2009

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Recommended Citation
Available at: http://ir.lawnet.fordham.edu/flr/vol78/iss3/7

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MEDIATION EXCEPTIONALITY

Jacqueline Nolan-Haley*

INTRODUCTION

If Alexis de Tocqueville had the opportunity to observe contemporary mediation practice in the United States and England, he might agree that there is a story to tell about difference—a story about how mediation is treated differently from other nonadjudicatory dispute resolution processes in both common-law jurisdictions. I will refer to this difference as "mediation exceptionality." One of the primary features of mediation exceptionality is the disparate manner in which mediation is promoted and delivered. In the United States, mediation is, in theory, a voluntary, consensual process, based on the principle of party self-determination. The Model Standards of Conduct for Mediators echo this understanding by emphasizing the importance of informed consent both as to process and outcome. But mediation is frequently delivered as a quasi-consensual or nonconsensual process. Compulsory participation in a variety of contexts is the norm in many court referral schemes. Mediation is also promoted as a

* I would like to thank Rachel Vorspan, Ed Purcell, Jonathan Hyman, Marianna Hernandez Crespo, Kathleen Scanlon, and, in particular, Nancy Welsh for helpful comments, and Colleen Hibbert for research assistance.

1. E.g., negotiation, consensus-building, conciliation, etc.


3. MODEL STANDARDS OF CONDUCT FOR MEDIATORS, Standard I (2005). While mediation is theoretically a voluntary and consensual process, I thank my colleague Nancy Welsh for reminding me that in reality, mediation is sold as a cheap and quick process.

4. The Alternative Dispute Resolution Act of 1998 authorized federal courts to compel parties to participate in certain Alternative Dispute Resolution (ADR) processes, including mediation. 28 U.S.C. § 652(a) (2006). On the state level, compulsory mediation takes place in different contexts under various statutory schemes. See SARAH RUDOLPH COLE, NANCY HARDIN ROGERS & CRAIG A. MCEWEN, MEDIATION: LAW, POLICY & PRACTICE § 7:2 (2008). As early as 1997, the American Bar Association adopted a resolution that supported court mediation programs. See SECTION OF DISPUTE RESOLUTION, AM. BAR ASS’N, RECOMMENDATION & REPORT TO THE HOUSE OF DELEGATES 227 (1997); see also G.
consensual process in England but is delivered under the shadow of the court's power to penalize parties who resist the invitation to mediate.\(^5\) The infusion of nonconsensual attributes into mediation, particularly in court-related programs, is one of the distinct features of mediation that is not shared generally by other nonadjudicatory dispute resolution processes.\(^6\)

Another example of its exceptionality is mediation's departure from the application of general legal rules. In England, instead of the usual rule that the unsuccessful party will be ordered to pay the costs of the successful party, mediation presents the exceptional case where costs may be imposed on a successful party whose consent to mediation is deemed to have been withheld unreasonably.\(^7\) In the United States, application of the usual rules of contract law to mediation has been questioned by some scholars who argue that mediated agreements should be treated differently from standard contracts—that laws should provide for "cooling off" periods before mediation agreements take effect so that parties have the opportunity to exercise a right of rescission.\(^8\)

A primary feature of mediation exceptionality that has resulted in the growth of consent litigation is the blending of consensual and nonconsensual attributes. In the United States, litigation focuses on party consent at the end point of mediation when an agreement has been reached; a significant body of case law involves challenges to the enforceability of

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\(^5\) For this reason, some observers suggest that England is "almost" a compulsory mediation jurisdiction. See Antoine Masson & Fiona Breen, Keeping the Essence of Mediation, \textit{1 WORLD ARB. & MEDIATION REV.} 371, 372 (2007).

\(^6\) As observers of the U.S. ADR landscape are aware, a similar problem has occurred with the arbitration process. Arbitration clauses in employment, consumer, and securities contracts have generated wide public debate as well as proposals for federal legislation to insure fairness in arbitration. See, e.g., Arbitration Fairness Act of 2009, H.R. 1020, 111th Cong. (2009) (pending).

\(^7\) See discussion of Halsey v. Milton Keynes General NHS Trust, infra notes 91–108 and accompanying text.

\(^8\) In my view, these are welcome correctives, and I endorse such proposals. See infra notes 65–66 and accompanying text. Some states have already modified traditional contract laws relating to the enforcement of mediated agreements in order to enhance the quality of the mediation. See, e.g., \textit{CAL. INS. CODE} § 100089.82(c) (West 2006); \textit{FLA. STAT. ANN.} § 627.7015(6) (West 2005); \textit{MINN. STAT.} § 572.35(2) (1998); \textit{see also COLE, ROGERS & McEwen, supra} note 4, § 4:13. A variation of mediation exceptionality includes attempts by courts to encourage settlements by developing disincentives to trial. This phenomenon is described by Cole, Rogers, and McEwen:

The development of disincentives reflects an approach to legal policy that departs from the focus of other procedural reforms of the century—rather than trying to decrease delay and expense and increase the impartiality of the trier of fact, these provisions do just the opposite. Disincentives are an attempt to improve court efficiency by lowering the numbers of parties who can afford to or dare to use the trial apparatus.

\textit{Id.} § 7:1.
mediated agreements, particularly in the area of contract formation. In contrast, the emphasis in English litigation has been on party consent at the front-end of mediation, before the process even begins, and there are a substantial number of cases challenging the imposition of costs for a party's failure to participate in mediation.

I. PROFESSOR OWEN FISS

"Against Settlement" can be considered a presage for mediation exceptionality. Just six years after the Pound Conference jump-started the modern ADR settlement movement, Professor Owen Fiss staked out objections to what he considered the peace for justice trade-offs of ADR. One of his objections centered on the quality of consent in settlement. Fiss claimed that consent from some individual litigants was often coerced, and that in the case of groups, there were no procedures for generating authoritative consent.

Fiss was wise to sound the early warnings on the fragility of consent in ADR settlement processes. He should have been concerned, however, not only with groups involved in large-scale public litigation but even with the quarreling neighbors who are somewhat trivialized in his critique. Litigants' vulnerability with respect to consent can be recognized most vividly today in the institutionalization of settlement in court-connected mediation programs.

9. James Coben & Peter N. Thompson, Disputing Irony: A Systematic Look at Litigation About Mediation, 11 HARV. NEGOT. L. REV. 43, 73–89 (2006). In this study, enforcement issues were raised in 568 opinions, representing forty-six percent of the study. Id.

10. See infra Part IV.


12. Id. at 1085–86. For an insightful, alternative reading of Fiss, see Amy J. Cohen, Revisiting Against Settlement: Some Reflections on Dispute Resolution and Public Values, 78 FORDHAM L. REV. 1143 (2009).

13. Fiss, supra note 11, at 1078–82. In addition to the lack of consent, Fiss was also concerned with the disparity of power between parties of unequal bargaining power, the quality of justice, and the loss of opportunity for the courts to make structural changes. Id. at 1076–78.

14. Fiss describes parties who "are ensnared in contractual relationships that impair their autonomy" and gives as an example lawyers and insurance companies whose settlement choices might not be in the best interests of their clients. Fiss, supra note 11, at 1078.


justice through the formalities of law—black-robed judges, the adjudication process, and invoking of rules of law. Instead, they are referred to a mediator who will take a first shot at their case, which will not necessarily be cast as a dispute, but as a joint problem to be solved by the neighbors themselves. Despite one’s view of the merits of institutionalizing mediation, there have been negative consequences. It has diminished party choice in dispute resolution generally, and with this diminution has come a significant weakening in the values associated with consent.

This essay views mediation exceptionality through the lens of mediation consent litigation that has occurred over the last ten years in the United States and England. It is a tale of two regimes that explicitly endorse mediation through laws and rules of civil procedure but do so through different structural designs. One is quasi-consensual, the other is compulsory. Parties who come to court searching for justice through law in the adjudication process are invited in the case of England—and often coaxed or compelled in the United States—to participate in mediation, a different process that invokes different values. In mediation, multiple values, including law, may be relevant in resolving a dispute. Not all litigants are interested in pursuing justice in this fashion, and mediation push-back in both countries has generated considerable litigation over the issue of consent.

The historical connections between English equity jurisdiction and U.S. mediation practice make the comparative tale of these two regimes a useful lens through which to view consent practices. While the United States is a more advanced mediation jurisdiction than England in terms of case volume and institutionalized experience, its mediation foundations borrow from the tradition of English equity jurisdiction. Both mediation and equity claim to offer individualized justice to disputing parties. Both regimes were conceived as part of an access to justice project. Equity jurisprudence developed to soften the harshness of common-law rules; U.S. mediation practice developed in part to provide access to justice that was considered to be otherwise unavailable in the common-law civil justice system.

media tion, scholars today question whether equity is still equitable\(^ {24}\) and whether mediation offers justice.\(^ {25}\)

II. MEDIATION AND CONSENT

Part of the contemporary skepticism about the ultimate justice and fairness of mediation results from the manner in which consent is honored in theory and dishonored in practice.\(^ {26}\) Consent holds an important place in law generally, and is assumed to be an overarching value in contemporary dispute resolution. With mediation, consent is frequently the selling point. This is a type of consent that Professor Fiss would perhaps describe as the "individualistic, unanimous consent exalted by the social contract tradition."\(^ {28}\)

Mediation consent has two elements: *front-end, participation consent* which should occur at the beginning of the mediation process and continue throughout the process; and *back-end, outcome consent* which should be present when parties reach an agreement in mediation.\(^ {29}\) The rhetoric of mediation consent is couched in rights-infused terms such as autonomy and party self-determination.\(^ {30}\) Mediation consent gives disputing parties ownership of their dispute and the right to decide its outcome.\(^ {31}\) Consent theoretically guards against coercive behavior by third-party facilitators and honors party participation. Apart from its fairness, justice, and human dignity values,\(^ {32}\) consent matters a great deal in mediation because of its instrumental value. Consent is linked to sustainability—it implies a commitment to honor one’s promise.

Contemporary models of compulsory and quasi-compulsory dispute resolution seriously limit disputants’ ability to influence how their disputes are resolved.\(^ {33}\) Nowhere is this phenomenon more evident than with court-
connected mediation programs, now a regular feature in both common-law and many civil-law jurisdictions. The parties’ initial buy-in to mediation may be based on its traditional promises of neutrality, empowerment and recognition, privatization, problem-solving, or what Deborah Hensler calls “mediation’s harmony ideology.” But this is not necessarily the picture that emerges from the practice of mediation. Whether it is a dramatic account of settlement as the only way out of jail, or more traditional case reports of duress and coercion, some of the actual practices of mediation bring a dose of reality to the romanticized version of the mediation story.

Even where parties voluntarily agree to participate in mediation, their consent may be uninformed. Consent is only as good as the disclosure that precedes it, and there is a growing recognition by thoughtful scholars of an opacity problem in mediation. Many aspects of mediation that should be disclosed are not. Some examples include the mediator’s style or orientation. Is it transformative? Facilitative? Evaluative? Narrative? This information can have a direct bearing on the outcome of mediation, but it is not usually disclosed to parties. Represented parties are at less risk of proceeding in the dark because lawyers typically exert considerable

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35. See Bernard S. Mayer, Beyond Neutrality: Confronting the Crisis in Conflict Resolution 85 (2004) (listing as four characteristics of mediation: (1) impartiality, (2) process orientation, (3) problem-solving, and (4) client-focused).

36. Hensler, supra note 15, at 84.


40. See Nolan-Haley, supra note 29, passim.

41. Considering the number of mediator approaches identified in the literature and the Model Standards requirement that parties make free choices with respect to process and outcome, Professor Frank Sander has suggested that mediators should disclose their styles. Frank E. A. Sander, Achieving Meaningful Threshold Consent to Mediator Style(s), DISP. RESOL. MAG., Winter 2008, at 9.


influence on the choice of mediator style or orientation. But what happens to pro se parties who remain uninformed?

Another area that calls for greater transparency to achieve informed consent is identification of the specific nature of the "problem" that is the subject of mediation. Will it be a broad definition of the problem that will permit parties to include a meaningful discussion of their needs and interests? Or will it be a narrow understanding limited to legal issues? Professors Nancy Welsh and Leonard Riskin have written recently about the problem-identification issue in mediation. They describe the repeat players in civil, nonfamily disputes who move fluidly between the litigation system and court-connected mediation, narrowly structuring the mediation process to fit a litigation mold. Plaintiffs who are often one-shot players are no match for the repeat players who narrow the definition of the problem to be resolved and the set of available remedies. Private caucuses with the mediator rather than joint sessions with all the parties are the norm, leaving little space for parties to express underlying or nonlegal interests. In effect, parties who may think that they signed on to an authentic mediation process find themselves in what looks like a traditional, legalistic negotiation setting.

III. THE AMERICAN MEDIATION STORY

The central ideology of American mediation is its voluntariness. Most ethical codes and practice standards define mediation as a voluntary process grounded in party self-determination. Mediation rhetoric, focusing on empowerment and recognition, is grounded in voluntariness. The Model Standards of Conduct for Mediators emphasize the importance of informed consent—"each party makes free and informed choices as to process and outcome." Nevertheless, mandatory mediation regimes are standard fare, with several different models ranging from strong-armed judicial suggestions, to making mediation a condition precedent for trial. U.S. courts and legislatures have had little problem in requiring parties to

44. Id. at 282–87, 309–18. Welsh and Riskin found that in court-connected mediation of "ordinary" cases, lawyers tend to prefer evaluation. In the mediation of larger commercial cases with sophisticated parties on both sides, clients and their lawyers tend to prefer mediators who can accomplish many tasks, including getting at underlying interests, facilitating, evaluating, etc. Leonard L. Riskin & Nancy A. Welsh, Is That All There Is?: "The Problem" in Court-Oriented Mediation, 15 GEO. MASON L. REV. 863, 924–25 (2008); see also Dwight Golann, The Changing Role of Evaluation in Commercial ADR, DISP. RESOL. MAG., Fall 2007, at 16, 18–19 (contrasting private commercial mediation and court-connected mediation).

45. Riskin & Welsh, supra note 44, passim.

46. Id. at 904–26 (offering three approaches that courts and private providers can use to assist parties in developing the most appropriate problem definitions and processes).

47. MODEL STANDARDS OF CONDUCT FOR MEDIATORS, Standard I (2005).

48. Id.

49. The methods of case referral and program design differ, but I include within the definition of mandatory regimes all types of pressured entry into mediation.
participate in the "voluntary" process of mediation, and in some jurisdictions they must do so in good faith.

Mandatory mediation has become an acceptable feature of the civil justice landscape despite the collateral problems inherent in these referral schemes. The standard American explanation for what appears to be an internally inconsistent structure is that there is a difference between coercion into a process and coercion in a process. While courts may require parties to attend and participate in mediation, no one may coerce parties during the process or pressure them into accepting a particular outcome. In short, front-end, participation consent is dispensed with, while back-end, outcome consent is required.

A review of mediation litigation in the United States suggests that mandatory mediation regimes have supported a culture of gentle coercion even when parties voluntarily participate in mediation and report their satisfaction with the process. In 1993, Professor Craig McEwen described what he labeled the "paradox of mediation," namely that when parties in conflict who are reluctant about mediation are required to mediate, they find the process fair and satisfying and would recommend it to others. More recent studies of court-connected mediation in general civil cases show that parties report mediation to be a fair process and are positive about

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50. There is no uniformity with respect to methods of case referral and program design in U.S. mediation programs. I include within the concept of mandatory mediation those situations where there is strong judicial encouragement to mediate.

51. See COLE, ROGERS & MCEWEN, supra note 4, § 7:6. The good faith statutes have resulted in a body of case law dealing with failures to negotiate in good faith. Courts generally uphold party self-determination and refuse to find that failure to make an offer in mediation amounts to a violation of the obligation to participate in good faith. See John Lande, Using Dispute System Design Methods To Promote Good-Faith Participation in Court-Connected Mediation Programs, 50 UCLA L. REV. 69, 78-86 (2002).


53. For a discussion of some of these problems, see generally Reuben, supra note 52.

54. This distinction, which was originally articulated in the first edition of Stephen B. Goldberg et al.'s Dispute Resolution, is criticized by Sally Merry, who argues that "[i]f parties are aware that a more coercive process will ensue if mediation fails, the dynamics of the mediation will differ sharply from 'pure mediation,' because the expectation of an imposed settlement will inevitably alter the meaning of the event for all the actors." Sally Engle Merry, Disputing Without Culture, 100 HARV. L. REV. 2057, 2066 (1987) (reviewing STEPHEN B. GOLDBERG ET AL., DISPUTE RESOLUTION (1985)).

55. The United States is certainly not alone with its mandatory mediation schemes. Australian courts have long upheld their right to require parties to mediate despite the absence of their consent, but their justification is somewhat more transparent. Hooper Bailie Associated Ltd. v. Natcon Group Pty Ltd. (1992) 28 N.S.W.L.R. 194, 206 ("What is enforced is not co-operation and consent but participation in a process from which co-operation and consent might come."). The Australian studies of mandatory mediation show that settlement rates and reports of satisfaction are similar to voluntary mediation. See KATHY MACK, NAT'L ADR ADVISORY COUNCIL & AUSTRALIAN INST. OF JUDICIAL ADMIN., COURT REFERRAL TO ADR: CRITERIA AND RESEARCH (2003).

procedural justice. But, the growing volume of mediation consent litigation signals that something more is going on than the satisfaction story tells us, particularly in court-connected mediation. Compliance is becoming problematic. In a study of litigated mediation cases for the period from 1999 through 2003, Professors James R. Coben and Peter N. Thompson found that the highest number of cases dealt with challenges to the enforceability of agreements reached in mediation. A follow-up study for cases litigated in 2004 through 2005 again found that enforceability was the most highly litigated issue. One of the lengthiest sections in Cole, Rogers & McEwen's classic treatise, Mediation: Law Policy & Practice, deals with challenges to the enforcement of mediated agreements. While enforceability cases include those dealing with procedural defects, such as missing signatures, etc., a large number of cases relate to the quality of a party's consent to the agreement that was reached in mediation.

It is not just the volume of mediation consent cases that is problematic, but the manner in which those cases are adjudicated. Traditional contract defenses that permit rescission for fraud, duress, and undue influence have been relatively unsuccessful in mediation because courts tend to enforce mediated agreements, even in the face of claims that the agreement is contrary to public policy. According to Professors Coben and Thompson, "[R]arely has a mediation participant successfully defended against enforcement of a mediated agreement based on a traditional contract defense." The weakness of traditional contract rules to remedy consent defects has caused some scholars to suggest a greater use of cooling off

57. See Roselle L. Wissler, Court-Connected Mediation in General Civil Cases: What We Know from Empirical Research, 17 OHIO ST. J. ON DISP. RESOL. 641, 690 (2002).
58. See, e.g., COLE, ROGERS & McEWEN, supra note 4, § 4.13; Coben & Thompson, supra note 9.
59. See Hedeen, supra note 38 (analyzing coercion in mediation); Thompson, supra note 38, 527–35 (analyzing duress and undue influence in mediation).
60. See Coben & Thompson, supra note 9.
63. It is difficult to determine what percentage of enforcement cases result from court-connected as opposed to voluntary mediation. The reported enforcement cases do not always indicate whether or not they arose in a court-connected setting.
64. COLE, ROGERS & McEWEN, supra note 4, § 4:13; Coben & Thompson, supra note 9, at 73–74; Andrew N. Weisberg, Comment, The Secret to Success: An Examination of New York State Mediation Related Litigation, 34 FORDHAM URB. L.J. 1549, 1552–59 (2007).
65. See Washington v. Noah, 9 P.3d 858 (Wash. Ct. App. 2000) (holding that the mediation agreement should be upheld even if it restricts a party's interest in freedom of expression).
66. Coben & Thompson, supra note 9, at 49. In this study, sixty-one percent of the agreements were enforced, seventeen percent were not enforced, eleven percent were remanded for additional proceedings, eight percent had no decision, and three percent were modified. COLE, ROGERS & McEWEN, supra note 4, § 4:13.
periods to protect self-determination and leave parties free to exercise their rights of rescission.67

IV. THE U.K. STORY

In England there is a somewhat different mediation story to tell. Parties must consent both to participate in mediation and to any agreements that are reached in mediation. But if a party refuses to give front-end, participation consent, and the refusal is deemed unreasonable by a court, then costs sanctions may be imposed.68 Thus, even parties who are successful in litigation may have to pay costs if they unreasonably refuse consent to mediation.69 This is contrary to the general English rule that the unsuccessful party pays costs.70 Compared to mediation litigation in the United States, with its high number of cases challenging the enforceability agreements made in mediation, English consent litigation is comprised largely of cases that relate to refusals to participate in mediation. If parties do consent to participate in mediation, it is unlikely that they will later challenge any agreement made in mediation.71

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67. Coben & Thompson, supra note 9, at 135–36; Welsh, supra note 19, at 87; see also James J. Alfini & Catherine G. McCabe, Mediating in the Shadow of the Courts: A Survey of the Emerging Case Law, 54 Ark. L. Rev. 171, 206 (2001) (reviewing enforcement cases and urging that courts enforce mediated settlements “within a framework that recognizes mediation’s unique character and attributes”); Steven Weller, Court Enforcement of Mediated Agreements: Should Contract Law Be Applied?, JUDGES’ J., Winter 1992, at 13, 39 (suggesting that because a mediator’s power distinguishes mediation from arm’s length settlement, judges should rescind agreements if there is a disparity in expertise between the parties and the weaker party misunderstood the agreement or its consequences). Other reform suggestions include judicial oversight for cases that are referred to mediation during litigation in order to “detect cases in which mediators’ own economic interests resulted in objectively bad settlements.” Peter L. Murray, The Privatization of Civil Justice, 91 JUDICATURE 272, 316 (2008).

68. The American rule is that each party must bear his or her own costs except where the litigation is vexatious or an abuse of process. Congress has enacted a number of fee-shifting statutes that are exceptions to this rule.

69. England’s cost-shifting approach to encourage mediation is similar in some respects to court-annexed arbitration programs in the United States that impose penalties against parties who reject an arbitral award in favor of a trial de novo unless a more favorable result is obtained at trial. Despite numerous challenges to these programs, courts have upheld them as legitimate means of promoting settlement. ALAN SCOTT RAU, EDWARD F. SHERMAN & SCOTT R. PEPPET, PROCESSES OF DISPUTE RESOLUTION: THE ROLE OF LAWYERS 540 (4th ed. 2006).

70. The exercise of the court’s discretion regarding costs is found in Part 44.3 of the Civil Procedure Rules. The general rule is that the unsuccessful party will be ordered to pay the costs of the successful party. CPR 44.3(2)(a), available at http://www.justice.gov.uk/civil/procrules_fin/contents/parts/part44.htm#IDAMJ15B. In deciding how to assess costs, the court must look at all the circumstances, including the conduct of the parties. CPR 44.3(4)(a). Conduct includes behavior during the proceedings and in pre-action protocols.

71. Compared to the United States, in England there are far fewer challenges to the enforceability of mediated agreements. See, e.g., Brown v. Rice & Patel & ADR Group, [2007] EWHC (Ch) 625; Crystal Decisions (UK) Ltd. v. Vedatech Corp., [2007] EWCHC (Ch) 1062 (attempting to set aside the settlement agreement on the grounds of fraud).
A. Historical Background

There is a substantial history of family mediation practice in England that dates back to the mid-1970s, but the modern mediation movement developed in conjunction with civil justice reform efforts in the 1990s. As a result of general dissatisfaction with the delays, inflexible proceedings, and general malaise of the civil justice system, the Lord Chancellor directed Lord Woolf to examine the civil justice system and offer proposals for reform. Lord Woolf’s findings described what one scholar has labeled “a rather depressing picture of the English civil justice system which is incomprehensible to litigants, costs significant sums of money and makes no or little use of modern technology.” Lord Woolf issued an interim and final report, Access to Justice, which dramatically altered the civil justice landscape. His proposals made litigation less appealing by instituting strict case management by judges and urging lawyers to educate their clients about ADR options and to encourage them to use ADR.

The Final Report concluded that despite the crisis in the English civil justice system, England was not ready for a mandatory ADR regime. According to Lord Woolf, “the problems in the civil justice system in this country, serious as they are, are not so great as to require a wholesale compulsory reference of civil proceedings to outside resolution.” The report formed the basis of a uniform Civil Procedure Rules (CPR) for England that took effect in April 1999. The CPR empowered courts to encourage parties to use ADR methods to resolve disputes, and to penalize litigants who failed to engage in appropriate ADR processes. The breadth of reforms led the Lord Chancellor to conclude that it was “the most radical...
programme for the modernisation of the civil justice system for 120 years."\textsuperscript{80} Beyond the courts, the promotion of ADR was extended to the government with the announcement of an "ADR Pledge" in March 2001 by the Lord Chancellor, in which all government departments and agencies made a commitment to consider ADR in all suitable cases "wherever the other party accepts it."\textsuperscript{81}

B. Case Law Development

Following the enthusiasm for ADR generated by Lord Woolf's report and the implementation of the CPR reforms, the practice of mediation began to generate consent-related litigation. In a series of cases between 2001 and 2004, the English courts grappled with questions about the extent of their power to promote a culture of settlement through compulsory mediation. If mediation were a panacea for the ills of the civil justice system, could the courts require parties to participate in it? What could be done about parties who declined an invitation to mediate?

The first significant case to deal with these questions, \textit{Cowl v. Plymouth City Council},\textsuperscript{82} involved a public law dispute over the rehousing of elderly residents in a nursing home run by the Plymouth City Council.\textsuperscript{83} The Council offered the residents an alternative process to avoid litigation, but the residents declined the offer.\textsuperscript{84} The Court of Appeal upheld the Council’s actions as reasonable and expressed strong disapproval that the case had progressed so far when an ADR process was made available.\textsuperscript{85} Lord Woolf offered strong language in both encouraging ADR and in disapproving of the parties who had failed to use it, particularly where public money was involved:

Today sufficient should be known about ADR to make the failure to adopt it, in particular where public money is involved, indefensible... This case will have served some purpose if it makes it clear that the lawyers acting on both sides of a dispute of this sort are under a heavy obligation to resort to litigation only if it is really unavoidable.\textsuperscript{86}

Following \textit{Cowl}, the courts continued to encourage parties to use mediation but imposed no penalties for failure to use it until the decision in \textit{Dunnett v. Railtrack plc.}\textsuperscript{87} Here, for the first time, judicial encouragement turned to quasi compulsion as the court made it clear that a successful party could be deprived of costs that it would otherwise be awarded because of a refusal to mediate.\textsuperscript{88}

\textsuperscript{80} Mistelis, \textit{supra} note 73, at 171.
\textsuperscript{81} Halsey, [2004] EWCA (Civ) 576, [7] (internal quotation marks omitted).
\textsuperscript{82} [2001] EWCA (Civ) 1935.
\textsuperscript{83} \textit{Id.} [4], [6].
\textsuperscript{84} \textit{Id.} [14].
\textsuperscript{85} \textit{Id.} [27].
\textsuperscript{86} \textit{Id.} [25]–[27].
\textsuperscript{87} [2002] EWCA (Civ) 303.
\textsuperscript{88} \textit{Id.}
Dunnett generated considerable commentary questioning whether there was now a requirement that all cases be mediated. The cases were back and forth on two interrelated issues: whether courts could require parties to participate in mediation and, if not, whether a court could impose cost sanctions against successful litigants who had refused to mediate.\(^8\) The Dunnett principle was unevenly applied.\(^9\) These questions were finally answered in the conjoined cases of Halsey v. Milton Keynes General NHS Trust and Steel v. Joy,\(^9\) wherein the Court of Appeal held that it should not require truly unwilling parties to mediate their cases, because compulsory referral would violate a litigant's fundamental rights to have access to the courts\(^9\) and run afoul of Article 6 of the European Convention on Human Rights.\(^9\) Even if it did have jurisdiction to compel unwilling parties to mediate, the court found it difficult "to conceive of circumstances in which it would be appropriate to exercise it."\(^9\) The court specifically rejected the notion that there should be a presumption in favor of mediation.\(^9\)

Halsey's rationale for not imposing a mandatory scheme was practical and pragmatic. Compulsory referral "would achieve nothing except to add to the costs to be borne by the parties, possibly postpone the time when the court determines the dispute and damage the perceived effectiveness of the ADR process."\(^9\) In short, the court held that its role was to encourage but not compel parties to engage in ADR.\(^9\)

While compulsory referral to mediation was considered unacceptable, encouragement to use ADR could be "robust." Accordingly, Halsey upheld a court's right to impose costs on a party who has unreasonably refused consent to mediate.\(^9\) In so doing, it readily acknowledged that this was a departure from the general rule on costs:

In deciding whether to deprive a successful party of some or all of his costs on the grounds that he has refused to agree to ADR, it must be borne in mind that such an order is an exception to the general rule that costs should follow the event. In our view, the burden is on the unsuccessful party to show why there should be a departure from the general rule. The

\(^8\) See Leicester Circuits Ltd. v. Coates Brothers PLC, [2003] EWCA (Civ) 290; Partridge v. Lawrence, [2002] EWCA (Civ) 1122; Hurst v. Leeming, [2001] EWHC (Ch) 1051 (judgment given on May 9, 2002, after the Dunnett v. Railtrack plc. decision).
\(^9\) Compare Royal Bank of Can. Trust Corp. Ltd. v. Sec'y of State for Defence, [2002] EWHC (Ch) 1841 (Secretary of State for Defence deprived of costs because of refusal to comply with the government pledge to use ADR), with Valentine v. Allen, [2003] EWCA (Civ) 915 (Dunnett distinguished where a party could demonstrate a real effort to compromise the dispute), and Hurst v. Leeming, [2001] EWHC (Ch) 1051 (limiting the reach of Dunnett where it appeared that mediation had no real prospect of success).
\(^9\) [2004] EWCA (Civ) 576.
\(^9\) Id. [9].
\(^9\) European Convention on Human Rights art. 6(1), Nov. 4, 1950, 213 U.N.T.S. 222.
\(^9\) Halsey, [2004] EWCA (Civ) 576, [9].
\(^9\) Id. [16] ("We do not, therefore, accept the submission made on behalf of the Civil Mediation Council that there should be a presumption in favour of mediation.").
\(^9\) Id. [10].
\(^9\) Id. [11].
\(^9\) Id. [13].
fundamental principle is that such departure is not justified unless it is shown... that the successful party acted unreasonably in refusing to agree to ADR.\footnote{Id.}

The court offered a nonexhaustive list of six factors in determining the reasonableness of a party's refusal to participate in mediation:

- (a) the nature of the dispute;
- (b) the merits of the case;
- (c) the extent to which other settlement methods have been attempted;
- (d) whether the costs of the ADR would be disproportionately high;
- (e) whether any delay in setting up and attending the ADR would have been prejudicial; and
- (f) whether the ADR had a reasonable prospect of success.\footnote{Id.}

Reasonableness was considered a relevant factor.\footnote{Id.}

In our judgment, it would not be right to stigmatise as unreasonable a refusal by the successful party to agree to a mediation unless he showed that a mediation had no reasonable prospect of success. That would be to tip the scales too heavily against the right of a successful party to refuse a mediation and insist on an adjudication of the dispute by the court. It seems to us that a fairer balance is struck if the burden is placed on the unsuccessful party to show that there was a reasonable prospect that mediation would have been successful.\footnote{Id.}

*Halsey* was greeted with mixed reviews. Some viewed it as a "sensible compromise,"\footnote{David Pliener, *At Last, Clarity for Mediation*, 11 New L.J. 878, 878 (2004).} while others criticized the court's failure to mandate mediation as "clearly wrong and unreasonable," with the Court of Appeal being "left in the dark" regarding the prevalence of mandatory mediation in other jurisdictions.\footnote{Sir Gavin Lightman, Chartered Inst. of Arbitrators, *Mediation: An Approximation to Justice*, 73 INT'L J. ARB., MEDIATION & DISP. MGMT. 400, 401 (2007) (criticizing *Halsey*'s reliance on Article 6 of the European Convention on Human Rights to prevent mandatory mediation and also criticizing the court's burden of proof scheme). For a more explicit argument that mediation should be mandatory, see Sir Anthony Clarke, Master of the Rolls, Speech to the Second Civil Mediation Council National Conference: The Future of Civil Mediation (May. 8, 2008), *available at* http://www.judiciary.gov.uk/docs/speeches/mr_mediation_conference_may08.pdf ("[A] horse (even a very obstinate horse) is more likely to drink if taken to water. We should be doing more to encourage (and perhaps direct) the horse to go to the trough. The more horses approach the trough the more will drink from it.").} Apart from the views of commentators, *Halsey* had a significant impact in decreasing the volume of cases that were mediated under existing court-referral schemes. Evaluation research conducted by Professor Hazel Genn shows that demand for mediation increased significantly following the *Dunnett* case in 2002.\footnote{GENN ET AL., *supra* note 73, at 134.} This is not surprising because *Dunnett* permitted costs penalties to be imposed on a successful

\footnote{Id. [16].}

\footnote{Id. [25].}

\footnote{Id. [28].}

\footnote{David Pliener, *At Last, Clarity for Mediation*, 11 New L.J. 878, 878 (2004).}

\footnote{Sir Gavin Lightman, Chartered Inst. of Arbitrators, *Mediation: An Approximation to Justice*, 73 INT'L J. ARB., MEDIATION & DISP. MGMT. 400, 401 (2007) (criticizing *Halsey*'s reliance on Article 6 of the European Convention on Human Rights to prevent mandatory mediation and also criticizing the court's burden of proof scheme). For a more explicit argument that mediation should be mandatory, see Sir Anthony Clarke, Master of the Rolls, Speech to the Second Civil Mediation Council National Conference: The Future of Civil Mediation (May. 8, 2008), *available at* http://www.judiciary.gov.uk/docs/speeches/mr_mediation_conference_may08.pdf ("[A] horse (even a very obstinate horse) is more likely to drink if taken to water. We should be doing more to encourage (and perhaps direct) the horse to go to the trough. The more horses approach the trough the more will drink from it.").}

\footnote{GENN ET AL., *supra* note 73, at 134.}
party who acted unreasonably in refusing to mediate. But, rather than representing an acknowledgement of the benefits of mediation, Professor Genn suggests that in many of these cases, parties were “unwillingly mediating to avoid possible costs penalties” under the Dunnett regime. However, after Halsey denied the court’s power to compel mediation, there was a significant decrease in demand for mediation.

C. Mediation Consent Litigation in England: The Post-Halsey Era

The Court of Appeal’s decision in Halsey prompted judges to encourage parties to use the mediation process, and it set the stage for a trajectory of consent litigation that extends far beyond the issue of participation in mediation. Halsey’s costs scheme that penalizes parties who are deemed to have unreasonably refused to mediate, has been extended to refusals to negotiate, delays in agreeing to mediate, taking unreasonable positions

106. Id. at 6, 52. The subjects of this evaluation were two court-annexed mediation programs in the Central London County Court. They consisted of (a) an experiment in quasi-compulsory mediation, involving automatic referral of cases to mediation, which ran for a year in the Central London Court between April 2004 and March 2005, and (b) a review of the operation of the Central London voluntary mediation scheme, which had been running continuously since 1996. Id. at 1.

107. Id. at 52.

108. Five weeks before Halsey was decided, a pilot quasi-compulsory scheme had been established in May 2004 in Central London County Court that involved the automatic referral of selected cases to mediation with an opportunity to opt out. See id. at 1. If parties failed to mediate and the judge did not accept their reasons, they would be liable for cost sanctions under Part 44 of the CPR. Id. at 12. Professor Hazel Genn concludes in her evaluation of the program that, given the opt-out rate of around eighty percent and interviews she conducted with solicitors, Halsey had a significant effect on the pilot program:

Indeed, it may not be an exaggeration to suggest that, whatever the precise intention of the court and the interpretation of the case by observers from different camps, the mood or tenor of the Halsey judgment and its representation in the professional press, effectively undermined both the object and operation of the automatic referral to mediation pilot.

Id. at 19.


110. See, e.g., Daniels v. Comm’r of Police, [2005] EWCA (Civ) 1312 (finding that defendant acted reasonably in refusing to negotiate); Sahota v. Singh, [2006] EWHC (Ch) 344 (imposing costs on successful party for refusal to negotiate); Hickman v. Lapthorn, [2006] EWHC (QB) 12 (finding that a failure to demonstrate that defendant’s position as to mediation and negotiation was unreasonable); see also Gil v. Baygreen Props. Ltd., [2004] EWHC (Ch) 2029; Multiplex Constrs. (UK) Ltd. v. Cleveland Bridge UK Ltd., [2008] EWHC (TCC) 2280, [90] (The defendants conceded that they owed money to the claimant but never made an offer of settlement with respect to this concession. The Court noted that the conduct of both parties was open to criticism, but the defendants’ “obstinate refusal to make any settlement offer” was the reason this litigation was not settled. Costs were adjusted accordingly).

in mediation,\footnote{112} and even to a party’s unreasonable conduct in demanding an apology as a prerequisite to mediation.\footnote{113} Courts have imposed costs for unreasonable refusals to negotiate or mediate in a number of cases,\footnote{114} but this is by no means the norm. With a great deal of frequency, courts have found that parties’ behavior in refusing to mediate is not unreasonable.\footnote{115} It is difficult to draw clear, definitive conclusions from these cases because

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\footnote{112} Earl of Malmesbury v. Strutt & Parker, [2008] EWHC (QB) 424. The parties waived the protections of confidentiality, and the court held that the party who agreed to mediation, but then took an unreasonable position in the mediation, was in the same position as a party who unreasonably refused to mediate. \textit{Id}. The court can take account of this behavior when assessing costs. \textit{Id}.\footnote{113} Merelie v. Newcastle Primary Health Care Trust, [2006] EWHC (QB) 1433; see also Wright v. HSBC Bank PLC, [2006] EWHC (QB) 1473. \footnote{114} See, e.g., Strachey v. Ramage, [2008] EWCA (Civ) 384; Couwenbergh v. Valkova, [2004] EWCA (Civ) 676; Marchands Assocs. LLP v. Thompson P’ship LLP, [2004] EWCA (Civ) 878; Chantrey Vellacott v. Convergence Group PLC, [2007] EWHC (Ch) 1774; Sahota v. Singh, [2006] EWHC (Ch) 344 (discounting of fifty percent for the successful party’s refusal to negotiate); P4 Ltd. v. Unite Integrated Solutions PLC, [2006] EWHC (TCC) 2924 (awarding partial costs because of unreasonable refusal to mediate); \textit{cf} Burchell v. Bullard, [2005] EWCA (Civ) 358 (agreeing that the \textit{Halsey} factors were established and that cost consequences should be imposed on the defendants but declining to impose costs in the interest of fairness because the case involved conduct that predated \textit{Halsey}).\footnote{115} See, e.g., Whapples v. Birmingham E. & N. Primary Care Trust, [2008] EWCA (Civ) 465, [28] (“[I]t is surprising how frequently even the most intractable case produces a satisfactory outcome in mediation assisted by a trained mediator. But that is a million miles away from saying that it is so unreasonable of a party not to undertake mediation at a stage before litigation.”); Brown v. MCASSO Music Prods., [2005] EWCA (Civ) 1546, [15] (holding that even if the claimant refused to mediate, a significant balancing factor in refusing to award costs was the defendant’s “unpreparedness to negotiate at a time when the judge was encouraging negotiation”); Reed Executive PLC v. Reed Bus. Info. Ltd., [2004] EWCA (Civ) 887, [46] (finding that prospects of a successful mediation were poor); Nigel Witham Ltd. v. Smith, [2008] EWHC (TCC) 12, [36] (The defendants were the successful parties. The claimant argued that the defendants failed to mediate until late in the day when the majority of the costs had been incurred and, thus, their delay in agreeing to mediate should have cost consequences. The court found however, that “even if there had been earlier mediation, the Claimant’s uncompromising attitude meant that it would not have had a reasonable prospect of success.”); Reynolds v. Stone Rowe Brewer, [2008] EWHC (QB) 497 (determining that mediation had little chance of success); Re Midland Linen Servs. Ltd, Chaudry v. Yap, [2004] EWHC (Ch) 3380, [56]–[60] (concluding that there was not a “serious engagement” in mediation that would justify a \textit{Halsey} finding that the petitioner should be deprived of costs). It is interesting to note the court’s reasoning as to why the respondents failed to meet their burden of proof that would justify the imposition of costs. The respondents had not provided sufficient evidence of their intention to go down the route of mediation to the other side. . . . [T]he case is marked by a pattern on behalf of the respondents of making and withdrawing offers, . . . hardly an incentive to the petitioner to negotiate. . . . I doubt whether the atmosphere that had been generated between the parties would have enabled a successful mediation to take place. Re Midland Linen Servs. Ltd, Chaudry, [2004] EWHC (Ch) 3380, [60]; see also The Wethered Estate Ltd. v. Davis, [2005] EWHC (Ch) 1903, [26] (finding the delay in going to mediation not to be unreasonable); Allen v. Jones, [2004] EWHC (QB) 1189 (no costs imposed where mediation not would have been suitable); \textit{cf} McGeough v. Thomson Holidays Ltd., [2007] EWCA (Civ) 1509, [26] (“Mediation is a valuable facility, which has a significant role to play in the administration of justice. It does not in my view assist the cause of mediation if parties are urged to mediate in a situation in which there is no real possibility that it will help.”).}
they have been decided within the *Halsey* reasonableness framework. However, a common rationale for refusing to impose costs has been reliance on the sixth *Halsey* factor: namely, whether mediation had a reasonable prospect of success. That this factor would become a recurrent theme in costs cases is somewhat unsettling because it is not clear what “success” meant to the court. Resolution of all pending issues? Some issues? A better understanding between the parties?116

V. SOME QUESTIONS TO PONDER

The consent litigation spurred by mediation exceptionality in the United States and England, though a product of different structural designs, raises common policy questions about the value of consent.117 Could it be that the differences between American and English mediation regimes reflect deeper differences between the two common-law cultures, particularly in their attitudes towards respect for self-determination and human dignity?118 The English courts’ focus on reasonableness respects human dignity and honors the principle of self-determination in practice as well as in theory. Rather than assuming that talking through mediation will work, English courts assume that it will not and place the burden of proof on the party who thinks otherwise and urges revision of the usual cost provisions.119 In fact, the *Halsey* court specifically rejected a proposal that there be a presumption in favor of mediation.120 Why is this so?

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116. One clue to the court’s thinking is the passage it quotes from *Hurst v. Leeming*, when Justice Lightman wrote:
If mediation can have no real prospect of success, a party may, with impunity, refuse to proceed to mediation on this ground. But refusal is a high risk course to take, for if the court finds that there was a real prospect, the party refusing to proceed to mediation may . . . be severely penalised. Further, the hurdle in the way of a party refusing to proceed to mediation on this ground is high, for in making this objective assessment of the prospects of mediation, the starting point must surely be the fact that the mediation process itself can and does often bring about a more sensible and more conciliatory attitude on the part of the parties than might otherwise be expected to prevail before the mediation, and may produce a recognition of the strengths and weaknesses by each party of his own case and of that of his opponent, and a willingness to accept the give and take essential to a successful mediation. What appears to be incapable of mediation before the mediation process begins often proves capable of satisfactory resolution later.

117. U.S. litigation focuses on consent at the end point of mediation after parties reach an agreement, whereas in England, litigation relates to consent or the lack of consent at the front end of mediation. There are far fewer U.S. cases that involve disputes about parties’ obligations to participate in mediation. See Cohen & Thompson, *supra* note 9, at 105–11 (reporting a total of 279 cases).

118. See infra note 121 & accompanying text (discussing values associated with consent).

119. I thank Nancy Welsh for this insight.

Compared to the United States, very few post-Halsey cases involve challenges to the enforceability of mediated agreements. Could it be that when parties agree to participate in mediation, they are more likely to honor the agreements that they make? Could it be that the low number of mediation enforceability cases in England suggests that American policy makers should have paid more attention to Fiss’s prescient critique of consent in settlement? Could it be that Fiss had it right twenty-five years ago?

These reflections on mediation exceptionality beg the question of why mediation is treated differently from other nonadjudicatory dispute resolution processes in the United States and England. One explanation suggested by Fiss’s critique points toward the messianic zeal of ADR proponents, those whom Michael Moffitt labels the ADR “evangelists,” who are determined in their quest to promote a culture of settlement. But, if as Fiss claimed twenty-five years ago, the appeal of settlement depends in large measure upon consent, then several aspects of mediation exceptionality weaken that foundation. This in turn diminishes the quality of justice available to parties in mediation.

Contemporary mediation consent litigation may be signaling that something is amiss in the grand design of ADR. We would do well to pay attention, remember Fiss, and bring real consent back into the picture.

121. See, e.g., Crystal Decisions (UK) Ltd. v. Vedatech Corp., [2007] EWHC (Ch) 1062 (challenging a mediated agreement on the grounds of duress and fraud).

122. This suggestion is consistent with some empirical evidence that parties are more likely to comply with mediated agreements than with court judgments because of the value of consent. See, e.g., Craig A. McEwen & Richard S. Maiman, Mediation in Small Claims Court: Achieving Compliance Through Consent, 18 LAW & SOC’Y REV. 11 (1984); Roselle L. Wissler, Mediation and Adjudication in the Small Claims Court: The Effects of Process and Case Characteristics, 29 LAW & SOC’Y REV. 323, 354 (1995).


124. Fiss, supra note 11, at 1078.

125. The specific features that weaken the foundation of consent are the blending of consensual and nonconsensual features in mediation in the United States and the imposition of cost consequences in England for unreasonable refusals to mediate.