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## Mapping the World: Facts and Meaning in Adjudication and Mediation

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# MAPPING THE WORLD: FACTS AND MEANING IN ADJUDICATION AND MEDIATION

*Robert Rubinson*

- I. INTRODUCTION
- II. MECHANISMS FOR MEANING
- III. ADJUDICATION AND FACT
  - A. *Adjudication Drives Meaning*
  - B. *Rules Define Facts*
  - C. *Just the Facts, Ma'am: The Role of Facts in Legal Discourse*
    - 1. *Facts in Jurisprudential Debates*
      - a. *Facts in Legal Formalism*
      - b. *Facts in Legal Realism*
    - 2. *Modern Critical Legal Theory*
  - D. *Facts "On the Ground" in Adjudication: Lawyers, Judges, and Juries*
    - 1. *Advocacy*
    - 2. *Procedure as Exclusion*
    - 3. *The Players: Who Finds Facts?*
- IV. WHAT BRINGS US HERE TODAY: "FACTS" IN MEDIATION
  - A. *An Introduction: The Mediator in Mediation*
  - B. *How Mediation Sorts "What Matters" from "What Does Not Matter"*
    - 1. *Do Mediators Impose Rules?*
    - 2. *Of Socks and Hats: Who Defines What Matters in Mediation?*
    - 3. *Participants as Meaning-Makers*
- V. THE ATTORNEY IN FACT
  - A. *Problem Definition by Attorneys: Conflict Primed for Adjudication*
  - B. *War of the Worlds*
- VI. CONCLUSION

## MAPPING THE WORLD: FACTS AND MEANING IN ADJUDICATION AND MEDIATION

Robert Rubinson \*

[N]o system of concepts that serves as an ordering structure can have categories, definitions, prototypes, principles, or what-have-you that are as numerous, variegated, and nuanced as the circumstances which bring the system into play.

Anthony G. Amsterdam<sup>1</sup>

[I]f one's only tool is a key, then every problem will seem to be a lock.

Diane Ackerman<sup>2</sup>

### I. INTRODUCTION

Jorge Luis Borges tells a story about cartographers whose maps did not satisfy their ambitions.<sup>3</sup> Only one would suffice: “[A] [m]ap of the [E]mpire whose size was that of the Empire, and which coincided point for point with it.”<sup>4</sup> Subsequent generations “saw that that vast [m]ap was [u]seless, and . . . delivered it up to the [i]nclemencies of [s]un and [w]inters.”<sup>5</sup> Sun and winters did their work: in the end the map lay in “Tattered Ruins.”<sup>6</sup>

Borges’ story evokes fundamental points about maps: they must simplify. A “map” that fails to simplify is not only useless, but fails the test of mapness and thus is no map at all.<sup>7</sup> It would be, in the words of William James, a “bloomin’ buzzin’ confusion.”<sup>8</sup>

Ideas about simplification and exclusion also describe processes of dispute resolution. Like a map, adjudication carves up the world in distinct ways. These ways include and exclude, with the exclusions far outstripping the inclusions.<sup>9</sup> Nevertheless, adjudication is, culturally, what dispute resolution is all about. Given how pervasive the adjudication norm is, its choices as to what is and what is not appear “natural,” especially in its foundational distinction between “law” and

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1. Letter from Anthony A. Amsterdam to Author (October 20, 1996) (on file with author).

2. DIANE ACKERMAN, *AN ALCHEMY OF MIND: THE MARVEL AND MYSTERY OF THE BRAIN* 4 (2004).

3. JORGE LUIS BORGES, *On Exactitude in Science*, in *COLLECTED FICTIONS* 325, 325 (Andrew Hurley, trans. 1998).

4. *Id.*

5. *Id.*

6. *Id.*

7. Philosophers view this issue as one of teleology, or purpose. See, e.g., DANIEL C. DENNETT, *DARWIN’S DANGEROUS IDEA: EVOLUTION AND THE MEANINGS OF LIFE* 23-24 (1995).

8. THOMAS S. KUHN, *THE STRUCTURE OF SCIENTIFIC REVOLUTIONS* 113 (2d ed. 1970).

9. See *infra* text accompanying notes 30-95.

“facts.”<sup>10</sup> In implementing this screening process, adjudication deploys a range of procedural processes, particularly rules of evidence through which some facts are “relevant” and some “irrelevant.” Indeed, the term “facts” only has meaning given what in the world (taken literally) the law deems “relevant.”

In contrast, mediation goes about its exclusions differently. “Facts” are whatever parties choose to identify as useful in mediation. Mediation moves from “facts” outwards, with “rules,” to the extent they can be viewed as “rules” at all, emerging from context. With an absence of legal rules there is no decoupling of facts and law: the distinction has no meaning. Mediation participants thus create what “is” in mediation, excluding both lawyers and third-party decision-makers as makers of “facts” or, to put it more grandly, the world.

This Article explores what is and what is not in adjudication and mediation, thus illuminating the profound differences between these two processes.<sup>11</sup> The Article does this work in four parts. First, it offers an analysis of cognitive mapmaking and its inevitability in constructing meaning. It then explores how adjudication defines meaning in a particular way. This Article then conducts a comparable analysis of mediation. Finally, it focuses on the bridging function attorneys play between the worlds of mediation and adjudication in light of the Author’s analysis and the practical implications of this function.

An important caveat: this discussion is, by design, not about whether mediation and adjudication are a better or worse means to resolve disputes. A growing literature addresses these issues<sup>12</sup> with many concluding that sometimes adjudication is “better” and sometimes mediation is “better.”<sup>13</sup> In any event, the answer is not meaningful in the abstract because horrific mediation happens<sup>14</sup> and

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10. See *infra* text accompanying notes 44-50, 74-86.

11. Another way of expressing this process is to make “the familiar strange.” ANTHONY G. AMSTERDAM & JEROME BRUNER, *MINDING THE LAW* 1 (2000).

12. The point of departure for this debate is Owen Fiss’ *Against Settlement*, which, although not addressing mediation specifically, critiques “informal” modes of dispute resolution that has been influential in debates about the value of mediation. 93 YALE L.J. 1073 (1984). There are many scholars who take an opposing view. See, e.g., Carrie Menkel-Meadow, *The Trouble with the Adversary System in a Postmodern, Multicultural World*, 38 WM. & MARY L. REV. 5 (1996); Robert A. Baruch Bush, *Mediation and Adjudication, Dispute Resolution and Ideology: An Imaginary Conversation*, 3 J. CONTEMP. LEGAL ISSUES 1 (1990).

13. An influential idea in this regard is the acronym “ADR.” While long understood as standing for “Alternative Dispute Resolution,” mediation proponents argue that this assumes that adjudication is the norm because other dispute resolution processes are “alternatives” to it. These proponents argue that the acronym should instead stand for “Appropriate Dispute Resolution,” which expresses a range of dispute resolution processes that might or might not be appropriate in a given circumstance. Carrie Menkel-Meadow, *Ethics in ADR: The Many “Cs” of Professional Responsibility and Dispute Resolution*, 28 FORDHAM URB. L.J. 979, 979-80 (2001). Another pithy way of expressing this idea originating with Maurice Rosenberg is “fitting the forum to the fuss.” Frank E. A. Sander & Stephen B. Goldberg, *Fitting the Forum to the Fuss: A User-Friendly Guide to Selecting an ADR Procedure*, 10 NEGOTIATION J. 49, 67 (1994).

14. See Joshua D. Rosenberg, *In Defense of Mediation*, 33 ARIZ. L. REV. 467, 468 (1991) (acknowledging how mediators can be “rude, insensitive, stupid and otherwise incompetent”). A relatively rare instance of judicial scrutiny of allegedly “bad mediation” is in *Allen v. Leal*, in which the mediator purportedly coerced settlement by admonishing plaintiffs that they would be “financially ruined” if they did not settle. 27 F. Supp. 2d 945 (S.D. Tex. 1998).

horrific adjudication happens.<sup>15</sup> The goal of this Article is to illuminate differences in how adjudication and mediation, taken on their own terms and norms, carve up the world. To that end, it assumes excellent mediation processes (and thus excellent mediators),<sup>16</sup> excellent adjudication processes (and thus excellent judges), and clients with adequate resources to pay for effective legal representation.<sup>17</sup>

## II. MECHANISMS FOR MEANING

There is little debate these days that “facts” are not “out there” to be discovered. A basic premise of many of the social sciences is that, as a matter of cognition, the brain must “screen” the meaningful from the not meaningful. This basic insight has spawned intense scrutiny on “meaning-making” in “anthropology, linguistics, philosophy, literary theory, psychology, and, it would seem, wherever one looks these days.”<sup>18</sup> This includes the role “categories” play in cognition.<sup>19</sup> Such an inquiry is sometimes characterized as the “cognitive revolution,” the crux of which is the human need to “go beyond the information given.”<sup>20</sup>

Social psychologists have been particularly active in exploring meaning-making. The groundbreaking work of Amos Tversky and Daniel Kahneman elaborated on how “people rely on a limited number of heuristic principles which reduce the complex tasks of assessing probabilities and predicting values to simpler judgmental operations.”<sup>21</sup> A sampling of these heuristics: people tend “to overestimate the normativity and accuracy of their own beliefs”; “manage knowledge in a variety of ways to promote the selective availability of information . . . already arrived at”; and “interpret facts consistent with those we already

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15. Critiques of “bad adjudication” are legion, although perhaps the most powerful relate to courts of “mass justice” where litigants, virtually all pro se, receive minimal due process and no more than several minutes before a judicial officer. Barbara Bezdek, *Silence in the Court: Participation and Subordination of Poor Tenants’ Voices in the Legal Process*, 20 HOFSTRA L. REV. 533 (1992). I offer my own experience and analysis in Robert Rubinson, *A Theory of Access to Justice*, 29 J. LEGAL PROF. 89 (2004-05).

16. My assumption also sidesteps a hotly contested debate in the mediation literature about what “style” of mediation is best, with such styles usually labeled as “facilitative,” “evaluative,” and “transformative.” See Carrie Menkel-Meadow, *When Dispute Resolution Begets Disputes of its Own: Conflicts Among Dispute Professionals*, 44 U.C.L.A. L. REV. 1871 (1997); Leonard L. Riskin, *Decisionmaking in Mediation: The New Old Grid and the New New Grid System*, 79 NOTRE DAME L. REV. 1 (2003); Joseph B. Stulberg, *Facilitative Versus Evaluative Mediator Orientations: Piercing the “Grid” Lock*, 24 FLA. ST. U. L. REV. 985 (1997). In this Article I adopt a facilitative approach—the style with which most mediators identify.

17. This last assumption is an exceptionally important issue and one I have explored in detail in Rubinson, *supra* note 15.

18. JEROME BRUNER, *ACTS OF MEANING* 2 (1990).

19. See generally GEORGE LAKOFF, *WOMEN, FIRE, AND DANGEROUS THINGS: WHAT CATEGORIES REVEAL ABOUT THE MIND* (1987).

20. See generally JEROME S. BRUNER, *GO BEYOND THE INFORMATION GIVEN* (Jeremy M. Anglin ed., 1973).

21. AMOS TVERSKY & DANIEL KAHNEMAN, *JUDGMENT UNDER UNCERTAINTY: HEURISTICS AND BIASES* 3 (Daniel Kahneman, et al. eds., 1982). Another important and influential study is RICHARD NISBETT & LEE ROSS, *HUMAN INFERENCE: STRATEGIES AND SHORTCOMINGS OF SOCIAL JUDGMENT* (1980).

believe.”<sup>22</sup>

A corollary to how humans inevitably simplify meaning is that such simplifications are as much about things that are not seen as about things that are seen. Sherlock Holmes famously noticed that a dog did *not* bark in the night.<sup>23</sup> We almost always notice a dog barking, which, necessarily, means that we do not notice a dog not barking.<sup>24</sup> “Noticing” (or including) only has meaning when what is noticed stands out from the vast expanse of what is not noticed (or excluded). This explains why the King’s map is useless: by not excluding anything, it, by extension, includes nothing as well.

Moreover, “interpretation” is driven by preexisting goals, processes or methodologies that, by their nature, only examine what is necessary for the methodology to work. For example, in a book ranging over architecture, agriculture, forestry, resettlement in Tanzania, and the Russian Revolution, James C. Scott traces how efforts to impose order in the teeth of interlocking complexity fail because they inevitably create a world only “legible” in light of its simplifications, thereby “systematically . . . nudg[ing] reality toward the grid of its observations.”<sup>25</sup> Another interdisciplinary work, by Judea Pearl, ranging over psychology, sociology, and computer science, defines “model” as “an idealized representation of reality that highlights some aspects and ignores others.”<sup>26</sup> A succinct expression of the idea in verbal/visual form is by psychologist Joseph Lee Rodgers:

Models as Simplified  
Reality  
Simplified as Models<sup>27</sup>

I can multiply examples<sup>28</sup> but perhaps a return to Sherlock Holmes serves best. The bark/non-bark question matters to Holmes because Holmes is a detective examining a particular set of circumstances with his inspired eye. A barking dog

22. See Robert Rubinson, *The Polyphonic Courtroom: Expanding the Possibilities of Judicial Discourse*, 101 DICK. L. REV. 3, 28 (1996), which includes an extended discussion and citation of authorities for these processes.

23. SIR ARTHUR CONAN DOYLE, THE ADVENTURE OF SILVER BLAZE (1892), in THE MEMOIRS OF SHERLOCK HOLMES (1974). This is not a trivial insight about human cognition and one that has long been noted. Francis Bacon wrote as follows in 1620: “[B]y far the greatest hindrance and aberration of human understanding proceeds from . . . deceptions of the senses: in that things which strike the sense outweigh things which do not immediately strike it, though they be more important.” FRANCIS BACON, THE NEW ORGANON, reprinted in FRANCIS BACON: A SELECTION OF HIS WORKS 338 (Sidney Warhaft ed. 1965) (1620).

24. Given context, unlike Holmes’ barking dog, we might even see nothing when there is something. An example comes from astronomy. “Black patches and lanes” in the Milky Way were long interpreted as empty spots or holes through which to see the “blackness of space.” TIMOTHY FERRIS, SEEING IN THE DARK 229 (2002). This “emptiness,” however, was later determined to be “writhing, tumbling clouds” of dust—a neat example of how what appears to be “nothing” is “something”—a perfectly logical explanation that was overlooked (literally) for centuries. *Id.*

25. JAMES C. SCOTT, SEEING LIKE A STATE 300 (1998).

26. JUDEA PEARL, CAUSALITY: MODELS, REASONING, AND INFERENCE 202 (2000).

27. Joseph Lee Rodgers, *The Epistemology of Mathematical and Statistical Modeling: A Quiet Methodological Revolution*, 65 AM. PSYCHOL. 1, 5 (2010).

28. See *supra* text accompanying notes 18-22.

can matter a lot or not at all. Examples of where it might matter a lot: a dog owner straining to hear barks or non barks to find her lost pet; a burglar aware that a vocal dog would blow his cover; someone who has a dog phobia (called cynophobia) and thus an overwhelming compulsion to avoid dogs. But if these activities (or purposes) are not what you're about, barks or their absence do not matter. At least in cognitive terms, they do not exist.

### III. ADJUDICATION AND FACT

Adjudication is a formalized methodology. Like all methodologies, adjudication imposes its own "grid" on the world to identify what matters and what does not.<sup>29</sup> What matters is defined as "facts." What does not matter is "irrelevant," or, much more likely, not even visible. This section will explore how the theory and practice of adjudication goes about this crucial business of finding "the facts of a case."

#### A. Adjudication Drives Meaning

So what are "facts"? How does adjudication select which "facts" to consider? Anthropologist Clifford Geertz's offers this description of the process: "The rendering of fact so that lawyers can plead it, judges can hear it, and juries can settle it is just that, a rendering: . . . [it] propounds the world in which its descriptions make sense."<sup>30</sup> Consider another anthropologist, Sally Engle Merry: "Law provides a set of categories and frameworks through which the world is interpreted."<sup>31</sup>

The basic idea here is that law creates a world by "reduc[ing] the chaotic, disorderly, constantly changing social reality beneath it to something more closely resembling the administrative grid of its observations."<sup>32</sup> These are "a series of typifications that are always some distance from the full reality these abstractions are meant to capture."<sup>33</sup> In doing so, adjudication screens the relevant from the irrelevant in order to render the world intelligible for its purposes.<sup>34</sup> Put another way, "facts" in adjudication are "interested, utilitarian facts,"<sup>35</sup> that is, of interest

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29. SCOTT, *supra* note 25, at 300.

30. CLIFFORD GEERTZ, *Local Knowledge: Fact and Law in Comparative Perspective*, in LOCAL KNOWLEDGE: FURTHER ESSAYS IN INTERPRETIVE ANTHROPOLOGY 167, 173 (1983).

31. SALLY ENGLE MERRY, GETTING JUSTICE AND GETTING EVEN: LEGAL CONSCIOUSNESS AMONG WORKING-CLASS AMERICANS 8 (1990). It is also perhaps no coincidence that an important study of "legal discourse" was co-written by a law professor and a professor of cultural anthropology. JOHN M. CONLEY & WILLIAM M. O'BARR, RULES VERSUS RELATIONSHIPS: THE ETHNOGRAPHY OF LEGAL DISCOURSE (1990).

32. SCOTT, *supra* note 25, at 82.

33. *Id.* at 76.

34. Interestingly, the law has tried to add subtlety to this "screening" function through "balancing tests"—a trend that has generated intense scholarly debate. See Don Herzog, *The Kerr Principle, State Action, and Legal Rights*, 105 MICH. L. REV. 1, 34 (2006) ("Balancing tests are notoriously manipulable: everything hangs on how we characterize the competing interests, and that work, like sausage-making, and for the same reason, usually gets done offstage."); Steven L. Winter, *Indeterminacy and Incommensurability in Constitutional Law*, 78 CALIF. L. REV. 1441, 1465 (1990) (noting that the rise of "balancing tests" absorbs the realist critique of formalism).

35. SCOTT, *supra* note 25, at 76.

and of utility to adjudication. Screening for “interested, utilitarian facts” necessarily “entails collapsing or ignoring distinctions that might otherwise be relevant.”<sup>36</sup>

### B. Rules Define Facts

In the language of adjudication, rules are powerful things. Legal discourse reifies the power of law through metaphor. Acts against law are acts of aggression, even violence:<sup>37</sup> a person “breaks” the law, “violates” the law, “evades” the law, “defies” the law.<sup>38</sup> Even the most common phrase of all—“against the law”—suggests forceful (itself a metaphor) opposition. These formulations embody a binary universe: you either adhere to rules or you do not. There is no middle ground in adjudication.

To gain this level of certainty, “facts” themselves must be certain.<sup>39</sup> In the vast majority of cases, the adversary system reduces the act of “finding facts” to two choices as to what is “true.” Consider the Supreme Court in *Anderson v. City of Bessemer*<sup>40</sup> describing how an appellate court should approach findings of fact: “Where there are two permissible views of the evidence, the factfinder’s choice between them cannot be clearly erroneous.”<sup>41</sup> This at first blush is a banal proposition, unremarkable in the extreme. Within it, though, is the world of adjudication: legal rules are an either/or proposition that generate either/or choices of facts as to what is “true.”<sup>42</sup> This on/off quality is crucial to the methodology of law.

### C. Just the Facts, Ma’am: The Role of Facts in Legal Discourse

Although *both* facts and law, as defined by adjudication, must be determinate, “facts” are peripheral in general academic discourse about law. Rules are the main event. While legal realism and its more recent variants focus on “facts,” these are usually “social facts” which are not “facts” in individual circumstances. In contrast, and perhaps ironically, adjudication “on the ground” presents a much fuller and more subtle portrayal of the methodology of law in action in terms of the interplay of facts and law, although conventions of the fact/law distinction remain

36. *Id.* at 81.

37. Robert Cover famously noted the “violent” consequences of violating law: “Legal interpretation takes place in a field of pain and death. A judge articulates her understanding of a text, and as a result, somebody loses his freedom, his property, his children, even his life.” Robert M. Cover, *Violence and the Word*, 95 YALE L.J. 1601, 1601 (1986).

38. For a detailed analysis of metaphor and its impact on cognition, see GEORGE LAKOFF & MARK JOHNSON, *METAPHORS WE LIVE BY* (1980).

39. When “found,” facts are rarely disturbed on appeal. See FED. R. CIV. P. 52(a)(6) (“Findings of fact, whether based on oral or other evidence, must not be set aside unless clearly erroneous. . .”).

40. *Anderson v. City of Bessemer*, 470 U.S. 564 (1985).

41. *Id.* at 574. Such procedural rules reflect deeply held cultural norms. There is a “Moral Law Folk Theory” that “[t]here must be one and only one correct conceptualization for any situation.” MARK JOHNSON, *MORAL IMAGINATION: IMPLICATIONS OF COGNITIVE SCIENCE FOR ETHICS* 8 (1993).

42. See Milner S. Ball, *Wrong Experiment, Wrong Result: An Appreciatively Critical Response to Schwartz*, 1983 AM. B. FOUND. RES. J. 565, 569-71 (1983) (in adjudication, there is an assumption that “truth is a matter of accuracy, a matter of reflecting an objective, external reality”).



central even there.

In this section, I offer a tour of the world of “facts” in the theory and practice of adjudication. This is necessarily a radical summary that, in a few pages, ranges over untold books and articles. The vast majority of these works, however, do not focus on “facts” as I have described them; my purpose then is to identify what this discourse does not address.

### 1. *Facts in Jurisprudential Debates*

I begin with the fascinating debate originating in the early twentieth-century about the methodology of law—a debate that continues to this day.

#### a. *Facts in Legal Formalism*

The status of facts in legal formalism can best be described as having, for all intents and purposes, no status at all.

Roberto Unger offers a representative formulation of legal formalism: Formalism is a “belief in the availability of a deductive or quasi-deductive method capable of giving determinate solutions to particular problems of legal choice.”<sup>43</sup> Lynn M. LoPucki offers another formulation: Formalism is the application of “the law laid down by legislatures and appellate courts to the facts of cases.”<sup>44</sup> These and other basic articulations of legal formalism, and there are many, tend to be exclusively concerned with the interpretation of “rules.” In a sense, formalism is a “giant syllogism machine, with a determinate, externally-mandated legal rule supplying the major premise, and objectively ‘true’ pre-existing facts providing the minor premise.”<sup>45</sup> Given that “there really is one true rule of law, universal and unchanging, always and everywhere the same,”<sup>46</sup> the subject of real inquiry is to state the “one true rule,” with facts at best a superficial, intellectually undemanding inquiry applied to the rule. Moreover, the facts and law *must* be separate entities with one not influencing the other or with, as one commentator has put it, law and fact not “contaminating one another.”<sup>47</sup>

In virtually all instances, then, formalist methodology strives to identify a “determinate, externally mandated legal rule” as all rules must be.<sup>48</sup> In the end, a

43. Roberto M. Unger, *The Critical Legal Studies Movement*, 96 HARV. L. REV. 563, 564 (1983).

44. Lynn M. LoPucki, *Legal Culture, Legal Strategy, and the Law in Lawyers' Heads*, 90 NW. U.L. REV. 1498, 1498 (1996).

45. Burt Neuborne, *Of Sausage Factories and Syllogism Machines: Formalism, Realism, and Exclusionary Selection Techniques*, 67 N.Y.U. L. REV. 419, 421 (1992).

46. GRANT GILMORE, *THE DEATH OF CONTRACT* 106-107 (Ronald K. L. Collins ed., 1995). Gilmore ties this “classical” tendency into avoidance of questions of fact in contract theory: “[C]lassical contract theory involved the avoidance of fact questions wherever possible as well as the restatement of questions of fact as questions of law.” *Id.* at 107. Gilmore argues that this idea applied to all areas of law, not just contracts. *Id.* at 111.

47. See GEERTZ, *supra* note 30, at 195 (“[E]nergies . . . in the Western tradition, have gone into distinguishing law from fact and into developing procedures to keep them from contaminating one another”). An obvious manifestation of this principle is how judges are finders of law and juries are “finders of fact”—the origin of jury instructions in which judges tell juries what law to apply after juries have decided what happened.

48. I mean a number of things when I refer to “rules” in adjudication. Most obviously, this would include prescriptive language adopted by legitimate rule-making bodies, whether the framers of the

striking aspect of how legal formalists view facts is that facts are really not viewed at all. They are simply “out there” to be found by anybody, and not needing the skills of legal analysis or, indeed, little if any intellectual scrutiny at all.<sup>49</sup>

*b. Facts in Legal Realism*

The critique of legal realism has a fascinating take on “facts.” The realist critique, arising roughly from 1920-1940, picked apart the “scientific,” deductive vision at the heart of formalism.<sup>50</sup> In joining the debate with the syllogistic mechanics of legal formalism, a “central lesson” of legal realism is that “there will often be a range of credible interpretations of the meaning of a given legal rule.”<sup>51</sup> The deeper critique is what drives a given “credible interpretation,” and here is where the “politics of law”<sup>52</sup> comes into play.

In this regard, legal realists conceived of law as constructed in light of a specific social “context.”<sup>53</sup> Here is one elaboration of what this means:

[T]he “rule” of a former case can never simply be applied to a new case; rather, the judge must *choose* whether or not the ruling in the former case should be extended to include the new case. That choice is essentially a choice about the relevancy of facts, and those choices can never be logically compelled. Given shared social assumptions, some facts might seem obviously irrelevant (e.g., the color of socks worn by the offeree should not influence the enforceability of a contract), but decisions about the relevance of other distinguishing facts are more obviously value-laden and dependent on the historical context (e.g., the relative wealth of the parties).<sup>54</sup>

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Constitution, federal, state, and local legislators, or agencies empowered to issue regulations. For purposes of this Article, there is no difference in how these prescriptions define factual relevance: the basic methodology of law is what is at issue, not hierarchies in the legal system. The role of cases is a bit more complicated. Their role as interpreters of prescriptions can be viewed as simply an adjunct to the factual carving of rules—they (at least rhetorically) define the meaning of rules. Similarly, the rhetorical conventions of common law see cases as elaborating preexisting principles.

49. The judicial opinion perfectly demonstrates this methodology, with its “statement of facts” presented as “what happened.” See Robert A. Ferguson, *Rhetorics of the Judicial Opinion: The Judicial Opinion as Literary Genre*, 2 YALE J.L. & HUMAN. 201 (1990); JOHN M. CONLEY AND WILLIAM M. O’BARR, RULES VERSUS RELATIONSHIPS: THE ETHNOGRAPHY OF LEGAL DISCOURSE 11 (1990) (in judicial opinions, “the raw material of the case is treated as transparent, transformed into a window through which the law views the set of constructed meanings it calls ‘facts’”). A revealing subgenre of scholarship examines “facts” in prominent cases by exploring the messy reality of “what happened” without the simplifying filter of judicial opinions. See, e.g., Roger C. Cramton & Lori P. Knowles, *Professional Secrecy and Its Exceptions: Spaulding v. Zimmerman Revisited*, 83 MINN. L. REV. 63 (1998) (describing details about a noted case in legal ethics relating to potential disclosure by defendant’s counsel of plaintiff’s life-threatening condition of which plaintiff was unaware); Elizabeth J. Samuels, *Stories Out of School: Teaching the Case of Brown v. Voss*, 16 CARDOZO. L. REV. 1445 (1995).

50. The preeminent collection of writings by legal realists is AMERICAN LEGAL REALISM (William W. Fisher III, Morton J. Horwitz & Thomas A. Reed eds., 1993).

51. David B. Wilkins, *Legal Realism for Lawyers*, 104 HARV. L. REV. 468, 512 (1990).

52. THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE (David Kairys ed., 3d ed. 1998) (1982) [hereinafter THE POLITICS OF LAW].

53. Elizabeth Mensch, *The History of Mainstream Legal Thought*, in THE POLITICS OF LAW, *supra* note 52, at 33.

54. *Id.* at 34.

Such a critique that “facts,” “relevance,” and “context” are crucial to decision-making and the development of law unleashed a frontal attack on the “determinate” view of “facts” so central to the formalist methodology.<sup>55</sup> However, realists virtually always referred to “facts” in terms of the *social context* or “social facts.”<sup>56</sup> Hence, the “relative wealth of the parties” is a “fact” crucial to just decision-making. This sense of “messy social particularity”<sup>57</sup> is, at this level, the heart of the realist critique. It requires “a close, contextual examination of social reality—to *facts*, rather than the nonexistent spheres of classicism”<sup>58</sup> that were, in Felix Cohen’s famous phrase, “transcendental nonsense.”<sup>59</sup>

The key for purposes of this Article, however, is that the realists’ “particularities” are *social particularities*. There is no sense of *individual*

55. This attack on formalism also extended to “private law,” such as torts, where legal realists drew upon “their concrete social experience in an urbanizing, industrializing society” in rejecting a determinate, objective view of causation. THOMAS L. HASKELL, *THE EMERGENCE OF PROFESSIONAL SOCIAL SCIENCE* 14-15 (1977). This rejection of objectivity of causation forced realist judges to submit causation questions to plaintiff-friendly juries—an example of the progressive underpinnings of much realist thought. See Morton L. Horwitz, *The Rise and Early Progressive Critique of Object Causation*, in *THE POLITICS OF LAW*, *supra* note 52, at 489-90.

56. A noted example of an explicit use of “social facts” is the famous “Brandeis Brief,” a term arising from a brief submitted by Louis Brandeis in 1908 regarding the constitutionality of a law “limiting the hours per day that women could work in laundries and other industries.” Lee J. Strang & Bryce G. Poole, *The Historical (In)accuracy of the Brandeis Dichotomy: An Assessment of the Two-Tiered Standard of Stare Decisis for Supreme Court Precedents*, 86 N.C.L. REV. 969, 981 (2008). Brandeis’ brief “included only two pages of legal argument” and “over 110 pages presenting social science data regarding the effects of long hours of labor on . . . women.” *Id.* at 981-82. The ultimate decision by the Supreme Court noted approvingly the “social facts” supplied by Brandeis. *Muller v. Oregon*, 208 U.S. 412, 419-20 (1908). An evocative example of the importance Brandeis ascribed to “social facts” is when he told Oliver Wendell Holmes that Holmes’ “summer occupations” should include the “study of some domain of facts,” such as “the textile industries of Massachusetts.” 2 HOLMES-POLLACK LETTERS: THE CORRESPONDENCE OF MR. JUSTICE HOLMES AND SIR FREDERICK POLLOCK, 1874-1932, at 13-14 (Mark DeWolfe Howe ed., 1961). Holmes noted that doing so “would be good for my immortal soul” and “good also for the performance of my duties,” yet “I shrink from the bore.” *Id.*

57. Mensch, *supra* note 53, at 34.

58. *Id.* at 35. Consider how social context is crucial to the origin of legal realism, particularly in the form of the Supreme Court’s aversion towards progressive legislation in the early twentieth-century to the New Deal. A classic instance is *Coppage v. Kansas*, in which the Court invalidated legislation outlawing “yellow dog contracts”—contracts forbidding workers from engaging in union activities—because economic inequality was not a recognized common law basis to render contracts unenforceable. 236 U.S. 1, 26 (1915). Although evidently true as a matter of common law doctrine, the Court’s obliviousness to social inequality invalidated progressive social reforms. Then, beginning with the appointment of Hugo Black 1937 by Franklin Roosevelt, the Supreme Court for some forty years declined to find constitutional fault with redistributive social legislation. Molly S. McUsic, *Redistribution and the Takings Clause*, in *THE POLITICS OF LAW*, *supra* note 52, at 623.

59. Felix S. Cohen, *Transcendental Nonsense and the Functional Approach*, 35 COLUM. L. REV. 809 (1935). See also Felix S. Cohen, *Dialogue on Private Property*, 9 RUTGERS L. REV. 357 (1954). Cohen’s memorable phrase is often used as shorthand for legal formalism. For a particularly fascinating treatment of these issues, see Stephen L. Winter, *Transcendental Nonsense, Metaphoric Reasoning, and the Cognitive Stakes for Law*, 137 U. PA. L. REV. 1105 (1989). See also Roscoe Pound, *Liberty of Contract*, 18 YALE L.J. 454, 458 (1908-09) (critiquing “the sharp line between law and fact in our legal system which requires constitutionality, as a legal question, to be tried by artificial criteria of general application and prevents effective judicial investigation or consideration of the situations of fact behind or bearing upon the statutes”) (emphasis added).

*particularities* as furnishing the core of appropriate or realistic judicial decision making. This is an important distinction. While, to be sure, social particularities might be a component (or, some would argue, must be a component) of individual particularities, there is no sense that decision making should happen at an individual level. This aspect of realism is wholly consistent with the political and social context in which it arose, which was at a time when courts were invalidating progressive legislation through (realists argued) the veneer of formalist methodology.<sup>60</sup>

However, while agreeing on little else, formalists and realists share one premise: decision making should be done by judges. The question thus was (and still largely is) not whether judges should make decisions, but how judges should make decisions.

## 2. Modern Critical Legal Theory

The critical theory movement is less focused than the realist critique, but most observers see the realists as their predecessors. Like realism, this critique, which arose out of the cultural upheavals of the 1960s, tends to pick apart doctrine as arising from social context. The critical legal theory movement (to the extent it is unified—a debatable point) often breaks down into the social categories upon which individual scholars focus. Common categories are feminist jurisprudence,<sup>61</sup> critical race theory,<sup>62</sup> queer theory,<sup>63</sup> and critiques based on socioeconomics.<sup>64</sup> Some scholars focus on interactions between these categories.<sup>65</sup> These broad

60. See *supra* note 59. An early example is Roscoe Pound's *Liberty of Contract*, which was a response to the invalidation by the Supreme Court of a maximum work hours law for bakers in *Lochner v. New York*, 198 U.S. 45, 45 (1905), *overruled in part by Day-Brite Lighting Inc. v. State of Missouri*, 342 U.S. 421 (1952), and *Ferguson v. Skrupa*, 372 U.S. 726 (1963). See Pound, *supra* note 59, at 454. Pound called such a result a fallacy "[t]o everyone acquainted at first hand with actual industrial conditions," and went on to ask: "Why, then do courts persist in the fallacy? Why do so many of them force upon legislation an academic theory of equality in the face of practical conditions of inequality?" *Id.* Of course, given a movement as broad and, at times, divergent, as legal realism, there are instances in the realist literature where "specific facts" in addition to "social facts" are viewed as crucial to decision making. See Harold J. Laski, *The Basis of Vicarious Liability*, 26 YALE L.J. 105 (1917), *reprinted in* AMERICAN LEGAL REALISM 140, 143 (William W. Fisher III et al. eds., 1993) ("Each case . . . calls for a new and distinct consideration, not only of the general facts of industry, but of the specific facts . . . in question" (quoting Felix Frankfurter)).

61. See Martha Albertson Fineman, *Gender and Law: Feminist Legal Theory's Role in the New Legal Realism*, 2005 WIS. L. REV. 405 (2005).

62. A classic and influential article on critical race theory is Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317 (1987). For an excellent history of critical race theory and a critique of its more recent applications, see Richard Delgado, *Crossroads and Blind Alleys: A Critical Examination of Recent Writing About Race*, 82 TEX. L. REV. 121 (2003) (book review).

63. Janet E. Halley, *Gay Rights and Identity Imitation: Issues in the Ethics of Representation*, in THE POLITICS OF LAW, *supra* note 52, at 115; Ian Halley, *Queer Theory by Men*, 11 DUKE J. GENDER L. & POL'Y 7 (2004). Queer theory has drawn a great deal from feminist jurisprudence, although there have been calls to distinguish the two movements. *Id.* at 12-13.

64. Florence Wagman Roisman, *Teaching About Inequality, Race, and Property*, 46 ST. LOUIS U. L.J. 665 (2002).

65. See, e.g., Kimberlé Crenshaw, *A Black Feminist Critique of Antidiscrimination Law and Politics*, in THE POLITICS OF LAW, *supra* note 52, at 356 (feminist jurisprudence and critical race

categories mask profound differences among individual commentators.

Nevertheless, despite the multiplicity of approaches under the critical theory banner, their treatment of “facts” recalls the realists’ focus on “social facts.” For example, an important strand in critical theory is that social context is crucial to decision-making or, put another way, group *experience* as modulated through “cultural meaning,” not merely individual “facts,” should be crucial to decision making.<sup>66</sup> Given this perspective, the critical theory movement explores specific social contexts, such as how the law treats traditionally marginalized groups. In a way, then, the critical legal theory movement continues the realist idea of *social* context.<sup>67</sup> Critical legal theorists thus dig down into how specific social contexts, with all their intertwining social, legal, and political histories, inform the development of law.<sup>68</sup>

Some modern critical theorists go further and argue that there is no good way to reach decisions, that there are no external principles—social or otherwise—that can generate traction to lead to just results.<sup>69</sup> Even this critique, however, remains wedded to the norms of adjudication in two ways. First, the focus is again the indeterminacy of rules, not facts. Second, the focus is on the indeterminacy of decision-making, not on who the decision maker can or should be and whether a change in this regard is worthwhile or even meaningful.<sup>70</sup>

There are many other examples of the complexity and variety of the critical theory movement, but in virtually all of these permutations *facts* in the sense of framing *individual* experience as conceptualizing conflicts are rarely, if ever, to be found. This remains true even among current successors of both the legal realists and critical legal theory scholars, such as the “New Legal Realists”<sup>71</sup> and scholars

theory); Sharon Elizabeth Rush, *Equal Protection Analogies—Identity and “Passing”*: Race and Sexual Orientation, 13 HARV. BLACKLETTER L.J. 65 (1997) (queer theory and critical race theory).

66. An influential example of such an analysis is Lawrence, *supra* note 62.

67. See *supra* text accompanying notes 53-60.

68. Legal realism has found its way into basic doctrinal debates, most notably in *Brown v. Board of Education*, 347 U.S. 483 (1954). One way of analyzing *Brown* is as legal realism in action: framing de jure segregation as “separate but equal” masks the reality (or context) that, in *Brown*’s famous analysis, African-American children are branded as inferior with consequent damage to “their educational and mental development.” *Id.* at 494-95. The subsequent development of law, from desegregation cases through affirmative action cases, is the triumph of “neutral” principle—“the Constitution is colorblind”—over how the country is not, with the result that the broader social context crucial to *Brown* has been replaced by an emphasis on particular showings of harm which are notoriously difficult to prove. For an analysis of this trend in the context of anti-discrimination law, see Alan Freeman, *Antidiscrimination Law From 1954 to 1989: Uncertainty, Contradiction, Rationalization, Denial*, in THE POLITICS OF LAW, *supra* note 52, at 285. See also Charles R. Lawrence III, *Race and Affirmative Action: A Critical Race Perspective*, in THE POLITICS OF LAW, *supra* note 52 at 312; AMSTERDAM & BRUNER, *supra* note 11, at 55-77.

69. One example is STANLEY FISH, DOING WHAT COMES NATURALLY: CHANGE, RHETORIC, AND THE PRACTICE OF THEORY IN LITERARY AND LEGAL STUDIES (1989). Fish argues that once “you start down the anti-formalist road, there is no place to stop”—all “is variable and contingent.” *Id.* at 2.

70. As to its lack of meaning, Stanley Fish argues that even taking the anti-formalist critique to its logical extreme, there still must be an assumption that there exists something “independent of anyone’s belief,” yet who that someone or something is remains unidentified. *Id.* at 104.

71. See Howard Erlanger, et al., *Forward to New Legal Realism Symposium: Is It Time for a New Legal Realism?*, 2005 WIS. L. REV. 335 (2005). While still relatively new, “new legal realists” employ an interdisciplinary approach, collaborating particularly with social scientists, to inform insights that

of “cultural studies.”<sup>72</sup>

*D. Facts “On the Ground” in Adjudication: Lawyers, Judges, and Juries*

Discussions about adjudication and the development of law in academic discourse are telling even in the context of the nuts and bolts of how matters are adjudicated. Understanding this “practical” realm involves exploring the skills of the advocate, the operation of procedural rules in adjudication that constrain the finding of facts, and who, in the end, decides “truth” in adjudication.

*1. Advocacy*

There is a formalist bent to advocacy in adjudication: there is truth and falsity in facts and law. There is also, simultaneously, an anti-formalist bent in advocacy: “fact investigation” and legal interpretation can be subject to multiple stories. Consider the role of “facts” at trial as described by Thomas Mauet:

A theory of the case is a clear, simple story of “what really happened” from your point of view. It must be consistent with the undisputed evidence . . . and the applicable substantive law. It must not only show what happened, but also explain why the people in the story acted the way they did. It should be consistent with the jury’s beliefs and attitudes about life and how the world works . . . . If you do not construct a clear, simple story that puts all the evidence together into a coherent whole . . . the jury will construct one without you . . . . Trials are in large part a contest to see which party’s version of “what really happened” the jury will accept as more probably true . . . . [T]he opposing sides usually have directly competing versions of reality . . . .<sup>73</sup>

Classic legal formalism is on display here: there can only be one “what happened.” Moreover, Mauet goes on to explain how a “story” must accord with the elements of a claim in a civil case or a defense in a criminal case<sup>74</sup>—again, a classic display of formalism’s syllogism: legal rule applied to facts generates result.<sup>75</sup>

There is, nevertheless, an anti-formalist twist embedded in Mauet’s description. Advocates *construct* stories in light of a jury’s (or judge’s) “beliefs and attitudes about how the world works.” This is not formalism in its pure form: there is some distance between the *Anderson* Court’s notion that a fact finder can choose one of “two permissible views of the facts” and Mauet’s expression of

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heretofore did not have an empirical basis. *Id.* at 341-42. The focus of inquiry remains, however, “social context,” albeit with a focus, in the Legal Realist tradition, on the “invisible” such as the homeless. *Id.* at 341.

72. See CULTURAL ANALYSIS, CULTURAL STUDIES, AND THE LAW: MOVING BEYOND LEGAL REALISM (Austin Sarat & Jonathan Simon eds., 2003) [hereinafter Sarat & Simon]. An oft-repeated idea among those associated with “cultural critiques” is that law is culture and culture is law—an elaboration of the work of Michel Foucault. Paul Schiff Berman, *Telling a Less Suspicious Story: Notes Toward a Nonskeptical Approach to Legal/Cultural Analysis*, in Sarat & Simon, *supra*, at 107.

73. THOMAS A. MAUET, TRIAL TECHNIQUES 24 (7th ed. 2007). See also Peter Tillers & David Schum, *A Theory of Preliminary Fact Investigation*, 24 U.C. DAVIS L. REV. 931, 959 (1991) (noting the power of stories at trial that “contain a mixture of evidence and conjecture”).

74. MAUET, *supra* note 73, at 24.

75. For a discussion of formalism as a “syllogism machine,” see *supra* text accompanying 43-49.

factual fluidity, the potential for *construction* of facts, a simplified map that offers a compelling story to finders of fact.<sup>76</sup>

It is also commonplace for advocates and, albeit rarely, scholars,<sup>77</sup> to note that the bulk of the day-to-day work of an advocate is “fact investigation,” not legal research. Mauet puts it like this: “Most cases are decided by facts, not law . . . . [L]itigators spend much of their time identifying and acquiring admissible evidence . . . that refutes the other side’s contentions.”<sup>78</sup>

This vision of advocacy “on the ground” demonstrates an important tension in the rhetoric of law and the practice of law. While skilled advocates are well aware of the importance of presenting a “true” version of “what happened,” advocates are also well aware that “what happened” is to be constructed. Skillful advocates construct *a* story that, to a fact-finder, is easy to grasp and *must be* what happened.<sup>79</sup> Powerful stories in advocacy appear *not* to be constructed, which in turn, is the source of their power. Clifford Geertz makes this point: If “‘fact-configurations’ are not merely things found lying about in the world and carried bodily into court, show-and-tell style, but close-edited diagrams of reality the matching process itself produces, the whole thing looks a bit like sleight-of-hand.”<sup>80</sup> “Sleight-of-hand” that is easy to spot is bad advocacy just as it is bad magic.

Thus, whether before juries,<sup>81</sup> trial judges,<sup>82</sup> or appellate judges,<sup>83</sup> “successful” advocacy entails constructing stories that cohere with applicable rules.<sup>84</sup> Multiple

76. *Anderson*, 470 U.S. 564.

77. For a rare rigorous scholarly treatment of fact investigation, see Tillers & Schum, *supra* note 73.

78. THOMAS A. MAUET, *PRETRIAL* 19 (7th ed. 2008).

79. Consider this account of an inexperienced attorney put to rights by an experienced trial lawyer: Dockins had spent many months working on the case. It was a dense thicket of legal theories – predatory trade practices, monopolies, and the law of contracts, with which he’d had little experience . . . . At one point, as Dockins labored to explain the complexities of the case, Willie Gary suddenly jumped up, fists clenched like a boxer ready to deliver body blows. “Loewen lied to Jerry O’Keefe!” Dockins was startled at the way Gary brushed aside all the arcane theories and reduced the case to its simplest elements. “This case,” Gary exclaimed . . . his voice raised, “is about lying, cheating, and stealing!”

Jonathan Harr, *The Burial*, *THE NEW YORKER*, Nov. 1, 1999, at 84.

80. GEERTZ, *supra* note 30, at 173.

81. Nancy Pennington & Reid Hastie, *A Cognitive Theory of Juror Decision Making: The Story Model*, 13 *CARDOZO L. REV.* 519 (1991).

82. Paul Holland, *Sharing Stories: Narrative Lawyering in Bench Trials*, 16 *CLINICAL L. REV.* 195 (2009).

83. Anthony G. Amsterdam, *Thurgood Marshall’s Image of the Blue-Eyed Child in Brown* [*Brown v. Board of Education*], 68 *N.Y.U. L. REV.* 226 (1993) (analyzing the narrative choices made by John Davis and Thurgood Marshall in the oral arguments for *Brown v. Board of Education*).

84. Ty Alper et al., *Stories Told and Untold: Lawyering Theory Analyses of the First Rodney King Assault Trial*, 12 *CLINICAL L. REV.* 1, 11 (2005) (“[A] litigator’s *theory of the case* is a detailed summary of the factual propositions . . . with the facts organized in such a way that they invoke the application of the . . . substantive rules of law . . . .”). It should hardly be news that more effective advocates—often the most highly paid advocates hired by the more highly resourced litigants—do a more effective job selecting facts in light of applicable legal rules. See, e.g., Peter Arenella, *Foreward, O.J. Lessons*, 69 *S. CAL. L. REV.* 1233, 1234 (1996) (“Money can have a greater impact on the verdict than the ‘facts’ because it dictates how those ‘facts’ are transformed into legally admissible and persuasive evidence.”). This point reaches its most intense manifestation in the huge number of civil

stories are possible, and recognizing and assessing the most effective story is part of lawyering and, ultimately, how the process of fact-finding in adjudication works.<sup>85</sup>

## 2. Procedure as Exclusion

Another dimension of “facts” in adjudication is how often the goal of procedure is to exclude them. The most obvious example is the Rules of Evidence. At its most general level, these rules are determining which facts matter in ascertaining “the truth.”<sup>86</sup> While usually framed in terms of “admissibility,” it is just as accurate to approach them from the opposite side, that is, as rules of “inadmissibility.” Inadmissibility may be based on “relevance,” the crux of which is how helpful evidence is in establishing “the existence of any fact that is of consequence” to the litigation.<sup>87</sup> The intricate rules of hearsay also exclude evidence that, as determined by the long history of the hearsay rules, is of questionable trustworthiness.<sup>88</sup>

Other related procedural mechanisms operate the same way. Pretrial motions—usually called motions in limine—determine whether evidence will or will not be admitted at trial.<sup>89</sup> The touchstone of permissible discovery is whether it “appears reasonably calculated to lead to the discovery of admissible evidence.”<sup>90</sup> A judge deems a trial unnecessary by granting a motion for summary judgment because “there is no genuine issue as to any material fact.”<sup>91</sup>

Taken together, these most basic of foundations of the adjudicatory process serve as limiting devices and, by extension, exclusionary devices. They shape stories based on what “the law’s views [are] on what constitutes a fact.”<sup>92</sup>

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cases where there is no attorney at all, thus leaving litigants in the dark about how to identify and “screen” facts relevant to the legal principles at issue. See Bezdek, *supra* note 15; Russell Engler, *And Justice for All—Including the Unrepresented Poor: Revisiting the Roles of the Judges, Mediators, and Clerks*, 67 *FORDHAM L. REV.* 1987 (1999). The crucial point for this Article, however, is not how appalling this state of affairs is (and it assuredly is), but that it is appalling because a primary (if not the primary) difference between skilled, highly resourced attorneys and less skilled, less well resourced attorneys (or unrepresented litigants) is their ability to find and shape facts in light of substantive and evidentiary legal rules at play.

85. Even the Supreme Court has, on occasion, recognized the importance of vivid storytelling in advocacy. Successful advocacy involves “tell[ing] a colorful story with descriptive richness . . . . Evidence thus has force beyond any linear scheme of reasoning . . . . This persuasive power of the concrete and particular is often essential . . . . A syllogism is not a story, and a naked proposition in a courtroom may be no match for the robust evidence that would be used to prove it.” Old Chief v. United States, 519 U.S. 172, 187-89 (1997). Note, however, that while recognizing the power of narrative, the Court does not embrace anti-formalism as far as facts are concerned. In other words, the “colorful story with descriptive richness” would be the *right story*, not the most effective story.

86. The Federal Rules of Evidence hold that the Rules “shall be construed” so “that the truth may be ascertained.” FED. R. EVID. 102.

87. FED. R. EVID. 401.

88. See FED. R. EVID. art. VIII, advisory committee note.

89. FED. R. EVID. 104(a).

90. FED. R. CIV. P. 26(b)(1).

91. FED. R. CIV. P. 56.

92. CONLEY & O’BARR, *supra* note 49, at 18.



### 3. *The Players: Who Finds Facts?*

A final brief and obvious point about adjudication: finders of fact in adjudication are judges and juries. These are the actors in the litigation process who reach conclusions about “what happened.” In contrast, attorneys are not decision makers, but rather the storytellers who present alternative versions of “what happened” so that decision makers can choose one or the other.<sup>93</sup>

This is a crucial point in terms of this Article, and one to which I will return at several points in what follows.<sup>94</sup>

## IV. WHAT BRINGS US HERE TODAY: “FACTS” IN MEDIATION

Mediation employs an entirely different means of resolving disputes, but my focus here is not a general overview of these differences—a task that has been performed elsewhere.<sup>95</sup> Rather, in examining mediation, I will adhere to the structure of my description of adjudication: How does the mediation process identify what matters and what does not matter and who does the deciding?<sup>96</sup>

### A. *An Introduction: The Mediator in Mediation*

Consider the rituals of adjudication: attendees in a courtroom stand as a judge enters; a clerk “calls the case”; the judge asks attorneys to “state your appearance for the record”; deference is shown (or should be shown) to judges while being addressed as “your honor”; witnesses are sworn. These are more than formalities: they are a sequence of events that reflects a deep-seated expectation.<sup>97</sup>

In contrast, “when mediation begins, a mediator should “exhibit[] an enthusiastic, positive and encouraging attitude.”<sup>98</sup> Rather than formal opening statements and swearing in of witnesses, mediators often begin with an open question: “Tell us what brings us here today”<sup>99</sup>—an invitation to say whatever a participant wants to say. This “wanting to say” is, more often than not, relating

93. This is not all to minimize the role of attorneys in American adjudication. Indeed, parties and, by extension, attorneys (if the parties can afford them) are tasked with marshalling evidence—a function that is not the job of a finder of fact. Marc Galanter, *Why the “Haves” Come Out Ahead: Speculations on the Limits of Legal Change*, 9 LAW & SOC’Y REV. 95, 120 (1974) (a judge acts “as umpire, while the development of the case, collection of evidence and presentation of proof are left to the initiative and resources of the parties”). The crucial role attorneys play in larger issues raised in this Article is discussed *infra* text accompanying notes 145-168.

94. See *infra* text accompanying notes 103-113.

95. See Robert Rubinson, *Client Counseling, Mediation, and Alternative Narratives*, 10 CLINICAL L. REV. 833,846-54 (2004). A widely read discussion of basic principles of mediation is KIMBERLEE K. KOVACH, *MEDIATION: PRINCIPLES AND PRACTICE* (3d ed. 2004).

96. A recent effort at exploring and comparing law and the “jurisprudence of mediation” is Michal Alberstein, *The Jurisprudence of Mediation: Between Formalism, Feminism, and Identity Conversations*, 11 CARDOZO J. CONFLICT RESOL. 1 (2009).

97. Social scientists call these norms a “script,” a set of normal expectations about the sequencing of an activity to which humans adhere without thinking. JEAN MATTER MANDLER, *STORIES, SCRIPTS, AND SCENES: ASPECTS OF SCHEMA THEORY* 94, 108 (1984). A classic example is a “restaurant script”—the process of being seated, handed a menu, served, and paying a bill. Robert P. Abelson, *Psychological Status of the Script Concept*, 36 AM. PSYCHOLOGIST 715, 715-27 (1981).

98. KOVACH, *supra* note 95, at 159.

99. *Id.* at 163.

“what happened” from a non-legal perspective, or even sharing thoughts, emotions, or anything else that do not strictly contribute to a narrative about “what happened.” This liberates participants from the limiting devices so characteristic of the fact-finding function of adjudication.<sup>100</sup>

A similar contrast can be drawn with the physical tableau presented by adjudication and mediation. The preeminent vision of adjudication is the judge who is physically isolated by the bench; indeed, attorneys can only “approach the bench” with permission. This physical elevation—a reflection of respect for the “law” of which a judge is the physical embodiment—is embedded in popular consciousness and, in all judicial settings and contexts, remains the essence of what a courtroom should look like. Consider, in contrast, the range of options available to a mediator about “physical arrangements.” Mediators should carefully consider “seating patterns, the shape of the table, the amount of physical space allotted to and between disputants, physical objects that indicate authority or differences in power, and space for public or private interaction.”<sup>101</sup> These are not trivial. As physical distancing and elevation have symbolic significance in adjudication, so do physical arrangements have significance in mediation. A central issue in mediation is “differences in power”—a concern to be dealt with by, among other things, choices about a round table, a desk behind which a mediator sits, no table at all, and who sits next to the mediator in all three of these arrangements.<sup>102</sup> These choices reflect the essence of mediation. Rather than imposing order and hierarchy—what courtroom arrangements not only do but are designed to do—skilled mediators do their utmost to eliminate hierarchy at many levels: mediator to participants, participants to participants, and, if appropriate, lawyers to all.<sup>103</sup>

It is a short step from understanding why a round table may be important in mediation to understanding a mediator’s role. A mediator “facilitates” by seeking to enable and empower participants to do the work of dispute resolution.<sup>104</sup> A leading mediation scholar puts the idea this way:

[A mediator] assumes the parties are intelligent, able to work with their counterparts, and capable of understanding their situations better than either their lawyers or the mediator. So the parties may develop better solutions than any that the mediator might create. For these reasons . . . the facilitative mediator assumes that his principal mission is to enhance and clarify communications between the

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100. See *supra* text accompanying note 86-92.

101. CHRISTOPHER W. MOORE, *THE MEDIATION PROCESS: PRACTICAL STRATEGIES FOR RESOLVING CONFLICT* 154 (3d ed., rev. 2003).

102. *Id.* at 155. It is perhaps easy to understand the impact of seating when considering a visit to a doctor’s office that typically involves a patient sitting in front of a large desk behind which a doctor sits, protected by the desk. This physical layout enhances a doctor’s aura of authority. See Deborah Franklin, *Patient Power: Making Sure Your Doctor Really Hears You*, N.Y. TIMES, Aug. 15, 2006 (quoting a patient who notes the power of “the guy with the white lab coat behind the giant desk”).

103. MOORE, *supra* note 101, at 150-52; Pamela Peters, *Gaining Compliance Through Non-Verbal Communication*, 7 PEPP. DISP. RESOL. L.J. 87, 105 (2007) (discussing when it is appropriate “to arrange all parties in a circle” and the importance of seating arrangements to “balance power disparities”).

104. A classic formulation in the mediation literature is that mediation is a “voluntary, consensual process, based on the principle of party self-determination.” Jacqueline Nolan-Haley, *Mediation Exceptionality*, 78 FORDHAM L. REV. 1247, 1247 (2009).

parties in order to help them decide what to do.<sup>105</sup>

This role requires consistent effort on the part of a mediator. This effort may be transparent, including a statement from the mediator that draws an explicit contrast with adjudication. For example, one leading mediation text notes that some mediators will “explain that they are not a judge, jury or fact-finder.”<sup>106</sup> Most mediation skills are not, to say the least, characteristic of judging: understanding the nuances of reframing and crafting questions in light of what participants say,<sup>107</sup> observations of body language and other non-verbal cues,<sup>108</sup> sensitivity to cross-cultural issues,<sup>109</sup> carefully crafting questions, guarding against playing too active a role in solving problems, and empathy.<sup>110</sup> A mediator has no “power” to force participants to engage in mediation at all: her “power,” at most, is to persuade participants of the value of the process.<sup>111</sup>

### *B. How Mediation Sorts “What Matters” from “What Does Not Matter”*

Forty years ago, Lon Fuller described the role “rules” play in mediation. According to Fuller, mediation liberates parties “from the encumbrance of rules” and “accept[s], instead, a relationship of mutual respect, trust[,] and understanding that will enable them to meet shared contingencies without the aid of formal prescriptions laid down in advance.”<sup>112</sup> I will elaborate on the implications of Fuller’s rich formulation.

105. This quote is from the seminal article by Leonard Riskin discussing “styles” of mediation. Leonard L. Riskin, *Mediator Orientations. Strategies, and Techniques*, 12 ALTERNATIVES HIGH COST LITIG. 111, 111-114 (1994).

106. See KOVACH, *supra* note 95, at 161.

107. John M. Livingood, *Reframing and Its Uses*, DISP. RESOL. J. Nov. 2002-Jan. 2003, at 42, 44.

108. KOVACH, *supra* note 95, at 55 (“Mediators must pay acute attention to nonverbal communication . . . throughout the mediation.”).

109. Harold Abramson, *Crossing Borders Into New Ethical Territory: Ethical Challenges When Mediating Cross-Culturally*, 49 S. TEX. L. REV. 921 (2008).

110. See KOVACH, *supra* note 95, at 65-69.

111. See MODEL STANDARDS OF CONDUCT FOR MEDIATORS, Standard I (2005) (“[P]arties may exercise self-determination at any stage of a mediation, including mediator selection, process design, participation in or withdrawal from the process, and outcomes.”). Nevertheless, there is “mandatory mediation,” meaning that courts order participants to mediate before engaging in further litigation, although even here participants almost always can choose to terminate the mediation if they wish. See Edward F. Sherman, *Court-Mandated Alternative Dispute Resolution: What Form of Participation Should Be Required?*, 46 SMU L. REV. 2079 (1993). To state the obvious, this is in stark contrast to Robert Cover’s observation that the state enforces law through violence. See Cover, *supra* note 37, at 1601.

112. Lon L. Fuller, *Mediation – Its Forms and Functions*, 44 S. CAL. L. REV. 305, 325-26 (1971). In this respect, mediation partakes of other modes of conflict resolution in other cultures. See, e.g., GEERTZ, *supra* note 30, at 222 (contrasting the “the Western polarization of applicable law and pertinent fact” to Islamic, Indic, and Malaysian notions of law as “interconnections of norms and happenings”); Andrew Huxley, *Golden Yoke, Silken Text*, 106 YALE L.J. 1885, 1911 (1997) (book review) (in Tibetan Buddhist law, “parties, judges, and conciliators engaged in factoring, viewed each case as unique, did not cite previous legal situations as precedents, and therefore did not elaborate precedential chains of legal rules based on cases”).

### 1. *Do Mediators Impose Rules?*

A central characteristic of a mediator's role is as facilitator.<sup>113</sup> They are not rule-givers or fact-finders.<sup>114</sup> This is a simplification, however. Most mediators do exert "control," although its purpose and execution are in direct contrast to the "control" so typical of adjudication.

In line with Fuller's account, skilled mediators do not impose "formal prescriptions laid down in advance." A mediator, however, will often discuss "ground rules," which are typically such things as "rules" against shouting, interrupting, according equal time to participants, and, if necessary, time constraints for the mediation itself. These, however, are not "imposed" (a mediator has no power to impose) but rather established with the participants' agreement, thus representing and demonstrating a kind of "process control" exercised by the participants themselves.<sup>115</sup> The key is that these "ground rules," even to the extent a mediator by persuasion or perceived stature imposes them, do not have a limiting function as to what matters in mediation. To the contrary, they seek to enable participants to define what matters by eliminating process barriers to achieve that goal. In this respect, "ground rules" are not the procedural rules of adjudication, that is, they are not a formally imposed set of prescriptions designed to cabin "facts" in light of applicable rules.

In some respects, the entire panoply of mediator "techniques" I have briefly described already does the same thing.<sup>116</sup> They are mechanisms for meaning generation, to cultivate what Fuller describes as "a relationship of mutual respect, trust and understanding that will enable them to meet shared contingencies without the aid of formal prescriptions laid down in advance."<sup>117</sup>

### 2. *Of Socks and Hats: Who Defines What Matters in Mediation?*

Participants themselves are the seat of meaning-making in mediation. The mediation literature offers an explicit justification for this central characteristic of mediation: parties are themselves far more "capable of understanding their situations better either than their lawyers or the mediator."<sup>118</sup> There is no need for abstractions or generalizations laid down by others to make sense of the

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113. See *supra* text accompanying notes 96-111.

114. A caveat: some mediators, however, feel free to offer their vision of applicable rules or norms. Ellen Waldman, in an important article, distinguishes three "models" of mediation: "norm-generating," "norm-educating," and "norm-advocating." Ellen A. Waldman, *Identifying the Role of Social Norms in Mediation: A Multiple Model Approach*, 48 HASTINGS L.J. 703, 707 (1997). Waldman's distinctions powerfully capture different mediation "styles." Waldman describes the "norm-generating" model as entailing mediation techniques to facilitate the identification by parties themselves of "norms" applicable to a dispute. *Id.* at 710-719. I adopt this model for my own analysis, which is in line with its preeminent status in the mediation literature of a "style" called "facilitative mediation." See *supra* note 16.

115. Chris Guthrie & James Levin, *A "Party Satisfaction" Perspective on a Comprehensive Mediation Statute*, 13 OHIO ST. J. ON DISP. RESOL. 885, 890-91 (1998). Indeed, such "process control" is an indication of participant "satisfaction" with the mediation process. *Id.* at 891.

116. See *supra* text accompanying notes 98-111.

117. See Fuller, *supra* note 112, at 326.

118. See *supra* text accompanying notes 105.

participants' world.<sup>119</sup> To again draw upon ideas from anthropology, mediation embraces "local knowledge,"<sup>120</sup> that is, the knowledge of participants who have experienced and, in a fundamental sense, "know" what a dispute involves. This entails "a comprehensive mix of their needs, interests, and whatever else they deem relevant regardless of rules of evidence or strict adherence to substantive law."<sup>121</sup> There is thus in mediation no "space" between participants' experience and the necessarily distant perspectives of others, including judges, juries, and lawyers.<sup>122</sup>

This perspective can at times generate results that, from an outside perspective, seem odd. Consider the example addressed earlier to illustrate what surely would be irrelevant in dispute resolution: "[T]he color of socks worn by an offeree" in a contract dispute.<sup>123</sup> In mediation, maybe the color violated every rule of fashion sense, pairing, say, bright orange socks with a somber pinstriped suit. Maybe this offended the offeror, or undermined the offeree's credibility. Do the participants, or one participant, care? If she does or they do, it matters. The color of socks is *unlikely* to have meaning in the context of the dispute, but in mediation what is meaningful is not defined by preexisting rules. Probabilities do not matter: circumstances are odd and unpredictable enough to generate seemingly bizarre assertions of value or conflict.

Moving from socks to hats, another example that illustrates this point comes from Oliver Wendell Holmes in his famous essay "The Path of the Law."<sup>124</sup> The legal process, as translated through a lawyer, is one that:

[R]etain[s] only the facts of legal import, up to the final analyses and abstract universals of theoretic jurisprudence. The reason why a lawyer does not mention that his client wore a white hat when he made a contract, while Mrs. Quickly would be sure to dwell upon it along with the parcel gilt goblet and the sea-coal fire, is that he foresees that the public force [i.e., the law] will act in the same way whatever his client had upon his head.<sup>125</sup>

Socks or hats or gilt goblets are *legal* irrelevancies and the enemy of virtually all "reasoned" adjudication. In a textured, "local world," however, parties might have strong feelings<sup>126</sup> about this or that and, as such, can be part of mediation.

119. I have explored this aspect of mediation in Rubinson, *supra* note 9, at 853.

120. See GEERTZ, *supra* note 30.

121. JAY FOLBERG & ALISON TAYLOR, *MEDIATION: A COMPREHENSIVE GUIDE TO RESOLVING CONFLICTS WITHOUT LITIGATION* 10 (1984).

122. James C. Scott makes this point in the context of the natural world:

The sharply focused interest of the scientific foresters in commercial lumber and that of the cadastral officials in land revenue constrain them to finding clear-cut answers to one question. The naturalist and the farmer, on the other hand . . . know a great many things about forests and cultivable land. Although the forester's and the cadastral official's range of knowledge is far narrower, we should not forget that their knowledge is systematic and synoptic, allowing them to see and understand things [a naturalist or farmer] would not grasp.

SCOTT, *supra* note 25, at 46.

123. See *supra* note 54.

124. Oliver Wendell Holmes, *The Path of the Law*, 10 HARV. L. REV. 457 (1897).

125. *Id.* at 458.

126. For example, the importance of "venting" in mediation has attracted substantial commentary, most of which argues that there is value in letting participants express anger and other emotions. See

Another odd use of facts from the perspective of adjudication is how what is not can be just as useful as what is. In adjudication, what is not relevant is banished from the realm of “fact finding” by being deemed, through motion or the rules of evidence, as something to be ignored and, if not, potentially tainting the entire process.<sup>127</sup> In contrast, in mediation what *doesn't work* or what turns out not to be useful can be crucial. Such things may eliminate certain possibilities, or suggest new possibilities. The act of thinking up things, whether ultimately useful or not, may contribute to a spirit of collaboration, which, in turn, can contribute to the ultimate richness or success of the process.<sup>128</sup> Maybe discussing socks has its value. Maybe not. Who knows?<sup>129</sup>

Mediation also draws upon another insight about conflict that tends to be largely non-existent in the world of adjudication: what conflict *is* is in flux and subject to transformation over time.<sup>130</sup> Adjudication views conflict as static, something to be reconstructed with the ultimate product the one “true” version of “what happened.”<sup>131</sup> In contrast, the mediation process itself seeks to cultivate

MOORE, *supra* note 101, at 173-74. As with many other aspects of mediation, this is far from a universal view. See Don Ellinghausen, Jr., *Venting or Vipassana: Mindfulness Meditation's Potential for Reducing Anger's Role in Mediation*, 8 CARDOZO J. CONFLICT RESOL. 63, 68 (2006) (arguing that the “venting-catharsis theory retains widespread appeal despite its ‘dismal record in research findings’”).

In contrast, appeals to “emotion” have long been derided in the formalist conventions of adjudication. To take one of innumerable examples, the Supreme Court case of *DeShaney v. Winnebago County Department of Social Services* involved what Justice Rehnquist characterized as the “undeniably tragic” story of a victim of unrelenting child abuse that resulted in brain damage and, ultimately, permanent institutionalization of the victim. 489 U.S. 189, 191-93 (1989). In criticizing dissents by Justices Blackmun, Brennan, and Marshall, Justice Rehnquist rejected as illegitimate any reliance on being “moved by natural sympathy”—a judicial shot across the bow accusing the dissenters of abandoning the formalist conventions of judicial decision-making. *Id.* at 202. For a discussion of formalism and judging, see *supra* text accompanying notes 43-49.

127. This is primarily achieved through the operation of the rules of evidence and allied procedures. See *supra* text accompanying notes 86-92.

128. This is a fundamental insight of the social science literature on “problem solving,” which involves listing ideas about problem resolution and transformation *before* assessing their feasibility and effectiveness. See Edwin H. Greenebaum, *On Teaching Mediation*, 1999 J. DISP. RESOL. 115, 123 (1999).

129. It is important to note that I am not claiming that somehow mediation can “rise above” the construction of meaning. This type of act does crop up in the Buddhist tradition: “Reality occurs prior to our falling into thought, prior to our getting ideas, prior to our coming up with explanations. Reality is *before* things form in our minds as crystallized objects, one thing distinguished from another.” STEVE HAGEN, *BUDDHISM IS NOT WHAT YOU THINK: FINDING FREEDOM BEYOND BELIEFS* 92 (2003). Lest one considers this idea as too far out for academic attention, there is a highly active “mindfulness” movement among mediation scholars and practitioners that draws from these Buddhist principles. Leonard Riskin, a noted mediation scholar, has done substantial work in this regard. See Leonard L. Riskin, *Mindfulness: Foundational Training for Dispute Resolution*, 54 J. LEGAL EDUC. 79 (2004).

130. For a fascinating study of these transformations, see William L.F. Felstiner, et al., *The Emergence and Transformation of Disputes: Naming, Blaming, Claiming . . .*, 15 LAW & SOC'Y REV. 631 (1980-81). Among its many insights, this Article notes that “new information, logic, insight, or experience . . . alter the participants’ understanding of their experience.” *Id.* at 641. See also Lynn Mather & Barbara Yngvesson, *Language, Audience, and the Transformation of Disputes*, 15 LAW & SOC'Y REV. 775, 776 (1980-81) (“[A] dispute is not a static event which simply ‘happens’ but . . . the structure of disputes, quarrels, and offenses includes *changes or transformations* over time.”).

131. See *supra* text accompanying notes 45, 73-75.

transformation<sup>132</sup> at two levels. One level is to enable parties to realize that “contending perceptions” can “coexist.”<sup>133</sup> To the extent appreciation of alternative perspectives happens, the mediation process has profoundly altered the essence of what a dispute *is*, thus dissolving the premises of the adversarial system and its assumption of two contending visions of “truth.”<sup>134</sup>

Secondly, the parties’ “comprehensive mix of their needs, interests, and whatever else they deem relevant” *has to* remain fluid when mediation is a success.<sup>135</sup> The exchange of such “comprehensive mixes” cannot be static by dint of all it includes, which is, to put it colloquially, a whole bunch of stuff. The mediator can nudge parties along this transformative process by structuring creative brainstorming, option generation, and ways for parties to better understand their “interests” rather than their “positions.”<sup>136</sup>

### 3. *Participants as Meaning-Makers*

Even with all of its openness to meaning-making and its changes of perspectives and its cultivation of dispute transformation, the mediation process does not and cannot generate a free-for-all with no basis for resolving disputes. Mechanisms to sort what matters from what does not matter are inevitable:<sup>137</sup> every activity must have a map that excludes and includes and a criteria to accomplish the excluding and including.<sup>138</sup> Fuller was careful to qualify his definition of mediation as operating “without the aid of *formal* prescriptions laid down in advance.”<sup>139</sup> There still must be the “aid of prescriptions,” albeit not formal or preexisting, and, thus, mediation cannot be, as one commentator suggests, “normative tabula rasa.”<sup>140</sup>

A way to get traction on what “prescriptions” are at play in mediation is to examine norms people follow in everyday life. These may be deeply rooted norms of fairness, of reciprocity, of looking hopefully to the future. After all, “people everywhere spend a good deal of effort and time figuring out what they *ought* to do, with whom, when, and how, and then doing it—or, if they don’t do it, then explaining or justifying why not.”<sup>141</sup> The “oughts” and “figuring outs” are

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132. Founders of one model of mediation are explicit in viewing the transformative potential of mediation by actually calling their model “Transformative Mediation.” See Robert A. Baruch Bush & Sally Ganong Pope, *Changing the Quality of Conflict Interaction: The Principles and Practice of Transformative Mediation*, 3 PEPP. DISP. RESOL. L.J. 67 (2002). While the details of this sophisticated vision of mediation is beyond the scope of this Article, its sense of “transformation” differs from the sense in which I am using the term. See generally Waldman, *supra* note 114.

133. Alan C. Tidwell, *Not Effective Communication but Effective Persuasion*, 12 MEDIATION Q. 3, 5 (1994).

134. For a description of the norms of dueling factual “truths” in adjudication, see *supra* text accompanying notes 73-85.

135. FOLBERG & TAYLOR, *supra* note 121, at 10.

136. The crucial distinction between “needs” and “interests” ultimately derives from ROGER FISHER ET AL., *GETTING TO YES: NEGOTIATING AGREEMENT WITHOUT GIVING IN* 41-43 (2d ed. 1991).

137. See *supra* text accompanying notes 18-29.

138. See *supra* text accompanying notes 18-29.

139. Fuller, *supra* note 112, at 326 (emphasis added).

140. Waldman, *supra* note 114, at 269.

141. AMSTERDAM & BRUNER, *supra* note 11, at 232.

necessarily normative. In adjudication, law is “oughts” and formalist syllogisms comprised of “fact” and “law” are the “figuring outs.” In mediation, people search for their “oughts” as a means to “figure out” as they do “everywhere,” both within and outside of dispute resolution. Mediation thus draws upon the “everywhere” skills people use every day.

Nevertheless, and perhaps ironically, it is commonplace for commentators to note that mediation may sometimes be performed in the “shadow of the law.”<sup>142</sup> Inevitably legal rules as communicated by attorneys or as understood by participants or by mediators themselves<sup>143</sup> are available to parties as a means of resolving disputes. Moreover, legal rules are a key component of an important negotiation and mediation concept called BATNA—the “Best Alternative to a Negotiated Agreement,”<sup>144</sup> which in many but not all instances would be adjudication with all of its attendant formality. Nevertheless, legal norms are not *the* or *sole* norms as they are, at least in theory, in adjudication. This is, perhaps ultimately, the crucial distinction with mediation.

The final part of this Article will examine how attorneys do and should act as bridges across the dispute resolution divide.

## V. THE ATTORNEY IN FACT

Thus far this Article has focused on the profound methodological differences between adjudication and mediation. The Article did examine how “facts” play out in advocacy, with attorneys engaging in anti-formalist “fact investigation” and story construction with the ultimate goal of integrating the result into formalist syllogism.<sup>145</sup> But the role of attorneys holds deeper lessons in light of the full analysis set forth in this Article: conflict definition, with definition bounded by facts, begins at the earliest stages of representation. This stage, which has attracted relatively little scholarly attention, holds great significance and promise in “on the ground” application of the themes developed in this Article.

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142. The phrase originally came from Robert H. Mnookin & Lewis Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 YALE L.J. 950, 968 (1979). For one application to mediation, see Leonard L. Riskin & Nancy A. Welsh, *Is That All There Is?: ‘The Problem’ with Court-Oriented Mediation*, 15 GEO. MASON L. REV. 863, 890-91 (2008).

143. There is a substantial literature as to whether mediators could or should give legal advice in mediation. The crux of the issue is that if attorney-mediators offer legal advice, there is a conflict of interest, and if non-lawyer mediators give legal advice, they have engaged in the unauthorized practice of law. Compare MODEL RULES OF PROF’L CONDUCT R. 5.5 (prohibiting the unauthorized practice of law), with MODEL RULES OF PROF’L CONDUCT R. 2.3 (lawyer acting as “third-party neutral” must insure parties understand the “lawyer’s role” as mediator, not as an attorney representing mediation participants). For purposes of this Article, the important point is that sometimes participants do receive legal advice from mediators. Indeed, in some “schools” of mediation this is the norm and not the exception. Murray S. Levin, *The Propriety of Evaluative Mediation: Concerns About the Nature and Quality of an Evaluative Opinion*, 16 OHIO ST. J. ON DISP. RESOL. 267, 269 (2001) (evaluative mediation has a “legal rights focus” and an evaluative mediator “gives advice, makes assessments, [and] renders opinions” on the case).

144. The phrase originates from GETTING TO YES. See FISHER ET AL., *supra* note 136, at 18.

145. See *supra* text accompanying notes 73-85.



*A. Problem Definition by Attorneys: Conflict Primed for Adjudication*

Robert J. Gilson and Robert H. Mnookin have called adjudication “disputing through agents.”<sup>146</sup> “Disputing” infers the factual world of adjudication. “Through” entails distancing, a space between disputants and disputing. And “agents,” that is, attorneys, identifies who bridges that space. Disputing through agents involves the obvious: filing motions, conducting discovery, engaging in settlement negotiations, trial practice, and so forth.

There is, however, an equally if not more important role that attorneys play: They shape disputes *before* adjudication begins.<sup>147</sup> Most attorneys carry in their heads the world of adjudication with all of its rules, facts, and mechanisms for finding and combining them. Lawyers only perceive “available choices about how to operate within the system in which [the lawyer] is situated.”<sup>148</sup>

This is a crucial role because, as noted above, “conflict” does not come into being fully formed, ready for the adjudicative process.<sup>149</sup> Rather, “conflict” is fluid and subject to transformation.<sup>150</sup> Attorneys are “agents” in transforming conflicts to fit into the methodology of adjudication: they render conflicts “amenable to conventional management procedures.”<sup>151</sup> To recall an earlier metaphor,<sup>152</sup> attorneys are cartographers, and, like all cartographers, their maps only include what is necessary in light the goals of the mapmaker which, in this case, is to shape conflict in order to engage in successful advocacy in adjudication.<sup>153</sup>

Despite the pervasiveness of adjudication in popular culture,<sup>154</sup> some scholars have noted that attorneys’ maps are not necessarily commensurate with clients’ maps.<sup>155</sup> This insight should not be overstated: the way adjudication approaches

146. Ronald J. Gilson & Robert H. Mnookin, *Disputing Through Agents: Cooperation and Conflict between Lawyers in Litigation*, 94 COLUM. L. REV. 509 (1994).

147. Carrie Menkel-Meadow, *The Transformation of Disputes by Lawyers: What the Dispute Paradigm Does and Does Not Tell Us*, 1985 MO. J. DISP. RESOL. 25, 31-33 (1985) (discussing how attorneys transform client stories before adjudication).

148. Carolyn Grose, *A Persistent Critique: Constructing Clients’ Stories*, 12 CLINICAL L. REV. 329, 360 (2006).

149. See *supra* text accompanying notes 130-133.

150. See Felstiner et al., *supra* note 130, at 641; Mather & Yngvesson, *supra* note 130, at 776.

151. Menkel-Meadow, *supra* note 147, at 31. Consider also Barbara Yngvesson’s formulation: [L]aw creates the social world by ‘naming’ it; legal professionals are empowered by their capacity to reveal rights and define wrongs, to construct the meaning of everyday events (as just or unjust, as crime or normal trouble, as private nuisance or public grievance) and thus to shape cultural understandings of fairness, of justice, and of morality.

Barbara Yngvesson, *Inventing Law in Local Settings: Rethinking Popular Legal Culture*, 98 YALE L.J. 1689, 1691 (1989).

152. See *supra* text accompanying notes 3-10.

153. See *supra* text accompanying notes 73-85.

154. Carol J. Clover, *Law and the Order of Popular Culture*, in *LAW IN THE DOMAINS OF CULTURE* 97 (Austin Sarat & Thomas R. Kearns eds., 1998).

155. There is an extensive and varied literature, often arising in the clinical education movement that explores this discursive “space.” A classic example is Lucie E. White’s, *Subordination, Rhetorical Survival Skills, and Sunday Shoes: Notes on the Hearing of Mrs. G.*, 38 BUFF. L. REV. 1 (1990). Other notable examples are Grose, *supra* note 148; Clark D. Cunningham, *The Lawyer as Translator, Representation as Text: Towards an Ethnography of Legal Discourse*, 77 CORNELL L. REV. 1298 (1992); Gerald P. Lopez, *Reconceiving Civil Rights Practice: Seven Weeks in the Life of a Rebellious Collaboration*, 77 GEO. L.J. 1603 (1989).

facts—especially the notion of “one truth” that can be “found”—remains deeply embedded culturally<sup>156</sup> and cognitively.<sup>157</sup> Nevertheless, scholars and sophisticated practitioners have grappled with the bridging function of lawyers as perhaps the ultimate challenge of lawyering. Indeed, the insights of the clinical education movement over the last fifty years can, in part, be viewed as identifying and seeking to build a bridge from client to lawyer rather than from lawyer to client—a process usually termed “client-centered lawyering.”<sup>158</sup> There is an element of the “empowering” norms of mediation when lawyers seek to come as close as possible to eliminating the space between advocate and client when communicating to third party decision-makers.

This point holds a new challenge for lawyers operating with clients in mediation in contrast to adjudication: mediation is disputing *with* agents, not *through* agents. And the prepositional shift, if mediation works as it hopes to, generates a verbal shift from *disputing* into *collaborating*. The end result is not disputing through agents, but collaborating with agents, plus, in the case of mediation, collaborating with agents with the aid of a facilitator.

With the rise of mediation, a central challenge of lawyering is thus to work *with* clients but not with the goal of communicating to a third party or, as the literature sometimes suggests, “translating” client stories to a third party.<sup>159</sup> Rather, it is to absorb the fluidity and openness of what “matters” and be a constructive agent (or, rather, collaborator) in mediation.

This topic remained for many years largely unexplored territory, but this is slowly changing of late as mediation spreads ever more widely and as attorneys’ involvement with mediation grows,<sup>160</sup> as, indeed, it must. This has led to increasing calls for attorneys to understand and adopt the mediation perspective,<sup>161</sup> with more scholars arguing for the modifications of the law school curriculum with ADR in mind.<sup>162</sup>

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156. JOHNSON, *supra* note 41, at 7-8.

157. LEE ROSS & RICHARD E. NISBETT, *THE PERSON AND THE SITUATION: PERSPECTIVES OF SOCIAL PSYCHOLOGY* 85 (1991) (“[P]eople fail to recognize the degree to which their interpretations of the situation are just that—constructions and inferences rather than faithful reflections of some objective and invariant reality.”).

158. A milestone of the pedagogical movement in this regard is DAVID A. BINDER & SUSAN C. PRICE, *LEGAL INTERVIEWING AND COUNSELING: A CLIENT-CENTERED APPROACH* (1977).

159. See Cunningham, *supra* note 155.

160. A pioneer in this area is Jean Sternlight. See Jean R. Sternlight, *Lawyers’ Representation of Clients in Mediation: Using Economics and Psychology to Structure Advocacy in a Nonadversarial Setting*, 14 OHIO ST. J. ON DISP. RESOL. 269 (1999). For a more recent, broader treatment of these issues, see Jean R. Sternlight & Jennifer Robbenolt, *Good Lawyers Should Be Good Psychologists: Insights for Interviewing and Counseling Clients*, 23 OH. ST. L.J. 437 (2008). See also Karen K. Klein, *Representing Clients in Mediation: A Twenty-Question Preparation Guide for Lawyers*, 84 N.D.L. REV. 877 (2008).

161. Phyllis E. Bernard, *The Lawyer’s Mind: Why a Twenty-First Century Legal Practice Will Not Thrive Using Nineteenth Century Thinking (With Thanks to George Lakoff)*, 25 OHIO ST. J. ON DISP. RESOL. 165, 168 (2010) (noting how “[i]n the twenty-first century, a thriving legal practice in America will adopt ADR’s active listening and problem-solving skills for everyday communication with clients”).

162. *Id.* at 167; John Lande & Jean R. Sternlight, *The Potential Contribution of ADR to an Integrated Curriculum: Preparing Law Students for Real World Lawyering*, 25 OHIO ST. J. ON DISP. RESOL. 247 (2010) (calling for transforming legal education by teaching more about ADR and ADR skills). There is

*B. War of the Worlds*

This is a fascinating time to be a lawyer as the profession comes to terms with mediation. A substantial literature expresses fear about attorney involvement in mediation.<sup>163</sup> This concern can be framed in the terms of this Article's analysis: "Facts" in adjudication are not what mediation is about,<sup>164</sup> and thus attorneys immersed in adjudication inhibit the effectiveness of mediation or even the practice of mediation itself. At the other end of the spectrum are expressions of how lawyers should and have absorbed the "collaborating with agents" conception of lawyering<sup>165</sup> or that, at least, fears about the negative influence of lawyer on mediation are overblown.<sup>166</sup>

Setting aside this debate, the ultimate goal in terms of lawyering is not that attorneys or, for that matter, scholars should jettison the map of adjudication. What is most important is for attorneys to recognize is that adjudication is *a* map, not *the* map. Adjudication, like any process or methodology or model, only includes what is necessary to its operation and excludes what is not. Attorneys should master different ways of processing disputes and facilitate the creation of the "world" in line with whatever mode of dispute resolution clients ultimately choose.

VI. CONCLUSION

"Facts" in adjudication is a term of art that reflects a specific methodology: the application of preexisting substantive and procedural rules which include and exclude in a very particular way. In contrast, mediation includes and excludes, but with no preexisting and binding rules. Rather, participants themselves identify and

also a casebook devoted to the subject of lawyers and ADR. EDWARD BRUNET & CHARLES B. CRAVER, *ALTERNATIVE DISPUTE RESOLUTION: THE ADVOCATE'S PERSPECTIVE* (2d ed. 2001).

163. Lande & Sternlight, *supra* note 162, at 269 ("Many believe that lawyers' adversarial methods and mindsets are inherently inconsistent with mediation."); Leonard L. Riskin, *Mediation and Lawyers*, 43 OHIO ST. L.J. 29, 57-59 (1982) (exploring how lawyers look at the world might contribute to lawyer distrust of mediation); Jacqueline M. Nolan-Haley, *Lawyers, Non-Lawyers and Mediation: Rethinking the Professional Monopoly from a Problem-Solving Perspective*, 7 HARV. NEGOT. L. REV. 235, 252 (2002) (lawyers' involvement in mediation might make ADR "more adversarial and legalistic"). A remarkable manifestation of this distrust is that mediators have the power to exclude lawyers in at least two states. CAL. FAM. CODE § 3182(a) (2009); KAN. STAT. ANN. § 23-603(a)(6) (1985).

164. See *supra* text accompanying notes 95-144.

165. An extensive study involving interviews with divorce lawyers in Maine is Craig A. McEwen, Nancy H. Rogers & Richard J. Maiman, *Bring in the Lawyers: Challenging the Dominant Approaches to Ensuring Fairness in Divorce Mediation*, 79 MINN. L. REV. 1317 (1995). The authors conclude that attorneys have embraced mediation and contribute to its success. *Id.* at 1394.

166. An important recent study—perhaps the only rigorous empirical study of the impact of lawyers on mediation—supports this conclusion. Jeffrey H. Goldfien & Jennifer K. Robbennolt, *What If the Lawyers Have Their Way? An Empirical Assessment of Conflict Strategies and Attitudes Toward Mediation Styles*, 22 OHIO ST. J. ON DISP. RESOL. 277 (2007). The authors explore "how attorneys shape mediation in their role as buyers of mediation services." *Id.* at 278. The authors' ultimate conclusion is that the variety of mediation styles employed by mediators and that variety in attorney "preferences" for the conduct of mediation mean that "an eclectic . . . assortment of styles will emerge as accepted forms of mediation." *Id.* at 316. The study, however, has important limitations. Subjects were not attorneys but "sixty-eight upper-class law students at two law schools." *Id.* at 292. Moreover, the thrust of the study was on mediator selection by attorneys, not on attorneys' counseling clients and attorneys' ultimate behavior in mediation. *Id.* at 278.

apply norms in light of the complexity of circumstances, which only they can fully know and understand. Both processes create a map to organize experience and circumstance. The difference is in how, when, and by whom the maps are made.

This difference, easily summarized, masks the mental gymnastics necessary to embrace, communicate, and implement different methodologies of conflict resolution. This is the ultimate challenge for mediators, mediation participants, and, perhaps most importantly, lawyers, who must reconfigure their professional outlook in order to see and thereby explain what is and is not in both mediation and adjudication.