes place. It is within this contextualization that lay the landmines of semantics that subtly change one’s view of reality itself. As commentators explain, the process of mediation is a “hegemonic process precisely because it generates a dominant ideology (a dominant story) by creating a web of shared meanings, a web created out of available stories/myths & their engendered forms of practices.”

The mediation process leads to dominant ideologies that subtly invade the perceptions of disputants, resulting in the perpetuation of powerful myths, beliefs, and dogma. As mediation takes place, the parties, and even the mediator, become drawn into the process, losing sight of the exterior world.

Mediation becomes a storytelling process, which is primarily dictated by culture, telling disputants which stories will be recognized, and which stories can and cannot be told. Mediation is displayed as synonymous to a “con game,” where the involved parties are “nickeled- and-dimed” to accept certain deals that make them abandon rights for themselves and others. The most common medium for mediation activities is of minting the currency of words, rather than using language as a means of communication. And through this process of exploration and reconstruction of reality, and with the creation of a common language and accompanying set of values, the mediation process builds on narrations. The narratives and stories told during mediation become reality to the participants involved.

At times, the mediator becomes the creator of the meaning of the conflict, and this meaning puts the resolution of conflict in perspective, making all follow a stream of thought, which purports to lead to socially desirable outcomes. Within this storytelling context, the risk of injustice is at its peak because the victim does not always realize what has been, what will be lost, and the victim may be willing to accept the resolution without question, just to have resolution – the almighty end of the mediation process. The contextualized reality may impede a party’s ability to question, or even recognize injustice, making the disadvantaged party a part of a culture within which injustice prevails.

According to some studies, mediation styles employed by the mediator are based on the mediator’s perceptions of disputants, their behavior, and their attitudes. Lower intrusiveness is used when disputants’ place their trust in the mediator, and more pressing techniques are used.

56 STEPHEN LINSTEAD, LIZ FULOP, & SIMON LILLEY, MANAGEMENT AND ORGANIZATION: A CRITICAL TEXT, 2ND ED. (PALGRAVE MACMILLAN 2009).
58 KEVIN AVRUCH, CULTURE AND CONFLICT RESOLUTION (USIP PRESS 1998).
60 DEIRDRE BODEN, THE BUSINESS OF TALK: ORGANIZATIONS IN ACTION (POLITY PRESS 1994); YIANNIS GABRIEL, STORYTELLING IN ORGANIZATIONS: FACTS, FICTIONS, AND FANTASIES (OXFORD UNIVERSITY PRESS. 2000); and DAVID M. BOJE, NARRATIVE METHODS FOR ORGANIZATIONAL & COMMUNICATION RESEARCH (SAGE PUBLICATIONS LIMITED. 2001).
when disputants’ maintain high expectations. As a result, mediators may prioritize their goals over disputant goals in order to reach resolution. Mediators may also pressurize parties toward favored outcomes by creating opportunities for the parties to pursue them. The style of the mediator also plays a role in creating a contextualized reality tailored to the unique needs of the parties in dispute.

To accomplish their goals, mediators may try to influence and alter disputants’ behaviors. As mediation progresses, new goals may emerge or goals may change which will, in turn, lead to the mediator modifying his or her own behavior. Throughout this process, mediators may follow their own concerns and emotions. In some cases, mediators may remain attached to a particular mediation technique such as allowing the parties to direct the course of mediation, which may lead to the violation of the rights of the parties. Some commentators suggest that mediators may have unconscious preferences to pressurize disputants. The mediators’ strategies and techniques influence the creation of a contextualized reality for the participants, and reciprocally, the participants’ behaviors create contextualized reality for the mediator and other participants.

B. Power Imbalances

Power imbalances may materialize in a variety of contexts within the mediation process. These power imbalances may arise because of differences in negotiating experience, an inept understanding of legal rights perhaps due to representation by a lesser skilled attorney (or by proceeding without representation), or even by the perception of power associated with one party being substantially wealthier than the other. The meaning of power in the process of mediation includes the ability to reach the desired goals or outcomes. Mediators and negotiators often portray power as relational and contextual and this power may shift between parties in the

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64 Wall & Dunne, *supra* note 5.
66 Wall & Dunne, *supra* note 5.
70 Wall & Chan-Serafin, *supra* note 63.
At times, a party may enter mediation with a distinct power disadvantage due to a faulty legal position or because of finances insufficient to pursue litigation of the claims. At other times, a party may assert a power position during the mediation process once that party realizes that the other party is willing to make certain concessions. Regardless of if the power imbalance manifests prior to or during mediation, this power imbalance is persistently regarded as an individualized flaw of mediation.

The scope of mediation and other ADR practices is aimed at exploitation of vulnerable groups of consumers, workers, poor, women, and other traditionally vulnerable social classes. Instead of helping these groups in accessing justice, mediation hurts their chance of doing just that. As one commentator explains, “ADR, in short, is a powerful means of replicating current social arrangements and power distributions. Replication occurs because problems are not faced, responsibility is diffused, grievants are cooled out, while everyone leaves thinking something positive has been done.’” Not only the ‘how’ of mediation but also the ‘who’ of it, is decided by culture. These power imbalances arise from the legitimatization of informal practices that underplay the role of formality in justice. The mediator’s failure to address and equalize power imbalances, leads to its reproduction, resulting in an unending cycle of domination by the powerful. Social classes that are traditionally vulnerable outside of mediation settings are often also vulnerable within mediation settings.

Feminists posit that women are a traditionally vulnerable social class, and this remains true also in mediation settings. One feminist critique focuses on the nature of power imbalance as it relates to domestic violence within intimate relationships as well as the consequences of these phenomena for dispute resolution. This feminist critique proposes that male parties commonly have more power than females after their relationship ends. The sources of male power are both tangible and intangible, as men often have more, have higher income, and have more property than women. Wealth creates power because the poorer party has less financial resources to commit to litigation (so often is in greater need of financial settlement). Some empirical research suggests that more impatient parties often sacrifice financial entitlements. This is true of the women entitled to child or spousal support. Other than tangibles, the

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75 Delgado, supra note 47.
76 Wall & Dunne, supra note 5.
77 Astor, supra note 38.
intangible resources also create power imbalances in negotiation and mediation. Males bring status, dominance, self-esteem, and reward expectation to the process of mediation while women suffer at the hand of depression, have fear of achievement, and often have guilt resulting from the dissolution of the relationship. As a traditionally vulnerable social class, women are frequently in the weaker power position during mediation.

Ethical concerns of mediation revolve around the imbalance of power distribution among disputants and the ignorance of their rights. Mostly, disputants are not able to exercise self-determination in mediation, as the process and outcomes are often determined by mediators or active outsiders. Sometimes, mediation develops its own tracks to be followed within an organization and environment. Power imbalances, as an individualized flaw of mediation, frequently manifest before, during, and after the mediation process.

C. Neutrality of the Mediator

One of the foundational concepts of mediation is ‘neutrality.’ Although mediation proponents emphasize the necessity of a neutral mediator, in practice, absolute neutrality is rarely, if ever, achieved. Closely tied to this concept of neutrality is the similar concept of impartiality which requires that mediators avoid biases and prejudices while performing their facilitative role. In theory, mediators should remain both neutral and impartial throughout the mediation process, but, according to commentators, rarely does this occur. Some have even gone so far as to call for the abandonment of neutrality as a tenet of mediation. Others have called for the reframing of mediation as a question of ethics, perhaps by replacing neutrality with other legitimatizing principles. Feminists raise the impartiality of mediators in their critiques.

83 Angela Cora Garcia, Kristie Vise, & Stephen Paul Whitaker, Disputing Neutrality: A Case Study of a Bias Complaint During Mediation, 20 CONFLICT RESOL. Q. 205 (Winter 2002); and Cobb & Rifkin, supra note 57.
86 LINSTED, FULOP, & LILLEY, supra note 56.
89 ASTOR & CHINKIN, supra note 53.
90 Id.
Although many pose variant solutions to the problem of partiality in mediation, the requirement of a neutral facilitator remains an integral aspect of the mediation process. In individualized situations of non-neutral or partial mediators, there is considerable opportunity for social injustice to pervade the process.

When it comes to ‘neutrality’ of mediation, there are many dimensions to examine. Foremost, a principle of neutrality informs mediators about their role in the process, requiring that they not influence the content or context of the process, and to avoid directing a result. A principle of neutrality in mediation requires that the mediator treat both parties equally. Another dimension of neutrality requires that the mediator remain independent and avoid personal connections with, financial dependence on, or informational privileges with the disputants. Lastly, neutrality requires that mediators remain free from governmental or other outside influences; this freedom is significantly important as the mediation has been institutionalized to embrace an informal non-partisan structure. A principle of neutrality thus requires a mediator to provide equal treatment, to avoid personal connections, and to remain free of external influences.

Impartiality is a synonym of neutrality, and is said to protect mediation from biases which may prevail because of the pre-existing relationship between a mediator and a party to mediation, or in cases within which the mediator’s interests are attached to the particular outcome of the process. An impartial mediator must avoid such conflicts of interest, avoid prejudice against a party, and avoid biases. A neutral mediator should also remain impartial.

Some mediators, however, reject the principle of neutrality, claiming that mediators will always bring certain preconceptions into the mediation process. These mediators accept that they cannot be value free and that they bring their perspectives, opinions and experiences to the process no matter how they try to emphasize the exclusion of these influences. Yet such a rejection undermines the legitimacy of mediation, a process free from formalized controls, which is justified by virtue of its ‘neutrality’ as well as the ‘consensual decision making’ by the parties. Other mediators give lip service to the principle of neutrality, while intervening in the process and undermining just outcomes. Whether a mediator expressly rejects or provides lip service to neutrality, a non-neutral mediator can, and often does, undermine the legitimacy of the process.

95 ALISON CLARKE-STEWART & CORNELIA BRENTANO, DIVORCE: CAUSES AND CONSEQUENCES (YALE UNIVERSITY PRESS 2006).
96 Astor, supra note 38.
97 Id.
99 Council of Australian Law Deans, supra note 80.
100 Australian Learning & Teaching Council, Bachelor of Laws: Academic Standards Statement. Learning and Teaching Academic Standards Project (2010).
101 LINDA MAUREEN FISHER & MIEKE BRANDON, MEDIATING WITH FAMILIES: MAKING THE DIFFERENCE (PEARSON EDUCATION. 2002).
102 Astor, supra note 38.
103 Id. at 224.
104 Cobb & Rifkin, supra note 57.
Experimental psychological literature supports the claim that gender stereotypes are strong and may color how a mediator perceives the parties in conflict.\textsuperscript{105} This concern is also forwarded by Mulcahy,\textsuperscript{106} Cobb and Rifkin,\textsuperscript{107} Greatbatch and Dingwall,\textsuperscript{108} and Astor\textsuperscript{109} as a major impediment to a mediator’s neutrality.\textsuperscript{110} According to some commentators, neutrality is a mere ‘rhetorical device’ that conceals the power games entailed in the process of mediation.\textsuperscript{111} The impossible claims of neutrality and impartiality are somewhat sobered by the fact that even judges, who are symbols of independence and neutrality, do not always go through the rational and deliberative process of reaching a decision, but rather are frequently guided by intuition.\textsuperscript{112} Neutrality and impartiality remain the ideals of practice, but ideals that are frequently unattainable.\textsuperscript{113} Even the conflicting parties play their role in de-neutralizing a mediator throughout the mediation process. If a mediator pays more attention to one party than another, it may be perceived as bias or impartiality.\textsuperscript{114} These issues reveal the interactional problems of the process of mediation,\textsuperscript{115} and that neutrality is a challenge and a paradox which is a theoretical ideal but is rarely, if ever, attainable in practice. Having identified the individualized flaws of mediation and how these flaws undermine social justice, this paper next proposes a normative framework for addressing the structural and individualized flaws of mediation.

V. Thwarting the Structural and Individualized Issues of Mediation

Despite the structural and individualized flaws of mediation, it is a process that, if successful, can save disputants considerable time, money, and psychological stress. These benefits of mediation do, for many, outweigh its potential social costs. Nevertheless, as a vehicle of social justice, the mediation process must be improved to thwart the structural and individualized deficiencies in order to more fully promote equality and reduce vulnerability. Some proponents of mediation contend that the risk to social justice may be minimized by mediator utilization of ‘best practices.’\textsuperscript{116} Other commentators suggest that mediators should be held ‘accountable’ for ensuring fair and just outcomes.\textsuperscript{117} Others employ a combination of best practices and accountability.\textsuperscript{118} Many authors favor a relational strategy within which mediators

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\bibitem{106} Linda Mulcahy, \textit{The Possibilities and Desirability of Mediator Neutrality-Towards an Ethic of Partiality?}, 10 \textsc{Soc. \\& Legal Stud.} 505 (2001).
\bibitem{107} Cobb \\& Rifkin, \textit{supra} note 57.
\bibitem{108} Greatbatch \\& Dingwall, \textit{supra} note 65.
\bibitem{109} Astor, \textit{supra} note 38.
\bibitem{111} Linda Mulcahy, \textit{supra} note 106; and Cobb \\& Rifkin, \textit{supra} note 57.
\bibitem{113} Marshall, \textit{supra} note 110.
\bibitem{114} Id.
\bibitem{115} Garcia, Vise, \\& Whitaker, \textit{supra} note 83.
\bibitem{116} Bush \\& Folger, \textit{supra} note 28.
\bibitem{118} Wall \\& Dunne, \textit{supra} note 5.
\end{thebibliography}
engage in facilitative and transformative narrations as well as proper sequencing. The goal of the relational strategy is to improve communication, clarify underlying feelings, and generally improve the relationship of the parties. Mediator accountability and the implementation of best practices are widely held approaches to resolving the issues of social justice associated with the mediation process.

One widely acknowledged best practice of mediators is that of “power balancing.” In an individual mediation, mediators can help bring the parties to equal footing and can minimize the damaging effects of power imbalance. For example, if the disputant parties lack negotiation skill, then the mediator’s role should be expanded to provide guidance to the parties. Mediators can help prepare the weaker party in the negotiation and let the party understand the power distribution of the process. The mobilization of the power of the less powerful should become part of the discussion. These goals can be achieved through supporting the weaker party in the planning of effective negotiation strategy and by assisting the weaker party to develop and manage resources, and enable the parties to make realistic concessions. One commentator contends that the mediator’s job is to discover the origin and characteristics of the power each party has, and to judge the degree of imbalance between them that could hinder the negotiating process. Power balancing can promote both micro and macro level social justice.

Mediators play a pivotal role in enabling social justice to be advanced. Mediators should work towards the equitable, just, and democratic relationships and should fight the traditions of controlling, restricting, and systematic silencing. Mediators should remain tied to the conflict and its resolution by addressing the power differentials among parties, particularly through the deconstruction of dominant doctrines. Guiding the parties to just outcomes and realigning their relationships free the parties and help them to understand how powerful social forces shape the imbalance and carve their positions. Such power balancing can lead to the propagation of social justice both at micro and macro levels by ensuring equality in the mediation process. Power balancing requires mediators to adopt “nontraditional” roles, of “informing and educating parties about the larger structural context of their conflict,” and educating them regarding how their problems might relate to and be grounded in “larger structural inequities.”

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119 Id.
120 Id.
122 Bush & Folger, supra note 28.
123 Wall & Dunne, supra note 5.
126 JOHN WINSLADE & GERALD MONK, NARRATIVE MEDIATION: A NEW APPROACH TO CONFLICT RESOLUTION (JOSSEY-BASS 2000).
This essay suggests an inextricable link between social justice and mediation. Under the proper circumstances, either could advance the other. In order for mediation to advance social justice, its very structure must be altered and rules must be implemented to guide mediator practice. The reformations required to substantiate mediation as a vehicle of social justice must simultaneously preserve the benefits of the mediation process for those who participate in it. Disputants are satisfied with mediation for various reasons: mediation is often cheaper,\(^\text{128}\) efficient,\(^\text{129}\) the solutions are long lasting,\(^\text{130}\) and it is better than other alternatives. Satisfaction with perceived justice of both procedural and restorative natures is also high among disputants.\(^\text{131}\) Mediation sometimes leads to disputants’ self-reflection\(^\text{132}\) and catharsis which sometimes results in the improvement of the relationship between the parties.\(^\text{133}\) Thus, the challenge is to reform the mediation process to advance social justice without derogating its cost effectiveness, expediency, and potential for devising mutually agreeable, long term solutions. The structural changes and behavioral rules must not undermine the aim of the mediation process which is not only to advance social justice but also to bring about the resolution to disputes. The following paragraphs sketch such a system - what we call the “formalized reflective” approach to mediation.

**A. The Formalized Reflective Approach to Mediation**

As Alice peered through the looking glass, she knew not the reality of the world on the other side of the glass. As Alice explored a world she never knew before, she exclaimed that “I’m not strange, weird, off, nor crazy, my reality is just different from yours.”\(^\text{134}\) Different perceptions of reality are often the case when two parties enter a mediation session, each with their own views, not remembering things the same way with both parties feeling as though they are being treated unfairly through the often expensive and stressful legal or political processes. The formalized reflective approach to mediation aims to acknowledge these different realities by implementing four precepts within the mediation process in order to advance social justice and fair outcomes.

Some authors have attempted to develop informal reflective approaches to mediation, but the approach set forth in this essay is unique from prior approaches. Contemporary reflective approaches teach mediators how to properly address conflict resolution, personal values, personal biases, intuitions, and study through a reflective and educational process of self-understanding, moderated intervention, and continuous training and learning.\(^\text{135}\) The crux of the reflective process is self-knowledge and awareness which allow one to adapt to individualized

\(^{128}\) Kloppenberg, *supra* note 16.

\(^{129}\) Swendiman, *supra* note 69.


\(^{132}\) Bleemer, *supra* note 11.


\(^{134}\) LEWIS CARROLL, ALICE’S ADVENTURES IN WONDERLAND & THROUGH THE LOOKING GLASS (1865).

circumstances and problems that inevitably arise in mediation settings. Proponents of this reflective process envision mediators engaging in these processes within the current, informal mediation setting. Proper implementation of an informal reflective approach does equip mediators with the potential to navigate beyond many of the individualized issues of mediation, such as power imbalances, neutrality, and contextualized reality. Yet, due to their persistence within the current informal edifice of mediation, even reflective mediators are ill-equipped to wrestle with the structural flaws of mediation. Through the formalization of a reflective mediation process, the cannibalization of social justice resulting from structural and individual deficiencies of contemporary mediation practices may subside.

The core precepts of the formalized reflective approach are:

1. **Fair Consent:** Mediation is justified by individual consent, self-determination of the participants, fairness of the process, and assurance of fair outcomes by the mediator;

2. **Reflective Neutrality:** Reflective neutrality requires that the mediator maintain impartiality and self-awareness, including avoiding biases and prejudices, while equalizing the parties and ensuring, through dialogue, that vulnerable parties are protected and their basic subsistence needs are satisfied;

3. **Active Mediator:** The mediator is reflectively neutral (not absolutely neutral), and should take on a more active, personal role in the process by engaging in power balancing and remaining accountable for fair outcomes; and

4. **Formalized Rules:** Mediation is restricted by formalized rules that guide the behaviors of the parties and the mediator, with sanctions for violations.

**1. Fair Consent**

The central justificatory mechanism of the formalized reflective approach is entailed in the precept of fair consent. Fair consent is ensured by both mediator and party fulfillment of imposed obligations within mediation settings. The concepts of “fairness” and “consent” both are commonly attributed roots of moral obligation.\(^\text{136}\) A fair outcome based on consent of the parties is buttressed by the imperative that mediation participants embrace self-determination through the mediation process, imputing that parties and the mediator all must ensure not only a fair outcome, but also a fair process. The obligation of ensuring a fair outcome lies with all participants, but the onus of this obligation falls upon the mediator, whose skill and experience will allow for a more practiced determination of equity. The assurance of fairness in process and outcome is further enhanced by the reflective neutrality of the mediator who actively engages in mediation in accordance with just procedural rules.

**2. Reflective Neutrality**

The formalized reflective approach abandons the tenet that mediation is justified by the absolute neutrality of a mediator. The ideal of absolute neutrality is rarely, if ever, an attainable goal despite its frequent recognition as the cornerstone of the mediation platform. Individuals, including mediators, are inevitably influenced by their background, experience, beliefs, and values. Absolute neutrality requires mediators to suppress their individual character and predispositions gleaned from life experience in order to neutralize themselves within the confines of mediation. Despite best efforts, even the appearance of absolute neutrality, if not absolute neutrality itself, is rarely attainable even if mediators strive to attain this ideal – leading to the collapse of the mediation platform.

Reflective neutrality, conversely, requires that mediators become self-aware of their background, experience, beliefs, and values, in order to stimulate a more effective mediation process. Through self-awareness, mediators may recognize and avoid bias and prejudice, and thus remain impartial while embracing their individualized experiential backdrop, including value structures, in order to promote the equalization of the mediating parties. The fixed points in the reflective neutrality process include the promotion of the principles of social justice: equality and protecting the vulnerable. Beginning from these fixed points, mediators should employ the reflective process in order to best promote social justice by embracing a more active role within a reflectively neutral system bounded by just procedural rules.

3. Active Mediator

In traditional mediation settings, the mediator’s role is primarily that of the facilitator of a dispute, but the formalized reflective approach requires a more active role by the mediator. While the mediator’s aim is still to facilitate a resolution, the mediator should aim to resolve the underlying reasons for a dispute, as opposed to merely reach a settlement between the parties. The mediator must listen, hear, and explain, in a reflective capacity in order to equalize the power of the disputants, thus, closing any gaps in inequality and protecting the vulnerable. To do this, a reflectively neutral mediator is tasked with ensuring fair consent, power balancing, and acknowledging the mediator’s own fallibility. Through continued training, study, and education, an active mediator can hone a knowledge base upon which to make sound judgments, within the bounds of just procedural rules.

The principles of mediation education remain a source of disagreement. The methods and aims of mediation education as well as the training that is required to prepare mediators for mediation are highly contested. One of the main reasons is that mediators belong to variety of professions including: lawyers, court welfare officers, social workers, or family therapists, all of whom frequently have different worldviews and may not prioritize the same ends in the process of mediation. To the contrary, the emphasis on specific educational standards for mediators


points towards the professionalization that may jeopardize the control and autonomy of the parties in the mediation process.\textsuperscript{139} These issues highlight the importance of designing a well-thought out and balanced educational program and continued training program, to ensure both the integrity of mediators and of the mediation process.

4. **Formalized Rules**

Fair consent, reflective neutrality, and the mediator’s active role may be implemented by the promulgation of procedural rules aimed at promoting the underpinning principles of social justice. The key to the effectiveness of these procedural rules is their enforcement mechanisms, including sanctions, associated with violations of these rules. Most contemporary mediation processes typically have few rules aside from the confidentiality of the proceedings (which are generally contractually stipulated between the parties) and the absolute neutrality of the mediator. In individualized regions or agencies, conventions have developed that allow for a variety of other local mediation customs that are sometimes embodied in policy-statements, contracts among parties, codes, or regulations. Yet, mediation more generally is lacking a harmonized system of rules aimed at implementing social justice within the mediation process. Such rules are vital to combatting the structural deficiencies of mediation.

By way of exemplar, we provide five proposed procedural rules aimed at ensuring that social justice is advanced.

A. *Prior to Mediation.* All parties to the mediation must consent to the choice of the mediator. If the parties cannot agree as to a mediator, then they cannot engage in mediation.

B. *Good Faith Deposit.* Prior to engaging in mediation, all parties must make a good faith deposit of money or property, in accordance with the instructions of the mediator.

C. *During Mediation.* All parties must engage in mediation in good faith. A failure to engage in good faith discussions, or other violations of these rules, will lead to a forfeit of the good faith deposit.

D. *Process.* All parties to the mediation shall be given notice of the issues that will be discussed in mediation, and the scope of the mediation shall be limited to those issues that each party is provided notice of, and each party shall be given the opportunity to be heard as to properly noticed issues.

E. *Equal Representation.* There shall be equal representation for each party during the mediation. No party shall have more than one individual representing them in the mediation. The representative and each party may attend, for a maximum total of two participants for each side of the mediation. Representatives may, but need not be, licensed legal practitioners.

These rules are not meant to be final or comprehensive, but only illustrations of the types of rules we envision as integral to the formalization of the mediation process. These illustrations are designed to be set within a larger construct of many other procedural rules that interrelate with each other to form a coherent whole - a formalized infrastructure for mediation.

The informality flaw of mediation is eliminated and the privatization flaw of mediation is ameliorated by the implementation of formal rules. Notwithstanding these structural improvements, privatization is a continuing issue with any settlement whether effectuated through mediation or any other form of confidential, negotiated settlement. The ability for parties to agree to keep the terms of their settlement confidential is supported by the far reaching public policy of freedom of contract regardless of if mediation or other mechanisms are involved in reaching that settlement. This relatively universal aspect of settlements aside, there is considerably more transparency in mediation when procedural rules governing the process are openly published and accessible to all. Parties will remain free, however, to keep the discussions during mediation and agreements reached through mediation confidential, so long as they abide by the rules of the mediation forum. These rules will advance social justice by imposing fair consent, reflective neutrality, and an active mediator upon a more formalized and transparent process of mediation.

B. All in Good Time: A Forward Look

The practical implementation of the formalized reflective approach requires an institutional shift toward social justice aims in mediating settings. This shift will not occur rapidly, but requires a gradual identification of just procedural rules and their promulgation and dissemination to the masses. We perceive two alternative ways by which such rules could be adopted: either through consensual agreement of all parties to such rules, or by agency or court oversight of the mediation process.

Until broadly adopted, mediators could utilize contractual arrangements through which parties to an individual mediation agree to adopt the procedural rules of the formalized reflective approach. Such an approach will promote micro level social justice which will ultimately aggregate to macro level improvements to social justice. Contractual arrangements such as these are a non-ideal means of promoting social justice because such micro level advancements towards social justice take time to aggregate into macro level social justice advances. Nevertheless, until larger scale changes are made, such contractual arrangements will aid in the proliferation of social justice.

On a larger scale, courts or independent agencies, such as the American Arbitration Association (AAA) already entail procedural rules that govern mediations and arbitrations conducted through their agencies. Courts and independent agencies could integrate, over time, rules intended to advance social justice through the promotion of equality and the protection of the vulnerable. Some of AAA’s mediation procedures already entail principles aligned with the formalized reflective approach. For example, AAA’s rules relating to accounting services mediation provide that the mediator is obliged to, “conduct the mediation based on the principle of self-determination. Self-determination is the act of coming to a voluntary, uncoerced decision.

in which each party makes free and informed choices as to process and outcome."\textsuperscript{141} This principle of self-determination as encompassed in AAA’s mediation procedures aligns with the formalized reflective approach. Nevertheless, there is still considerable progress to be made towards ensuring social justice principles are both encapsulated and enforced within mediation settings. Regardless of the ultimate method of implementation, just procedural rules are necessary to implement the precepts of the formalized reflective approach in order to preserve social justice without derogating the dispute resolution capacity of the mediation process.

VI. Conclusion

Mediation may become compatible with social justice if practiced in accordance with the precepts of the formalized reflective approach. The problems of privatization and informality are systemic in nature and rooted in structural imbalances that may be lessened by formalized rules of procedure. On the other hand, contextualization of reality and power imbalances in mediation are individualized issues that can be assuaged by empowering the mediator with the necessary tools of social justice. The precepts of the formalized reflective approach achieve both of these aims. Although mediation is not the only means of achieving social justice, it stands alongside litigation and administrative hearings as one vehicle for the propagation of social justice.\textsuperscript{142} When pursuing mediation, or any vehicle of dispute resolution, one must reflect “about who we are, what we want from a given situation, and what kind of relationships we want to build.”\textsuperscript{143} Mediation is often the preferable option because it stands on the pillars of self-determination and party participation.\textsuperscript{144}

Mediation holds promise for better dissemination of social justice if the fundamental principles of self-determination of party and effective human dialogue remain the north star of the mediation practice in accordance with the precepts of the formalized reflective approach. Mediation fails to advance social justice issues when it frees itself from these defining precepts. The heart of the mediation process recognizes the capacity of people to confront their issues, including the issues that implicate inequities and power imbalances. When mediation loses its integrity, it fails as a tool for justice and civility.\textsuperscript{145} The formalized reflective approach should be understood as an approach geared towards making mediation a process able to produce social justice. The self-determination of parties should be the prime focus of mediators, and they should encourage the parties to listen to each other first. Human dialogue facilitates understanding of the issue and empathy towards each other. The abilities, limits, and systemic failures can be identified and can be worked on together.\textsuperscript{146} Through formalized reflection, mediation can become a tool for closing the gaps of inequality, diminishing the exploitation of the vulnerable, and advancing social justice.


\textsuperscript{142} Bush, supra note 43.

\textsuperscript{143} Neves, supra note 8 at 486.


\textsuperscript{145} Bush & Folger, supra note 28.

\textsuperscript{146} Id.