Mediation, the Rule of Law, and Dialogue

Nayha Acharya[*]

In this paper the author urges discussion on the legitimacy of mediation processes, a discussion that is not prevalent in legal scholarship. The author argues that mediation outcomes can be inconsistent with the rule of law given that the same case can have a different outcome depending on whether it is litigated or mediated. On the other hand, crucial and valuable aspects of mediation can result in a presumption of legitimacy. With the rule of law critique in mind, the author discusses how dialogue theory can be used to improve upon the mediation process.

The author begins by exploring the value inherent in the rule of law, which poses a conundrum for court-annexed mediation because it is not designed to administer law in the same way as adjudication. However, this does not make mediation illegitimate. Instead, a framework for mediation can be developed to encompass both rule of law values and mediation's unique characteristics. Mediation is not a watered-down version of litigation; it is a distinct process of dialogue that centralizes self-determination and consensual decision-making. The author then suggests that dialogue theory can serve as this grounding framework for mediation. Dialogue theory embraces the values of equality and dignity, which underpin the ideals of the rule of law and the key features of mediation. Under this framework, mediators must recognize that their primary role is to secure a fair dialogue and not to champion a settlement. Where there is hesitancy by one party to accept a settlement, the mediator should encourage the party to express their concern rather than forcing the settlement as this facilitates genuine dialogue. To ensure fair treatment of members of our communities, the author concludes by urging that the mediation process and its legitimacy be more widely discussed given its increased importance in the civil litigation system.

[*] Assistant Professor at the Schulich School of Law, Dalhousie University, teaching Alternative Dispute Resolution, Civil Procedure, and Legal Ethics and Professionalism. I would like to thank my research assistants, Erin Mitchell, and Josh Pye for their excellent work. I also thank PhD candidate Akinwumi Ogunranti, and Professors Bruce Archibald and Kim Brooks for providing very helpful comments on earlier drafts of this piece.

Introduction

Mediation is gaining increasing relevance in the Canadian civil litigation landscape, given its relative speed, inexpensiveness, and simplicity compared to what is often seen as a cumbersome formal adjudicative system.[1] Access to civil justice depends on an efficacious legal system, but the legitimacy of legal institutions cannot rest only on efficiency. A good legal system must demand that when court-annexed mediation is used, participants are accessing a legitimate dispute resolution process, not just a more efficient or a cheaper one. Absent an assurance as to the legitimacy of the mediation process, the potential for substantive unfairness and procedural impropriety goes dangerously unchecked. To avoid this, we need to have a substantiated idea of what constitutes legitimate mediation. We must then consider whether Canadian mediation programs are indeed legitimate, and if not, we must determine how we can make them so. Yet theorization on the legitimacy of mediation processes has not seen much scholarly debate in Canada.

In the hope of beginning to fill this gap, I offer a conceptualization of what a legitimate court-connected mediation process must entail using dialogue theory as a grounding. This provides a starting point for further discussion and debate about what constitutes legitimate mediation, and how to operationalize it in a Canadian civil justice context. Such discourse is urgent in Canada, given that mediation has become intertwined within the civil litigation enterprise.

My starting point is to interrogate a key critique that questions the legitimacy of the mediation process on the basis that it is incapable of protecting the rule of law. In summary: the propriety of an adjudicative outcome depends on its consistency with the rule of law—to

1. Civil rules in Nova Scotia, Ontario, British Columbia, Alberta, and Quebec provide examples of legislated mediation provisions. See e.g. NS, *Nova Scotia Civil Procedure Rules*, r 10 [*NSCPR*]; ON, *Rules of Civil Procedure*, RRO 1990, Reg 194, rr 24.1, 75.1–75.2; *Provincial Court Act*, RSA 2000, c P-31, ss 65–66; AB, *Rules of Court*, AR 124/2010, vol 1, r 4.16(1); *Notice to Mediate (General) Regulation*, BC Reg 4/2001, s 3; BC, *Supreme Court Civil Rules*, BC Reg 168/2009, r 9-2; *Small Claims Rules*, BC Reg 261/93, r 7; Arts 1, 556, 605–619 CCP.

assess the legitimacy of an adjudicative outcome, the operative question is "were the existing laws (including procedural laws) applied properly?" In striking contrast, mediation invites participants to pursue a self-determined resolution of a dispute through communal formation of fresh norms. Pre-existing norms in the form of law may be relevant in the mediation process, but the legitimacy of the ultimate mediated outcome does not depend on consistency with law.

When mediating a breach of contract action, for instance, parties may be liable to pay damages in law, but may agree to specific performance in a mediation. In a personal injury matter, a defendant may realize that the injured party is unable to prove causation to a balance of probabilities standard of proof but may nonetheless accept responsibility and agree to pay a sum to the injured party to aid their recovery. An injured party may be entitled to a greater compensatory award in law but may accept a lesser sum in order to resolve the dispute faster. An ex-wife in a divorce proceeding may agree to less spousal support than she may be entitled to in law and instead gain more child support or greater access, and so on.

Such outcomes are inconsistent with the governing legal norms. As such, it would be unacceptable for a judge to arrive at these outcomes in an adjudicative context, but they are perfectly acceptable outcomes of a mediation process. In this sense, the mediated outcome is inconsistent with the rule of law. The common response of, "so what, if the parties agree on the outcome?" is not enough, because it is difficult to ascertain whether parties really do agree to the outcome in a meaningful sense, or whether they were coerced in some way—either by a more powerful party, or by the reality of being unable to afford adjudication. Exacerbating the problem, theoretical and empirical scholarship from other jurisdictions, discussed below, suggests that less powerful parties (like women or minorities) more readily give up their legal entitlements in informal dispute resolution. As such, the rule of law critique is not just an abstract theoretical issue—it brings to light that mediation is a potential avenue for exploiting vulnerabilities and perpetuating social inequities.

On the other hand, mediation has several crucial, valuable virtues, including (but not limited to) its non-adversarial orientation, its increased ability to affect uniquely tailored outcomes, and its prioritization of relationships and self-determination.[2] Recognizing such values, along with its relative efficiency,

2. See e.g. Andrew J Pirie, *Alternative Dispute Resolution: Skills, Science, and the Law*, (Toronto: Irwin Law, 2000) (discussing adversarial and non-adversarial mindsets in the context of dispute resolution at 52–63); Robert A Baruch Bush & Joseph P Folger, *The Promise of Mediation: The Transformative Approach to Conflict*, revised ed (San Francisco: Jossey-Bass, 2005) (discussing mediation as being able to provide context-specific outcomes at 9–11); Robert A Baruch Bush & Joseph P Folger, "Mediation and Social Justice: Risks and Opportunities" (2012) 27:1 Ohio St J Disp Resol 1 [Bush & Folger, "Risks and Opportunities"] (highlighting the values of self- determination and inter-party understanding at 33–49).

can result in a presumption of legitimacy, but this presumption must be substantiated.[3]

I use the rule of law critique as a starting point for my inquiry into legitimate mediation because it is grounded by some of the most central and dearly held values within traditional legal systems, and it highlights that mediation is starkly and fundamentally different from adjudicative dispute resolution. As I explain further below, both concepts are imperative to keep in mind in the task of proposing a viable framework for legitimate mediation. The development of this framework must involve engaging with the rule of law critique; it must demonstrate alertness to the risks that vulnerable parties may face in less formal dispute resolution; and it must appreciate the unique value and opportunity that mediation can offer.

I open in Part I by considering why the rule of law matters and what fundamental values it is designed to protect. Drawing on the insights of Lon Fuller, Joseph Raz, and Jeremy Waldron, I contend that it matters because it ensures that legal subjects are treated fairly, with dignity, and as inherent equals. These values are uncompromisable in any legitimate legal system. I suggest then, that the legitimacy of a court-connected mediation

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Carrie Menkel-Meadow offers a list of values associated with settlement, which may be understood as values that underlie mediation as well:

> Settlement can be justified on its own moral grounds—there are important values, consistent with the fundamental values of our legal and political systems, that support the legitimacy of settlements of some, if not most, legal disputes. These values include consent, participation, empowerment, dignity, respect, empathy and emotional catharsis, privacy, efficiency, quality solutions, equity, access, and yes, even justice.

See Carrie Menkel-Meadow, "Whose Dispute Is It Anyway?: A Philosophical and Democratic Defense of Settlement (in Some Cases)" (1995) 83:7 Geo LJ 2663 at 2669–70. For a cataloguing of the values of mediation, see also Law Commission of Canada, *Transforming Relationships Through Participatory Justice* (Ottawa: Minister of Public Works and Government Services, 2003) at 107–11.

3. For example, the Nova Scotia Court of Appeal's mediation program is described on its websites as promoting resolutions "that can bring more satisfaction to the parties in less time and at a lower financial and emotional cost". See "The Court of Appeal: Judicial Mediation Program" (last visited 15 January 2020), online: *The Courts of Nova Scotia* <courts.ns.ca/Appeal_Court/NSCA_mediation_program.htm> [perma.cc/HXP5-UL93]; The Canadian Judicial Council says that judges as mediators may "help both parties reach an agreement by suggesting a settlement", in order to resolve the dispute in a manner that is "much less rigid, cheaper and faster". See "Alternative to Going to Court" (last visited 15 January 2020), online: *Canadian Judicial Council* <cjc-ccm.ca/en/resources-center/know-your-judicial-system/alternative-going-court> [perma.cc/DA4D-NPEB].

process lies in its consistency with the values that inhere in the rule of law. This, as I explain, poses a conundrum because mediation, in its very essence, is not designed to administer the existing law in the way that adjudication is. But, I suggest this does not mean that it is illegitimate to include mediation within legal institutions. The goal is to develop a framework for mediation that can encompass both rule of law values as well as the key principles that make mediation unique, powerful, and valuable. These key principles are self-determination and autonomous, consensual decision-making.

In Part II, I suggest that a way forward is available through dialogue theory. I suggest that Jürgen Habermas' discourse principles can serve as a helpful guiding framework to set out the conditions of legitimate mediation because they embody the requisite values of the rule of law (equality and dignity) as well as those of mediation (self-determination and consensual decision-making). Moreover, I explain why conceptualizing mediation as dialogue can help the players involved maintain a process that is as responsive as possible to the vulnerabilities of parties. Throughout my discussion, I point out debates and challenges that can arise in operationalizing the discourse principles as constructs of legitimate mediation in the hope that such debates will be carried forward in Canada soon.

The main purpose of this paper is to open a debate about how to define a legitimate mediation process. The approach I have adopted is to start by setting out the long-standing and contemporary issues associated with mediation and relating them to the umbrella concern that mediation is not oriented toward maintaining the rule of law. I then suggest that dialogue theory can help us arrive at a definition of legitimate mediation that can enable a reconciliation between the values of mediation and the values of the rule of law. In the end, having suggested dialogue theory as a grounding framework for mediation, I provide some comments on how a dialogue theory-based conceptualization of mediation may inform the practical elements of a mediation program, pointing out the continual debates that would, and should, arise in structuring a good mediation process. Introducing and moving these debates forward is warranted and necessary in the Canadian civil justice scholarly landscape.

I. Exploring the Critique of Mediation as Contrary to the Rule of Law

A. The Rule of Law: Why It Matters

The first step in my inquiry is to make explicit why the rule of law matters in legal institutions. The rule of law is one of the most pervasive political and

legal ideals in Western tradition.[4] It can mean many things in many contexts, but there are some core elements of the rule of law that are generally shared. These uncontroversial conceptions of it, especially those that apply in a dispute resolution context, are what matter most here.[5] Rule of law can be understood as having two basic dimensions. The first dimension encompasses the formal characteristics of laws and their applicability to legal subjects. Where the rule of law is manifest, laws are predictable and certain, and officials (like judges) reliably apply and enforce only those rules that have legal validity.[6] The principle that there must be congruence between the rules that become valid law and

4. As David Luban notes, references to the rule of law can be traced to Plato's *Laws* and Aristotle's *Politics*. See David Luban, *Legal Ethics and Human Dignity* (New York: Cambridge University Press, 2007) at 99. For a discussion of the historical development of rule of law ideas around the world, see Antony Black, *A World History of Ancient Political Thought* (Oxford: Oxford University Press, 2009).

5. In what follows, I present what is sometimes referred to as a "thin" definition of the rule of law, which aligns with the jurisprudential writing of theorists like Lon Fuller, Joseph Raz, and even Jürgen Habermas. In other work, I have more fully outlined the appeal of the approach that Habermas takes to the rule of law and legal legitimacy. See Nayha Acharya, "Deciding 'What Happened?' When We Don't Really Know: Finding Theoretical Grounding for Legitimate Judicial Fact-Finding" (2020) 33:1 Can JL & Jur 1. Thicker conceptions suggest the inclusion of concepts like democracy and human rights within the ideal of the rule of law. I cannot take up the propriety of such inclusions here, but for a clear discussion on the matter, see Brian Z Tamanaha, "The History and Elements of the Rule of Law" (2012) 2012:2 Sing JLS 232 at 233–36 [Tamanaha, "History and Elements"]; Lord Bingham, "The Rule of Law" (2007) 66:1 Cambridge LJ 67 at 75–76. My purpose here is to show that all conceptions of the rule of law, thick or thin, will include the elements that I set out as necessary aspects of the rule of law, and these uncontroversial elements can helpfully inform a theory of legitimate mediation.

6. This formulation is paralleled in what Lon Fuller describes as the "internal morality of law". See Lon L Fuller, *The Morality of Law*, revised ed (New Haven: Yale University Press, 1964) [Fuller, *Morality of Law*]. Outlining the type of conception of the rule of law suggested above, Waldron held that

> [a] conception of the Rule of Law like the one just outlined emphasizes the virtues that Lon Fuller discussed in *The Morality of Law*: the prominence of general norms as a basis of governance; the clarity, publicity, stability, consistency, and prospectivity of those norms; and congruence between the law on the books and the way in which public order is actually administered.

See Jeremy Waldron, "The Concept and the Rule of Law" (2008) 43:1 Ga L Rev 1 at 7. See also Joseph Raz, "The Rule of Law and its Virtue" in Joseph Raz, ed, *The Authority of Law: Essays on Law and Morality* (Oxford: Clarendon Press, 1979) 210 at 223.

their application, administration, and enforcement is particularly relevant to judicial dispute resolution and the rule of law critique of mediation. Societies that enjoy the rule of law invariably have an adjudicative system whose function it is to apply agreed-upon public norms (laws), and only these norms.[7] This ensures that officials (judges, in the dispute resolution context) are constrained by law. As Waldron puts it:

> Most conceptions of [the rule of law] ideal . . . give central place to a requirement that people in positions of authority should exercise their power within a constraining framework of public norms, rather than on the basis of their own preferences, their own ideology, or their own individual sense of right and wrong.[8]

Along with the notion that laws must guide judicial decision-making, the rule of law is also used to denote ideals of natural justice or due process in the context of the administration of law.[9] These procedural principles include a right to participate in the decision-making process through the presentation of evidence and argumentation, and the right to be heard by a non-biased, independent body. Again, Waldron's articulation is helpful:

> [T]he essential idea [of the rule of law] is much more than merely functional—applying norms to individual cases. . . . Most importantly, it is procedural: the operation of a court involves a way of proceeding that offers to those who are immediately concerned an opportunity to make submissions and present evidence, such evidence being presented in an

7. This does not mean that in legal systems that espouse rule of law values, the adjudicative outcomes are always accurate. Factual uncertainty can result in outcomes being substantively inaccurate. What matters is that the system is underpinned by a commitment to applying the law as it is to the facts that are ascertained on the relevant legal standard of proof. It would be unacceptable for a judge to arrive at a conclusion that is inconsistent with the existing legal norms.

8. Waldron, *supra* note 6 at 6. This, he notes, is in keeping with Ronald Cass' comments: "The final element of the rule of law, constraint from external authority, like its other elements, helps assure that the processes of government, rather than the predilections of the individual decision maker, govern." See Ronald A Cass, *The Rule of Law in America* (Baltimore: The Johns Hopkins University Press, 2001) at 17.

9. The notion of the rule of law that was popularized by AV Dicey in 1885 focused more squarely on this administrative aspect of the rule of law. See AV Dicey, *Introduction to the Study of the Law of the Constitution* (London, UK: MacMillan and Co, 1885). See also Richard H Fallon Jr, "'The Rule of Law' as a Concept in Constitutional Discourse" (1977) 97:1 Colum L Rev 1 at 18–19.

> orderly fashion according to strict rules of relevance and oriented to the norms whose application is in question. The mode of presentation may vary, but the existence of such an opportunity does not. . . . Throughout the process, both sides are treated respectfully and above all listened to by a tribunal that is bound to attend to the evidence presented and respond to the submissions that are made in the reasons that are given for its eventual decision.[10]

The rule of law is underpinned by, and assures, important values: equality and dignity.[11] The value of equality is evident in the commitment to non-arbitrary treatment by ensuring consistent application of only valid laws. Along with equality, the value of respecting dignity is also expressed within the rule of law principles. Ensuring that individuals are predictably subjected only to existing legal rules allows for people to plan their lives in accordance with the law—securing dignity for legal subjects requires such autonomy. Moreover, strong connections exist between the procedural aspects of the rule of law and the prioritization of human dignity—the right to a fair process and to participate in decision-making is rooted in a demand that legal subjects be treated as persons who have agency and the capacity to make their case.[12]

10. Waldron, *supra* note 6 at 23. For commentary on the procedural principles that complement the formal aspects of the rule of law in an international context, see A Wallace Tashima, "The War on Terror and the Rule of Law" (2008) 15:1 Asian American LJ 245. See also Brian Z Tamanaha, *On the Rule of Law: History, Politics, Theory* (Cambridge: Cambridge University Press, 2004) at 122–26 [Tamanaha, *On the Rule of Law*]; Tamanaha, "History and Elements", *supra* note 5.

11. Some accounts of the rule of law offer different underpinning values, like autonomy and agency. In my view, dignity encompasses such values because recognizing a person's autonomy, agency, or capacity is a recognition of their inherent dignity, so I opt for that language instead.

12. The link between the rule of law and dignity is a prominent theme in many authors' work. See e.g. Raz, *supra* note 6 ("[r]especting human dignity entails treating humans as persons capable of planning and plotting their future" at 221). See also Fuller, *Morality of Law*, *supra* note 6 ("[e]very departure from the principles of law's inner morality is an affront to man's dignity as a responsible agent" at 162); David Luban, "The Rule of Law and Human Dignity: Re-Examining Fuller's Canons" (2010) 2:1 Hague J on Rule of L 29 (claiming that Fuller's

These assurances give the judicial system legitimacy.[13] This legitimacy is necessary because judicial outcomes are authoritative. An adjudicative outcome binds all parties involved, including the losing party, even in hard cases where the losing party presented viable and reasonable arguments.[14] Free, civil, and stable societies require that such authoritative decisions be justified—they must deserve their authoritative status. The rule of law principles, through their assurance of equal and dignified treatment, can provide this justificatory grounding. When a legal institution respects the equality and dignity of the people who are subject to it, as evidenced through its commitment to the rule of law, the expectation that subjects will respect the authority of the outcomes has some grounding.[15] Without a commitment to the rule of law, such an expectation is unreasonable. This, in my understanding, is why the rule of law matters—it assures dignified and equal treatment of legal subjects. True and robust adherence to the rule of law endows the authoritative, and even coercive, legal system with legitimacy.[16]

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principles make important contributions to protecting human dignity). Additionally, as Jeremy Waldron notes:

> [L]aw is a mode of governance that deals with people on the basis that they have a view of their own to present on the application of the norm to their situation; it respects their dignity as beings capable of explaining themselves. We can now complement that with the idea that law is inherently respectful of persons as agents; it respects the dignity of voluntary action and rational self-control.

See Waldron, *supra* note 6 at 28.

13. Here, I agree with Rebecca Hollinder-Blumoff and Tom Tyler's statement: "The rule of law fosters legitimacy by equally applying fixed law to all individuals and, in some definitions, respecting individuals' rights. Procedural justice promotes legitimacy by giving individuals a neutral and trustworthy decision maker, allowing them a voice, and treating them with courtesy and respect." See Rebecca Hollander-Blumoff & Tom R Tyler, "Procedural Justice and the Rule of Law: Fostering Legitimacy in Alternative Dispute Resolution" (2011) 2011:1 J Disp Resol 1 at 9–10.

14. For my take on the relationships between legitimacy and authority in an adjudicative context, see Acharya, *supra* note 5.

15. The ideas that (1) judicial outcomes must be authoritative and must simultaneously be justifiable such that their authority (and demand for obedience) is grounded, and (2) that such justification may be found in formal or procedural aspects of the rule of law, have roots in the jurisprudential thinking of Jürgen Habermas. Habermas notes that: "On the one hand, established law guarantees the enforcement of legally expected behavior and therewith the certainty of law. On the other hand, rational procedures for making and applying law promise to legitimate the expectations that are stabilized in this way; the norms *deserve* legal obedience." See Jürgen Habermas, *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy*, translated by William Rehg (Cambridge, UK: Polity Press, 1996) at 198 [Habermas, *Facts*

Locating legitimacy in mediation engages a different conversation because parties come to their own resolution as opposed to having one authoritatively imposed on them, as in adjudication. That a mediated outcome is the product of the parties' agreement may lead to the conclusion that no further inquiry into the legitimacy of the outcome is warranted—presumably, the impacted parties agree to its legitimacy, so it may seem redundant, and even compromising to the parties' self-determination, to seek additional reasons for its legitimacy. Coupled with discontent over the inaccessibility of the judicial system, such ideas about the inherent legitimacy of mediated outcomes have undoubtably played a role in its enthusiastic embrace within Canadian civil litigation.[17]

But many have cautioned against draping a false cloak of legitimacy over mediation, especially considering its potentially dangerous undermining of the rule of law. In the name of values like self-determination, harmony, cooperation, relationship preservation, and efficiency, critics argue that proponents make

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and Norms] [emphasis in original]. Similarly, Lon Fuller also suggests that law must deserve its authoritative demand and posits that law earns its authoritative quality when there is a reciprocal relationship between lawmakers and those governed. That reciprocal relationship, as represented by his internal morality principles, provides a reason for why legal subjects can reasonably assent to the law's authority. See Fuller, *Morality of Law*, *supra* note 6. Fuller notes, "there is a kind of reciprocity between government and the citizen with respect to the observance of rules. . . . When this bond of reciprocity is finally and completely ruptured by government, nothing is left on which to ground the citizen's duty to observe the rules" (*ibid* at 39–40).

16. Two clarifications are relevant at this juncture: first, the idea that the rule of law confers legitimacy on legal principles is not to suggest that rule of law principles are actually operationalized in every legal system that purports to hold them dear. Certainly, the access to justice crisis which prevents individuals from truly participating in the legal system (which led, at least in part, to the surge in popularity of ADR) does constitute a compromise to the rule of law. My purpose is not to minimize the practical challenges associated with adjudication, but to come to an understanding of what role the rule of law, as a principle, plays in the adjudicative context in order to respond to the critique that the rule of law plays a problematically lesser role in mediation. Second, the notion that the rule of law is a source of legitimacy for legal systems does not suggest that adherence to the rule of law ensures absolute justice or invariably good decisions. As Tamanaha puts it, "[t]he rule of law cannot be about everything good that people desire from government." See Tamanaha, *On the Rule of Law*, *supra* note 10 at 113. Legitimacy does not imply perfection, and there are limits to what can be achieved by any institution. But those limits do not, in my view, result in illegitimacy. For a discussion on the concept of legitimacy in an imperfect adjudicative system more fully, see Acharya, *supra* note 5. In my discussion below, I discuss the limitations of the rule of law and how those limitations are relevant to responding to the critique of mediation rooted in commitment to the rule of law.

17. As Jacqueline Nolan-Haley remarks, "[t]he trend toward court mediation is remarkable because our civil justice system has traditionally promised justice through law. The promise of mediation is different: Justice is derived, not through the operation of law, but through

mediation out to be inherently more enlightened than the slow, adversarial, and heavy-handed adjudicative system. In doing so, they problematically belittle the values that inhere in the legal system through adherence to the rule of law and the protection of legal rights, and they over-prioritize settlement between parties.

These cautions have been expressed rigorously by scholars, theoreticians, judges, and even practitioners of meditation. Owen Fiss offered one of the most famous critiques in his piece, "Against Settlement". There, he writes:

> Parties might settle while leaving justice undone. . . . Although the parties are prepared to live under the terms they bargained for, and although such peaceful coexistence may be a necessary precondition of justice, and itself a state of affairs to be valued, it is not justice itself. To settle for something means to accept less than some ideal.[18]

With similar sentiments, Laura Nader has called for alertness to the darker side of what she calls "harmony ideology".[19] She contends that the rise of alternative dispute resolution (ADR) is best understood as an ideological attempt to de-emphasize justice and rights and replace them with harmony.[20] But, as is implicit in Fiss' comments above, striving for harmony is not inherently better than striving for justice or protection of legal rights and, in fact, can be harmful.

This harm becomes clearer in light of evidence that weaker, more disadvantaged parties bear a greater burden when it comes to securing harmony. For decades, scholars have been calling attention to the disadvantages faced by vulnerable parties in informal dispute resolution contexts. In 1985, on the heels of Fiss' critique, Richard Delgado et al cautioned about the dangers that racial minorities and economically disadvantaged parties face in mediation.[21] In 1991, Trina

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autonomy and self-determination." See Jacqueline M Nolan-Haley, "Court Mediation and the Search for Justice Through Law" (1996) 74:1 Wash ULQ 47 at 49.

18. Owen M Fiss, "Against Settlement" (1984) 93:6 Yale LJ 1073 at 1085–86.

19. See Laura Nader, "Controlling Processes in the Practice of Law: Hierarchy and Pacification in the Movement to Re-Form Dispute Ideology" (1993) 9:1 Ohio St J Disp Resol 1 [Nader, "Controlling Processes"]; Laura Nader, *Harmony Ideology: Justice and Control in a Zapotec Mountain Village* (Stanford: Stanford University Press, 1990).

20. See Nader, "Controlling Processes", *supra* note 19. Nader notes: "A movement to control litigation was being constructed to replace justice and rights talk with what I call harmony ideology, the belief that harmony in the guise of compromise or agreement is ipso facto better than an adversary posture" (*ibid* at 3).

21. See Richard Delgado et al, "Fairness and Formality: Minimizing the Risk of Prejudice in Alternative Dispute Resolution" (1985) 1985:6 Wis L Rev 1359 at 1359–63.

Grillo authored an important and compelling critique, explaining that in the family law context, women can be easily manipulated into "consensually" giving up their rights.[22] In 2017, Delgado again voiced the same concerns, pointing to empirical studies showing that disadvantaged parties tend to secure worse outcomes in informal contexts than their counterparts who are generally more powerful in society.[23]

Several hypotheses exist for why these disadvantages perpetuate in mediation and negotiation situations. Delgado's theory is that in the informal context, familiar roles of dominance can, and do, easily manifest, while within formal contexts their emergence is less likely:

> Indeed, the comfortable setting and informal atmosphere instead provide an ideal situation for the stronger actor to behave in his usual confident fashion and expect the mediator to enact his wishes, as well. He is apt to speak forthrightly, as though his account of things is the only possible one. His body language and manner will signal to onlookers that he expects to secure a favorable outcome. The woman or minority group

22. See Trina Grillo, "The Mediation Alternative: Process Dangers for Women" (1991) 100:6 Yale LJ 1545. See also Linda Babcock & Sara Laschever, *Women Don't Ask: Negotiation and the Gender Divide* (Princeton: Princeton University Press, 2003); Penelope E Bryan, "Killing Us Softly: Divorce Mediation and the Politics of Power" (1992) 40:2 Buff L Rev 441; Isabelle R Gunning, "Diversity Issues in Mediation: Controlling Negative Cultural Myths" (1995) 1995:1 J Disp Resol 55. *Cf* Daniel Del Gobbo, "The Feminist Negotiator's Dilemma" (2018) 33:1 Ohio St J Disp Resol 1 (the author catalogues the research done on gender difference in negotiation and challenges the narrative that there is a typically female manner of negotiating that tends to disadvantage women).

23. See Richard Delgado, "Alternative Dispute Resolution: A Critical Reconsideration" (2017) 70:3 SMU L Rev 595 at 597–99. For a sampling of those empirical studies, see *ibid* at 597–98, nn 22, 28. Notably, a study by Gary LaFree and Christine Rack found that women and minorities seeking smaller awards typically faired better in litigation as compared to mediation. See Gary LaFree & Christine Rack, "The Effects of Participants' Ethnicity and Gender on Monetary Outcomes in Mediated and Adjudicated Civil Cases" (1996) 30:4 Law & Soc'y Rev 767 at 776–89, cited in Delgado, *supra* note 23 at 598, n 28. Similarly, Christine Rack found that when minorities where negotiating with other minorities their claims tended to begin lower than when a white party was negotiating with a minority. See Christine Rack, "Negotiated Justice: Gender & Ethnic Minority Bargaining Patterns in the Metrocourt Study" (1999) 20:2 Hamline J Pub L & Pol'y 211 at 217–18, cited in Delgado, *supra* note 23 at 598, n 28. Finally, Ian Ayres found that automobile salespersons typically offered women worse deals than they offered men due to the perception that women did not know any better. See Ian Ayres, "Fair Driving: Gender and Race Discrimination in Retail Car Negotiations" (1991) 104:4 Harv L Rev 817 at 818–20, cited in Delgado, *supra* note 23 at 597, n 22.

> member may well sense the prevailing atmosphere with its familiar expectations and not put his or her case forward as forcefully as it might merit.[24]

Delgado's theory seems viable. Protection of legal entitlements is not prioritized in informal dispute resolution as much as coming to a compromise. But, as Delgado notes, it is more likely that the less powerful party does the compromising, simply, and problematically, because they are more accustomed to it. Moreover, they are more likely to be overtly or subtly encouraged by the mediator to do so. For instance, women may be disproportionately encouraged to "act like women"—to refrain from anger and to accept compromise.[25] Similarly, mediators that share characteristics with one of the parties are more likely to give that party more time to speak, and to validate their positions, thus encouraging the other party to abandon or at least soften theirs, or accept narratives about themselves that portray stereotypical and prejudiced attitudes.[26] Aggravating the problem even more, since successful mediation is often construed as achieving a settlement, mediators are incentivized to push parties toward settlement, without as much concern for the substance of the settlement.[27]

Fundamentally, critics demand recognition that it is erroneous to assume that a mediation is good or successful simply because parties have reached a resolution, because that resolution may be unjust, even though the parties

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24. Richard Delgado, "The Unbearable Lightness of Alternative Dispute Resolution: Critical Thoughts on Fairness and Formality" (2017) 70:3 SMU L Rev 611 at 621.

25. See Grillo, *supra* note 22.

26. Isabelle Gunning writes that mediators draw from their own experiences (or cultural myths) to understand the dispute and the narratives of the parties. See Gunning, *supra* note 22 at 68–70. She also writes that while adversarial courtroom advocacy is meant to distance the parties and prevent the parties from valuing their relationship over their self-interest, courtroom adjudication is not without unconscious or systemic racism either. In this context, prejudice manifests itself in both the operation of formal rules and in biased attitudes masked by codewords (see *ibid* at 63–65).

27. For instance, James Coben and Penelope Harley claim that the institutionalization of mediation has moved its primary goal away from community empowerment and toward the efficient settlement of disputes. See James Coben & Penelope Harley, "Intentional Conversations About Restorative Justice, Mediation and the Practice of Law" (2004) 25:2 Hamline J Pub L & Pol'y 235 at 257–58. Nancy Welsh describes court-connected mediation as especially evaluative or coercive, with a mediator's success measured in the number of cases they successfully settle. See Nancy A Welsh, "You've Got Your Mother's Laugh: What Bankruptcy Mediation Can Learn from the Her/History of Divorce and Child Custody Mediation" (2009) 17:2 Am Bankr Inst L Rev 427 at 438–39 [Welsh, "Bankruptcy Mediation"]. Robert A Baruch Bush details the institutionalization of mediation in the late 1990s, writing that increased connection with the courts had made mediation more coercive. Community mediation centres and divorce mediators also seemed to remain settlement-oriented, even when they attempted to distance themselves

seem, on the surface, to have consented to it.[28] The realities of mediation that they point to are unsettling and need to be taken seriously, especially given that mediation is being increasingly integrated into civil justice. Invoking the mantra that mediation is cheaper, faster, and simpler offers no satisfactory response. Rather, what is needed is serious engagement with the question of how legitimate mediation can be defined, such that concerns associated with de-prioritization of the rule of law are taken into account.

B. Responding to Rule of Law Concerns

The first step toward a theory of legitimate mediation that is responsive to rule of law concerns requires maintaining clarity on what the normative load of the rule of law really is and its limits. It is helpful to begin by imagining a situation where a patient is misdiagnosed by her doctor resulting in delayed treatment. She cannot, however, prove on a balance of probabilities that the doctor's misdiagnosis constituted a breach of the standard of care. If a judge nonetheless awards compensation, the outcome is illegitimate because it is contrary to the pre-existing legal principle that injuries are only compensable if negligence (i.e., breach of the standard of care) can be proven on a balance of probabilities. Of course, there are hard cases where the legal rules are unclear and their interpretation is debatable, but at the heart of the debate is securing the best interpretation of the existing law so that it can be applied to the facts of the case.[29] Otherwise, adjudication fails to uphold the rule of law, and its processes and outcomes cannot be legitimate.

Mediation, on the other hand, is a process that should enable mutual creation of fresh norms that will then guide the parties' own resolution of the dispute. As Fuller puts it, "mediation is commonly directed, not toward achieving conformity to norms, but toward the creation of the relevant norms themselves".[30] In other words, the parties themselves will decide what

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from the courts. See Robert A Baruch Bush, "Staying in Orbit, or Breaking Free: The Relationship of Mediation to the Courts over Four Decades" (2008) 84:3 NDL Rev 705 at 727–30.

28. In addition to those otherwise noted, for other prominent critics see e.g. Harry T Edwards, "Alternative Dispute Resolution: Panacea or Anathema?" (1986) 99:3 Harv L Rev 668 at 675–82; Judith Resnik, "Procedure's Projects" (2004) 23 CJQ 273 at 276; David Luban, "Settlements and the Erosion of the Public Realm" (1995) 83:7 Geo LJ 2619 at 2622–23.

29. Ronald Dworkin popularized the phrase "hard cases" when referring to cases of legal indeterminacy, and the hard task of resolving that indeterminacy to come to a judicial conclusion. See Ronald Dworkin, "Hard Cases" (1975) 88:6 Harv L Rev 1057.

30. Lon Fuller, "Mediation—Its Forms and Functions" in Kenneth I Winston, ed, *The Principles of Social Order* (Durham, NC: Duke University Press, 1981) 125 at 128. See also *ibid* at 144–45.

principles matter and therefore what they should do. As such, in a mediation context, while the existing legal rules may be relevant, they do not dictate the validity of the outcome. Unlike adjudication, a valid mediated outcome may be inconsistent with the rules that are set out in the law. For instance, consider the above example of the patient who suffers a medical misdiagnosis and delay in treatment. Parties may agree that she is entitled to some compensation and their resolution may reflect this, even though at law she may not be so entitled.[31] Accordingly, while a mediated outcome may be consistent with legal norms, it does not have to be. So, securing the rule of law in the sense of ensuring that the existing laws are administered and enforced cannot be accomplished through mediation. For that, an authoritative adjudication process is necessary. This is an important recognition, and one of which proponents of mediation and reformers of civil justice must always remain aware.

But none of this necessitates the conclusion that adjudication is the only viable and just dispute resolution process and that mediation is irredeemable. Such a conclusion depends on the false premise that just or good outcomes can only be those that are consistent with existing law. This cannot be true, particularly in post-traditional, pluralistic societies.[32] What the law should be, and indeed even what the law is, is often indeterminate, and multiple viable interpretations will exist. Ultimately, one interpretation wins the day, but this does not mean that the other interpretations or other norms are inherently bad or unjust; it means that they do not become valid law.[33] This recognition yields an understanding of the normative limits of the rule of law. Take for example debates around legalization of cannabis. There are surely viable arguments on both sides. In some societies, the pro-legalization side won the day, and in others, the pro-criminalization side won the day, at least for now. A judge in the first society must not find a person guilty of a crime if they smoke recreational cannabis—this would be an illegitimate finding. In the second society, a judge must find a recreational smoker guilty of a crime, and failure to do so would

31. As noted by the Law Commission of Canada: "A degree of flexibility over the distribution of responsibility is possible in a consensus-based justice process. This type of flexibility does not always exist in a conventional litigation model. A consensus-based justice approach to conflict enables factors to be taken into account in responsibility allocation beyond what formal rules of law might suggest." See Law Commission of Canada, *supra* note 2 at 105.

32. See Carrie Menkel-Meadow, "The Trouble with the Adversary System in a Postmodern, Multicultural World" (1996) 38:1 Wm & Mary L Rev 5. For similar sentiments, see also Maria Antonietta Foddai, "Mediation on Trial: Incongruencies Within a Traditional Legal Paradigm" (2014) 4:1 J Arbitration & Mediation 123.

33. For jurisprudential expression of this idea, see e.g. Habermas, *Facts and Norms*, *supra* note 15 at ch 5. Further, he states: "In a pluralistic society in which various belief systems compete with each other, recourse to a prevailing ethos . . . does not offer a convincing basis for legal discourse" (*ibid* at 200). Similar ideas have been expressed in the context of democratic

constitute an illegitimate outcome. An application of the existing rules will be valid in either society, even though the law is substantively different in both. The validity of the outcomes is not derived because of any necessary moral superiority of one rule—if this were the case, then only one of the societies would end up with a legitimate outcome. But both outcomes are legitimate in that both secure the rule of law in that particular society.

This legitimacy is not derived from the moral "rightness" or superiority of the law itself. The rule of law cannot, and does not, make this normative promise. Rather, it secures legitimacy because it ensures that people are not subjected to arbitrary exercise of authoritative power and that legal subjects are treated as equals and with dignity, as discussed previously.

But this simply does not mean that the only just, fair, or good resolution is one that is secured through the rule of law, as in adjudication. In fact, as Carrie Menkel-Meadow has pointed out, sometimes mediated outcomes are better than potential adjudicative outcomes precisely because they are inconsistent with legal rules.[34] In the medical misdiagnosis situation described above, for example, many would say that compensating a patient for a misdiagnosis is a better outcome than awarding no compensation, which is the legitimate outcome that the adjudicative process would yield through an application of the existing tort law framework.

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legitimacy. David Estlund writes:

> [I]n a diverse community there is bound to be little agreement on whether a decision is legitimate, since there will be little agreement about whether it meets the independent standard of, say, justice. If the decision is made by majority rule, and voters address the question whether the proposal would be independently correct, then at least a majority will accept its correctness. However, nearly half of the voters might deny its correctness, and on a correctness theory they would in turn deny the legitimacy of the decision—deny that it warrants state action, and/or places them under any obligation to comply. Brute disagreement of this kind raises pragmatic questions about how to maintain stability. A morally deeper worry stems from the fact that much of the disagreement might be reasonable, or in our more generic term, qualified. First, there might be qualified disagreement on what counts as just. Second, even if there is an account of justice that is beyond qualified objection, I assume there will be qualified disagreement in many cases about what actual decisions and institutions meet the agreeable principles of justice.

See David M Estlund, *Democratic Authority: A Philosophical Framework* (Princeton, NJ: Princeton University Press, 2008) at 99.

34. See Menkel-Meadow, *supra* note 2 at 2676.

The rule of law provides the adjudicative system with institutional legitimacy, but it does not result in the adjudicative system and its outcomes being infallible and invariably just.[35] Adherence to the rule of law assures that although the legal system (or any institution) cannot promise absolute justice, the values of protecting and recognizing the equality and dignity of legal subjects lie at the heart of the system, and this maintains its goodness.[36] Similarly, although mediation is not oriented toward applying pre-existing laws to resolve disputes, it can nonetheless have institutional legitimacy, just as adjudication can, as long as the same fundamental values that underlie the rule of law and adjudicative legitimacy are expressed within the mediation process.

The task, then, is to establish a framework for legitimate mediation that holds at its core the values of equality and dignity, along with the values inherent to mediation—recognition that parties are capable of engaging in consensual, mutual ordering and a recognition of their right to self-determine the resolution of their dispute in accordance with the norms that they themselves create.

Dialogue theory is well suited to provide such theoretical rooting for legitimate mediation because, as I explain below, conceptualizing mediation through dialogue theory can create space for all the above noted values, and can orient the mediation process and players within it to become increasingly responsive to the concerns raised by critics, explained above. In the next section, I offer some preliminary thoughts on how mediation can be theorized as dialogue and why it would be beneficial to do so. My hope is that my comments here initiate further debate about the wisdom of conceptualizing mediation as dialogue and about the nuances of what it means for mediation to be a good dialogue.

II. Mediation as Dialogue

The concept of dialogue has been theorized by philosophers and theorists of education, psychology, ethics, and more.[37] Though many unique contributions as to what constitutes dialogue and what its utility is have been offered, a common theme is that a true dialogue is an authentic commitment to co-creation of meaning through mutual contribution and understanding. In the context of conflict, David Bohm, for instance, suggests that dialogue can help

35. For an accessible and succinct discussion of the value and limitations of the rule of law, see Tamanaha, "History and Elements", *supra* note 5.

36. For a fulsome argument on this point, see Acharya, *supra* note 5.

37. Contemporary dialogue theory is usually attributed to Martin Buber. See Martin Buber, *I and Thou*, translated by Walter Kaufmann (New York: Charles Scribner's Sons, 1970). See also Paulo Freire, *Pedagogy of the Oppressed*, translated by Myra Bergman Ramos (New York:

participants come to a new and authentically shared understanding, even (and maybe especially) when there is a history of tension or conflict between them.[38]

Given that mediation is a dispute resolution process that involves mutual norm creation through communal engagement among parties, concepts of dialogue can helpfully inform a theory of good mediation.[39] Three crucial questions are key in furthering the task of using dialogue theory as a conceptual grounding for court-annexed mediation:

i. What constitutes a genuine dialogue? (What does a good dialogue look like? What are its conditions?)

ii. Why is a good dialogue good? (What values are expressed in the concept of dialogue, and particularly, how are the values of equality, dignity, self-determination, and autonomous decision-making represented in the conditions of a good dialogue?)

iii. How can dialogue theory be operationalized in practice? (How can the idea of mediation-as-dialogue be used as a practical guide for securing a space for legitimate mediation? What are the implications for how mediators, parties, and party's representatives should behave in order to engage in a dialogical mediation? What structures should be in place to enable mediation as dialogue?)

Many theorists of dialogue discuss its benefits, but there is less direct discussion about its actual conditions—what would a genuine dialogue look like? How does it come about? To approach this question, I turn to Habermas' jurisprudential ideas, which offer a rich theory of dialogue within the context of a legal system. For Habermas, when legal decisions occur through a process

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Continuum Publishing Company, 1970); Nel Noddings, *Caring: A Feminine Approach to Ethics and Moral Education* (Berkeley: University of California Press, 1984); David Bohm, *On Dialogue* (New York: Routledge Classics, 2010); Michael Paquette, Erich J Sommerfeldt & Michael L Kent, "Do the Ends Justify the Means? Dialogue, Development Communication, and Deontological Ethics" (2015) 41:1 Public Relations Rev 30.

38. See Bohm, *supra* note 37.

39. See e.g. Ted Lewis & Mark Umbreit, "A Humanistic Approach to Mediation and Dialogue: An Evolving Transformative Practice" (2015) 33:1 Conflict Resolution Q 3 (advocating that approaching mediation through the lens of dialogue best maximizes the human potential of genuine mutual understanding). See also Stephen Chilton & Maria Stalzer Wyant Cuzzo, "Habermas's Theory of Communicative Action as a Theoretical Framework for Mediation Practice" (2005) 22:3 Conflict Resolution Q 325.

that best approximates the conditions of what he calls a "rational discourse", the emergent outcome can be considered valid and legitimate.[40] In the adjudicative context, this means that if the litigants were able to participate in a rational discourse process, and the adjudicative outcome is a product of that process, then the outcome is legitimate.[41] That is, the legitimacy of the outcome is derived from the fact that the process involved a fair and good discourse. What, then, constitutes such a discourse? As I have noted elsewhere, Solum has helpfully defined the necessary conditions of rational discourse in a formulation that was originally suggested by Robert Alexy, and then adopted by Habermas.[42] Solum's presentation of the conditions of rational discourse is as follows:

> i. Rule of Participation: Each person who is capable of engaging in communication and action is allowed to participate.
>
> ii. Rule of Equality of Communicative Opportunity: Each participant is given equal opportunity to communicate with respect to the following:
>
> a. Each participant is allowed to call into question any proposal;
>
> b. Each participant is allowed to introduce any proposal into the discourse; and
>
> c. Each participant is allowed to express attitudes, sincere beliefs, wishes, and needs.
>
> iii. Rule Against Compulsion: No participant may be hindered by compulsion—whether arising from inside the discourse or outside of it—from making use of the rules secured under (1) and (2).[43]

For Habermas, then, to the extent that discourse principles are approximated within adjudicative structures, such that the conditions of participation and non-coercion are respected, the process and outcomes that emerge from it can be considered legitimate.

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40. See Habermas, *Facts and Norms*, *supra* note 15.

41. See *ibid* at ch 5.

42. See Acharya, *supra* note 5.

43. Lawrence B Solum, "Procedural Justice" (2004) 78:1 S Cal L Rev 181 at 269–70.

But why does adherence to these discourse principles result in legitimizing the resolution? These discursive principles can do the normative work of giving legitimacy to an outcome because they are value-laden. Where law emerges through a process that embodies the principles of rational discourse, affected parties are entitled to an equal right to voice their viewpoints and arguments freely and meaningfully. This provides a justifiable reason, grounded in the fairness and justifiability of the process, for the participants to recognize the legitimacy of the resolution.[44]

The discourse principles are valuable in the enterprise of setting out legitimate dispute resolution in the mediation context because they give simultaneous expression to the values that underlie the rule of law and the fundamental features of mediation. The values of equality and dignified treatment of parties are represented in the ideals of equal participation and equal communicative opportunity, as well as the rule against coercion. Moreover, self-determination is foundational to dialogue because its very purpose is to ultimately arrive, together, at an authentic, uncoerced, non-imposed outcome. In addition, there is no demand to apply any predetermined norms. Rather, the conditions of discourse carve out a space for parties to co-create the norms through a fair dialogue. As such, I gratefully commend Chilton and Cuzzo for seeing and writing about the value of Habermas' principles as a framework for mediation.[45] The concept of dialogue, emboldened by Habermas' principles of discourse, provides a promising scaffolding for defining what constitutes legitimate mediation. It would give rise to a model that is rooted in values that go beyond efficiency, and that resonates with the values of the rule of law and simultaneously provides expression for appreciating mediation as a dialogue oriented toward mutual understanding, and, ultimately, a self-determined outcome.

This leads to the third and most difficult question—how can the theory of an ideal dialogue be translated into a practical framework for assessing, reforming, and creating legitimate mediation programs in Canadian civil justice? In my comments below, I indicate challenges and points of debate that would, and

44. See Habermas, *Facts and Norms*, *supra* note 15 at 197–98. Tom Tyler's work with respect to the relationship between participation and legitimacy is well known. See e.g. Tom R Tyler, "The Psychological Consequences of Judicial Procedures: Implications for Civil Commitment Hearings" (1992) 46:2 SMU L Rev 433; Tom R Tyler, "What is Procedural Justice?: Criteria Used by Citizens to Assess the Fairness of Legal Procedures" (1988) 22 Law & Soc'y Rev 103; Hollander-Blumoff & Tyler, *supra* note 13.

45. See Chilton & Cuzzo, *supra* note 39. Readers should see Chilton and Cuzzo for a more detailed look at Habermas' theories of linguistic presuppositions of communicative action and the authors' take on how these presuppositions can be used to inform what mediators should do. Although Chilton and Cuzzo do not link their analysis to the rule of law, as I attempt here, I find their insights into how mediation can and should be informed by Habermas' theory to be valuable and entirely complimentary to what I have tried to offer here.

should, arise in giving as full an expression to each of the discourse principles as possible within a mediation process. My purpose here is not to resolve all these debates because that cannot be done single-handedly; my goal is to suggest that these are valuable debates that must be on our civil justice agenda in Canada as we assess and reform our mediation processes.

A. Rule of Participation

Naturally, a mediation process must be structured in a way that allows parties who have an interest in the outcome to be present and able to participate. The availability of translators and other aids is an obvious condition that is necessary to ensure that individual communicative needs are met, but there are additional questions that can arise in assessing whether a mediation program best meets this condition.[46] For instance, this condition invokes questions around who should have a seat at the mediation. It cannot be the case that any person can participate—individuals must have some relationship to the issue at hand, but, of course, the precise nature of the requisite relationship may be debatable. Surely, a mediation process does not need standing requirements equivalent to adjudication contexts. The key is that assessing mediation programs must involve considerations of who can be allowed to participate and why.

In addition, it may be worth recognizing that allowing additional participants may even improve the communicative capacity (and therefore ability to fully participate) of the directly affected parties. This has been recognized in the Nova Scotia Family Law Mediation program, which allows parties to request a support person to attend their mediation with them.[47] Support persons are often family members and they assist the primary party in communicating comfortably. This can be a useful mechanism for improving a party's communicative capacity and their ability to meaningfully participate in the dialogue. This relates closely with the second dialogical condition discussed below.

B. Rule of Equality of Communicative Opportunity[48]

Assessing a mediation program on the criterion of ensuring equal communicative opportunity must involve a nuanced consideration of varied

46. For comments on making mediation accessible to people with disabilities, see Martha E Simmons, "One Mediation, Accessible to All", *Dispute Resolution Magazine* 23:1 (Fall 2016) 23.

47. See "Mediation" (last modified 27 March 2020), online: *Family Law Nova Scotia* <www.nsfamilylaw.ca/services/court/mediation> [perma.cc/TKX7-6Z9J].

48. See Chilton & Cuzzo, "Habermas's Theory", *supra* note 39. The authors offer an insightful discussion on the value of allowing and enabling parties to ask one another questions. They

forms of communication and a determination of whether the mediation process makes space for that variance. This challenge brings to mind critics of Habermas' theory of rational discourse who complain that his prioritization of rationality as a guiding light for participants in an authentic discourse is both Eurocentric and male-centric. They suggest that the centrality of rationality improperly assumes that the only valid way to persuade one another is through logic and reason, yet many people and cultures use other means, like stories, narrations, or emotive expressions to convey meaning.[49] The emphasis on rationality in Habermas' theory may minimize and even exclude this type of communication. Such exclusion would constitute a compromise to the second condition of equal communicative opportunity. In the mediation sphere, this concern most obviously manifests as a form of mediator bias. As noted above, a mediator may give more validation and more time to speak to someone whose manner of speaking and expressing themselves is more relatable to that mediator.[50] Assessment of mediation programs must include finding ways to determine and continually re-assess whether such mediator biases are influencing the participants' communicative opportunity. Subtle demands for Euro- or male-typical rationality should be understood and recognized by mediators and representatives in a mediation, and thereby minimized.

Rationality can, however, be interpreted broadly, and in some important respects, rationality may be considered valuable. First, there is no reason to think that telling a story, relating a personal narrative, or recognizing and expressing the emotional aspects of a conflict are irrational. Rather, such discursive

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particularly focus on the idea that questions allow for open and authentic communication and genuine listening, and can thereby foster the relationship-building goal of mediation. "Mediators", they suggest, "can serve as a guides to reinstate and reinforce the inherent value of the question" (*ibid* at 17).

49. See Mojca Pajnik, "Feminist Reflections on Habermas's Communicative Action: The Need for an Inclusive Political Theory" (2006) 9:3 European J Soc Theory 385, citing Jane Braaten, "From Communicative Rationality to Communicative Thinking: A Basis for Feminist Theory and Practice" in Johanna Meehan, ed, *Feminists Read Habermas: Gendering the Subject of Discourse* (New York: Routledge, 1995) 139, Simone Chambers, "Feminist Discourse/Practical Discourse" in Johanna Meehan, ed, *Feminists Read Habermas: Gendering the Subject of Discourse* (New York: Routledge, 1995) 163, Carol C Gould, *Rethinking Democracy: Freedom and Social Cooperation in Politics, Economy, and Society* (Cambridge: Cambridge University Press, 1990), and Iris Marion Young, *Inclusion and Democracy* (Oxford: Oxford University Press, 2002).

50. See e.g. Gunning, *supra* note 22 (showing that minority parties may adopt narratives that are more in line with the mediator's bias). See also Grillo, *supra* note 22 (noting that women are often disallowed, in various ways, to express emotions like anger, because they are considered unfeminine).

elements would add to the richness of the dialogue and help participants to understand the dispute from the other's perspective.[51]

Secondly, mediators may help parties avoid some of the pitfalls of irrationality that we are all prone to and enable a better understanding among parties. Roger Fisher and William Ury are famous proponents of recognizing that human elements, like our propensity to "get angry, depressed, fearful, hostile, frustrated, and offended", can prevent rational exploration of a problem.[52] So can our tendency of allowing our egos to become irrationally attached to a position that we take, which makes wise reconciliation and agreement less likely.[53] A good mediator should be able to help parties move past these "people problems", as Fisher and Ury call them.[54] They offer valuable methods for how negotiators may do so in their well-known approach to principled negotiation outlined in their book, *Getting to Yes: Negotiating Agreement Without Giving In*. The most central idea is to avoid over-commitment to positions by focusing instead on the interests that underlie the parties' positions.[55] By doing so, parties are in a better position to rationally determine whether they have mutual or complementary interests and may be able find ways to maximize the realization of as many interests as possible of all parties. Mediators would do well to adopt the concepts of principled negotiation to help parties achieve rationally motivated outcomes.

Finally, rationality may reasonably be taken to imply that participants be willing to provide reasons for their claims and positions, and to that extent it is valuable, because it would help to maintain authenticity and sincerity in the dialogue. Through dialogue wherein both parties are prepared to offer reasons for their positions or claims, participants have the best chance of truly understanding each other and proceeding toward a meaningful consensus. The demand for reasons may also help to diffuse situations where a party makes powerful and coercive assertions without having to be accountable for them through articulation of reasons. Mediators should, then, be adept at asking parties to explain their claims, to provide grounding reasons, and to notice and point out inconsistencies.[56]

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51. See Jürgen Habermas, "A Reply to My Critics" in John B Thompson & David Held, eds, *Habermas: Critical Debate* (London: The Macmillan Press Ltd, 1982) 219.

52. Roger Fisher & William Ury with Bruce Patton, ed, *Getting to Yes: Negotiating Agreement Without Giving In*, 3rd ed (New York: Penguin Publishing, 2011) at 21.

53. See *ibid* at 5.

54. *Ibid* at 21.

55. See *ibid* at 11.

56. For excellent examples of phrasing that mediators may use in this respect, see Chilton & Cuzzo, *supra* note 39.

C. Rule Against Compulsion

Compulsion can occur in a mediation context through two sources of power exertion. One is rooted in power differentials between the parties. A more powerful party may cause a less powerful party to speak less, disagree less, and accept a compromise more readily. For instance, in a mediation between an employer and an employee, the employee may experience a power differential that causes her to agree more readily to certain terms. Second, a mediator may exert influence to cause one or both of the parties to accept an agreement. Numerous studies suggest that mediators use tactics that pressure parties to settle, compromising the principles against compulsion.[57]

These are challenging concerns, but using dialogue theory as a guiding framework for legitimate mediation can be helpful in becoming responsive to them. At its core, this framework enables and demands an interpretation of successful mediation as one where a fair discourse happened, rather than one where a settlement or a compromise was reached, and several important ideas that are relevant to concerns around compulsion flow from this approach.

First, it implies mediators must recognize that their primary role is to secure a fair dialogue, not to champion a settlement. Along these lines, Bush and Folger advocate that mediators must be taught that "the essential role of the mediator is to *support* the parties' conversation, and their deliberation and decision-making, rather than to control, guide, or direct it in any way", and they provide practical guidance to that effect.[58] Assessing mediation programs must involve determining whether mediation training programs expressly emphasize that the mediator's role is to secure a space for a fair dialogue, not to achieve settlement. This type of mediator training is imperative if a dialogical approach to mediation is adopted. In addition, to continually improve court-annexed mediation, empirical inquiries should be made to determine whether parties felt coerced during a mediation, whether they felt imposed upon, whether they felt heard and respected, and whether they felt truly engaged in an authentic dialogue.[59]

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57. As noted in the discussion above, Richard Delgado has done work implying that mediators function like decision-makers and their prejudicial biases can impact the process—so for instance, a person from the dominant group gets to ask more questions, or gets to speak more—which in terms of the rational discourse frame, hinders condition two of equal communicative opportunity. Welsh has described how court-annexed mediation involves mediator tactics that pressure parties to settle. See Welsh, "Bankruptcy Mediation", *supra* note 27 at 438–39. See also Coben & Harley, *supra* note 27 at 257–58.

58. Bush & Folger, "Risks and Opportunities", *supra* note 2 at 40 [emphasis in original].

59. While no empirical studies seem to have focused squarely on the dialogic nature of mediation in Canada, some empirical work has been conducted to assess the participants' experience during mediation. See Julie MacFarlane & Michaela Keet, "Civil Justice Reform and Mandatory Civil Mediation in Saskatchewan: Lessons from a Maturing Program" (2005)

This criterion raises a related question around the propriety or advisability of judges acting as mediators. Some empirical evidence suggests that the gravitas that judges bring to mediations results in their statements being interpreted as essentially authoritative by the parties.[60] Given that the primary role of judges is to provide statements of legal evaluations of cases (as opposed to facilitating open dialogues), it would not be surprising if the endpoint of judicial mediation is often an influential comment about the legal merits of each side's case. On the one hand, some may feel that such judicial evaluation would serve as a safeguard in mediations since judges are experts in protecting legal rights and upholding the rule of law. This view, however, espouses a narrow interpretation of both the adjudicative system and the mediation process.

First, in an adjudicative context, the rule of law is not protected only by a judge, but also by procedural and structural protections and precautions, including the rules of evidentiary disclosure, appeals processes, and public accountability. Judicial statements made in a mediation context are, by design, not subject to the same procedural demands as they would be in a litigation context. As a rule, judicial mediations may involve very influential statements from the judge, but without the procedural safeguards that help to legitimate authoritative judicial outcomes in an adjudicative context. This, then, could cause a dangerous compromise to the rule of law, and in particular, its procedural aspects.

Moreover, the idea that a judge's presence in a mediation may help to ensure the rule of law or otherwise help to secure "good" outcomes fails to duly recognize mediation as a distinct process of dialogue that centralizes self-determination. Mediation must not be understood as a sort of "adjudication lite"—a cheaper and less robust version of adjudication, where a judge makes a fairly quick call about the merits of the case and the advisability of pursuing litigation further. Such an interpretation of mediation constitutes a compromise to the dignity of the participants in at least two ways. First, it results in a pseudo-authoritative judicial statement, but disavails participants of the procedural commitments that inhere in legitimate adjudication. Second, it suggests that legal norms are necessarily primary, and given their legal expertise, judges know best how a dispute should be resolved. This fails to recognize mediation as a unique and valuable process because of its commitment to dialogue between parties and consensual decision-making. Adopting a dialogue-based framework for legitimate mediation could help to avoid these potential pitfalls by invoking a

42:3 Alta L Rev 677. See also Nancy A Welsh, "Magistrate Judges, Settlement, and Procedural Justice" (2016) 16:3 Nevada LJ 983, which provides a helpful empirical tool that can (and should) be used to assess court-connected mediation programs.

60. See Coben & Harley, *supra* note 27; Welsh, "Bankruptcy Mediation", *supra* note 27; Baruch Bush, *supra* note 27 and accompanying text.

paradigmatic shift away from considering mediation as a way to quickly resolve disputes, and instead seeing it as a process designed for mutual decision-making and problem-solving. This shift should be evident in judicial approaches to mediation, as well as in any mediator's approach to mediation. It should be reflected in mediator training and in the participant's experience.

Another related benefit of recognizing successful mediation as good dialogue (rather than achieving a settlement) is that it makes space for parties to be supported in their decisions not to settle. Bush and Folger persuasively explain that securing the ability to leave a mediation is a significant source of power for a party because it prevents them from feeling a compulsion to accept a resolution that is not truly acceptable.[61] This has implications for both mediators and lawyers representing clients in a mediation. When a mediator recognizes that there is hesitancy on the part of a party to enter into a settlement, rather than encouraging acceptance of the settlement (which would be incentivized if the mediator sees settlement as success), the mediator does better when they encourage the party to express their concerns that lie beneath that hesitation.[62] Such encouragement supports a genuine dialogue, and empowers parties to a far greater extent than attempting to push a party into accepting an agreement. Similarly, lawyers must also recognize that their role in a mediation is to assist their clients in engaging in an informed dialogue and not to push clients toward a particular outcome. This was recently recognized by the Court of Queen's Bench of Alberta in *Raichura v Jones*, where a lawyer was ordered to pay damages for improperly pushing a client into accepting settlement.[63]

Along with establishing the correct role of the mediator as facilitator of dialogue and not champion of settlement, assessing a mediation program may also involve considering structural features that would help to secure a fair dialogue. For instance, pre-mediation conferences where parties meet the mediator and are alerted to the process of mediation would likely support dialogical mediation. Parties should be expressly told that the mediator's role is not to protect one side or to secure an outcome for parties that would be secured in a court. Rather, the purpose is to facilitate a dialogue between the parties to enable them to arrive at a conclusion of their own, if they so wish. Parties should be made aware that the purpose of mediation is to provide a space to engage in a genuine discourse, to listen to one another, and to raise concerns sincerely. They should accept that their propositions may be challenged, that inconsistencies in what they say may be brought to light, and that they may be

61. See Bush & Folger, "Risks and Opportunities", *supra* note 2.

62. See *ibid* at 43.

63. 2020 ABQB 139. This case is currently under appeal. For a helpful and thoughtful commentary, see Deanne Sowter, "Mediation: A Warning Not to Bully a Client Into Settlement" (18 September 2020), online: *Slaw* <www.slaw.ca/2020/09/18/mediation-a-warning-not-to-bully-a-client-into-settlement/>.

asked to articulate why they take certain positions.[64] Thereafter, parties should be invited to determine whether they feel confident that the mediation program is suitable for them.

Conclusion

My primary intention in this paper was to offer a theorization of the legitimacy of mediation, which I consider urgent because of how enthusiastically mediation has been embraced into civil litigation systems. That embrace has been largely underpinned by the value of efficiency; but the legitimacy of legal processes requires more grounding than that if we are to ensure that community members are treated fairly. Here, I have suggested that an appropriate grounding can be found in the values of equality and dignity which also underpin the ideal of the rule of law in an adjudicative context. I have suggested that these values are at the core of dialogue theory, which can therefore become the scaffolding for a theory of legitimate mediation. I have found dialogue theory to be a promising model for legitimate mediation because it embodies the core values of equality and dignity, while simultaneously centralizing self-determination and consensual decision-making, which are key features of mediation.

I wish to reiterate one theme that has emerged through the inquiry presented here: the protection of the rule of law, in the sense of ensuring congruence between existing laws and their administration by the courts, is only possible through adjudication—but this does not imply that mediation is necessarily illegitimate. Express recognition of this ensures that the value of adjudication is never inappropriately minimized and helps to maintain conceptual clarity as to the fact that mediation is distinct from adjudication, and the value that it brings as a dispute resolution process is unique. That clarity is imperative when assessing mediation programs and considering civil procedure reform initiatives with respect to mediation.

The key purpose of this paper has been to offer a starting point for a discourse around mediation as dialogue. To this end, in the last part of the paper, I have offered brief comments that indicate how dialogue theory, particularly Habermas' conditions of rational dialogue, can be used as a framework for continual discussion, debate, re-evaluation, and assessment on how to ensure a fair and responsive mediation process. I hope that these comments may encourage further discussion on how best the theory of dialogue can become operationalized within Canadian civil justice. Given the tremendous value that mediation as a dispute resolution process can offer, and at the same time bearing in mind the potential dangers that inhere in it, I believe that such discussion is urgent.

64. I recognize that asking parties to behave well during a mediation does not guarantee that they will. But there is value in setting out the expectations.