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MEDIATION: THE BEST AND WORST OF TIMES

*Jacqueline Nolan-Haley**

At this period in the evolution of dispute resolution, mediation is in a unique time zone, similar to what Dickens described in a *Tale of Two Cities*, as the best and worst of times, the seasons of Light and Darkness. It is the best of times, the season of Light and a time of joy in honoring human connections, as mediation is widely embraced in the public and private sectors. From government agencies and courts to corporations and United Nations peacemaking units, mediation offers a vision of hope in the midst of drowning bureaucracies, clogged dockets, corporate scandals and ethnic conflicts. But it is also the worst of times, the season of Darkness and sadness, as mediation escapes to her slumber and hibernates, surrounded by problems that need to be resolved, and could potentially be resolved, if only she were responsive.¹

Responding to one of the questions raised in this Symposium—is mediation sleeping—I take the optimistic view that mediation is not sleeping but simply resting, exhausted from the multiple demands placed on her. I make a modest claim that we can reasonably hope she will arise from her rest, radiate light, and offer the potential for healing² when the value of consent is once again acknowledged and respected. In short, we need a renewed appreciation of consent in mediation.³

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¹ Consider the creative possibilities of resolving conflicts around issues related to ebola, immigration and environmental disasters.

² See Lois Gold, *Mediation and the Culture of Healing*, in BRINGING PEACE INTO THE ROOM, 183 (Daniel Bowling & David Hoffman eds., 2003).

³ Throughout this Article, the term “consent” means “informed consent.” See Jacqueline M. Nolan-Haley, *Informed Consent in Mediation: A Guiding Principle for Truly Educated Decisionmaking*, 74 NOTRE DAME L. REV. 775 (1999).

I. THE SEASON OF LIGHT

At one level, mediation is at the height of popularity, in some cases displacing arbitration as a method of dispute resolution.⁴ Frustrated by the delays and costs associated with contemporary arbitration practice, parties are turning to mediation to resolve and manage their disputes.⁵ “Obsession with mediation,” claims one scholar, is a “global phenomenon.”⁶ International and domestic provider organizations that formerly were focused on arbitration have enacted new rules that concentrate exclusively on mediation.⁷ Support for mediation is ubiquitous. From Africa⁸ to Malaysia⁹ the mediation project is gaining traction; in India, court-annexed mediation programs have been described as a “ray of hope.”¹⁰ Over the

⁴ See Jacqueline M. Nolan-Haley, *Mediation: The “New Arbitration,”* 17 HARV. NEGOT. L. REV. 61 (2012). There is evidence showing that at the start of their cases, people involved in civil lawsuits prefer mediation to nonbinding arbitration. See Donna Shestowsky, *The Psychology of Procedural Preference: How Litigants Evaluate Legal Procedures Ex Ante*, 99 IOWA L. REV. 637 (2014).

⁵ See e.g., Alexander McKinnon, *Mediation in England & Wales, Hong Kong and Singapore: Arbitration’s Reactions to Developments in Litigation*, 8 WORLD ARB. & MED. REV. 369 (2014).

⁶ Hazel Genn, *Why the Privatization of Civil Justice is a Rule of Law Issue*, 36th FA Mann Lecture at 11 (2012) (copy on file with the author). See generally NADJA ALEXANDER, *GLOBAL TRENDS IN MEDIATION* (2d ed. 2006).

⁷ E.g., INTERNATIONAL CHAMBER OF COMMERCE, *ICC MEDIATION RULES* (2014) (replacing Rules of Amicable Dispute Resolution), available at <http://www.iccwbo.org/products-and-services/arbitration-and-adr/mediation/rules/>; INTERNATIONAL BAR ASSOCIATION, *RULES FOR INVESTOR-STATE MEDIATION* (2012), available at http://www.ibanet.org/LPD/Dispute_Resolution_Section/Mediation/State_Mediation/Default.aspx [hereinafter IBA RULES]; CENTER FOR EFFECTIVE DISPUTE RESOLUTION, *CEDR RULES FOR THE FACILITATION OF SETTLEMENTS IN INTERNATIONAL ARBITRATION* (2009), available at http://www.cedr.com/about_us/arbitration_commission/Rules.pdf; AMERICAN ARBITRATION ASSOCIATION, *COMMERCIAL ARBITRATION RULES AND MEDIATION PROCEDURES R-9* (amended 2013) (requiring that disputes in excess of \$75,000.00 be mediated), available at http://https://www.adr.org/aaa/ShowProperty?nodeId=/UCM/ADRSTG_004103.

⁸ Paul Kirgis, *Status and Contract in an Emerging Democracy: The Evolution of Dispute Resolution in Ghana*, 16 CARDOZO J. CONFLICT RESOL. 101 (2014); Jacqueline M. Nolan-Haley, *Mediation and Access to Justice in Africa: Perspectives from Ghana*, 21 HARV. NEGOT. L. REV. (forthcoming 2015); Jacqueline Nolan-Haley & James Kwasi Annor-Ohene, *Procedural Justice Beyond Borders: Mediation in Ghana*, HARV. NEGOT. L. REV. ONLINE (2014), available at <http://www.hnlr.org/wp-content/uploads/2014/03/Nolan-Haley-and-Annor-Ohene-Procedural-Justice-Beyond-Borders.pdf>.

⁹ Press Release from the National University of Singapore, *Singapore International Mediation Institute Launched to Set World-Class Mediation Standards* (Nov. 5, 2014), <http://news.nus.edu.sg/press-releases/8288-singapore-international-mediation-institute-launched-to-set-world-class-mediation-standards>.

¹⁰ Sukhsimranjit Singh, *International Dispatch: Dispute Resolution Developments in India*, 21 DISP. RESOL. MAG. 34 (2014).

last ten years, the United Nations has offered greater encouragement to strengthen the role of mediation in resolving disputes and preventing conflict,¹¹ and has issued Guidelines for effective mediation.¹² The World Bank maintains an office of mediation services as part of its conflict resolution program.¹³ Scholars have suggested that mediation could be useful as a parallel practice to arbitration in investor-state disputes¹⁴ and the International Bar Association (“IBA”) has issued rules to govern such mediations.¹⁵ Currently, an UNCITRAL working group is considering a proposal from the United States for a convention on the recognition and enforcement of international settlement agreements resulting from mediation.¹⁶

In the United States, mediation is the most frequently used ADR process in state and federal courts. Judicial support for mediation, whether rooted in efficiency reasons¹⁷ or possibly exhaustion with adversarial procedures, has been a major factor in its growth.¹⁸ Corporations have also embraced mediation. A recent survey of Fortune 1000 companies showed that more companies reported using mediation for nearly all kinds of disputes while

¹¹ See REPORT OF THE SECRETARY-GENERAL ON ENHANCING MEDIATION AND ITS SUPPORT ACTIVITIES, S/2009/189 (Apr. 8, 2009) (describing the need for experienced mediators and support teams with women adequately represented, who have sufficient resources to intervene at early stages of conflict and attempt to address the root causes of conflict, overcome impediments to progress and obtain agreements that result in sustainable peace.) [hereinafter REPORT OF THE SECRETARY-GENERAL].

¹² See e.g., UNITED NATIONS GUIDANCE FOR EFFECTIVE MEDIATION, REPORT OF THE SECRETARY GENERAL (2012), available at http://www.un.org/ga/search/view_doc.asp?symbol=A/66/811 [hereinafter UNITED NATIONS GUIDANCE]. Key factors for effective mediation include consent, impartiality, preparedness, inclusivity, national ownership, international law and normative frameworks, coherence, coordination and complementarity of the mediation effort and quality peace agreements.

¹³ *Mediation Services*, THE WORLD BANK OFFICE OF MEDIATION SERVICES, <http://web.worldbank.org/WBSITE/EXTERNAL/EXTABOUTUS/ORGANIZATION/ORGUNITS/EXTCRS/EXTMEDIATION/0,,contentMDK:20224649~menuPK:64166116~pagePK:64166099~piPK:64166052~theSitePK:471064,00.html> (last visited Mar. 23, 2015).

¹⁴ See Jack J. Coe, Jr., *Toward A Complementary Use of Conciliation in Investor-State Disputes—A Preliminary Sketch*, 12 U.C. DAVIS J. INT’L L. & POL’Y 7 (2005); Nancy Welsh and Andrea Schneider, *The Thoughtful Integration of Mediation into Bilateral Investment Treaty Arbitration*, 18 HARV. NEGOT. L. REV. 71 (2013).

¹⁵ See IBA RULES, *supra* note 7.

¹⁶ INT’L MEDIATION INST., HOW USERS VIEW THE PROPOSAL FOR A UN CONVENTION ON THE ENFORCEMENT OF MEDIATED SETTLEMENTS (2014), available at <http://imimediation.org/un-convention-on-mediation>.

¹⁷ Jennifer Reynolds, *Judicial Review: What Judges Write When They Write About Mediation*, 5 PENN. ST. Y.B. ON ARB. & MEDIATION 111 (2013).

¹⁸ Genn, *supra* note 6, at 13.

fewer companies reported arbitrating in key categories.¹⁹ Finally, mediation has proved effective in the resolution of disputes arising from disaster claims²⁰ and a range of environmental issues.²¹

II. RESTING BETWEEN THE DARK AND THE DAYLIGHT²²

Mediation's Season of Light is fading. Some of my colleagues in this Symposium have eloquently described mediation's descent from light to darkness.²³ I will simply add to that list a few other storms threatening the landscape—assurances of confidentiality not honored,²⁴ courts that look the other way when this happens,²⁵ promises made in mediation and not kept,²⁶ accusations of mediator coercion,²⁷ participants acting in bad faith by using mediation as a fishing expedition, mediators failing to disclose conflicts of interest,²⁸ and in some situations, giving inaccurate information to

¹⁹ Thomas J. Stipanowich and J. Ryan Lamare, *Living with ADR: Evolving Perceptions and Use of Mediation, Arbitration and Conflict Management in Fortune 1000 Corporations*, 19 *HARV. NEGOT. L. REV.* 1 (2014).

²⁰ American Arbitration Association, *Storm Sandy*, https://www.adr.org/aaa/faces/aoe/gc/government/statenaturaldisasterprograms/sandy;jsessionid=54vvJk3DQnT6zlKj4pR0JHjtJ340SI8K8QnMxTpzBTWqqbSBGL27!810521221?_afLoop=257104801964186&_afWindowMode=0&_afWindowId=null#%40%3F_afWindowId%3Dnull%26_afLoop%3D257104801964186%26_afWindowMode%3D0%26_adf.ctrl-state%3Dbg8c3gnl8_4 (describing the AAA Storm Sandy mediation program).

²¹ See e.g., Kenneth Cloke, *Conflict, Climate Change, and Environmental Catastrophe: How Mediators Can Help Save the Planet*, 12 *CARDOZO J. CONFLICT RESOL.* 307 (2011).

²² Sadly, this is not the pleasant time of day described in Henry Wadsworth Longfellow's beloved poem *The Children's Hour*, available at <http://www.poets.org/poetsorg/poem/childrens-hour>.

²³ Robert A. Baruch Bush & Joseph P. Folger, Symposium, *Reclaiming Mediation's Future: Re-Focusing on Party Self-Determination*, 16 *CARDOZO J. CONFLICT RESOL.* 741 (2015); James R. Coben, Symposium, *Barnacles, Aristocracy and Truth Denial: Three Not So Beautiful Aspects of Contemporary Mediation*, 16 *CARDOZO J. CONFLICT RESOL.* 779 (2015).

²⁴ James Coben & Peter N. Thompson, *Disputing Irony: A Systematic Look at Litigation about Mediation*, 11 *HARV. NEGOT. L. REV.* 43, 57–72 (2006).

²⁵ Sarah Cole, *Protecting Confidentiality in Mediation: A Promise Unfulfilled*, 54 *KAN. L. REV.* 1419 (2006).

²⁶ Coben & Thompson, *supra* note 24, at 73–89 (discussing cases challenging the enforceability of mediated agreements).

²⁷ E.g., *Vitakis-Valchine v. Valchine*, 793 So. 2d 1094 (2001) (the case was remanded to the trial court).

²⁸ *CEATS, Inc. v. Continental Airlines, Inc.*, 755 F.3d 1356 (Fed. Cir. 2014) (petition for cert. pending).

parties.²⁹ Also clouding the landscape are multiple permutations of mediation³⁰—other processes out there labeled mediation but in fact very different from the traditional understanding of mediation as a voluntary process based on party self-determination. Tacked on to this list are mediators who combine arbitration with mediation,³¹ those who offer proposals for settlement,³² and judges who mediate.³³ Some countries use mediation and conciliation interchangeably, leading to confusion in cross-border mediation with parties who have different expectations of the process.³⁴

Numerous critics have described mediation's shortcomings. Some have argued that unlike arbitration and litigation, mediation is unregulated and leaves mediation parties without protection.³⁵ Others are concerned that mediation may become diluted as an increasing number of lawyers request that the joint session be eliminated.³⁶ Some commentators claim that as mediation practice moves away from the fundamental principle of self-determination, its power to deal with issues of social justice has diminished.³⁷ Finally, as mediation has expanded in the courts, it has generated

²⁹ Rachael Field, *Neutrality and Power: Myths and Reality* (Nov. 2002), available at <http://www.mediate.com/articles/fieldr.cfm> (challenging mediators to be more honest in their claims of neutrality when mediating family disputes.).

³⁰ Peter Adler, *Protecting the Future of Mediation* (Nov. 2014), available at <http://www.mediate.com/articles/AdlerFuture.cfm> (observing that “[M]ediation is a container into which people pour (and sometimes extract) collaborative law, citizen review panels, deliberative democracy, settlement hearings (in and out of court), collaborative governance, family conferencing, peer mediation, settlement weeks, joint fact-finding, and appreciative inquiry.”).

³¹ See, e.g., Edna Sussman, *Developing an Effective Med-Arb/Arb-Med Process*, 2 N.Y. DISP. RESOL. LAW. 71 (2009); Kristin M. Blankley, *Keeping a Secret From Yourself? Confidentiality When the Same Neutral Serves Both as Mediator and as Arbitrator in the Same Case*, 63 BAYLOR L. REV. 317 (2011); Brian Pappas, *Med-Arb and the Legalization of Alternative Dispute Resolution*, 20 HARV. NEGOT. L. REV. (forthcoming 2015).

³² See, e.g., Stephen Hochman, *A Mediator's Proposal—Whether, When, and How It Should Be*, *MEDIATE.COM* (2010), available at <http://www.mediate.com/pdf/mediatorsproposal.pdf>.

³³ Wayne D. Brazil, *Judicial Mediation of Cases Assigned to the Judge for Trial – Magistrate Judges Celeste F. Bremer and Karen K. Klein*, 17 DISP. RESOL. MAG. 24 (2011).

³⁴ MANON SCHONEWILLE & FRED SCHONEWILLE, *THE VARIEGATED LANDSCAPE OF MEDIATION: A COMPARATIVE STUDY OF MEDIATION REGULATION AND PRACTICES IN EUROPE AND THE WORLD*, 23–24, 33–34 (2014).

³⁵ Hazel Genn, *What is Civil Justice For? Reform, ADR, and Access to Justice*, 24 YALE J.L. & HUMAN. 397 (2012).

³⁶ See, e.g., Eric Galton & Tracy Allen, *Don't Torch the Joint Session*, 21 Disp. Resol. Mag. 25 (2014). It should be noted, however, that the feasibility of joint sessions depends upon context. UN mediators, for example, favor shuttle diplomacy over joint sessions that may give parties the opportunity to become more entrenched in their positions. See REPORT OF THE SECRETARY-GENERAL, *supra* note 9.

³⁷ Robert A. Baruch Bush & Joseph P. Folger, *Mediation and Social Justice: Risks and Opportunities*, 27 OHIO ST. J. ON DISP. RESOL. 1, 49 (2012) (“When the [this] foundational principle

critiques of ethnic and gender disparity in the treatment of minority claimants,³⁸ and claims that it does not provide access to justice but simply to settlement.³⁹

III. THE SEASON OF DARKNESS

Mediation, exhausted from all she is asked to do, now resists engagement.⁴⁰ Current pushback from potential users attests to this reality.⁴¹ The season of darkness is upon us, and this is happening on a global basis, not just in countries in the European Union whose reluctance to use mediation prompted the debate leading to this Symposium.⁴² Mordehai Mironi describes the sad story of the “mediation” revolution in Israel, as a tale of a broken dreams and unfulfilled promises.⁴³ He writes about the failure of the mediation revolution and the abandonment of the concept of mediation as a vehicle for social and cultural change as courts develop mediation substitutes within the court system.⁴⁴ With an increasing backlog of cases and pressure from the media and bar association, clearing the docket has become the first priority of court administrators.⁴⁵

of self-determination is compromised, mediation loses its uniqueness as an instrument for both civility and justice.”).

³⁸ See, e.g., Sharon Press, *Court-Connected Mediation and Minorities: A Report Card*, 39 CAP. U. L. REV. 819 (2011).

³⁹ Genn, *supra* note 35, at 411.

⁴⁰ See, e.g., Carrie Mendel-Meadow, *Variations in the Uptake of and Resistance to Mediation Outside of the United States*, NINTH ANNUAL FORDHAM CONFERENCE ON INTERNATIONAL ARBITRATION AND MEDIATION, CONTEMPORARY ISSUES IN INTERNATIONAL ARBITRATION AND MEDIATION: THE FORDHAM PAPERS (2014).

⁴¹ Hazel Genn writes that in England, “despite the promotion of mediation and the pressure exerted by the judiciary, there has been a relatively weak “bottom-up” demand even for very low-cost, court-linked mediation schemes.” Genn, *supra* note 35, at 404. Giuseppe De Palo and Mary Trevor report that according to statistics from the Centre for Effective Dispute Resolution in London, despite the fact that 90% of commercial mediations settle, only 8000 commercial and civil cases are mediated annually. Giuseppe De Palo and Mary B. Trevor, *Is Mediation Moving Out of the Shadows And Into the U.K. Practice Mainstream?*, 30 ALTERNATIVES 173 (2012).

⁴² Constantin-Adi Gavrilă & Christian Radu Chereji, *What Went Wrong with Mediation*, MEDIATE.COM (Feb. 2014), <http://www.mediate.com/articles/GavrilăAbl20140207.cfm>; but cf. Giuseppe De Palo, *Voluntary Mediation? Apparently, the False Prince Charming*, MEDIATE.COM, (Mar. 2014), <http://www.mediate.com/articles/PaloResponse.cfm>.

⁴³ Mordehai Mironi, *Mediation v. Case Settlement: The Unsettling Relations Between Courts and Mediation - A Case Study*, 19 HARV. NEGOT. L. REV. 173 (2014).

⁴⁴ *Id.*

⁴⁵ *Id.* at 199.

IV. RETURN TO CONSENT

We should not separate consent from mediation.⁴⁶ I propose a return to a consensual understanding of mediation, so that we may recover at least plausible account mediation's joy, and its powerful connections to human dignity. Hopefully, this will attract potential users to engage with her once again. Mediation is a voluntary process based on party self-determination.⁴⁷ Acknowledgement of this first principle honors the consensual nature of mediation both at entry into the process, during the process and at the outcome.⁴⁸

Pushback from potential users is often the result of unwanted pressure. Some parties' discomfort with mediation comes from being pressured into participation.⁴⁹ Coercion appears in many disguises—from telling parties that mediation is an automatic part of the litigation process to imposing costs and fees if they refuse to mediate. Non-consensual mediation may help to clear dockets, but it is a poor substitute for the real thing. It compromises a party's ability to influence how her dispute is resolved,⁵⁰ and may minimize the potential for meaningful settlement. There is some research which shows that cases are more likely to settle at mediation if the parties enter into the process voluntarily rather than being pressured into the process.⁵¹

A. *Court Mediation*

Court-connected programs have been a breeding ground for non-consensual mediation practices with variations of mandatory

⁴⁶ Jacqueline M. Nolan-Haley, *Judicial Review of Mediated Agreements: Improving Mediation with Consent*, 5 PENN ST. Y.B. ARB & MEDIATION 152 (2013).

⁴⁷ MODEL STANDARDS OF CONDUCT FOR MEDIATORS, STANDARD I (2005), available at <http://www.nhd.uscourts.gov/pdf/NH-Mediation-Conduct%20Code.pdf>.

⁴⁸ Jacqueline M. Nolan-Haley, *Informed Consent in Mediation: A Guiding Principle for Truly Educated Decisionmaking*, 74 NOTRE DAME L. REV. 775 (1999).

⁴⁹ Not all parties share this view, however. In an IMI survey of in-house counsel and senior managers in North America and Europe, nearly half the respondents stated that mediation should be a mandatory step in both arbitration and litigation. *IMI International Corporate Users ADR Survey*, INT'L MEDIATION INST. (Apr. 4, 2014), available at <http://imimediation.org/imi-international-corporate-users-adr-survey-summary>.

⁵⁰ See Donna Shestowsky, *Disputants' Preferences for Court-Connected Dispute Resolution Procedures: Why We Should Care and We Know So Little*, 23 OHIO ST. J. ON DISP. RESOL. 549, 550 (2008).

⁵¹ Genn, *supra* note 35, at 406.

regimes operating in many countries.⁵² In the United States, for example, courts have upheld programs where parties may be required to participate in mediation⁵³ while England has adopted a more indirect approach through the imposition of costs.⁵⁴ In the seminal case of *Halsey v. Milton Keynes General NHS Trust*, Lord John Dyson considered the question of whether courts could compel unwilling parties to mediate and he concluded that while courts could not force unwilling parties to mediate, they could use robust means to encourage mediation.⁵⁵ Thus, parties who unreasonably refused to mediate could be liable for costs.⁵⁶ *Halsey* generated much debate over the merits of compulsory mediation with courts extending its principle to refusals to negotiate, delays in agreeing to mediate, and taking unreasonable positions in mediation.⁵⁷ Ten years after the *Halsey* decision, Lord Dyson reflected on the normative question of whether courts could order parties to mediate. His response is instructive on the issue of consent:

[T]he real question is not whether or not a power exists to order mediation. Rather it is whether the court should exercise that power. Ten years on, I remain in the “carrot” camp; it is one thing to compel parties to consider mediation; it is another to frog march them to the mediation table and deny them access to the courtroom if they refuse to participate in the mediation.⁵⁸

⁵² See, e.g., Timothy K. Kuhner, *Court-Connected Mediation Compared: The Cases of Argentina and the United States*, 11 ILSA J. INT'L & COMP. L. 519 (2005); Marcello Marinari, *Italy*, in EU MEDIATION: LAW AND PRACTICE 193 (Giuseppe De Palo & Mary B. Trevor eds., 2012) (refers to Italy's practice of mandating pre-trial mediation of some domestic civil and commercial disputes). See NADJA ALEXANDER, INTERNATIONAL AND COMPARATIVE MEDIATION: LEGAL PERSPECTIVES 154–69 (2009). See also Julia Ann Gold, *ADR Through a Cultural Lens: How Cultural Values Shape Our Disputing Processes*, 2005 J. DISP. RESOL. 289, 316–17.

⁵³ See, e.g., *In re Atlantic Pipe*, 304 F.3d 136 (1st Cir. 2002); see also ALTERNATIVE DISPUTE RESOLUTION ACT OF 1998, 28 U.S.C. § 652; SARA R. COLE ET AL., MEDIATION: LAW, POLICY AND PRACTICE, ch. 9 (2014–2015).

⁵⁴ This has resulted in much litigation with parties challenging the validity of their consent to participate in mediation. See Jacqueline M. Nolan-Haley, *Mediation Exceptionality*, 78 FORDHAM L. REV. 1247, 1256 (2009); Jacqueline M. Nolan-Haley, *Is Europe Headed Down the Primrose Path with Mandatory Mediation?* 37 N.C.J. INT'L L. & COM. REG. 981, 999–03 (2012).

⁵⁵ *Halsey v. Milton Keynes General NHS Trust* [2004] EWCA Civ. 576.

⁵⁶ The *Halsey* court offered a non-exhaustive list of six factors in determining the reasonableness of a party's refusal to participate in mediation: (1) the nature of the dispute; (2) the merits of the case; (3) the extent to which other sentiment methods have been attempted; (4) whether the costs of the ADR would be disproportionately high; (5) whether any delay in setting up and attending the ADR would have been prejudicial; and (6) whether the ADR had a reasonable prospect of success. *Id.*

⁵⁷ See cases in Nolan-Haley, *Mediation Exceptionality*, *supra* note 53, at 1261–62.

⁵⁸ Lord Dyson, *Belfast Mediation Conference: Halsey 10 Years On-The Decision Revisited* 11 (May 9 2014) (on file with the author).

B. *International Mediation*

Forced mediation has the trappings of arrogance, one of the seven deadly sins of mediation described by UN diplomat Lakhdar Brahimi.⁵⁹ In the context of resolving international conflicts, meaningful mediation requires consent,⁶⁰ and lack of voluntariness in mediation has been considered morally problematic.⁶¹ Consent is an integral aspect of mediator ethics codes,⁶² rules,⁶³ and policy documents. The UN Guidance for Effective Mediation, for example, identifies consent as a crucial ingredient, noting that—“[t]he success or failure of a mediation process ultimately depends on whether the conflict parties accept mediation and are committed to reaching an agreement.”⁶⁴ Certainly, where usage is low, we need to find new ways to motivate parties to use mediation.⁶⁵ But, at the same time, we need to understand that there may be cultural reasons why mediation will not be a good fit in some cases.⁶⁶

⁵⁹ LAKHDAR BRAHIMI & SALMAN AHMED, *CTR. ON INT’L COOP., IN PURSUIT OF SUSTAINABLE PEACE: THE SEVEN DEADLY SINS OF MEDIATION* (2008). In addition to arrogance, Brahimi lists ignorance, partiality, impotence, haste, inflexibility and false promises. *Id.* at 5–11.

⁶⁰ See JACOB BERCOVITCH, *THEORY AND PRACTICE OF INTERNATIONAL MEDIATION* 29 (2011) (claiming that “effective mediation requires consent, high motivation and active participation.”).

⁶¹ See Lea Brilmayer, *Daniel J. Meador Lecture: America: The World’s Mediator*, 51 ALA. L. REV. 715, 717 (1999). With reference to the role of the United States as mediator in international conflicts, Brilmayer writes “What seems to be a mutual acceptance of the process and outcome of mediation is frequently coerced, to a greater or lesser degree.” *Id.*

⁶² See, e.g., *IMI Code of Professional Conduct*, INT’L MEDIATION INST., R. 3.2, <https://imimediation.org/imi-code-of-professional-conduct> (“Fairness and integrity of the Process. Mediator will explain the mediation process to the parties and their advisers and be satisfied that they consent to the process being used and to the Mediator selected.”) (last visited Mar. 23, 2015).

⁶³ See, e.g., IBA RULES, *supra* note 7, at art. 8(2) (“The mediator shall assist the parties to reach an agreement on a settlement of their dispute on a voluntary basis in which the parties make free, informed and self-determined choices as to the process and the outcome. . . .”).

⁶⁴ UNITED NATIONS GUIDANCE, *supra* note 12, at 23. It defines mediation as a “voluntary endeavor in which the consent of the parties is critical for a viable process and a durable outcome.” *Id.*

⁶⁵ A study from the Netherlands shows that mediation is not a one size fits all process and that success depends upon whether there is an appropriate analysis of the type of conflict. Genn, *supra* note 35, at 10 (citing MACHTELD PEL, *THE HAGUE, REFERRAL TO MEDIATION: A PRACTICAL GUIDE FOR AN EFFECTIVE MEDIATION PROPOSAL* pt. 1 (2008)).

⁶⁶ E.g., In Ghana, parties reject what they consider the “compromise values” of mediation, particularly when it comes to highly valued assets such as land. Nolan-Haley, *Mediation and Access to Justice in Ghana*, *supra* note 8.

V. CONCLUSION

Once consent is restored, it may be possible to recover an account of the joy of mediation. This is an intentional task that will require imagination, memory and reflection. We need to remember:

- (1) what Lon Fuller told us about mediation's capacity to realign relationships;⁶⁷
- (2) that mediation offers relief from a somewhat rigid, rules-bound justice system just as equity offered relief from the common law;⁶⁸
- (3) that mediation as a process has some powerful capacities—to acknowledge emotions and to respect the psychological and spiritual needs of the parties, including the need to reconcile, to forgive and to be forgiven; and finally
- (4) that mediation provides opportunities to honor human dignity.

We all know stories about the joy that mediation can bring to parties. Consider the accounts that many of our colleagues in this Symposium have written about the powerful stories that mediators tell,⁶⁹ the transformative effects of empowerment and recognition,⁷⁰ and the procedural justice benefits that accompany mediation.⁷¹ For many of us, it was a certain joy that brought us to mediation in the first place. If we can recover a renewed account of that joy, I believe that mediation will arise from her slumber and parties will be motivated to engage in the process. This will not happen while the value of consent remains an imaginary part of the mediation process. A new dawn will rise when consent in mediation is for real.

⁶⁷ Lon Fuller, *Mediation: Its: Its Forms and Functions*, 44 S. CAL. L. REV. 305 (1971).

⁶⁸ Nolan-Haley, *Mediation Exceptionality*, *supra* note 53, at 1250.

⁶⁹ *E.g.*, *STORIES MEDIATORS TELL* (Eric R. Galton & Lela P. Love eds., 2012); *See also* DANIEL BOWLING & DAVID HOFFMAN, *BRINGING PEACE INTO THE ROOM* (2003).

⁷⁰ ROBERT BARUCH BUSH & JOSEPH P. FOLGER, *THE PROMISE OF MEDIATION* (2d ed. 2005).

⁷¹ Nancy Welsh, *Remembering the Role of Justice in Resolution: Insights from Procedural and Social Justice Theories*, 54 J. LEGAL EDUC. 49 (2004); Nancy Welsh, *Stepping Back through the Looking Glass: Real Conversations with Real Disputants About Institutionalized Mediation and its Value*, 19 OHIO ST. J. ON DISP. RESOL. 573 (2004).