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Realizing Dispute Resolution: Meeting the Challenges of Legal Realism Through Mediation

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REALIZING DISPUTE RESOLUTION: MEETING THE CHALLENGES OF LEGAL REALISM THROUGH MEDIATION

Robert Rubinson*

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INTRODUCTION

Recent decades have seen an explosion of interest in legal realism and mediation. At first glance, they appear not to have much to do with each other, with legal realism being a theory of jurisprudence and mediation being a form of alternative dispute resolution. In fact, however, they are closely aligned.

The realist movement flowered in the early 1930s¹ and its continuing power has led scholars in recent years to herald the coming of a “new legal realism.”² Realism developed a range of insights that reject the idea of law as an exercise in logic.³ Realism holds that legal analysis and logic are *ex post facto* justifications for conclusions already arrived at.⁴ From a realist perspective, judges reach decisions through subconscious motivations, whether based on politics, psychology, or individual experience.⁵ Realists also argue that law arises in social and individual contexts in a particular way—a granular view focused on how law affects actual human beings.⁶

Mediation has similarly generated an exhaustive literature of increasing volume and complexity.⁷ Mediation is profoundly different from adjudication.

¹ Marcus J. Curtis, *Realism Revisited: Reaffirming the Centrality of the New Deal in Realist Jurisprudence*, Note, 27 YALE J.L. & HUMAN. 157, 157–58 (2015).

² The amount of this new literature is massive. See, e.g., BRIAN LEITER, NATURALIZING JURISPRUDENCE: ESSAYS ON AMERICAN LEGAL REALISM AND NATURALISM IN LEGAL PHILOSOPHY (2007); Tracey E. George, et al., *The New Old Legal Realism*, 105 NW. U. L. REV. 689, 691 (2011); Elizabeth Mertz, *Legal Ethics in the Next Generation: The Push for a New Legal Realism*, 23 LAW & SOC. INQUIRY 237, 237 (1998); Thomas J. Miles & Cass R. Sunstein, *The New Legal Realism*, 75 U. CHI. L. REV. 831, 831 (2008); Victoria Nourse & Gregory Shaffer, *Varieties of New Legal Realism: Can a New World Order Prompt a New Legal Theory?*, 95 CORNELL L. REV. 61, 64 (2009) (“over 300 papers have cited the term ‘new legal realism’”); Edmund Ursin, *Clarifying the Normative Dimension of Legal Realism: The Example of Holmes’s The Path of the Law*, 49 SAN DIEGO L. REV. 487, 490 (2012). The use of the term “New Legal Realism” originates with David M. Trubek’s article *Complexity and Contradiction in the Legal Order: Balbus and the Challenge of Critical Social Thought about Law*, 11 LAW & SOC. REV. 527, 543–44 (1977) (calling for “new realism” within legal studies). For an account of themes underlying New Legal Realism, see *infra* text accompanying notes 76–88.

³ See *infra* text accompanying notes 28, 39–51.

⁴ See *infra* text accompanying notes 39–42.

⁵ See *infra* text accompanying notes 28, 91–109.

⁶ For a good example, see George, et al., *supra* note 2, at 716, which examines how judicial opinions arise from and influence people “on-the-ground” in interesting, if not surprising, ways.

⁷ The field continues to mature, and now includes four law school journals dedicated solely to alternative dispute resolution: the *Cardozo Journal of Dispute Resolution*, *Ohio State Journal on Dispute Resolution*, *Pepperdine Dispute Resolution Law Journal*, and the *Journal of Dispute Resolution* published by the University of Missouri School of Law. An important non-law school publication is *Conflict Resolution Quarterly*, which publishes predominantly empirical work from a social science perspective. Moreover, “classics” on

One fundamental difference is that it shifts the focus of decision-making from judges to the disputants themselves.⁸ Disputants exchange perspectives and develop their own norms—whether “legal” or not—to form the basis for settlement. As a result, there is no need to conduct legal analysis, or to apply facts to law, or for judges to reach “right” results. Mediation enables disputants to engage in ways of resolution of their own choosing.⁹

Mediation thus represents realism in action. Both focus on the specifics of what happens “on the ground.”¹⁰ Both have a long history of interdisciplinary research.¹¹ Both focus on the limitations and uncertainties—if not dangers—of adjudication.¹² However, while realism has successfully developed a powerful critique, the realists have had difficulty crafting an affirmative program that resolves the issues their critique identifies.¹³ In many ways, mediation is that affirmative program.

This Article, then, explores how mediation provides insights about how to respond to the enduring challenges realism first posed over eighty years ago. The Article does so in four sections. The first two sections describe the foundations of realism and mediation. The third section traces how mediation furnishes ways to answer the realist critique. The final section identifies areas where mediation does not provide all the answers to realism. The most important of these is ameliorating challenges low-income disputants face when engaged in mediation.

I. REALISM

A. *The Realist Challenge*

Realism is a crucial—some have said the most important—movement in conceptions of law in the last century.¹⁴ A challenge, however, is to define realism in narrow enough terms to make it meaningful. References to “realism” may embody whatever is viewed as necessary to approach law “realistically.”¹⁵ This is too diffuse to be helpful, and circular as well: what is real depends on

conflict resolution have emerged. For two examples, see Owen M. Fiss, Comment, *Against Settlement*, 93 YALE L.J. 1073 (1984); Leonard L. Riskin, *Understanding Mediators' Orientations, Strategies, and Techniques: A Grid for the Perplexed*, 1 HARV. NEGOT. L. REV. 7 (1996).

⁸ See *infra* text accompanying notes 147–57, 163–66.

⁹ See *infra* text accompanying notes 158–66.

¹⁰ See *infra* text accompanying notes 193–200.

¹¹ See *infra* text accompanying notes 218–23.

¹² See *infra* text accompanying notes 212–17.

¹³ See *infra* text accompanying notes 83–111.

¹⁴ LEITER, *supra* note 2, at 1 (“American Legal Realism was, quite justifiably, the major intellectual event in 20th century American legal practice and scholarship”). For a collection of seminal writings from the realist school, see AMERICAN LEGAL REALISM (William W. Fisher III et al. eds., 1993).

¹⁵ See *infra* text accompanying notes 77–82.

conceptions of what law “really” is, and such conceptions may be ideas that the original realists strenuously argued against.

Moreover, some critique the term “realism” because it suggests a unity of ideas among a designated set of realists that did not exist,¹⁶ or an unwarranted degree of novelty because that realist ideas were novel when, in fact, similar ideas were percolating in the nineteenth century.¹⁷ While important, these debates are not necessary to address here: there is meaningful consensus about realism is, and, with that in mind, the following offers an overview of realism both in its original incarnation and in the work of “new legal realists” whose work builds upon ideas of the first realists.¹⁸

B. *The “Original Realists”*

Oliver Wendell Holmes has been acknowledged as the originator of realism.¹⁹ His groundbreaking 1897 article *The Path of the Law*²⁰ was particularly influential.²¹ Some forty years later, in the 1930s, a group of other scholars—what this Article calls the “original realists”—elaborated on Holmes’s ideas.

While, as noted, not all realists were of one mind,²² realism, at its core, was a reaction against “formalism”²³—the idea that law is a set of rules that, through a correct application of logic, lead to precise and certain results.²⁴ The following summarizes main themes expressed by the realists beginning with Holmes.

¹⁶ Karl Llewellyn—one of the original realists—made this point as early as 1931. Karl N. Llewellyn, *Some Realism about Realism—Responding to Dean Pound*, 44 HARV. L. REV. 1222, 1256 (1931) [hereinafter Llewellyn, *Some Realism*] (realists do not have a “group philosophy or program”).

¹⁷ Brian Z. Tamanaha has made these points in detail. See Brian Z. Tamanaha, *Legal Realism in Context*, in 1 THE NEW LEGAL REALISM 147, 147 (Elizabeth Mertz et al. eds., 2016) [hereinafter Tamanaha, *Legal Realism in Context*]; Brian Z. Tamanaha, *Understanding Legal Realism*, 87 TEX. L. REV. 731, 734 (2009) [hereinafter Tamanaha, *Understanding*]; Tamanaha, however, does not dispute the importance of ideas associated with the realists, but, rather, the identification of realism as an independent source of these insights.

¹⁸ For an overview of a chronology of these movements, see ROY L. BROOKS, *STRUCTURES OF JUDICIAL DECISION MAKING FROM LEGAL FORMALISM TO CRITICAL THEORY* (2d ed. 2005).

¹⁹ *Id.* at 91.

²⁰ O. W. Holmes, *The Path of the Law*, 10 HARV. L. REV. 457 (1897).

²¹ For an anthology of Holmes’s writings, see THE ESSENTIAL HOLMES (Richard A. Posner ed. 1992).

²² See Llewellyn, *supra* note 16, at 1254 (arguing that realism does not constitute one “school” of thought). Brian Z. Tamanaha goes further, decrying “gerrymandering” by scholars who cherry-pick ideas from different realists to support the scholars’ favored interpretation of what realism is. See Tamanaha, *Legal Realism in Context*, *supra* note 17, at 161.

²³ While “formalism” is the most common term, other synonyms include “fundamentalism” or “absolutism.” JEROME FRANK, *LAW AND THE MODERN MIND* 61–62 (Transaction Publishers 2009) (1930).

²⁴ BROOKS, *supra* note 18, at 40–59 (summarizing formalism).

1. Holmes's Critique

There is no exaggerating the importance of Oliver Wendell Holmes as the source of realism.²⁵ Subsequent realists openly acknowledged this debt in terms approaching the hagiographic.²⁶

The Path of the Law captures the essence of his critique and, by extension, of realism more generally. The following is an oft-cited²⁷ section from that article:

The language of the judicial decision is mainly the language of logic . . . [b]ut certainty generally is illusion . . . Behind the logical form lies a judgment as to the relative worth and importance of competing legislative grounds, often an inarticulate and unconscious judgment, it is true, and yet the very root and nerve of the whole proceeding. You can give any conclusion a logical form . . . [Such a conclusion, however,] is because of some belief as to the practice of the community or of a class, or because of some opinion as to policy, or, in short, because of some attitude of yours upon a matter not capable of exact quantitative measurement, and therefore not capable of founding exact logical conclusions. . . . [I]f the training of lawyers led them habitually to consider . . . the social advantage on which the rule they lay down must be justified, they sometimes would hesitate where now they are confident, and see that they were taking sides upon debatable and often burning questions.²⁸

Holmes's points here—that logic is a fallacy, that unconscious assumptions generate decisions, that certainty is an illusion—are core insights of realism.

²⁵ Laura Kalman, for example, notes how realists “elaborated upon Holmes more than they led the way.” LAURA KALMAN, *LEGAL REALISM AT YALE 1927–1960*, at 17 (1986). *See also* BROOKS, *supra* note 18, at 91 (describing Holmes as the “‘father’ of legal realism”). Holmes's importance and reputation remain extraordinarily high. Richard A. Posner, *Introduction* to *THE ESSENTIAL HOLMES*, *supra* note 21, at ix (describing Holmes as “the most illustrious figure in the history of American Law” and “a major figure in American intellectual and cultural history generally”). Although Holmes was still alive at the beginning of the flowering of realism, he was near the end of a long life (he died in 1935 at 95) and did not appear to comment on the work of the far younger scholars who were so influenced by him.

²⁶ Jerome Frank, for example, was quite explicit in this regard, and even wrote the final chapter of his leading text as an homage to Holmes and titled it “Mr. Justice Oliver Wendell Holmes, the Completely Adult Jurist.” FRANK, *supra* note 23, at 253–60.

²⁷ *See* Holmes, *supra* note 20.

²⁸ *Id.* at 465–68. Holmes reiterated his rejection of logical form by writing that “[t]he felt necessities of the time, the prevalent moral and political theories, intuitions of public policy, avowed or unconscious, even the prejudices which judges share with their fellow-men, have had a good deal more to do than the syllogism in determining the rules by which men should be governed.” OLIVER WENDELL HOLMES, *THE COMMON LAW* 3 (Harvard Univ. Press 2009) (1881).

2. *The “Original Realists”*

Primarily in the 1930s,²⁹ a group of legal scholars—collectively known as “realists”—built upon Holmes’s original critique.³⁰ Karl Llewellyn³¹ and Felix Cohen³² were prominent realists.³³ The realist most often cited as presenting realism in its “pure” (if not most radical) form was Jerome Frank, particularly in his book *Law and the Modern Mind* published in 1930.³⁴

These writers, among others, were both enormously influential and enormously controversial, with their influence spreading into legal scholarship,³⁵ law teaching,³⁶ and even statutory drafting, including the Uniform Commercial Code.³⁷

The original realists were fervent in their beliefs. Consider the following manifesto by Karl Llewellyn that explicitly recalls the opening verses of the Gospel of John:

Ferment is abroad in the law. The sphere of interest widens; men become interested again in the life that swirls around things legal. Before rules, were facts; in the beginning was not a Word, but a Doing. Behind decisions stand judges; judges are men; as men they have human backgrounds. Beyond rules, again, lie

²⁹ Some have noted that the rise of realism coincides with the growth of the New Deal. See Curtis, *supra* note 1. This historical context is important to understand, but beyond the scope of this Article.

³⁰ For a collection of writing from the original realists, see AMERICAN LEGAL REALISM, *supra* note 14.

³¹ For two important articles by Llewellyn about realism, see Llewellyn, *Some Realism, supra* note 16; Karl N. Llewellyn, *A Realistic Jurisprudence—The Next Step*, 30 COLUM. L. REV. 431 (1930) [hereinafter Llewellyn, *A Realistic Jurisprudence*]. For a discussion of Llewellyn’s influence, see WILLIAM TWINING, *KARL LLEWELLYN AND THE REALIST MOVEMENT* (1973).

³² For Cohen’s most famous work, see Felix S. Cohen, *Transcendental Nonsense and the Functional Approach*, 35 COLUM. L. REV. 809 (1935). For an intellectual biography of Cohen, see DALIA TSUK MITCHELL, *ARCHITECT OF JUSTICE: FELIX S. COHEN AND THE FOUNDING OF AMERICAN LEGAL PLURALISM* (2007).

³³ Other influential realists were Morris R. Cohen, Underhill Moore, Herman Oliphant, Max Radin, and Fred Rodell. The writings of all three, among others, are included in the leading anthology of the realist literature. AMERICAN LEGAL REALISM, *supra* note 14.

³⁴ FRANK, *supra* note 23. It is impossible to overestimate the importance of this book at the time of its publication and thereafter. One scholar described appearance of the book as if it “fell like a bomb on the legal world.” Charles E. Clark, *Jerome N. Frank*, 66 YALE L.J. 817, 817 (1957). Laura Kalman took the explosion metaphor a step further by describing the book as “an intellectual atomic bomb” that left “few . . . untouched.” KALMAN, *supra* note 25, at 8.

³⁵ See AMERICAN LEGAL REALISM, *supra* note 14.

³⁶ Jerome Frank, *Why Not a Clinical Lawyer-School?*, 81 U. PA. L. REV. 907, 909–10 (1933).

³⁷ Stewart Macaulay, *The New Versus the Old Legal Realism: “Things Ain’t What They Used to Be”*, 2005 WIS. L. REV. 365, 370 (noting how Karl Llewellyn added a realist cast to the drafting of the UCC).

effects: beyond decisions stand people whom rules and decisions directly or indirectly touch.³⁸

Albeit in sweeping language, Llewellyn suggests a number of related ideas that characterize realism. The first is a critique of “logic” and the supposed strict adherence to rules that goes along with it. The realists held that judges actually manipulate “law”—whether statutes or opinions—in any way they chose to lead to a result that, for non-legal reasons, they want to reach.³⁹ Felix Cohen presented this critique by imagining a formalist “heaven” that contains a

dialectic-hydraulic-interpretation press, which could press an indefinite number of meanings out of any text or statute, an apparatus for constructing fictions, and a hair-splitting machine that could divide a single hair into 999,999 equal parts and, when operated by the most expert jurists, could split each of these parts again into 999,999 equal parts.⁴⁰

The image of the “dialectic-hydraulic-interpretive press” illustrates how, through manipulation, any decision can be presented in logical form.⁴¹ Judges manipulate legal texts at will and thereby justify a conclusion rather than demonstrate how the conclusion was actually reached.⁴²

A second and related idea identifies the actual bases upon which judges reach conclusions. Holmes saw these influences as “some belief as to the practice of the community or of a class, or because of some opinion as to policy.”⁴³ Cohen saw judicial decisions as “an intersection of social forces.”⁴⁴ Frank referred to “multitudinous and complicated” factors that arise from judges’ “peculiarly individual traits.”⁴⁵ Note that the realists, or at least the most radical of

³⁸ Llewellyn, *Some Realism*, *supra* note 16, at 1222 (1931). The biblical verse that Llewellyn echoes is as follows: “In the beginning was the Word, and the Word was with God, and the Word was God. The same was in the beginning with God. All things were made through him; and without him was not anything made that hath been made.” 1 *John* 1:1–3 (American Standard).

³⁹ Elizabeth Mensch, *The History of Mainstream Legal Thought*, in *THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE* 34–35 (David Kairys ed., 3d ed. 1998) (application of precedent does not “logically compel[]” a given result).

⁴⁰ Cohen, *supra* note 32, at 809. Others employ different images to express the idea of formalism-as-machine. See Lawrence Lessig, *Understanding Changed Readings: Fidelity and Theory*, 47 *STAN. L. REV.* 395, 462 (1995) (referring to judicial analysis as a “phonograph . . . through which the preexisting legal principles are given expression”) (quoting Robert Eugene Cushman, *The Social and Economic Interpretation of the Fourteenth Amendment*, 20 *MICH. L. REV.* 737, 744 (1922)).

⁴¹ See Holmes, *supra* note 20, at 465–70.

⁴² See Holmes, *supra* note 20, at 465–70. Frank called this “the dominance of the conclusion.” FRANK, *supra* note 23, at 109.

⁴³ See Holmes, *supra* note 20, at 466. See also LOUIS MENAND, *THE METAPHYSICAL CLUB* 341–42 (2001) (“experience” includes “everything that arises out of the interaction of the human organism with its environment: beliefs, sentiments, customs, values, policies, prejudices”).

⁴⁴ Cohen, *supra* note 32, at 843.

⁴⁵ FRANK, *supra* note 23, at 112–15. Frank also extended this criticism to jury verdicts. *Id.* at 183–99.

them, argued that these influences were not mere biases, but the *only* possible bases for a judicial decision.⁴⁶

A third idea is that judges do not themselves recognize how logic is an illusion. They have convinced themselves that they really do follow rules that lead to “right” results.⁴⁷ This illusion originates from a “longing for certainty”⁴⁸ which leads, in turn, to what Frank characterized as “Peter Pan legends of a juristic happy hunting ground in a land of legal absolutes.”⁴⁹ Thus, the real bases for decisions go unrecognized—a situation Frank called “self-delusion”⁵⁰ or, more evocatively, “judicial somnambulism.”⁵¹

A fourth theme is a call for greater focus on how law affects actual people. There are two elements to this critique. One is the impact that judicial decision-making has on individual cases.⁵² For example, Llewellyn identified the contingencies that determine whether a litigant can recover for a claim for breach of contract:

[I]f the other party does not perform as agreed, you can sue, and *if* you have a fair lawyer, and nothing goes wrong with your witnesses or the jury, *and* you give up four or five days of time and some ten to thirty percent of the proceeds, and wait two to twenty months, you will *probably* get a judgment for a sum considerably less than what the performance would have been worth—which, if the other party is solvent and has not secreted his assets, you can in further due course collect with six percent interest for delay.⁵³

The other element is outside individual lawsuits. For example, Felix Cohen noted that “beyond the [judicial] decision are human activities affected by it”⁵⁴—the social consequences that go beyond individual cases.

A final theme emphasizes the importance of particularity.⁵⁵ Realists had little use for generalities. Rather, they attacked those who conceived law as ab-

⁴⁶ *Id.* at 114; Holmes, *supra* note 20, at 465–66.

⁴⁷ Frank called this “rule fetichism [*sic*].” FRANK, *supra* note 23, at xiii.

⁴⁸ Holmes, *supra* note 20, at 465–66.

⁴⁹ FRANK, *supra* note 23, at 260.

⁵⁰ FRANK, *supra* note 23, at 167.

⁵¹ FRANK, *supra* note 23, at 159. Some trivialize realism as saying no more than “what the judge had for breakfast” generates decisions. RONALD DWORKIN, *LAW’S EMPIRE* 36 (1986). It is unclear, however, whether some realists would take offense at the intended insult, particularly since the point captures the idea that high-minded formalism ignores circumstances that, in a real way, affect judges in their day to day lives. Indeed, Frank came reasonably close to the “breakfast” idea as an accurate reflection of the realist critique. *See* FRANK, *supra* note 23, at 147 (“judicial discretion . . . may be . . . controlled by the merest trifles such as the toothache, the rheumatism, the gout, or a fit of indigestion, or even through the very means by which indigestion is frequently sought to be avoided.”).

⁵² *See* Cohen, *supra* note 32, at 843; Llewellyn, *A Realistic Jurisprudence*, *supra* note 31, at 437–38.

⁵³ Llewellyn, *A Realistic Jurisprudence*, *supra* note 31, at 437–38.

⁵⁴ Cohen, *supra* note 32, at 843.

⁵⁵ FRANK, *supra* note 23, at 61.

stract, disembodied, and sterile.⁵⁶ Realists instead often suggested that the way to understand law was through the examination of outside legal sources. Felix Cohen identified anthropology, religion, political science, and economics as possibilities.⁵⁷ Frank drew extensively upon psychology, particularly the work of Sigmund Freud and Jean Piaget.⁵⁸ There are many other examples.⁵⁹

All of these aspects of realism, among others, were radical indeed, and continue to be, as one commentator has put it, “corrosive.”⁶⁰ To view realism as merely a call for “judicial activism” or to base decisions on “public policy” minimizes how subversive it is. Rather, realists would say that *all* judicial decisions are really the result of assumptions that a judge is not aware of.⁶¹

C. The “New” Legal Realism

The cataclysm of World War II, among other things,⁶² ended the original era of realism. Its impact has endured, however: some have argued that virtually all subsequent legal theory can be understood as a reaction to it.⁶³ That said,

⁵⁶ Virtually all of LAW AND THE MODERN MIND can be seen in this light. A good example is Frank’s critique of Joseph Henry Beale, a Harvard professor whom the realists saw as the very model of a misled formalist. FRANK, *supra* note 23, at 53–61, 203.

⁵⁷ Cohen, *supra* note 32, at 830–33.

⁵⁸ FRANK, *supra* note 23, at 75–99. Frank relied particularly on Sigmund Freud, devoting an early chapter to describe how law acts as a “father substitute” with a religious dimension. *Id.* at 14–23, 192, 210–18. It is difficult for a modern reader to take these ideas seriously, and some have suggested this has contributed to the relative lack of recognition of the importance of the book in recent years. See Brian H. Bix, *Introduction*, in LAW AND THE MODERN MIND xv (1930) (Frank’s “attempt to incorporate psychoanalytic theory into a legal realist jurisprudence” is “what now seems strangest and least persuasive” about the book).

⁵⁹ For a discussion of how realists drew upon social science, see AMERICAN LEGAL REALISM, *supra* note 14, at 232–36.

⁶⁰ Mensch, *supra* note 39, at 35. Mensch argues that post-realist theorists must grapple with the realist critique without the benefit of the “naive [*sic*] confidence of the past” *Id.* at 36.

⁶¹ Some trace the origin of the idea of “public policy” to the ancient distinction between “law” and “equity,” with equity—what is now called “public policy”—acting as a check when law would lead to unjust or unfair consequences. BROOKS, *supra* note 18, at 6–12. The distinction, however, collapses when viewed through the lens of realism: “objective” application of either law or equity is driven by cognition unknown to the judge. Another way of looking at this is through the longstanding debate about the value of equity itself. One critique of equity is that it is necessarily arbitrary—what seventeenth-century legal philosopher John Selden called the equivalent of whether a judge “has a long foot, another a short foot.” *Id.* at 7. A realist might well agree, but would say that the metaphor applies equally to application of “law.”

⁶² Allen R. Kamp, *Between-the-Wars Social Thought: Karl Llewellyn, Legal Realism, and the Uniform Commercial Code in Context*, 59 ALB. L. REV. 325, 330 (1995).

⁶³ Mensch, *supra* note 39, at 35 (“[s]ince the realists, American jurists have dedicated themselves to the task of reconstruction”).

in some incarnations its influence is subtler—a kind of realism lite, with its rougher, more radical edges smoothed out.⁶⁴

Not always, however. Realism’s radical spirit burst forth in the Critical Legal Studies movement⁶⁵ until that movement fell out of favor in relatively short order.⁶⁶ More enduring are a cluster of critical movements focused on disempowered groups: people of color (Critical Race Theory),⁶⁷ women (Feminist Jurisprudence),⁶⁸ LGBTQ persons (“Queer Theory”),⁶⁹ Latinos (“Lat Crits”),⁷⁰ socioeconomics (“Critical Class Theory Movement” or “Class Crits”),⁷¹ and, of particular currency, the impact of multiple identities (intersectionality).⁷² These movements often analyze how purported legal “neutrality” masks and facilitates discrimination and subordination—a project that is very much in the realist vein.⁷³ Indeed, Derrick Bell—a founder of Critical Race Theory—was explicit about this.⁷⁴

⁶⁴ Michal Alberstein, *The Jurisprudence of Mediation: Between Formalism, Feminism and Identity Conversations*, 11 CARDOZO J. CONFLICT RESOL. 1, 11 (2009) (noting that “the realist critique was domesticated”).

⁶⁵ Roberto Mangabeira Unger, *The Critical Legal Studies Movement*, 96 HARV. L. REV. 563, 563–64 (1983). For a comparison between realism and Critical Legal Studies that focuses on the differences between the two, see WOUTER DE BEEN, *LEGAL REALISM REGAINED: SAVING REALISM FROM CRITICAL ACCLAIM* 1 (2008).

⁶⁶ After the Critical Legal Studies “burst upon . . . the scene” in the 1970s, it went into “deep decline.” Robert C. Ellickson, *The Twilight of Critical Theory: A Reply to Litowitz*, 15 YALE J.L. & HUMAN. 333, 340 (2003).

⁶⁷ See, e.g., RICHARD DELGADO & JEAN STEFANCIC, *CRITICAL RACE THEORY: AN INTRODUCTION* (3d ed. 2017); *CRITICAL RACE THEORY: THE KEY WRITINGS THAT FORMED THE MOVEMENT* (Kimberlé Crenshaw et al. eds., 1995).

⁶⁸ See, e.g., KATHARINE T. BARTLETT ET AL., *GENDER LAW AND POLICY* 1 (2d ed. 2014); *FEMINIST LEGAL THEORY: AN ANTI-ESSENTIALIST READER* (Nancy E. Dowd & Michelle S. Jacobs eds., 2003); Martha Albertson Fineman, *Gender and Law: Feminist Legal Theory’s Role in New Legal Realism*, 2005 WIS. L. REV. 405.

⁶⁹ See, e.g., Carlos A. Ball, *Essentialism and Universalism in Gay Rights Philosophy: Liberalism Meets Queer Theory*, 26 LAW & SOC. INQUIRY 271 (2001).

⁷⁰ See, e.g., *THE LATINO/A CONDITION: A CRITICAL READER* (Richard Delgado & Jean Stefancic eds., 1998); Robert Westley, *Lat Crit Theory and the Problematics of Internal/External Oppression: A Comparison of Forms of Oppression and Inter-Group/IntraGroup Solidarity*, 53 U. MIAMI L. REV. 761 (1999).

⁷¹ See Justin Desautels-Stein et al., *Classcrits Mission Statement*, 43 SW. L. REV. 651 (2014).

⁷² For a classic examination of intersectionality, see Peggy McIntosh, *White Privilege and Male Privilege: A Personal Account of Coming to See Correspondences Through Work in Women’s Studies*, in *FEMINIST LEGAL THEORY: AN ANTI-ESSENTIALIST READER*, *supra* note 68, at 63. See also Theresa Glennon, *The Developmental Perspective and Intersectionality*, 88 TEMP. L. REV. 929 (2016).

⁷³ See, e.g., Derrick Bell, *Racial Realism*, 24 CONN. L. REV. 363, 369 (1992) (noting how “abstract principles lead to legal results that harm blacks and perpetuate their inferior status” and “mask policy choices and value judgments”); For the realist critique of “logic,” see *supra* text accompanying notes 39–42.

⁷⁴ See Bell, *supra* note 73, at 363–64 (drawing connections between legal realism and law reform on behalf of African-Americans).

Moreover, in the last twenty years or so, many scholars self-identify as “new legal realists.” The amount of this literature is enormous—as of 2009 “over 300 papers have cited the term ‘new legal realism.’”⁷⁵ Prominent scholars such as Cass Sunstein,⁷⁶ Frederick Schauer,⁷⁷ and Daniel A. Farber⁷⁸ have written on the topic. The new legal realists are not of one mind, although they do draw upon discernable ideas from the original realists.⁷⁹ Often their goal is to examine how law affects real people, often by drawing upon social science.⁸⁰ As one commentator has put it, new legal realists “make another attempt at the original legal realist agenda of getting formal law and the ‘real world’ . . . into conversation with one another.”⁸¹

In an effort to understand the different areas and methodologies upon which new legal realists draw, Victoria Nourse and Gregory Shaffer have grouped “new realists” into three categories each of which, in turn, includes different emphases and variations.⁸² The first group—the “behaviorists”—focuses on how behavioral economics and judicial attitudes based on ideology or political affiliation drive judicial decisions.⁸³ This group also explores how cognitive biases can impede rationality.⁸⁴ The second group—the “contextualists”—examine “law in action” by investigating behavior in the real world.⁸⁵ The third group—the “institutionalists”—examines the complex ways that institutions, such as government, business norms, and private interests, interact.⁸⁶ Nourse and Shaffer’s work illustrates the vitality of legal realism as framing current critical approaches to law.⁸⁷

⁷⁵ Nourse & Shaffer, *supra* note 2, at 64.

⁷⁶ Miles & Sunstein, *supra* note 2, at 831–33.

⁷⁷ Frederick Schauer, *Legal Realism Untamed*, 91 TEX. L. REV. 749 (2013).

⁷⁸ Daniel A. Farber, *Toward a New Legal Realism*, 68 U. CHI. L. REV. 279 (2001) (book review).

⁷⁹ The degree to which the new realist movement owes its methodology and goals to the original realists is contested, but there is no doubt that the original realists remain, at a minimum, an important influence. William Twining, *Legal Realism and Jurisprudence: Ten Theses*, in 1 THE NEW LEGAL REALISM, *supra* note 17, at 128–29 (noting how in terms of the relationship between new legal realists and original realists, “[t]here may be some actual continuities and some unfinished agenda, as well as some false claims to ancestry”).

⁸⁰ Elizabeth Mertz, *Introduction: New Legal Realism: Law and Social Science in the New Millennium*, in 1 THE NEW LEGAL REALISM, *supra* note 17, at 2 (new legal realists seek to move the “discussion envisioned by the original Realists forward into the new millennium”).

⁸¹ *Id.* at 3.

⁸² Nourse & Shaffer, *supra* note 2, at 62. For a summary of Nourse and Shaffer’s categories, see Mark C. Suchman & Elizabeth Mertz, *Toward a New Legal Empiricism: Empirical Legal Studies and New Legal Realism*, 6 ANN. REV. L. & SOC. SCI. 555, 562 (2010).

⁸³ Nourse & Shaffer, *supra* note 2, at 77–78.

⁸⁴ *Id.* at 77.

⁸⁵ *Id.* at 79.

⁸⁶ *Id.* at 85–90.

⁸⁷ See Suchman & Mertz, *supra* note 82, at 557 (noting how the range of new legal realism “trace their intellectual pedigrees back to the original Legal Realist movement of the 1930s”).

D. The Continuing Challenge for Old and New Realism: What To Do?

Realism thus was and continues to be a rich source for thinking about law from multiple perspectives. While some academics, judges, and lawyers continue to frame legal analysis as formalist, there is a wide recognition that this is a guise. As one commentator has noted:

Since the realists, American jurists have dedicated themselves to the task of reconstruction . . . After realism, American legal theorists had, as it were, eaten of the tree of knowledge, and there could be no return to the naive confidence of the past.⁸⁸

If the realist critique was a success, however, it was far less successful in proposing affirmative programs that would rectify the problems it identified.⁸⁹ This is not to say there were not attempts: there were, but they were not particularly effective.⁹⁰

One response drew upon psychology. Holmes argued that judges should reject the illusion of certainty and bring to consciousness motivations that actually generate their decisions.⁹¹ Building on this idea, Jerome Frank suggested that a judge should be “well trained . . . in the best available methods of psychology”⁹² in order to “observe their own mental processes.”⁹³ This would involve judges

scruti[nizing] . . . his own personality so that he might become keenly aware of his own prejudices, biases, antipathies, and the like, not only in connection with attitudes political, economic and moral but with respect to more minute and less easily discoverable preferences and disinclinations.⁹⁴

Frank argued that this is the “best we can hope for.”⁹⁵

However, Frank’s suggestion generates difficulties. The study of psychology does not necessarily lead to awareness of one’s “own personality.” Psychotherapy might perhaps do so, but mandating this for judges is, to put it mildly, unlikely. Another perhaps deeper objection is that biases are endemic to human cognition,⁹⁶ and to somehow bring “biases” to the forefront of consciousness

⁸⁸ Mensch, *supra* note 39, at 34–35. A well-known exception is Antonin Scalia. A full discussion of Scalia’s theories of interpretation is beyond the scope of this Article, but suffice it to say what has been called his “textualism” is more nuanced than he is often given credit for. BROOKS, *supra* note 18, at 63–74 (describing the difference between Scalia’s “textualism” and formalism).

⁸⁹ Mensch, *supra* note 39, at 35–36 (realism “was so corrosive that many of the most influential realists evaded the full implications of their own criticism”); *see also* AMERICAN LEGAL REALISM, *supra* note 14, at 165–71.

⁹⁰ Mensch, *supra* note 39, at 35–36.

⁹¹ Holmes, *supra* note 20, at 466–67.

⁹² FRANK, *supra* note 23, at 158 n.27.

⁹³ *Id.* at 163.

⁹⁴ *Id.* at 158 n. 27. Frank sometimes lapsed into a spiritual mode. He said, for example, that what is required is “an enlightened state of awareness of . . . unawareness.” *Id.* at 164.

⁹⁵ *See supra* note 194 and accompanying text.

⁹⁶ *Id.*

simplifies a complex process that is not so easy, or even possible, to move beyond.⁹⁷ This is not to say that the study of psychology and cognitive science has no value at all: it does, and important work has drawn upon it to great effect.⁹⁸ Nevertheless, it is far from the full answer that Frank so confidently asserts.

Another idea is to redress what realists decried as the isolation of judges from the real world—something that Jerome Frank called the “occupational disease” of “appellate-court-itis.”⁹⁹ One possibility is to have judges better understand the experience of others through reading or through personal observations. Holmes recounted a conversation he had with Louis Brandeis that illustrates this point. Brandeis suggested that Holmes study “some domain of fact”¹⁰⁰ by actually visiting the “textile industries” in Lawrence, Massachusetts to “get a human notion of how it really is.”¹⁰¹ Brandeis’s choice of Lawrence was not arbitrary. It had a largely female, poor, immigrant population who worked in textile factories and was the location of a notable strike in 1912.¹⁰² Lawrence was hardly the Massachusetts that Holmes—a privileged member of one of the most prominent families in Boston—knew.¹⁰³

Other more recent suggestions about the value of gaining experience outside of one’s social milieu have arisen in critical theory literature and elsewhere.¹⁰⁴ Judge Alex Kozinski has argued that judges should witness an execu-

⁹⁷ One overview of social science literature compiled a “partial list” of forty-two different cognitive biases. Mario J. Rizzo & Douglas Glen Whitman, *The Knowledge Problem of Paternalism*, 2009 B.Y.U. L. REV. 905, 951 (citing Joachim I. Krueger & David C. Funder, *Towards a Balanced Social Psychology: Causes, Consequences, and Cures for the Problem-Seeking Approach to Social Behavior and Cognition*, 27 BEHAV. & BRAIN SCI. 313, 317 tbl.1 (2004)). For an overview of biases and the challenges in overcoming them in the context of lawyering and mediation, see Douglas N. Frenkel & James H. Stark, *Improving Lawyers’ Judgment: Is Mediation Training De-Biasing?*, 21 HARV. NEGOT. L. REV. 1 (2015).

⁹⁸ For examples, see JENNIFER K. ROBBENOLT & JEAN R. STERNLIGHT, *PSYCHOLOGY FOR LAWYERS: UNDERSTANDING THE HUMAN FACTORS IN NEGOTIATION, LITIGATION, AND DECISION MAKING* (2012).

⁹⁹ FRANK, *supra* note 23, at xli.

¹⁰⁰ Letter from Oliver Wendell Holmes to Frederick Pollock (May 26, 1919), in 2 HOLMES-POLLOCK LETTERS: THE CORRESPONDENCE OF MR. JUSTICE HOLMES AND SIR FREDERICK POLLOCK, 1874–1932, 13–14 (Mark DeWolfe Howe ed., 1941).

¹⁰¹ *Id.*

¹⁰² The strike is known as the “Bread and Roses Strike.” See WILLIAM CAHN, *LAWRENCE 1912: THE BREAD AND ROSES STRIKE* (1980); 4 PHILIP S. FONER, *HISTORY OF THE LABOR MOVEMENT IN THE UNITED STATES* 306–28 (1965). The event “became a nearly legendary part of national political life . . .” Seth Kupferberg, *Political Strikes, Labor Law, and Democratic Rights*, 71 VA. L. REV. 685, 697 n.51 (1985). The conditions in the factories in Lawrence had long been notorious. The collapse of a roof due to a fire 1860 led to the death of hundreds of workers. Mark DeWolfe Howe, *The Diary of George Templeton Strong*, 66 HARV. L. REV. 1546, 1547 (1953) (book review).

¹⁰³ Posner, *supra* note 25, at ix.

¹⁰⁴ Mari J. Matsuda, *Looking to the Bottom: Critical Legal Studies and Reparations*, 22 HARV. CIV. RTS.-CIV. LIBERTIES L. REV. 323, 324–25 (1987) (judges should “study[] . . . the actual experience of black poverty and listen[] to those who have done so.”).

tion before deciding death penalty cases¹⁰⁵ or wear make-up before deciding whether mandatory grooming guidelines for women are discriminatory.¹⁰⁶ Justice Shirley Abrahamson of the Wisconsin Supreme Court went to court in casual clothes to learn about the experience.¹⁰⁷ Some scholars have recommended broadening experience less directly by reading “outsider” narratives as a means to avoid “serious moral error.”¹⁰⁸

These solutions can perhaps be helpful. Reading, traveling, and seeking out broader life experience can be eye-opening and, at times, life-changing. Nevertheless, no travel itinerary or reading list could begin to address the multiplicity of social and individual contexts that come before a judge, and arguing that it would vastly simplify the complexity and particularity of individual experience.¹⁰⁹

Another potential solution involves interdisciplinary research. A foundation of realism is to assess law in the context of other disciplines.¹¹⁰ New legal realists continue this project.¹¹¹ Particularly compelling examples are among those engaged in Critical Race Theory and Feminist Jurisprudence, both of

¹⁰⁵ See Alex Kozinski, *Tinkering with Death*, NEW YORKER, Feb. 10, 1997, at 52 (wondering how he “with cool precision, cast votes and write opinions that seal another human being’s fate but lack the courage to witness the consequences of my actions.”).

¹⁰⁶ Judge Kozinski, in a gender discrimination case regarding mandatory grooming requirements for women in a Nevada Casino, imagined a situation where there is “a rule that all judges wear face powder, blush, mascara and lipstick while on the bench.” *Jespersen v. Harrah’s Operating Co., Inc.*, 444 F.3d 1104, 1118 (9th Cir. 2006).

¹⁰⁷ Justice Abrahamson observed trial court proceedings and was treated rudely by attorneys and court personnel. Shirley S. Abrahamson, *The Woman Has Robes: Four Questions*, 14 GOLDEN GATE U. L. REV. 489, 497–98 (1984).

¹⁰⁸ Richard Delgado & Jean Stefancic, *Norms and Narratives: Can Judges Avoid Serious Moral Error?*, 69 TEX. L. REV. 1929, 1929–32, 1934, 1936–38, 1945–46 (1991) (suggesting that if judges read narratives about, for example, Japanese culture and slavery they might have avoided notorious opinions like *Koramatsu* and *Plessy*).

¹⁰⁹ The increasingly influential idea of “intersectionality” holds that an individual may identify as constituted by multiple identities, such as race, gender, socioeconomic status, and sexual orientation. See generally Glennon, *supra* note 72, at 931.

¹¹⁰ Cohen, *supra* note 32, at 834 (“legal science necessarily involves us in psychology, economics, and political theory.”).

¹¹¹ Frank himself had an opportunity to put his realism into practice while serving as judge for the Second Circuit from 1941 to 1957. A good example of his judicial approach is his lengthy concurrence in *United States v. Roth*, 237 F.2d 796, 801–27 (2d Cir. 1956) (Frank, J., concurring), an obscenity case later affirmed by the Supreme Court. *Roth v. United States*, 354 U.S. 476 (1957). Frank’s concurrence was accompanied by a lengthy appendix which reflects strains of realism by discussing the history, psychology, philosophy, and literature of censorship. *Roth*, 237 F.2d at 805–27. Most notably he addresses “[h]ow censorship under the statute actually operates,” which includes how judges, prosecutors, jurors, and public opinion act “as censors.” *Id.* at 820–24. At the same time, the opinion includes conventional legal analysis, including of precedent—a process he decried in *LAW AND THE MODERN MIND*. FRANK, *supra* note 23, at 136–38 (calling an opinion an “essay” subject to multiple interpretations). Judge Frank thus employed a hybrid of conventional analysis and realism in his *Roth* concurrence.

which draw extensively on history, sociology, psychology, and economics¹¹²—attempting to translate “social knowledge into policy and action.”¹¹³ This effort has borne fruit in crafting law reform efforts, sometimes with success.¹¹⁴ Judges will also on occasion employ this approach. A good example is Stephen Breyer’s dissent in *District of Columbia v. Heller*, in which he offers a detailed description of social science data that addresses the impact of gun violence in urban communities.¹¹⁵

It would be preposterous to dismiss this wealth of work by lawyers, scholars, and judges who incorporate social science as failures. There are, however, inherent limitations faced by this approach. It is seductive for legal scholars to plug social science into legal issues. This offers a veneer of being interdisciplinary, with a risk of simplifying, if not outright distorting, the distinct goals and methodologies of social science research.¹¹⁶

A related issue is that social scientists, whether engaged in quantitative or qualitative work, do not claim to have reached definitive conclusions. Indeed, a fundamental element of research design is to qualify conclusions and identify fruitful areas for additional investigation.¹¹⁷ These caveats tend to be lost, however, when conclusions are deployed to support a given proposal or perspective, and particularly so when debates are politically fraught.¹¹⁸ James Boyd White has noted the simplicity of assuming that social science can “pass a plate with the truth on it over to the law.”¹¹⁹

[T]he world created by [social science] is not monolithic but full of variety and tension, not so much a set of established propositions as a set of questions and methods. The results of such work are normally not “findings” in any simple

¹¹² Athena D. Mutua, *The Rise, Development and Future Directions of Critical Race Theory and Related Scholarship*, 84 DENV. U. L. REV. 329, 339 (2006). See also *supra* text accompanying notes 84–89.

¹¹³ Mertz, *supra* note 80, at 20.

¹¹⁴ A famous example is Charles Lawrence’s “cultural meaning test” which he developed to uncover “unconscious racism.” Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317, 328 (1987). By employing psychology to uncover hidden biases, the article’s approach is very much in the realist mold.

¹¹⁵ *District of Columbia v. Heller*, 554 U.S. 570, 681–89 (2008).

¹¹⁶ For a nuanced discussion of these challenges, see Elizabeth Mertz & Katherine Barnes, *Combining Methods for a New Synthesis in Law and Empirical Research*, in 1 THE NEW LEGAL REALISM, *supra* note 17, at 180–81.

¹¹⁷ DELBERT C. MILLER & NEIL J. SALKIND, HANDBOOK OF RESEARCH DESIGN AND SOCIAL MEASUREMENT 14 (Delbert C. Miller & Neil J. Salkind eds., 6th ed. 2002) (describing recognition of the “[s]hortcomings of current research and possible solutions” as a formal element of research design).

¹¹⁸ A fundamental psychological tendency in this regard is “confirmation bias”—the process of viewing the world as confirming pre-existing views and discounting evidence that contradicts those views. Raymond S. Nickerson, *Confirmation Bias: A Ubiquitous Phenomenon in Many Guises*, 2 REV. GEN. PSYCHOL. 175, 175 (1998).

¹¹⁹ JAMES BOYD WHITE, JUSTICE AS TRANSLATION: AN ESSAY IN CULTURAL AND LEGAL CRITICISM 13 (1990).

sense but tentative conclusions in a series of tentative conclusions, elaborated topics for argument and discussion¹²⁰

Finally, “scientific” truths of the past have been shown to reflect and justify ideas that, we know now, were horrifyingly wrong. A famous example is the extensive pseudo-science of racial differences.¹²¹ Perhaps ironically, Holmes himself offers another example by enthusiastically embracing the scientific legitimacy of eugenics in his infamous opinion *Buck v. Bell*.¹²²

Efforts, then, to establish an affirmative program to redress the realist critique have either failed or, at best, have not fully succeeded.¹²³ Mediation offers a fresh way to consider this challenge, and it is to mediation that this Article now turns.

II. MEDIATION

While the roots of mediation have a long history,¹²⁴ mediation has experienced massive growth in the last forty years.¹²⁵ Mediation is practiced in an extraordinarily wide variety of disputes: divorce,¹²⁶ commercial disputes,¹²⁷ community disputes,¹²⁸ environmental disputes,¹²⁹ conflicts between or among

¹²⁰ *Id.*

¹²¹ See STEPHEN JAY GOULD, *THE MISMEASURE OF MAN* 52 (1996) (tracing the use of “scientific” evidence to demonstrate innate differences among “races”).

¹²² *Buck v. Bell*, 274 U.S. 200, 207 (1927) (declaring that “[t]hree generations of imbeciles are enough.”).

¹²³ See AMERICAN LEGAL REALISM, *supra* note 14, at 165 (characterizing the realist “affirmative program” as “desultory” and “less insightful” than their critique).

¹²⁴ For an interdisciplinary history of mediation, see Carrie Menkel-Meadow, *Mothers and Fathers of Invention: The Intellectual Founders of ADR*, 16 OHIO ST. J. ON DISP. RESOL. 1 (2000). For a discussion of mediation that stretches back centuries, see Valerie A. Sanchez, *Towards a History of ADR: The Dispute Processing Continuum in Anglo-Saxon England and Today*, 11 OHIO ST. J. ON DISP. RESOL. 1 (1996).

¹²⁵ Art Hinshaw, *Regulating Mediators*, 21 HARV. NEGOT. L. REV. 163, 167 (2016) (“[m]ediation has seen tremendous growth over the last thirty years, moving from an unconventional means of conflict resolution to a common step in the traditional litigation process.”).

¹²⁶ DIVORCE AND FAMILY MEDIATION: MODELS, TECHNIQUES, AND APPLICATIONS 4 (Jay Folberg et al. eds., 2004).

¹²⁷ See CATHY A. COSTANTINO & CHRISTINA SICKLES MERCHANT, *DESIGNING CONFLICT MANAGEMENT SYSTEMS: A GUIDE TO CREATING PRODUCTIVE AND HEALTHY ORGANIZATIONS* xiii (1996) (detailing the uses of ADR and mediation for conflicts within organizations).

¹²⁸ See *THE POSSIBILITY OF POPULAR JUSTICE: A CASE STUDY OF COMMUNITY MEDIATION IN THE UNITED STATES* 3–4 (Sally Engle Merry & Neal Milner eds., 1993); Sara Cobb & Janet Rifkin, *Neutrality as a Discursive Practice: The Construction and Transformation of Narratives in Community Mediation*, 11 STUD. L. POL. & SOC’Y 69, 71 (1991).

¹²⁹ Elaine Smith, *Danger-Inequality of Resources Present: Can the Environmental Mediation Process Provide an Effective Answer?*, 1996 J. DISP. RESOL. 379, 379–81; Lawrence Susskind, *Environmental Mediation and the Accountability Problem*, 6 VT. L. REV. 1, 1 (1981).

students at schools,¹³⁰ criminal matters (usually called “victim-offender mediation”),¹³¹ international disputes,¹³² and virtually any type of controversy, even those that could not or would be unlikely to be the subject of litigation.¹³³

The following examines several aspects of mediation that are of particular relevance to this Article.

A. *Mediation and “ADR”*

Mediation is one of the processes, along with arbitration and settlement, often grouped as “Alternative Dispute Resolution,” or ADR. Many proponents of mediation embrace the acronym, but not what the initials stand for. In their view, ADR should really stand for “Appropriate Dispute Resolution.”¹³⁴ This seemingly minor change represents an important idea: litigation is not the primary means of dispute resolution but rather one of many alternatives. This is sometimes referred to as “fitting the forum to the fuss.”¹³⁵ Litigation is appropriate for some “fusses”: mediation is for others.¹³⁶

¹³⁰ William S. Haft & Elaine R. Weiss, *Peer Mediation in Schools: Expectations and Evaluations*, 3 HARV. NEGOT. L. REV. 213, 213–15 (1998); Kelly Rozmus, *Peer Mediation Programs in Schools: Resolving Classroom Conflict but Raising Ethical Concerns?*, 26 J.L. & EDUC. 69, 69–71 (1997).

¹³¹ Mark William Bakker, Comment, *Repairing the Breach and Reconciling the Discordant: Mediation in the Criminal Justice System*, 72 N.C. L. REV. 1479, 1480 (1994); Jennifer Gerarda Brown, *The Use of Mediation to Resolve Criminal Cases: A Procedural Critique*, 43 EMORY L.J. 1247, 1248 (1994).

¹³² Judd Epstein, *The Use of Comparative Law in Commercial International Arbitration and Commercial Mediation*, 75 TUL. L. REV. 913, 914 (2001).

¹³³ For a review of the preceding and other applications of mediation, see KIMBERLEE K. KOVACH, *MEDIATION: PRINCIPLES AND PRACTICE* 339–57 (3d ed. 2004).

¹³⁴ Carrie Menkel-Meadow, *The Trouble with the Adversary System in a Postmodern, Multicultural World*, 38 WM. & MARY L. REV. 5, 37 (1996) (preferring “appropriate dispute resolution” to “alternative dispute resolution”).

¹³⁵ Frank E.A. Sander & Stephen B. Goldberg, *Fitting the Forum to the Fuss: A User-Friendly Guide to Selecting an ADR Procedure*, NEGOT. J., Jan. 1994, at 49, 67. Some courts have implemented this idea by establishing “multi-door courthouses.” The idea is that litigants may enter different “doors,” each of which represent different dispute resolution processes. See Larry Ray & Anne L. Clare, *The Multi-Door Courthouse Idea: Building the Courthouse of the Future . . . Today*, 1 OHIO ST. J. ON DISP. RESOL. 7, 9 (1985).

¹³⁶ Some commentators have argued that counseling clients about ADR should be mandatory. See, e.g., Robert F. Cochran, Jr., *ADR, the ABA, and Client Control: A Proposal that the Model Rules Require Lawyers to Present ADR Options to Clients*, 41 S. TEX. L. REV. 183, 187–88 (1999). The Model Rules of Professional Conduct have moved in this direction. MODEL CODE OF PROF'L RESPONSIBILITY r. 2.1 cmt. (AM. BAR ASS'N 2002) (“when a matter is likely to involve litigation, it may be necessary . . . to inform the client of forms of dispute resolution that might constitute reasonable alternatives to litigation.”). Some go further and hold that a failure to do so is legal malpractice. Robert F. Cochran, Jr., *Legal Representation and the Next Steps Toward Client Control: Attorney Malpractice for the Failure to Allow the Client to Control Negotiation and Pursue Alternatives to Litigation*, 47 WASH. & LEE L. REV. 819, 823–24 (1990).

B. *How Is Mediation Defined?*

There is no consensus about how mediators should mediate or even what mediation is.¹³⁷ This is not due to lack of effort. One effort is as follows:

[M]ediation is . . . the intervention in a negotiation or a conflict of an acceptable third party who has limited or no authoritative decision-making power, who assists the involved parties to voluntarily reach a mutually acceptable settlement of the issues in dispute.¹³⁸

Another definition is that mediation is a “process where the third party neutral, whether one person or more, acts as a facilitator to assist in resolving a dispute between two or more parties.”¹³⁹ State statutes offer variations on these themes.¹⁴⁰

One commonality among these efforts is that the mediator’s role is not as a decision-maker. Rather, a mediator “assists” the parties, although what such “assistance” means tends to be vague. It might range from actively encouraging parties to settle a matter to doing nothing except sit as participants speak to one another. This vagueness is largely inevitable because there is little consensus about the proper way to conduct mediation.¹⁴¹

This lack of consensus is usually analyzed through three widely recognized models of mediation: evaluative mediation, facilitative mediation, and transformative mediation.¹⁴² While all three have adherents, evaluative mediation tends to be the outlier at least in the mediation literature: full-fledged defenses of an evaluative approach as the right approach are rare.¹⁴³ As its name sug-

¹³⁷ Lorig Charkoudian et al., *Mediation by Any Other Name Would Smell as Sweet—or Would It? The Struggle to Define Mediation and Its Various Approaches*, 26 CONFLICT RES. Q. 293, 313 (2009) (noting that “there is no accepted agreement as to the definition of mediation . . .”).

¹³⁸ CHRISTOPHER W. MOORE, *THE MEDIATION PROCESS: PRACTICAL STRATEGIES FOR RESOLVING CONFLICT* 15 (3d ed. 2003).

¹³⁹ KOVACH, *supra* note 133, at 14.

¹⁴⁰ Virginia is a representative example: Mediation is “a process in which a neutral facilitates communication between the parties and, without deciding the issues or imposing a solution on the parties, enables them to understand and to reach a mutually agreeable resolution to their dispute.” VA. CODE ANN § 8.01-576.4 (West 2017).

¹⁴¹ Richard Birke, *Evaluation and Facilitation: Moving Past Either/Or*, 2000 J. DISP. RESOL. 309, 314 (2000); Kenneth M. Roberts, *Mediating the Evaluative-Facilitative Debate: Why Both Parties Are Wrong and a Proposal for Settlement*, 39 LOY. U. CHI. L.J. 187, 187 (2007).

¹⁴² The classic article that establishes different approaches is Leonard L. Riskin, *Understanding Mediators’ Orientations, Strategies, and Techniques: A Grid for the Perplexed*, 1 HARV. NEGOT. L. REV. 7 (1996). Riskin’s article was published prior to the rise of “transformative mediation,” but that form of mediation has joined evaluative and facilitative mediation as “the big three” models of mediation. Dorothy J. Della Noce, *Evaluative Mediation: In Search of Practice Competencies*, 27 CONFLICT RESOL. Q. 193, 194 (2009).

¹⁴³ Even an important defense of evaluative mediation notes that “[d]ifferent approaches to mediation practice have merit.” L. Randolph Lowry, *Evaluative Mediation*, in *DIVORCE AND FAMILY MEDIATION: MODELS, TECHNIQUES, AND APPLICATIONS*, *supra* note 126, at 73. Defenses of other forms of mediation are usually not so measured. *See generally* Lela P. Love,

gests, evaluative mediators evaluate the legal merits of a dispute,¹⁴⁴ and many argue that this represents litigation under the guise of mediation—a kind of false advertising.¹⁴⁵ In contrast, facilitative and transformative mediation have little in common with litigation: they proceed from fundamentally different premises, and these distinct premises have particular importance in analyzing the relationship between mediation and litigation.¹⁴⁶ This Article will thus focus on these two models.

Facilitative mediators believe that participants are experts on their own lives, and thus best equipped to define and resolve their own conflicts.¹⁴⁷ Such mediators seek to “shift attention from retrospective positions and accounts to prospective stories, effectively disconnecting the problem from its history, from its roots.”¹⁴⁸ Facilitative mediators rarely (or, depending on the mediator, ever) evaluate legal positions or present themselves as having particular authority or expertise to do so.¹⁴⁹

Transformative mediators defer to the participants not only as to how to conduct the mediation, but even as to what the goals of the mediation are. Robert A. Baruch Bush and Joseph A. Folger, the founders of transformative mediation,¹⁵⁰ describe their conception of transformative mediation as follows:

[M]ediation [has] a unique potential for . . . changing the mindset of people who are involved in the process . . . [P]arties are helped to transform their conflict in-

The Top Ten Reasons Why Mediators Should Not Evaluate, 24 FLA. ST. U. L. REV. 937 (1997).

¹⁴⁴ Lowry, *supra* note 143, at 72.

¹⁴⁵ 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) (“it is common for evaluative mediators to be lawyers or retired judges with considerable substantive legal expertise”).

¹⁴⁶ See Robert Rubinson, *Client Counseling, Mediation, and Alternative Narratives of Dispute Resolution*, 10 CLINICAL L. REV. 833, 871–72 (2004).

¹⁴⁷ Leonard Riskin, for example, notes that a facilitative mediator “assumes that the parties are intelligent, able to work with their counterparts, and capable of understanding their situations better than the mediator and, perhaps, better than their lawyers . . . [T]he facilitative mediator assumes that his principal mission is to clarify and to enhance communication between the parties in order to help them decide what to do.” Riskin, *supra* note 142, at 24.

¹⁴⁸ Cobb & Rifkin, *supra* note 128, at 71. This, however, is not an absolute rule: many facilitative mediators acknowledge that exploration of the past, and the corresponding catharsis that might arise from that exploration, can be an integral part of mediation. See, e.g., KOVACH, *supra* note 133, at 48–49; MOORE, *supra* note 138, at 162–69.

¹⁴⁹ The question regarding whether to assess parties’ choices about settlement is complicated and mediators—including self-identified facilitative mediators—differ on the question. For a discussion of the issue, see Ellen A. Waldman, *Identifying the Role of Social Norms in Mediation: A Multiple Model Approach*, 48 HASTINGS L.J. 703, 720–55 (1997), proposing “norm-generating,” “norm-educating,” and “norm-advocating” as mediators’ choices about assessing settlement options.

¹⁵⁰ The definitive discussion of transformative mediation is ROBERT A. BARUCH BUSH & JOSEPH P. FOLGER, *THE PROMISE OF MEDIATION: THE TRANSFORMATIVE APPROACH TO CONFLICT* 258 (rev. ed. 2005).

teraction—from destructive to constructive—and to experience the personal effects of such transformation.¹⁵¹

In performing their role, mediators adhere to one primary mandate: “follow the parties wherever they may decide to go next.”¹⁵²

Both facilitative and transformative mediation reject law as the sole means to resolve conflict. Lon Fuller, in a classic statement about the nature of mediation,¹⁵³ said that 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.”¹⁵⁴ Liberated from such “encumbrances,” mediation has a “capacity to reorient the parties toward each other, not by imposing rules on them, but by helping them to achieve a new and shared perception of their relationship, a perception that will redirect their attitudes and dispositions toward one another.”¹⁵⁵ Although law can and does sometimes play a role in mediation even in facilitative or transformative mediation,¹⁵⁶ law is not the primary basis or, in some cases, a basis at all for resolving conflict.¹⁵⁷

Mediation is also fundamentally different from litigation procedurally. With the exception of legal and contractual confidentiality protections,¹⁵⁸ mediation has little formal “process.” While there are norms and conventions about how to practice mediation,¹⁵⁹ these are more in the way of “best practices” (at least in the view of some) that are not formalized and are certainly not enforceable.

¹⁵¹ *Id.* at 22–23.

¹⁵² *Id.* at 184.

¹⁵³ Menkel-Meadow, *supra* note 124, at 15–16.

¹⁵⁴ Lon L. Fuller, *Mediation—Its Forms and Functions*, 44 S. CAL. L. REV. 305, 325–26 (1971).

¹⁵⁵ *Id.*

¹⁵⁶ Sometimes this idea is expressed as the presence of the “shadow of the law”—a phrase that originates from Robert H. Mnookin & Lewis Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 YALE L.J. 950, 968, 997 (1979). Unsurprisingly, the presence of lawyers enhances the possibility that law plays an important role in mediation. Craig A. McEwan, et al., *Bring in the Lawyers: Challenging the Dominant Approaches to Ensuring Fairness in Divorce Mediation*, 79 MINN. L. REV. 1317, 1376, 1391–92 (1995).

¹⁵⁷ This is a crucial distinction between facilitative and transformative mediation as opposed to evaluative mediation. Most facilitative and all transformative mediators do not recognize law as controlling or even relevant unless the parties deem it so, while evaluative mediation does the opposite. See *supra* text accompanying notes 142–157. Indeed, there is an accepted practice in facilitative mediation to avoid framing conflict in litigation terms—such as “complaint,” “answer,” “position,” “custody and visitation”—as a means to move parties away from the litigation narrative. See, e.g., Rubinson, *supra* note 146, at 871–72.

¹⁵⁸ Lawrence R. Freedman & Michael L. Prigoff, *Confidentiality in Mediation: The Need for Protection*, 2 OHIO ST. J. ON DISP. RESOL. 37, 37–45 (1986).

¹⁵⁹ A good example is a “private session or caucus” in which the mediator meets with each mediation participant privately and confidentially. KIMBERLEE K. KOVACH, *MEDIATION: PRINCIPLES AND PRACTICE* 161 (3d ed. 2004).

A good example of the lack of formal process in mediation relates to the concept of “evidence.” A core principle underlying litigation is that facts must be “relevant.”¹⁶⁰ Relevance is defined as whether “the fact is of consequence in determining the action.”¹⁶¹ A judge decides what is relevant, and thereby what is admissible or not. Holmes offers a vivid illustration. Litigation “retain[s] only the facts of legal import,” and thus “a lawyer does not mention that his client wore a white hat when he made a contract” even if his client wants him to do so.¹⁶²

Mediation has no such limitations. The mediator has no power to exclude “evidence” on any basis, let alone relevance.¹⁶³ Perhaps discussing the white hat is, for some reason, important to one or both parties. There is no “rule” to “exclude” it.¹⁶⁴ Moreover, an exchange of perspective[s]—hardly the stuff of admissible facts in litigation—might be crucial.¹⁶⁵ Anything could be “relevant” in mediation if the participants deem it so.¹⁶⁶

Another important dimension of mediation is that it is forward-looking.¹⁶⁷ This aspect of mediation enables participants to craft solutions that will fulfill their interests in the future.¹⁶⁸ This upends the litigation norm, which primarily focuses on “findings of fact”—a historical reconstruction that is required to assess what remedy or penalty, if any, is appropriate.¹⁶⁹

¹⁶⁰ See FED. R. CIV. PRO. 26(b)(1) (“[p]arties may obtain discovery regarding any nonprivileged matter that is relevant to any party’s claim or defense and proportional to the needs of the case . . .”).

¹⁶¹ FED. R. EVID. 401(b).

¹⁶² Holmes, *supra* note 20, at 458.

¹⁶³ JAY FOLBERG & ALISON TAYLOR, *MEDIATION: A COMPREHENSIVE GUIDE TO RESOLVING CONFLICTS WITHOUT LITIGATION* 10 (1984) (noting that participants in mediation can discuss “whatever . . . they deem relevant regardless of rules of evidence . . .”); Carrie Menkel-Meadow, *Remembrance of Things Past? The Relationship of Past to Future in Pursuing Justice in Mediation*, 5 CARDOZO J. CONFLICT RESOL. 97, 114 (2004) (mediation offers “open dialogue unrestricted by rigid rules of evidence . . .”).

¹⁶⁴ Even putting the issue in terms of “exclusion” misconstrues mediation because the mediator does not issue “orders.” Menkel-Meadow, *supra* note 163, at 113.

¹⁶⁵ KOVACH, *supra* note 133, at 140 (mediation enables parties to “begin to acknowledge another view of the situation”); Alan C. Tidwell, *Not Effective Communication but Effective Persuasion*, 12 *MEDIATION Q.* 3, 5 (1994) (“[t]he challenge for mediation is to somehow lead people to a situation where they can, at the very least, allow two contending perspectives to coexist”).

¹⁶⁶ FOLBERG & TAYLOR, *supra* note 163, at 10 (mediation involves “a comprehensive mix of” [participants’] “needs, interests, and whatever else” they choose to discuss).

¹⁶⁷ Cobb & Rifkin, *supra* note 128, at 71 (mediation focuses “not in the past but in the present and the future”).

¹⁶⁸ Jana B. Singer, *Bargaining in the Shadow of the Best-Interests Standard: The Close Connection between Substance and Process in Resolving Divorce-Related Parenting Disputes*, 77 *LAW & CONTEMP. PROBS.* 177, 181 (mediation is “future-oriented--designed to shift attention away from past acts and grievances and toward the future-oriented predictions”).

¹⁶⁹ There are seeming exceptions, such as calculating future damages in civil cases, but these efforts remain contingent on whether prior events warrant engaging in the calculation at all.

In the end, then, mediation fundamentally diverges from adjudication in form and substance.

III. MEDIATION AS REALISM

Mediation is, in many respects, realism in action. This Section describes how and why.

A. *F.S.C. Northrop and Realism and Mediation*

There has been little consideration of the connections between mediation and realism. A rare exception is Carrie Menkel-Meadow—a central figure in mediation scholarship—who has identified this connection, albeit without undertaking a sustained analysis of it.¹⁷⁰ Another example is Lon L. Fuller, who, as discussed above, described mediation in non-formalist terms although he did not explicitly cite realism in doing so.¹⁷¹ A few others have made the connections implicitly, although, again, with no focused analysis.¹⁷²

An exception is a little-known article entitled *The Mediation Approval Theory of Law in American Legal Realism* written by F.S.C. Northrop in 1958.¹⁷³ Northrop, a philosopher by trade,¹⁷⁴ began his teaching at Yale University during the heyday of original realism, although he has not been identified

¹⁷⁰ Consider the following: “I have often thought of interest-based negotiation and mediation as a legacy of legal realism. They are adaptive expressions of the interaction of the ‘law on the books’ with the needs and interests of real people conducting transactions or having disputes.” Carrie Menkel-Meadow, *Whose Dispute Is It Anyway? A Philosophical and Democratic Defense of Settlement (In Some Cases)*, 83 GEO. L.J. 2663, 2677 n.69 (1995). For other examples, see Carrie Menkel-Meadow, *Ethics in Alternative Dispute Resolution: New Issues, No Answers from the Adversary Conception of Lawyers’ Responsibilities*, 38 S. TEX. L. REV. 407, 416 (1997) (“formalism spawned realism, the rigidity of rules and the ‘limited remedial imagination of courts,’ [and] “gave (re)birth to the more flexible and hybrid forms of mediation”); Carrie Menkel-Meadow, *From Legal Disputes to Conflict Resolution and Human Problem Solving: Legal Dispute Resolution in a Multidisciplinary Context*, 54 J. LEGAL EDUC. 7, 12 (2004) (the “focus on ‘disputing processes’ de-centers—but does not eliminate—law as the primary variable explaining how disputes are resolved . . . was a natural derivative of the school of legal realism . . .”).

¹⁷¹ Fuller, *supra* note 154.

¹⁷² See Michael Albertstein, *The Jurisprudence of Mediation Between Formalism, Feminism and Identity Conversations*, 11 CARDOZO J. CONFLICT RESOL. 1, 19 (2009) (referring to “mediation as a practical discourse, which offers an alternative to mainstream jurisprudential thinking.”).

¹⁷³ F. S. C. Northrop, *The Mediation Approval Theory of Law in American Legal Realism*, 44 VA. L. REV. 347, 348 (1958). It appears that the article has only been cited 19 times in the 60 years since its publication, and in 18 of these 19 times the article is listed in a footnote without further comment. The one exception is in a single, non-substantive sentence in a book review from 1966. Jerome Alan Cohen, Book Review, 80 HARV. L. REV. 489, 492 (1966).

¹⁷⁴ KALMAN, *supra* note 25, at 149. Northrop was particularly interested in comparing eastern and western philosophy. See F.S.C. NORTHROP, *THE MEETING OF EAST AND WEST: AN INQUIRY CONCERNING WORLD UNDERSTANDING* (3d prtg. 1964).

as a realist.¹⁷⁵ He appears, apart from *Mediational Approval* article, to have had no other connection to mediation. The timing of the article is unusual: it was written after the flowering of realism yet before the full emergence of both new legal realism and mediation. Nevertheless, his article represents the primary—if not only—sustained effort to examine interconnections between mediation and realism.

Northrop identifies two ways to “arrive at a theory of law.”¹⁷⁶ One is through “codification”—essentially a type of formalism.¹⁷⁷ The other is through what he calls “the mediational approval theory of law”—a process involving “recourse to . . . the disputants themselves.”¹⁷⁸ This “approval theory” involves “bringing the considerations behind each party’s psychological judgment to the attention of the other party”¹⁷⁹—something he vividly called “unique-for-meness.”¹⁸⁰ He associates this process as realist.¹⁸¹

Northrop saw his two “theories of law” as appropriate for different types of dispute. Codification is appropriate when issues of “social good” are at stake, such as those involving “all the people of the nation.”¹⁸² In contrast, mediation is for matters where individual needs are at issue.¹⁸³ In such cases, “[b]y restricting the criterion of justice to the local disputants, treating each case as particular and unique, justice is done to the diversity and relativity of the people’s approvals and disapprovals.”¹⁸⁴

Northrop was plainly not a “pure realist” in the mold of Jerome Frank or even Holmes: he did not deny the legitimacy of “codification” or view logic as judicial window-dressing.¹⁸⁵ He did, however, view his “mediational theory”—extra-legal conflict resolution by disputants focusing on their own needs and, more generally, on the “particular”¹⁸⁶—as realist. Northrop thus develops an important insight. “Mediational theory” solves a basic limitation of formalism: it cannot take into account the specifics—the “particularity”—of disputes.

¹⁷⁵ Northrop does not appear in most discussions of realism except in passing. See KALMAN, *supra* note 25, at 149 (mentioning Northrop as a faculty member at Yale without further discussion).

¹⁷⁶ Northrop, *supra* note 173, at 348.

¹⁷⁷ *Id.* at 350.

¹⁷⁸ *Id.* at 348–49.

¹⁷⁹ *Id.* at 349.

¹⁸⁰ *Id.* at 356.

¹⁸¹ *Id.*

¹⁸² *Id.* at 363.

¹⁸³ *Id.* at 360.

¹⁸⁴ *Id.* at 351.

¹⁸⁵ For the view of Frank and Holmes on logic as illusory, see *supra* text accompanying notes 27–28, 48–52.

¹⁸⁶ Northrop, *supra* note 173, at 356.

B. *The Mediation Solution*

Northrop's prescient work is a good jumping off point to examine what happens when the realist critique is viewed through the profoundly different perspective of mediation.

1. *Judgeless Dispute Resolution*

As discussed above, realists repeatedly asserted that judges inhabit a place defined by distinct views and life experiences.¹⁸⁷ A judge assembles legal authority to support a decision already arrived at.¹⁸⁸ "Political, economic, and moral prejudices"¹⁸⁹—what Holmes called "inarticulate and unconscious judgment"¹⁹⁰—are difficult if not impossible to eradicate. New legal realism and related movements similarly recognize this challenge.¹⁹¹

Mediation provides a remarkably simple answer to this seemingly intractable problem. Instead of grappling with how judges can or should reach decisions, mediation moves the locus of decision-making from judges to the participants themselves. This is not to say that psychological perceptions are eliminated: cognitive shortcuts—called "heuristics"—influence everyone's thinking, including participants.¹⁹² Nevertheless, parties know infinitely more about themselves than anyone else ever could, including judges.

2. *Individualizing Justice*

According to the realists, formalism's "dry and abstract logic"¹⁹³ leads to "dehumanized justice."¹⁹⁴ In its place, realists called for the "individualization of law"¹⁹⁵ through a focus on social reality and particularity.¹⁹⁶ New Legal realists take this insight further: their work tends to be more contextual rather than linear and seeks to incorporate "law" into "extralegal factors" in light of a complex set of interactions involving "legal actors" and "institutional norms and pressures."¹⁹⁷

¹⁸⁷ See *supra* text accompanying notes 170–88.

¹⁸⁸ See *supra* text accompanying notes 27–28, 39–42.

¹⁸⁹ FRANK, *supra* note 23, at 117.

¹⁹⁰ Holmes, *supra* note 20, at 465.

¹⁹¹ See, e.g., Lawrence, *supra* note 114, at 321 (noting how "racism infects almost everyone" and "is influenced by unconscious racial motivation").

¹⁹² For two leading books on the subject, see RICHARD E. NISBETT & LEE ROSS, HUMAN INFERENCE: STRATEGIES AND SHORTCOMINGS OF SOCIAL JUDGMENT (James J. Jenkins et al. eds., 1980); JUDGMENT UNDER UNCERTAINTY: HEURISTICS AND BIASES (Daniel Kahneman et al. eds., 1982).

¹⁹³ FRANK, *supra* note 23, at 192.

¹⁹⁴ *Id.* at 191.

¹⁹⁵ *Id.* at 183.

¹⁹⁶ Mensch, *supra* note 39, at 33–35.

¹⁹⁷ Michael McCann, *Preface*, in 1 THE NEW LEGAL REALISM, *supra* note 17, at xv.

Mediation meets this challenge in a different way. It is purely individualized because individuals control the process.¹⁹⁸ By eschewing formalist “prescriptions laid down in advance,”¹⁹⁹ mediation focuses on the centrality of the extra-legal—the “human world.”²⁰⁰ Mediation is thus the opposite of “dry and abstract”: it is concrete, particular, and specific, and thereby realist.

3. *Particularizing Remedies*

Another aspect of “dehumanizing justice”—albeit one that the realists only hinted at—relates to how courts award money damages and little else.²⁰¹ Money serves as a proxy for all damages. It is, however, a poor, if not irrelevant, proxy at best for many litigants. One study about medical malpractice found that money was the primary aim of only 18 percent of claimants.²⁰² In contrast, over 50 percent saw their aims as non-monetary, such as admission of fault and prevention of future errors.²⁰³ The analysis of these results has a distinct realist cast: Lay disputants want disparate things than what the justice system can deliver. What they desire is inherently different from the paradigm of legal discourse and decision-making that attorneys and judges are “socialized into in law school,” which dominates discussions by legal actors.²⁰⁴

In contrast, the individualized process of mediation extends to individualized remedies as well. Participants can resolve issues through any number of means that take into account the specifics of a dispute and the disputants themselves.²⁰⁵ These might include apologies, new business arrangements, specifying future conduct, and whatever else participants choose to include.²⁰⁶ Transformative mediation goes further and eliminates even a residue of formalism, with its goal of transforming mindsets and social interactions without driving towards “settlement.”²⁰⁷

¹⁹⁸ FRANK, *supra* note 23.

¹⁹⁹ Fuller, *supra* note 154, at 326.

²⁰⁰ TAMARA RELIS, PERCEPTIONS IN LITIGATION AND MEDIATION: LAWYERS, DEFENDANTS, PLAINTIFFS, AND GENDERED PARTIES 17 (2009).

²⁰¹ *Id.* at 42–43.

²⁰² *Id.* at 43.

²⁰³ *Id.* at 42–43. The study also found that the listing of claimants’ goals was not driven by cultural disapproval of identifying money as a goal.

²⁰⁴ *Id.* See also Tom R. Tyler, *Citizen Discontent with Legal Procedures: A Social Science Perspective on Civil Procedure Reform*, 45 AM. J. COMP. L. 871, 894 (1997).

²⁰⁵ Robert A. Creo, *Mediation 2004: The Art and the Artist*, 108 PENN. ST. L. REV. 1017, 1021 (2004) (“[m]any ‘equitable’ and other non-economic remedies are given a voice in mediation that has been lost in the civil justice system.”).

²⁰⁶ Kenneth R. Feinberg, *Mediation—A Preferred Method of Dispute Resolution*, 16 PEPP. L. REV. S5, S6 (1989); Donna L. Pavlick, *Apology and Mediation: The Horse and Carriage of the Twenty-First Century*, 18 OHIO ST. J. ON DISP. RESOL. 829 (2003); Rennard Strickland, *Legal Education in the Twenty-First Century*, 80 OR. L. REV. 1449, 1456 (2001); See *supra* text accompanying notes 165–68.

²⁰⁷ BUSH & FOLGER, *supra* note 150, at 217.

4. *It's Complicated*

A strain of realism sees formalism as a mechanism for simplification.²⁰⁸ This is perhaps ironic, given that conventionally it is formalistic legal analysis—the “thinking like a lawyer”—that appears arcane and thereby requires attendance at law school to master.²⁰⁹

Mediation, once again, makes a sharp shift from adjudication’s view of expertise. In true realist fashion, mediation jettisons the simplicity of formalism for the complications of real life. In mediation, however, it is not judges who are tasked with understanding this complexity. Rather, it is the participants who are “experts”: they and they alone inhabit their own world, with all of its history, experience, and understandings. Such a world is unknowable to anyone but participants themselves.²¹⁰ The realist challenge of how to encourage judges to recognize and grapple with the complexity of reality is thus met because mediation employs experts whose expertise is beyond reproach: the parties themselves.

5. *The Man Behind the Curtain*

The realist critique raises another knotty question: To what extent should the public know that uncertainty and unconscious judgment are the real bases for decision-making? The question is a difficult one. On the one hand, Holmes and his successors argued repeatedly and strenuously the importance of judges recognizing the real, non-logical basis for their decisions.²¹¹ On the other hand, doing so too transparently risks compromising the legitimacy of law before the public—what Frank characterized as whether there is “value” in “lay ignorance.”²¹² The issue then is whether maintaining the illusion of certainty before the public is a helpful fiction because it preserves confidence in law. Not many realists apart from Frank confronted the issue, perhaps because any answer is so troubling.

With mediation, however, the question is not worth asking. It is not the courts that make decisions, so there is nothing to be transparent about. Individuals have legitimacy in reaching their own agreements about their own conflicts. Indeed, mediation empowers participants, thereby rendering the legitimacy of courts a moot point.

²⁰⁸ FRANK, *supra* note 23, at 245–46 (alluding to legal “over-simplification”).

²⁰⁹ Frank, *supra* note 36, at 913 (arguing that “[t]he trouble with much law school teaching is that, confining its attention to a study of upper court opinions, it is hopelessly simplified”).

²¹⁰ See *supra* text accompanying notes 149–51.

²¹¹ See *supra* text accompanying notes 28, 48–52.

²¹² See FRANK, *supra* note 23, at 245 (discussing the argument that “[t]he laity must not peer behind the scenes” at how decisions are actually reached).

6. *The “Certainty” Critique*

Realists repeatedly decried the delusion of judges who believe that rules, when rightly applied, lead to results that are correct.²¹³ In Holmes’s terms, certainty is an illusion, and judges do neither themselves nor anyone else any favors by pretending that it is not.²¹⁴

Mediation accepts the realist critique of certainty and draws upon it as a means to demonstrate its own value. This is done through a concept called the “best alternative to a negotiated agreement”—usually known by its acronym “BATNA.”²¹⁵ A BATNA is the best option available should the parties fail to reach a negotiated agreement.²¹⁶ The best option in such a situation would typically be litigation. This does not mean achieving hoped-for results in litigation, such as “winning” or being found “not guilty.” Rather, it is *pursuing* litigation and everything that accompanies it: delays, expense, and, most importantly for purposes of this Article, uncertainty driven by whatever invisible factors motivate a judge to reach a particular decision. While no one will know how a mediation will unfold or whether it will succeed, a result reached by the parties themselves is, by definition, certain.²¹⁷

Thus, the idea of BATNA accepts the realist notion that the results of litigation are uncertain. However, by offering certainty through mediated agreements, it transforms the realist challenge into a way to conceptualize the benefits of the mediation alternative.

7. *The Interdisciplinary Impulse*

Realists have long looked to other disciplines as a means to enrich their critique.²¹⁸ “New legal realists” also see empiricism as integral to their work.²¹⁹

²¹³ See *supra* text accompanying notes 28, 39–42.

²¹⁴ FRANK, *supra* note 23, at 94. Frank’s uncertainty critique extended to jury decisions as well. *Id.* at 186 (jury verdicts characterized by “utter unpredictability”).

²¹⁵ Roger Fisher and William Ury first developed this idea in ROGER FISHER & WILLIAM URY, *GETTING TO YES: NEGOTIATING AGREEMENT WITHOUT GIVING IN* (3d ed. 2011).

²¹⁶ *Id.* at 104.

²¹⁷ Lawrence Susskind & Gerard McMahon, *The Theory and Practice of Negotiated Rule-making*, 3 YALE J. ON REG. 133, 153 (1985) (noting how the “uncertainty” of assessing BATNA is an incentive for settlement); Julie Macfarlane, *Why Do People Settle?*, 46 MCGILL L.J. 663, 705–06 (2001) (BATNA includes personal/commercial uncertainty in litigation); Scott R. Peppet, *Updating Our Understanding of the Role of Lawyers: Lessons from MasterCard*, 12 HARV. NEGOT. L. REV. 175, 186 (2007) (noting “advice from negotiation and alternative dispute resolution scholars urging parties to settle earlier by reducing uncertainty”). The uncertainty of BATNA has also arisen in a variety of specialized mediation contexts. Janet C. Neuman, *Run, River, Run: Mediation of a Water-Rights Dispute Keeps Fish and Farmers Happy—For a Time*, 67 U. COLO. L. REV. 259, 318 (1996) (“the uncertainty associated with how a court might resolve . . . rights . . . left the parties somewhat unsure of their BATNAs and gave impetus to the desire for a negotiated solution.”).

²¹⁸ Cohen, *supra* note 32, at 841–42.

²¹⁹ See Suchman & Mertz, *supra* note 82.

Indeed, many have drawn upon both qualitative and quantitative studies to illuminate their perspectives and pursue their goals.²²⁰

The relationship between mediation and other disciplines is different, and for a simple reason: mediation is itself composed of different disciplines. Psychology, anthropology, sociology, and law have all played a role in the origins, development, and practice of mediation.²²¹ Leading mediation journals arise from both the world of law and from social science.²²² Mediators themselves are from different professions, especially law and mental health practitioners.²²³ Unlike realists, then, there is no need to issue a call for mediation to be more interdisciplinary. It is already.

IV. LIMITATIONS: INCOME INEQUALITY AND ACCESS TO JUSTICE

This Article has thus far examined how mediation represents realism in action, and how, as a result, it meets challenges of the realist critique. Mediation does not provide all of the answers, however.²²⁴ Perhaps the preeminent question it does not answer relates to social inequality. This section provides an overview of the twin struggles of realism and mediation to come to grips with and gain traction in solving the intersection of poverty and dispute resolution.

A. *Social Justice and Realism*

The experience of those in poverty with the judicial system—often referred to as “access to justice”—has little or nothing in common with how law school teaches civil and criminal procedure.²²⁵ The ways in which the judicial system is stacked against low-income litigants are too numerous to mention and are beyond the scope of this Article. They manifest at the level of individual adjudication²²⁶ and in the jurisprudence of the Supreme Court.²²⁷ One core aspect of

²²⁰ *Id.* at 563.

²²¹ Menkel-Meadow, *supra* note 170, at 12.

²²² ²²² See *supra* text accompanying note 7.

²²³ Elizabeth E. Bader, *The Psychology and Neurobiology of Mediation*, 17 CARDOZO J. CONFLICT RESOL. 363 (2016); David C. Hesser & Elizabeth Jarrell Craig, *Team Mediation: An Interdisciplinary Model Balancing Mediation in the “Matrix”*, 7 PEPP. DISP. RESOL. L.J. 113, 116 (2007) (“Mediators are generally either attorneys or mental health professionals.”). How psychology is embedded in mediation remains a particularly lively topic. *Id.* at 124 (addressing “the infusion of mental health professionals into the mediation process”); Daniel A. Hoffman & Richard N. Wolman, *The Psychology of Mediation*, 14 CARDOZO J. CONFLICT RESOL. 759 (2013) (exploring the application of “psychological phenomena” to mediation).

²²⁴ Some mediation proponents approach hyperbole in their advocacy of mediation. See, e.g., Love, *supra* note 143, at 945 (mediation enables humans to “continue to survive and evolve as a species”). BUSH & FOLGER, *supra* note 150, at 258 (mediation is “an essential positive force in constituting human identity and shared meaning”).

²²⁵ The literature on the issue is voluminous. For an excellent overview, see DEBORAH L. RHODE, ACCESS TO JUSTICE (2004).

²²⁶ The most famous treatment of this issue, and one that has been and continues to be influential, is Marc Galanter, *Why the “Haves” Come Out Ahead: Speculations on the Limits of*

the subordination of low-income litigants plays out when they face adversaries who command substantial economic resources. Examples include a tenant facing a landlord,²²⁸ a debtor facing a creditor,²²⁹ a homeowner facing a lender,²³⁰ or, more generally, a pro se litigant facing a party represented by counsel.²³¹ Courts of “mass justice” fail to offer resources that can vindicate the procedural and substantive rights of those in poverty in such situations.²³² In the criminal arena, this leads to defendants being coerced into accepting pleas without a meaningful right to trial by jury.²³³

To a certain extent, realism does appear to, or at least should, address issues of poverty given its “on the ground” focus.²³⁴ Nevertheless, realism tends to examine adjudication—its uncertainty and illusions—by describing cases free of specific characteristics, such as generic cases of breach of contract.²³⁵ The impact of the legal system on those in poverty was thus rarely, if ever, addressed in the work of the original realists.

More recent iterations of realism do address poverty head on, although not always in explicitly realist terms. There is a large literature on problems of access to justice, particularly courts of mass justice in which an overwhelming

Legal Change, 9 L. & SOC’Y REV. 95 (1974). A dimension of Galanter’s critique is that the structure of the legal system is such that “there are . . . more rights and rules ‘on the books’ than can be vindicated or enforced.” *Id.* at 122.

²²⁷ Michele Gilman, *A Court for the One Percent: How the Supreme Court Contributes to Economic Inequality*, 2014 UTAH L. REV. 389.

²²⁸ Mark H. Lazerson, *In the Halls of Justice, the Only Justice is in the Halls*, in 1 THE POLITICS OF INFORMAL JUSTICE 11, 119–21 (Richard L. Abel ed., 1982); Carroll Seron et al., *The Impact of Legal Counsel on Outcomes for Poor Tenants in New York City’s Housing Court: Results of a Randomized Experiment*, 35 LAW & SOC’Y REV. 419, 421 (2001).

²²⁹ Peter A. Holland, *Junk Justice: A Statistical Analysis of 4,400 Lawsuits Filed by Debt Buyers*, 26 LOY. CONSUMER L. REV. 179 (2014).

²³⁰ Many scholars have examined how “power differentials” can render mediation inappropriate or dangerous. See, e.g., Rebecca Hollander-Blumoff & Tom R. Tyler, *Procedural Justice and the Rule of Law: Fostering Legitimacy in Alternative Dispute Resolution*, 2011 J. DISP. RESOL. 1, 15–16 (noting that power differentials have the “potential for party coercion”).

²³¹ Michael M. Pettersen et al., *Representation Disparities and Impartiality: An Empirical Analysis of Party Perception of Fear, Preparation, and Satisfaction in Divorce Mediation When Only One Party Has Counsel*, 48 FAM. CT. REV. 663 (2010); Richard W. Painter, *Pro Se Litigation in Times of Financial Hardship—A Legal Crisis and Its Solutions*, 45 FAM. L. Q. 45, 47 (2011).

²³² See Robert Rubinson, *A Theory of Access to Justice*, 29 J. LEGAL PROF. 89 (2005) (describing how available judicial resources produce courts of mass justice, which fail to preserve the rights of low-income litigants).

²³³ Alexandra Natapoff, *Misdemeanors*, 85 S. CAL. L. REV. 1313, 1343 (2012) (referring to criminal proceedings as “meet ‘em, plead ‘em,” “cattle herding,” and “McJustice”); Michael M. O’Hear, *Plea Bargaining and Procedural Justice*, 42 GA. L. REV. 407, 409 (2008) (“ninety-five percent of convictions are obtained by way of a guilty plea”).

²³⁴ See *supra* text accompanying notes 53–55.

²³⁵ An example is Karl Llewellyn’s illustration of the uncertainty of judicial trial-level decisions quoted at *supra* note 16, at 1231–32.

number of pro se parties litigate.²³⁶ Some that draw upon elements of realism, particularly the law and society movement, also explore this territory.²³⁷ Other critical theories, such as Critical Race Theory and Feminist Jurisprudence, at times address poverty through their exploration of how law oppresses disempowered groups.²³⁸

This literature has gone a long way to illuminate the ways law facilitates and instantiates the marginalization of the poor. In the end, though, these issues remain intractable, hence the continued vitality of work that seeks to ameliorate them.

B. *Mediation and Social Justice*

Mediation literature suffers from similar shortcomings, particularly issues arising in “court-annexed” mediation in which most low-income mediate. All fifty states have some form of court-annexed mediation.²³⁹ The professed goals of these programs are often admirable, particularly promotion of self-determination for litigants and speedy adjudication of claims.²⁴⁰ Not all intentions, however, are so party-centered: a core goal, whether stated explicitly or not, is to manage overwhelmed dockets in light of resource limitations.²⁴¹ This sometimes leads to quick-fire mediation, with little or no time to engage in the

²³⁶ Russell Engler, *And Justice for All—Including the Unrepresented Poor: Revisiting the Roles of the Judges, Mediators, and Clerks*, 67 FORDHAM L. REV. 1987, 1987 (1999).

²³⁷ See generally Frank Munger, *Immanence and Identity: Understanding Poverty through Law and Society Research*, 32 LAW & SOC’Y REV. 931(1998).

²³⁸ An influential example is Charles Lawrence’s proposal for a “cultural meaning test” as a means to uncover “unconscious racism,” thereby enabling plaintiffs to prove a violation of the Equal Protection Clause without a showing of specific intent. Lawrence, *supra* note 114, at 355–56. For a discussion of the impact of the feminist critique on law, see *The Feminist Persuasion: How Gender-Based Scholarship Informs Law and Law Teaching*, 15 REV. L. & WOMEN’S STUD. 3 (2005). This literature has been criticized as ignoring socioeconomic status as a category that cuts across other social categories. See Wendy A. Bach, *The Hyperregulatory State: Women, Race, Poverty, and Support*, 25 YALE J.L. & FEMINISM 317 (2014); Beth Caldwell, *Addressing Intersectionality in the Lives of Women in Poverty: Incorporating Core Components of a Social Work Program into Legal Education*, 20 J. GENDER SOC. POL’Y & L. 823 (2012).

²³⁹ See Alternative Dispute Resolution Act of 1998, 28 U.S.C. §§ 651–658 (1998); *Court ADR Across the U.S.*, RSI’S COURT ADR RESOURCE CENTER, <http://courtdr.org/court-adr-across-the-us/> [<https://perma.cc/24CP-36CR>] (last visited Sept. 28, 2017); see also Deborah R. Hensler, *Our Court, Ourselves: How the Alternative Dispute Resolution Movement Is Reshaping Our Legal System*, 108 PENN ST. L. REV. 165, 185–88 (2003).

²⁴⁰ See Hensler, *supra* note 239, at 185.

²⁴¹ See Will Pryor, *What’s Wrong with Mediation These Days, and How Can We Fix It?*, 32 ALTERNATIVES TO HIGH COST LITIG. 69, 71 (2014) (courts can “become addicted to mediation referral as a means of docket control”); *How to Prevent Mediation from Running Aground—Also: Busting Myths About What Arbitrators Do*, 23 ALTERNATIVES TO HIGH COST LITIG. 3, 7 (2005) (quoting a senior settlement attorney as saying that “court mediation programs exist for docket control purposes”); Yishai Boyarin, *Court-Connected ADR—A Time of Crisis, a Time of Change*, 95 MARQUETTE L. REV. 993, 1005 (2012).

open process that is a defining characteristic of mediation.²⁴² Moreover, most of these litigants do not have the means to retain counsel, thus creating further risk when they mediate.²⁴³

In addition, power differentials are a core concern for many mediators. Such differentials in terms of socioeconomic status is a particular issue,²⁴⁴ although other situations also bring power differentials into play, such as ethnicity²⁴⁵ and gender²⁴⁶ and when one participant is a victim of domestic violence.²⁴⁷ The presence of power differentials subvert self-determination and autonomy.²⁴⁸ Autonomy assumes both parties are able to work together, and without an even playing field, one party can coerce, or at least influence, a particular result.²⁴⁹ Autonomy thus becomes grand in the abstract but troubling in practice.

Perhaps ironically, one answer to this problem is to stress the virtues of a traditional adjudicative process. One of the strengths of mediation—its flexibil-

²⁴² Peter Salem, *The Emergence of Triage in Family Court Services: The Beginning of the End for Mandatory Mediation?*, 47 FAM. CT. REV. 371, 378 (2009) (quoting a court-connected mediator that judicial “expectations” are to deliver settlements in a “fraction of the time required to effectively do so”).

²⁴³ Trina Drake Zimmerman, *Representation in ADR and Access to Justice for Legal Services Clients*, 10 GEO. J. ON POVERTY L. & POL’Y 181, 186 (2003). Virginia, for example, requires that all mediators communicate that “[e]ach party . . . has the opportunity to consult with independent legal counsel at any time and is encouraged to do so.” VA CODE ANN. § 8.01-576.12 (West 2002). Despite sounding reasonable, the advice is a sham if a party cannot retain counsel because they have no means to do so. For discussions about the value of representation in mediation, 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); McEwan et al., *supra* note 156, at 1319.

²⁴⁴ See Lydia Nussbaum, *ADR’S Place in Foreclosure: Remediating the Flaws of a Securitized Housing Market*, 34 CARDOZO L. REV. 1889, 1938–41 (2013) (discussing issues facing pro se homeowners in foreclosure proceedings).

²⁴⁵ Richard Delgado et al., *Fairness and Formality: Minimizing the Risk of Prejudice in Alternative Dispute Resolution*, 1985 WIS. L. REV. 1359, 1378–84.

²⁴⁶ Trina Grillo, *The Mediation Alternative: Process Dangers for Women*, 100 YALE L.J. 1545, 1557–58 (1991); Penelope Eileen Bryan, *Reclaiming Professionalism: The Lawyer’s Role in Divorce Mediation*, 28 FAM. L. Q. 177 (1994). *But see* Carrie Menkel-Meadow, *Portia in a Different Voice: Speculations on a Women’s Lawyering Process*, 1 BERKELEY WOMEN’S L.J. 39, 40–43 (1985) (arguing that mediation can be more suitable for “female needs” than litigation).

²⁴⁷ Nancy Ver Steegh, *Yes, No, and Maybe: Informed Decision Making about Divorce Mediation in the Presence of Domestic Violence*, 9 WM. & MARY J. WOMEN & L. 145, 147 (2003).

²⁴⁸ *Id.* at 175. Penelope E. Bryan, *Killing Us Softly: Divorce Mediation and the Politics of Power*, 40 BUFF. L. REV. 441 (1992).

²⁴⁹ Hollander-Blumoff & Tyler, *supra* note 230, at 16 (“power differentials may mean that mediation is simply an inappropriate forum for some subset of cases in which the potential for party coercion dictates that individual rights cannot be adequately protected”); Richard Delgado, *Alternative Dispute Resolution: Conflict as Pathology: An Essay for Trina Grillo*, 81 MINN. L. REV. 1391, 1394–97 (1997) (discussing the difficulty participants may have in recognizing power differentials in mediation).

ity and lack of external constraints imposed by legal rules or court-imposed judgments—can also be its greatest weakness: some see the recourse to rights and rules in adjudication as a power equalizer.²⁵⁰ The realist vision of litigation, however, does not offer much assurance, given realism’s critique of adjudication as arbitrary and uncertain, with judges driven by subconscious, and often class-based, motives. Moreover, in light of the “on the ground” questions just addressed, litigation ignores how the process in courts of mass justice are profoundly flawed and do not deliver on the promise of equal justice under the law.

A weakness of both realism and mediation, then, is their inability to resolve a range of questions about how poverty subverts both mediation and adjudication.

CONCLUSION

Mediation offers a mode of dispute resolution that resonates and absorbs the realist critique and moves it in a positive direction. It operationalizes realism, and it does so by engaging in an activity that, by definition, sets aside judging and the law. Instead of struggling to find ways for judges to embrace and build upon social particularity in doing their jobs, mediation moves social particularity to a place where it naturally resides: among litigants themselves. While mediation does not provide all the answers, particularly regarding poverty and dispute resolution, mediation embodies what realism has hoped—and continues to hope—to achieve.

In the end, then, mediation rejects what the realists rejected, and replaces it with a process that is very much in the realist mold. Oliver Wendell Holmes would be proud.

²⁵⁰ See Grillo, *supra* note 246, at 1557–58; Delgado et al., *supra* note 245, at 1391–99; Fiss, *supra* note 7, at 1077 (arguing how a court-rendered judgment “lessen[s] the impact of distributional inequalities”).