PARALLEL JUSTICE: CREATING CAUSES OF ACTION FOR MANDATORY MEDIATION

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By Marie A. Failinger*

At its edges, the common law tradition is inadequate to respond to human suffering that nevertheless cries out for justice. Judges will sometimes name injustices even while acknowledging that they cannot provide a remedy because a claim is non-justiciable.¹ This does not have to be so: the steady growth of court-annexed mediation² and the development of the restorative justice movement³ have created an opening to provide a measure of justice to victims of nonjusticiable cases, a response that can honor the policies that prevent courts from pronouncing judgment in these cases, while offering the victims the remedy of encounter with their wrongdoers. At least some justice is possible because mediation has evolved from a private, consensual undertaking disconnected from legal process and become a fully integrated part of our civil judicial system. Similarly, restorative justice has taken a respected place as a viable alternative to retributive justice in criminal court.

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¹ See, e.g., Triplett v. St. Amour, 444 Mich. 170, 185, 507 N.W.2d 194, 200 (Mich. 1993) (quoting Columbia Casualty Co. v. Klettke, 259 Mich. 564; 244 N.W. 162 (Mich. 1932))(rejecting a cause of action for fraud in inducing a tort settlement, and noting “[t]his rule seems harsh, for often a party will lose valuable rights because of the perjury of his adversary. However, public policy seems to demand that there be an end to litigation. . . .[.] ’the wrong in such case, is of course a most grievous one, and no doubt the legislature and the courts would be glad to redress it if a rule could be devised that would remedy the evil without producing mischief far worse than the evil to be remedied.’”) See also Keane v. State, 164 Md. 685, 694, 166 A. 410, 413, 413 (Md. 1933) (rejecting a writ of coram nobis for a man convicted on the basis of mistaken eyewitness testimony, and noting “[i]t is unfortunate that there is no complete and adequate remedy for such a wrong as that of which the petitioner complains, but this court cannot create a remedy where none exists, since its function is to discover and apply existing law and not to make new law”).

² For a description of the advent of court-annexed or court-connected mediation, see Bobbi McAdoo and Nancy Welsh, Look Before You Leap and Keep on Looking: Lessons from the Institutionalization of Court-Connected Mediation, 5 Nev. L.J. 399 (2004-05) (hereinafter McAdoo and Welsh).

³ For a description of the basic principles and practices of restorative justice, see Howard Zehr, The Little Book of Restorative Justice (2002).
Indeed, proposals for legal system reform using alternative methods of dispute resolution continue to dare the American legal system to diversify its approaches to conflict. Prof. Frank Sander has argued that we should diversify the types of conflict resolution processes available “at the courthouse door” to manage currently recognized causes of action.⁴ In his vision, a panoply of dispute resolution opportunities should be available to potential litigants as an integrated part of any justice system, including counseling, mediation, negotiation, and litigation itself. Indeed, ADR practice has confirmed that alternatives to traditional litigation can be valuable assets of any judicial system, whether litigants entering the courthouse door are directed to an appropriate process, or public adjudication is pre-empted through privately arranged arbitration, negotiation or mediation before a conflict ever reaches the courthouse.⁵

Expanding on this vision, I will argue that American lawmakers should make use of court-integrated ADR systems by recognizing new substantive causes of action remediable solely by mandatory mediation and similar restorative practices like sentencing circles and family group conferencing.⁶ Many injustices currently go without remedy because there is no

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⁴ See McAdoo and Welsh, supra note 12, at 402-404 (describing Sander’s introduction of the idea at a conference to commemorate the Pound lectures in St. Paul, and the task force recommendations that resulted from it). See also A Dialogue Between Professors Frank Sander and Mariana Hernandez Crespo: Exploring the Evolution of the Multi-Door Courthouse 670 (2008) available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1265221 (visited March 2012)(noting that the multi-door courthouse idea “is to look at different forms of dispute resolution . . . and see whether we could work out some kind of taxonomy of which disputes ought to go where, and which doors are appropriate for which disputes.”).

⁵ Currently, ADR is available for voluntary dispute resolution through private mediators, but in many states it is also available to parties who can state a legally cognizable claim in court, such as a petition for divorce or personal injury claim, who may be offered or even ordered to attempt mediation or another form of ADR before a court will consider their claims. See, e.g., Sharon B. Press, Institutionalization: Savior or Saboteur of Mediation? 24 FLA. ST. U. L. REV. 903, 905-06 (1997) (noting that “[t]he President of the United States routinely deploys mediators to assist with international crises, ballplayers routinely seek arbitration to resolve contract disputes, and students nationwide, some as young as elementary school age, participate in peer mediation programs.”). See also Lela Love and Joseph B. Stulberg, The Uses of Mediation, The NEGOTIATOR’S FIELDBOOK 573, 574 (Andrea Kupfer Schneider & Christopher Honeyman eds., 2006) (noting the use of mediation in controversies from the Internet, on the street, or schools to cases filed in court).

⁶ Sentencing circles are alternatives to judicial sentence adjudication offered to willing defendants and victims. KAY PRANIS, BARRY STUART AND MARK WEDGE, PEACEMAKING CIRCLES: FROM CRIME TO COMMUNITY 21 (2003).
recognized cause of action for that harm, or a plaintiff cannot meet an element of a recognized cause of action, or there is a defense, such as a constitutional bar. Even if a court cannot properly impose involuntary sanctions, such as criminal punishment, civil damages, or injunctive relief, I suggest that these harms can be recognized through “mediation-only” causes of action, enabling judges to order mandatory court-annexed mediation or similar restorative practices. Creating “mediation-only” causes of action offers the promise of transforming victims’ injuries and relationships with wrongdoers, while avoiding traditional objections to the use of court coercion to redress or prevent behavior that clearly offends community morals.

In Part I, I will suggest how such a system might procedurally work, using just a few examples of the constitutional problems that demonstrate the inadequacy of common law justice in a system of individual rights. In Part II, I argue that the creation of a separate “track” or legal system for currently non-justiciable causes of action is not as radical as it may appear: there are instructive parallels between the equity court system that emerged out of the common law and court-annexed mediation practices that suggest the viability and value of this project. In Part III, I consider standard objections to the use of mandatory mediation, a concept that seemw incoherent in light of the birth of mediation as a voluntary process.

a typical circle, the defendant, his representatives, a prosecutor, sometimes the judge, sometimes family of defendant or victim, other professionals and members of the community may be called to talk about the offense and its impact on both its direct victim and the community at large. The circle also tries to identify alternatives to incarceration that will better repair the harm caused the victim (viewed as more than damages or other legal harm), while holding the offender accountable for his wrongdoing and yet restore his ties to the community. For an example, see id. at 15-16, 21-22. Family group conferencing, which is widely in New Zealand, brings the family of a juvenile (usually) together with criminal justice professionals and community members to understand the relationship between the offense and the family system, and to enlist families in responses that will permanently alter the dynamics that led a juvenile into crime. See Allison Morris and Gabrielle Maxwell, Restorative Justice in New Zealand: Family Group Conferences as a Case Study, 1998 WEST. CRIMINOLOGY REV. 1, 3-4 (1998) (available at http://wcr.sonoma.edu/v1n1/morris.html[visited July 5, 2012]); For an example, see Pranis, supra note 16, at 22. For a discussion of the history of restorative justice, see Anthony J. Nocella II, An Overview of the History and Theory of Transformative Justice, 6 PEACE AND CONFLICT REV. 1, 3-5 (2011), available at http://www.review.upeace.org/pdf.cfm?articulo=124&ejemplar=23 (visited April 4, 2012) See also Howard Vogel, The Restorative Justice Wager: The Promise and Hope of a Value-based Dialogue Driven Approach to Conflict Resolution for Social Healing, 8 CARDOZO J. CONFLICT RESOL. 565, 568-70 (2007)
In Part IV, I will consider how a system might be designed to identify cases appropriate for mandatory mediation only. Finally, in Part V, I briefly explore how these causes of action might be framed in constitutional cases, and consider whether such new causes of action for injury will defeat substantive and procedural values that have made such claims non-justiciable. It seems fair to test the proposal for mediation-only claims against existing constitutional rights cases because these cases are perhaps my proposal’s most difficult challenge: allowing such claims potentially implicates critical democratic values embedded in our protection of speech and the press.

Though I will use constitutional cases, this proposal is not meant to be limited to cases with constitutional difficulties. As one potential application, states may find a mediation-only pathway helpful to respond to injuries sounding in tort where it is difficult to establish some elements of a cause of action. For example, the mediation pathway might be used where causation is difficult to establish in mass tort cases, where it is hard to measure damages because the plaintiff has no material or physical injury, and even cases where standard equitable remedies, like injunctions, will not serve to redress the wrongdoing. Causes of action remediable only through mandatory mediation might be valuable in states that have been reluctant on public policy grounds to recognize causes of action for wrongs as various as publication of private facts and false light privacy torts, breach of the covenant of good faith and fair dealing in employment, workplace or cyberspace bullying, or even intentional infliction of emotional distress claims against lawyers, to name just a few uses for a mediation-only cause of action.  

7 See, e.g., Anita L. Allen, Privacy Torts: Unreliable Remedies for LGBT Plaintiffs, 98 CAL. L. REV. 1711, 1720-21, 1761-62 (2010) (describing some states’ reluctance to extend privacy torts to include publication of private facts
I. Re-imagining the Course of Constitutional Litigation

To consider whether we need to explore the concept of mediation-only causes of action, we might consider two spectacular failures of the common law court system, constrained by constitutional values, to provide any real justice to true victims. One is nearly fifty years old—the American Nazi proposal to march through Skokie Illinois—and one is relatively recent—the Westboro Baptist Church picket of the funeral of Lance Corporal James Snyder.

In 1977, a small band of neo-Nazis proposed to march in Skokie, a town where victims of the Holocaust who emigrated to America thought they would be safe. The proposed march was announced with a poster depicting a figure with a hand around his throat and the words, “We are Coming” and “Smash the Jew System.” For the Nazis, this threat was a taunt to Chicago officials who had stymied their plans to protest the racial integration of Marquette Park by requiring that a $250,000 parade bond to march in Chicago. For as many as 7,000 survivors of the Nazi camps who had found refuge in Skokie, however, the sight of Nazi uniforms brought or false light cases and noting other cases where courts were reluctant to find outrageous conduct for IIED cases); Robert J. Tepper and Craig G. Whit, Workplace Harassment in the Academic Environment, 56 ST. LOUIS U. L.J. 8 (2011) (noting courts’ reluctance to recognize causes of action for workplace bullying); James J. Brudney, Reluctance and Remorse: The Covenant of Good Faith and Fair Dealing in American Employment Law, 32 COMP. LAB.L & POL’Y J. 773-774 (2011) (discussing reluctance of states to provide causes of action for violation of the covenant of good faith and fair dealing in at-will employment situations); Alex B. Long, Lawyers Intentionally Inflicting Emotional Distress, 42 SETON HALL L. J. 138-142 (forthcoming, 2012) (discussing courts’ reluctance to permit IIED claims against lawyers.) Compare Geoffrey Rapp, Defense Against Outrage and the Perils of Parasitic Torts, 45 GA. L. REV. 107, 138-142 (2010) (noting the expansion of courts’ use of negligent infliction of emotional distress, including the elimination of significant physical injury requirement.)

8 PHILIPPA STRUM, WHEN THE NAZIS CAME TO SKOKIE: FREEDOM FOR SPEECH WE HATE 1 (1999) (describing the survivors’ belief that as American citizens, they should have the right “to live peacefully and safely, dealing as best they could with their unspeakable memories of families brutally separated, of forced labor and starvation, and of those who are forced into the gas chambers to die.”).

9 Id. at 18, 98 (describing posters bearing Jewish caricatures, and a poster of three rabbis involved in a ritual murder of a Christian.”).

10 Id. at 5-6, (noting that local Caucasians blamed Jewish landlords for renting to blacks in Marquette Park). 14-15 (noting that Collin may have been particularly upset because his office was in Marquette Park.) In Collin’s view, African American and Jewish American Chicagoans were linked: in addition to the help that Jewish landlords provided in desegregating parts of Chicago, the Nazis thought that Jews were involved in a Federal Reserve and Communist “conspiracy” to take over economic power in the U.S., which was thwarting his organization’s goals of returning black Americans to Africa. Id. at 13-14
back unspeakable memories: roaming gangs of Lithuanians beating Jews to death with iron bats or stuffing water-hoses into their mouths to drown them, Jews burned to death, raped, tortured and murdered in Lithuanian prisons by guards. Nazi leader Frank Collin’s hateful words recalled “[d]eath in a most horrible form, not only death to be shot in a moment to be killed but death after torture.” Citing the First Amendment, the lower federal courts refused to enjoin Collin from marching in Skokie.

In 2006, the United States Supreme Court refused to uphold a damages award made to the family of a maligned dead Marine in Snyder v. Phelps. Albert Snyder lost his 20-year-old son, Marine Lance Corporal Matthew Snyder, in Iraq. Matthew’s was one of many military dead whose funerals have been picketed by Rev. Phelps and members of the Westboro Baptist Church (WBC). They claimed that soldier deaths in Afghanistan and Iraq were God’s punishment for the moral sins of American society and government attempts to silence their preaching. The defendants “protested outside the Snyders’ church on the day of Matthew’s funeral, holding signs reading, among other things, ‘Thank God for Dead Soldiers,’ “God Hates Fags,” “Priests Rape Boys,” “God Hates You,” and “You’re going to Hell.” Even though the church re-directed mourners to another entrance, the WBC protesters were only 200-300 feet

11 Id. at 10
12 Id. at 10. Strum notes that the Lithuanians called this rape/torture/murder practice “going to peel potatoes.” Id. Perhaps the most searing memory was of the “Children’s Action” that tore children under 11 or 12 from their parents, threw them “into vans like packages,” and destroyed every one. Id. at 12.
13 Id. at 98.
14 Id.
16 The announcement that the Westboro Baptist Church ("WBC") would picket the funeral at “St. John’s Catholic dog kennel” stated “Killed by IED—like the IED America Bombed WBC with in a terroristic effort to silence our anti-gay Gospel preaching by violence.” Brief for Petitioner, Snyder v. Phelps, ___U.S. __, 131 S.Ct. 1207 (2011) (No. 09-751) 2010 U.S. S.Ct. Briefs LEXIS 505 at 4. Fred Phelps Sr., by contrast, admitted that he was picketing funerals as revenge against all Marines because some of them assaulted him three years previously. Id. at 6. His own expert admitted that the WBC signs were “personal” to the Snyder family and interfered with the family’s grieving process, thus contributed to Mr. Snyder’s depression. Id. at 6
17 Id.
from the funeral procession. The Catholic school across the street closed its blinds so
schoolchildren would not have to face the protesters and press. More painfully, the WBC
posted a lengthy poem lambasting Lance Corporal Snyder, who was not gay, and his family.
The poem claimed that his parents “raised him for the devil,” and stated that Matthew’s parents
“RIPPED that body apart and taught Matthew to defy his Creator, to divorce, and to commit
adultery.” They claimed that God killed Matthew so the WBC could preach God’s word of
vengeance. Reading this description on the website, Mr. Snyder vomited; in the wake of the
funeral, his diabetes was exacerbated, and, further depressed, he stated that he could never think
about the funeral without pain. Yet, the United States Supreme Court rejected Snyder’s claims
for defamation, intrusion on seclusion, and intentional infliction of emotional distress that had
resulted in a jury verdict of over $10 million.

These are perhaps more anguishing constitutional stories than most, but they underscore
the constitutional conclusion that the fear, anguish and anger that these victims have suffered is
an acceptable price for a robust democracy.

What alternatives might have been available to Sol Goldstein, one of the Holocaust
survivors who confronted the Nazis in Skokie, or Albert Snyder, Matthew’s father, if the
common law recognized that they had a cause of action triggering a parallel “mediation-only”
process for the harms caused to them? In current court-annexed mediation, perhaps the most
common pathway to mediation starts with the filing of a regular complaint alleging a justiciable

18 Id. at
19 Id. at 7-8
20 Id. at 8.
21 Id.
22 Funeral Protests aren’t welcome, but they’re free speech, Fort Worth Star-Telegram March 4, 2011, available at
2011 WLNR 4220643 (visited February 1, 2013)
cause of action, sometimes an answer, and then review by the trial judge assigned to the case for possible referral to court-annexed mediation processes. If these processes fail, the case is then placed back on the court docket and proceeds in traditional fashion. The mediation referral often occurs early in the case; but in many cases, parties are not precluded from filing additional pleadings or obtaining some discovery before the case is either settled or returned to the district court.  

In a mediation-only system proposed here, cases like Snyder’s and Goldstein’s that were eligible only for mandatory mediation might initially be managed like standard litigation in the first stages. That is, a plaintiff would plead a cognizable cause of action sounding only in mediation, and a judicial decision-maker would determine that the elements of this cause of action appear to make out a case for mandatory mediation referral. The defendant Westboro Baptist Church or Nazi Party could argue, as they can now through motions to dismiss and motions for summary judgment, that the case on its face does not meet the elements for mandatory referral. A judicial officer would rule on that motion, finding either that the plaintiff has not pleaded a cause of action eligible for mandatory mediation, or that the case should proceed to mediation. Such motions could be decided by existing trial judges, or the courts could use law-trained referees or judicial administrators to rule on objections to mediation jurisdiction, with possible appeals to a trial-level judge similar to those provided to small claims

See, Bobbi McAdoo, Nancy Welsh and Roselle Wissler, *Institutionalization: What Do Empirical Studies Tell us about Court Mediation?* 34-35 GPSOLO March 2001 (noting that cases are more likely to settle if mediation occurs early in the litigation though in some cases, giving lawyers information about the case through discovery and allowing some motions to be decided sometimes helps cases to settle).
or conciliation court litigants today. If necessary to get a defendant to continue in the process, jurisdictions considering a mediation-only pathway might wish to consider whether a mediation complaint should be kept out of public records, as is the current practice when private parties use mediation on their own.

While such a case would resemble a traditional lawsuit to this point, if the case were a mediation-only cause of action employing a court-annexed process, the pathway after this point would look quite different. Plaintiffs or defendants would not be entitled to utilize current discovery vehicles such as depositions and interrogatories to build their cases prior to mediation. Rather, information-gathering from the opponent would occur just as it does in current mediation practice---the parties and others who may participate in the mediation would tell their stories and voluntarily disclose any factual information they choose as part of the process of bringing their own perspectives and needs to light. While this may seem frustrating or even unfair to lawyers used to being able to compel factual information from their adversaries in order to estimate the likelihood of success at trial, the critical thing to remember here is that mediation, particularly in its transformative variety, is not primarily centered on either determining with scientific precision what actually happened or coming to an objective judgment about either the wrongdoer or the wrong. It is primarily centered on repairing the relationship, using truth-telling and moral evaluation as sometimes useful methods toward reconciliation or rapprochement, but not as ultimate goals.

To be sure, the creation of a parallel dispute resolution system, managing its own defined causes of action through its own processes, might seem a bold, even unnecessary move in a society already overtaxed with government regulation and drop-of-a-hat litigation. However, I...
would argue that the modern American legal system leaves too many injustices lingering without a remedy to justify dismissing the promise of such a system without a thorough investigation. This article cannot investigate all of these concerns at length. Rather, its goal is to initiate a public discussion on whether this is a valuable way forward for the American justice system, and how it might be implemented.

I. SEEKING A MODEL FOR COURT-CONNECTED MEDIATION: THE RISE OF THE EQUITY COURTS

While the creation of a parallel system of justice for currently non-justiciable cases might seem more radical than our current uses of mediation, I believe there are some parallels between the rise of the equity courts and court-annexed mediation that suggest that parallel systems to common law adjudication can be successful, and therefore, we do not need to be especially worried about this kind of innovation. Like modern mediation, the equity courts evolved from the inability of the common law courts to deliver justice in all cases, to fully name which cases should be justiciable, and to consistently find an appropriately just remedy. Historians variously describe the origins of the legal streams that found their confluence in the English system of equity by the 14th century. Some historians note that equity had ancient roots in Roman and German legal systems. The exercise of equity in England is known to have preceded the

25 See GEORGE GOLDSMITH, THE DOCTRINE AND PRACTICE OF EQUITY 6-7 (6th ed. 1871) Goldsmith identifies the reign of Edward I (1239-1307) as a key moment in the development of equity, because of the assignment in the Statute of Westminster the Second of the power to the masters of chancery to issue writs after they had decided that the complainant had no remedy at law, but Goldsmith argued that equitable jurisdiction as such was developed much later. Id. at 6-7 Story argues that the jurisdiction of chancery was fully operational by the reign of Richard II (1367-1400), JOSEPH STORY, COMMENTARIES ON EQUITY JURISPRUDENCE 8 (1846).
26 See, e.g., ELLIOT H. GOODWIN, THE EQUITY OF THE KING’S COURT BEFORE THE REIGN OF EDWARD THE FIRST 10-12 (1899) (discussing the claim that equity comes from the Roman aequitas but noting the limited power of the Roman praetor to ignore positive law, and arguing for its roots in Teutonic and Carolingian processes). See also
Norman kings, suggesting that even ancients understood the fissures between the rule of law and justice. Other scholars tracing the rise of equity emphasize its ecclesiastical roots, centered in theological and philosophical attempts to justify “a departure from formal rights owing to moral or other considerations.” Indeed, Lord Chancellor Cowper argued that “equity is no part of the law, but a moral virtue which qualifies, moderates and reforms the rigour, hardness and edge of the law, and is a universal truth.” Goldsmith summarizes equity, a system in accordance with the principles of natural and universal justice,” as “softening the asperities, supplying the deficiencies, guiding and assisting the administration of positive law, and offering redress where, from its nature, that law could give none.” Although the parallels are inexact, what we know about the rise of equity permits us to compare the ways in which court-connected mediation can perform a comparable systemic and ethical role.

A. Equity and Mediation: A Systemic Comparison

GOLDSMITH, supra note 19, at 3 (discussing the Roman office of praetor which judged “according to equity and conscience, where a rigid adherence to the strict letter of the law would work a hardship or injustice” though Goldsmith notes that Rome did not have separate court systems). See id. at xvii (quoting Lord Ellesmere’s tracing of the office to king Jehoshaphat, the Hebrew king circa 873 B.C.E- 849 B.C.E).

GOODWIN, supra note 20, at 12-13 (noting the existence of equitable jurisdiction in Anglo-Saxon England as well as by Norman dukes before the Norman conquest).

See ALISTAIR HUDSON, EQUITY & TRUSTS 7, 11 (2009(quoting Hegel and describing the origin of the equity courts as a mixture of ecclesiastical and precedential law, and noting the Greek roots of the idea); but see RALPH E. KURTZ, A SHORT TREATISE ON “THE RIGHT OF A COURT OF EQUITY TO DIRECT ACTS BEYOND ITS JURISDICTION, 26-27 (1917) (noting Pollock and Maitland’s argument that the chancery had its roots in the early English church, and that the chancellor “as keeper of the conscience of the people could enforce his decrees by threats upon the religious life . . . ” of litigants). See also GOLDSMITH, supra. note 19, at xiv and xvi, 13 (noting that the Roman office of chancellor passed to the Roman Church, which adopted the office of chancellor to be the principal judge of a bishop’s consistory, and that until the right of Edgar, the chancellor was a clergyman because of his literacy); STORY, Id. note 19, at 11 (noting that equity pleadings were likely borrowed from both civil and canon law). also argues that the ecclesiastical lawyers welcomed the adoption of Roman civil law because of their interest in strengthening their power over the laity. GOLDSMITH, supra, note 19, at 7-8.

HUDSON, supra note 22., at 14 n 1 quoting Lord Cowper in Lord Dudley v. Lady Dudley (105) Ch. 241, 244.

GOLDSMITH, supra note 19, at 18 (quoting Mr. Spence’s view that equity filled defects in the common law “by introducing a jus honorarium” and to take cases “where no remedy, or an inadequate remedy, was provided by law.”); see J.J. PARK, WHAT ARE COURTS OF EQUITY, 17 (1832)/ Park argues with Story that the equity court has jurisdiction where there is no “plain, adequate and complete remedy” at law, e.g., the remedy must not be “doubtful and obscure,” it must not “fall short of what the party is entitled to,” and it “must reach the whole mischief, and secure the whole right of the party, now and for the future . . . ”); STORY, supra note 19, at 7.
Both equity and mediation are essentially powers reserved from the common law system by the sovereign. In equity, and I will argue in mediation, the sovereign retains the possibility of seeking justice in a different way, even as the comprehensiveness of common law court jurisdiction over the adjudication of conflicts increased. Similarly, as with mediation, equity power once held largely as ministerial evolved to become significant legal authority to achieve justice; and substantive and procedural rules in the equity courts became increasingly more complex and certain, just as procedural rules have become in mediation. As a system priding itself on the ability to be flexible and to consider context and persons in the delivery of justice, equity still had to contend with the criticism that it was pregnant with abusive power because it could subvert rule of law values such as the uniform application of the law, certainty and predictability. However, the system of equity found ways to balance this potentially all-embracing power by restricting its own jurisdiction. As I will suggest, this concern that mediation might overtake and damage common law values is not as serious if mediation becomes a parallel system of justice. Court-annexed mediation stands in a much different position vis-à-vis common law authority, and embodies both practices and values that guard against concerns about subverting bedrock common law values and procedures.

Even though we now think of equity as an adjunct to law, it is important to recall that it was once the opposite: the common law was understood to be a delegated power of the King who reserved all other powers of doing justice to himself, including the power to overrule the judges who were his delegates. 31 During the reign of Henry II, when localized, discretionar

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31GOLDSMITH, supra note 19, at 22 (describing Henry II’s reservation of legal power “as the fountain of justice and equity.”); GOODWIN, supra note 20, at 18, 23 (noting that by the time of Edward I, the King swore an oath to be the
justice began to develop into a law that was “common” to the kingdom, the king reserved the right to overrule the developing “rule of law” system for any reasons he saw fit. Holdsworth’s discussion of the creation of the King’s courts suggests that while the King’s justice was not always just—it could be dispensed arbitrarily to favor his friends and harm his enemies—its partiality was no different from the preferential treatment shown by his delegated jurists in the early years of the common law system. Yet, the King’s justice was apparently the “least worst” form of justice available, if lack of bias toward one’s friends and prejudice against one’s enemies are the measure of a fair judicial system. And there are at least some soundings that part of the role of equity was to alleviate the harshness of the law in cases where poverty made the strict exercise of the law difficult.

Moreover, there have always been philosophical reasons for the sovereign to retain the ultimate power to rule and overrule appointed judges. As with any law that becomes “common,” attempting to enforce uniform obligations and protections for all after centuries of ad hoc justice, the English common law could not fully resolve ancient difficulties attending legal systems that

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32 See HUDSON, supra note 22, at 15 (noting Henry II’s preservation of the right to petition the King even after creation of a common law for the entire realm to be administered by the King’s Bench courts.)
33 Id. at 32-33, 35-36 (noting that before Henry II’s reforms, the king’s justice was obtained by payment, and his protection of the weak against the powerful was exercised arbitrarily to those who could pay for the privilege).
34 HOLDSWORTH, supra note 25, at 194-95 but see GOODWIN, supra note 20 at 21.24 (noting that the king often used his power to interfere and alter either procedure or judgment arbitrarily, but suggesting that some of that abuse was kept in check by protests from members of the House of Commons, e.g., about the overuse of pardons).
35 HOLDSWORTH, supra note 25, at 194-95.
36 Id. at 31-32 (noting that fines imposed by the pipe rolls were sometimes remitted or reduced in case of poverty, and that pardons were given in some cases for paupers who owed fines).
aspire to both justice and the rule of law: how can a law be fairly applied to two persons who
stand in somewhat different situations? What must be done when formal justice and formal
equality fail to call forth an equitable result? What is the duty of the sovereign when “the
strictest right is the greatest wrong” (sumnum ius summa injuria),” when litigants insist on
standing upon the law even when they are aware of the injury that their assertion of right will
cause others? Moreover, even in early times, the need to ensure against the oppression of court
officers was noted.

On first glance, the notion that justice ultimately comes from the sovereign who retains
the right to achieve it, and not from the sovereign’s authorized procedures or officials, may not
seem to find any obvious parallel in the modern mediation movement. Nor might court-
connected mediation seem to resemble equity as the stroke of true justice the sovereign decrees,
a stroke that up-ends and disrupts the pedestrian and flawed justice offered by the institutional
rule of law. Yet, from a broader perspective, the institutions of mediation and restorative justice
essentially argue that the true power for resolving disputes, for transforming conflict into
understanding and cooperation, lies in the people themselves, those in conflict and those who
constitute the community around them. In this way, mediation practice does not simply lie in the
shadows of court justice as a poor, efficient cousin of the true power, the common law. Rather, it
is the other way around: individuals and their communities, retaining the right to resolve
disputes, have provided limited authorization to the court systems and the common law to carry

37 See HUDSON, supra note 22 at 6-7, 11 (discussing the difficulty of creating rules without treating individuals in
some cases unjustly and noting Aristotle’s similar argument for why equity is superior justice).
38 Geoffrey Hartman, The Tricksy Word: Richard Weisberg on the Merchant of Venice, 23 LAW & LITERATURE 71,
76 (2011) (referring to this maxim as showing that “law, as a limiting action, may itself come upon a limit, or have
to be limited as it approaches, or even as it is infected by, the violence or violation it seeks to curb.”)
39 GOODWIN, supra note 20, at 15.
out these tasks. It is the people, individually and collectively, who reserve the power to do the justice that the modern common law courts cannot achieve through alternative means, however much these processes may subvert common law processes and remedies. That is, people may choose the courts’ justice, or they may recognize that true justice cannot be done in the courts, and seek to exercise their original “jurisdiction” over their conflicts through mediation and other ADR processes.

We might also see development parallels between equity and mediation: both began as ad hoc informal processes and became more formal and powerful systems of dispute resolution. According to Blackstone, the English system of equity evolved through the slow ascription of Roman and ecclesiastical judicial powers to what were essentially ministerial offices of secretaries and scribes, until these became stronger until eventually the office of chancellor became very powerful.40 In a parallel way, mediation has slowly evolved from a privatized dispute system infrequently used, first into a procedural “referral option” for frustrated litigants, and then to an office of legal power that becomes part of the common law judge’s arsenal of state control, at least in those jurisdictions that have adopted court-annexed mediation. 41 More colorfully, we may suggest that mediation has found its voice as not a poor but worthy cousin of the common law courts, but as a “right hand” of the courts, entrance to and exit from which courts significantly control.

40 See GOLDSMITH, supra note 19, at xiv (noting that the name chancellor meant scribe or secretary in the Roman courts, though the office later assumed both judicial and supervisory powers); HOLDSWORTH, supra note 25, at 395 (noting that the Chancery was essentially a secretariat under the Norman and Angevin Kings, and the Chancellor essentially served as a prime minister for the Curia Regis, the governing entity/)
41 See, e.g., Nancy A. Welsh, The Thinning Vision of Self-Determination in Court-Connected Mediation: The Inevitable Price of Institutionalization? 6 HARV. NEGOTIATION L. REV. 1, 64-68 (2001)(describing ways in which judges are involved in coercing settlement in court-annexed mediation cases)
Historically, we see the increased sophistication and elaboration of rules in the system of equity as it evolved, a trajectory that finds some parallels in court-annexed mediation. Equity developed from a somewhat happenstance series of informal pleas to the king’s justice\footnote{See, e.g., GOODWIN, supra note 20, at 15-16, 18 (describing the change to a system of justice where a litigant must first go to the ordinary courts before applying to the king, while preserving the right to apply to the king).} into a sophisticated dispute system in the High Court of Chancery, requiring appropriate pleadings and sporting dual jurisdictions overlapping the common law system.\footnote{GOLDSMITH, supra note 19, at 30-34 (showing the development of equity jurisdiction and the ways that equity and common law competed and ultimately settled on their competing jurisdiction).} In England, until the merger of the equity and common law courts in 1873,\footnote{HUDSON, supra note 22, at 17 (stating that the two systems were separate until the year of 1873).} cases in the ordinary jurisdiction of the equity courts were resolved through common and statutory law, and those in its extraordinary jurisdiction according to the developed rules and maxims of equity.\footnote{See GOLDSMITH, supra note 19, at 1-2 (discussing the development and ultimate purpose of equity); but see id. at 60 (noting at the time of Henry V, the chancellor has only extraordinary jurisdiction).} So too, ADR theoreticians and practitioners, particularly in court-annexed and court-enforced mediation, have focused on a sophisticated refinement of mediation processes, including the innovation of remedies, and the development of ethical rules and parameters around the enforcement of mediation agreements. Indeed, there is now such a robust “law of mediation” that the recently published treatise on mediation law by Professor James Coben and his co-authors ran to three volumes and 3600 pages.\footnote{See JAMES R. COBEN, ET AL., MEDIATION: LAW, POLICY & PRACTICE (2011-2012 Trial Practice Series).}

One glaring difference between the equity courts and court-annexed mediation is the subject of this paper. The equity courts did not simply stop at the development of procedure and remedy. Rather, the law of equity developed a substantive dimension as well: it has been described both as a “reservoir of general principles” to achieve fairness and as a “code of
technical substantive rules of law.” 47 I argue that court-annexed mediation should more resemble this equity development: that legislatures and courts should create a “substantive law” of cases referable to mandatory mediation even if they are not justiciable in court. That menu of cases should include not only those traditional legal disputes that have proven amenable to more efficient resolution through ADR, such as commercial disputes, and cases where process dynamics of mediation are important to preserving important ongoing relationships, such as divorce. They should also, perhaps most importantly, include cases that should be “actionable” at least in the sense that mandatory mediation could be ordered by the courts. Whether the “law of mediation” will develop substantive value principles in the same way as equity has developed its maxims remains to be seen, but this is a development that should be welcomed, not stifled.

B. Avoiding Equity’s Stumbles

One concern that mediation advocates may have about the use of the equity courts as a model for development of a viable court-annexed mediation system is precisely that equity became a rigid system that adopted (and arguably exacerbated some of) the flaws of the common law courts, 48 a development most mediation advocates would find disappointing. On the other side, those proposing caution in the expansion of mediation, particularly the use of mandatory mediation in some cases, have challenged its failure to be beholden to the values of the rule of

47 HUDSON, supra note 22 at 6 (noting that equity can be understood as the means to ensure that strict application of the law did not result in unfairness, or as a collection of substantive principles developed by equity courts to judge people’s consciences, or as a set of procedural rules and forms developed by the Chancery courts); See also PARK, supra note 24 at 11-12 (claiming that equity has gone beyond “discretionary interference, wherever the law was harsh or silent” to have rules that are “fixed laws in themselves, sometimes supplying, sometimes controlling . . . the institutions of common and statute law.”).
48 See JOSEPH STORY, COMMENTARIES ON EQUITY PLEADINGS, AND THE INCIDENTS THEREOF 11-12 (1892) (describing equity as “a science of great complexity. . .” requiring “great talents to master in all its various distinctions and subtle contrivances. . . ”).
law and the protections of the current system of adjudication, including the protection that lawyers provide to clients. As just the most prominent example, mediation theorists and women’s advocates have argued for years over whether justice is possible in a mediation setting where one party has abused his power over the other.

These conflicting challenges raise the question whether any system designed to bring justice outside of the constraints of a rule of law regime must and should be cabined lest it abuse its power. Moreover, they ask whether the constraints necessary to cabin that power necessarily lead alternative systems to mimic the very processes and create the very difficulties in the common law courts that caused the parallel rise of the equity courts to be necessary.

Some legal historians have argued that the values that equity brought to the table, such as flexibility and fairness, were eventually swept away by equity’s development of rigid forms of pleadings and processes, which narrowed what conflicts equity could consider. In Humphrey’s words, equity became simply a rival to the common law: it became “[p]ositive Law, acting and bound by fixed rules [that had] long lost its original character of discretionary interference, wherever the law was harsh or silent. . . . [I]ts rules have become fixed laws in themselves, sometimes supplying, sometimes controlling, as occasion or accident may have directed, the institutions of common and statute law.”

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50 See, e.g., HUDSON, supra note 22 at 19 (describing different causes of action and remedies between common law and equity); Kroger, supra note , at 1438 quoting SIR WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 822-24 (1877) (quoting Blackstone describing equity as “’a labored connected system, governed by established rules and bound by precedents” and calling for a merger of law and equity, so the rules were the same, lest they “cease to be courts of justice).
51 PARK, supra note 24 at 11-12 (quoting JAMES HUMPHREYS, OBSERVATIONS ON THE ACTUAL STATE OF ENGLISH LAWS OF REAL PROPERTY 204(2d ed. 1827).
Others argue that the normative debate over the place of equity—whether it should continue to utilize “judicial discretion and natural law” or whether it should be “embracing a more formal and ‘legal’ conception of equity based on strict procedural rules and stare decisis” - continued well past the adoption of formalities in the equity courts. For example, Prof. Kroger argues that these debates continued into the 18th century in the United States. To be sure, the early Marshall Court first veered in the direction of rigid substantive rules and formal principles like the English system of equity. Kroger argues, though, that under Justice Marshall, the Court restored the traditional, moral understanding of equity in its early 19th century jurisprudence, using language such as “justice, “equity” and honor” to explain its decisions.

These concerns about the increasingly rigidified and complicated processes of equity may be correct, but in some senses, some formalization of any system calling itself legal is dictated by the reality that ultimate power such as was exercised by equity must necessarily be somewhat cabined in any system founded on the rule of law. These concerns were expressed by common lawyers about equity throughout its history. John Selden claimed “equity is a Roguish thing: for Law we have a measure, know what to trust to; Equity is according to the Conscience of him...

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52 John R. Kroger, *Supreme Court Equity, 1789-1835, and the History of American Judging*, 34 Hous. L. Rev. 1425, 1433-34 (1998) (noting the traditionalist view that natural law was the proper source of rules, that precedents were not important because equity was a universal truth, and that equity was unbridled justice).
53 *Id.* at 1436 (describing the 18th century move of the English Chancellors to “‘legalize’ equity by standardizing procedure and adopting stare decisis in place of discretionary and natural law-based adjudication.”)
54 *Id.* at 1433.
55 *Id.* at 1430-31.
56 *Id.* at 1447 (arguing that the early Marshall court, from 1801-1820, adopted a “modern or Blackstonian [jurisprudence], typified by strict application of stare decisis, formal procedure, and strict construction of legal texts” as well as the “triumph of notions of judicial duty over concerns about substantive justice.”).
57 *Id.* at 1458-59, 1466 (arguing that during the later Marshall Court years, 1820-35, equitable discretion “made a startling comeback” to join precedent as an important source of rules, including “highly subjective concepts like ‘the spirit’ of laws, ‘the sanction of public policy,’ ‘conscience,’ ‘the equity of the case’ . . . . ‘gross injustice,’ [and] ‘moral obligation’ . . . ”).
58 *Id.* at 1436.
that is Chancellor, and as that is larger or narrower, so is Equity." Equity poses chaotic possibilities if it has the absolute power to overrule law in those unforeseen and uncharted circumstances where justice demands. Otherwise, the modern movement to the rule of law would be drowned in the sea of exceptions that equity might ostensibly give in recognition of the unique contexts that each set of litigants presents before the decision-maker.

In point of historical fact, the parallel system of equity and its potential for abusing power and upending the predictability of the common law ended up being cabined in two ways: first, equity was treated as a last resort for justice, and only when the application of the law "shocked the conscience." Merely inadvertent injustices served up by the common law courts had to be accepted by those in conflict as the price of the rule of law. Second, the law of equity developed its own forms and causes of action, so that the equity court’s jurisdiction was ultimately limited by the nature of the conflict---for example, trusts went to equity courts, real property disputes to the law courts or to the “ordinary” common law-governed jurisdiction of Chancery.

The potentially vast power of the mediation movement has been cabined by a different set of constraints. First, mediation has been treated as an “annexation” to the court system rather

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59 Id. JOHN SELDEN, THE TABLE TALK OF JOHN SELDEN 148-49 (3d ed. 1860); HUDSON, supra note 22, at 8 (noting that “certainty is the hallmark of every effective legal system, but it is also true to say that chaos and complexity are the common characteristic of every problem which confronts such a legal system.”

60 See STORY, supra note 19 at 3, 5 (noting that neither common law nor equity can address some wrongs, which are left to the conscience of the parties); HUDSON, supra note 22, at 13 (noting that equity did not ensure that no loss was suffered, but rather than ordinary people would not be harmed by fraud, undue influence, etc. ); Joseph R. Long, Equitable Jurisdiction to Protect Personal Rights 33 YALE L.J.115 (1923) (noting that equity was limited in granting relief for a pure mistake of law, and that it did not enforce personal rights where no property rights were involved).

61 See, e.g., STORY, supra note 19 at 5-6 (describing the different causes of action and remedies available); HAROLD POTTER, AN INTRODUCTION TO THE HISTORY OF EQUITY AND ITS COURTS 18 (describing the substantive cases that gave jurisdiction in the Court of Chancery before the mid-17th century); GOLDSMITH, supra note 19 at xviii (noting the assignment of jurisdiction to equity of bankruptcies, and the persons and estates of mentally incompetent persons).
than a parallel and potentially more powerful challenger. While in theory and occasionally in practice a court-ordered mediation can subvert both substantive rules of law and processes if the parties agree, most courts seem to believe that they have a retained power to overturn any mediation agreements that are strongly inconsistent with outcomes the law would provide. 62 Thus, the showdown between the equity courts and the common law courts which was “won” by equity is not likely to occur between the common law and mandatory mediation in any near future.

Second, the most widely utilized ADR processes are consensual: most obviously, even if a court may order parties into mediation, it may not order that the mediation be successfully concluded, or arrive at a particular result, though it may signal to mediators and parties that the court has a preference for a certain outcome. 63 Thus, the required willingness of the parties to utilize mediation processes and consent to their result has to a large extent cabined any inappropriate power-grab by the mediation movement over the parties who use mediation. Indeed, one might argue that mediation has spread the power over outcomes by spreading the costs of mediation among the parties and the mediator in a way that a judicial system does not. Except in rare circumstances, the plaintiff in a court case carries the largest economic burden of litigation, while the decision-maker bears virtually no cost of a bad decision. By contrast, if a mediation fails, the costs of the failure fall upon the unsuccessful mediator as well as the parties, if nothing else by harming the mediator’s “track record” of successful resolutions. 64

63 See McAdoo and Welsh, supra note 12, at 408 (describing the mandatory consideration rule in Minnesota and how the rule does not mandate an outcome nor mediation at all).
64 Id. at 417 (discussing judges’ perceptions that mediation is more costly, and adds a layer of time and complexity).
Third, the values of the mediation movement tend to exercise some corrective over the
tendency by mediation professionals to subsume legal power over the courts to themselves. The
mediation movement was founded to be an alternative to court processes, and the values of
autonomy, consent and collaboration that it embraces make it less likely to become rivalrous
with the court system for power. To be sure, mediation theorists like Folger and Bush have
argued that mediators focused primarily on settlement may be tempted to hijack mediations from
the parties by pressuring them to accept agreements that will close cases or mimic likely court
decisions. However, even accepting that this problem may occur, the dispersal of legal power
among the many available mediators, and party choice of mediators, suggest that the mediation
industry will not consolidate enough power to pose a significant political threat to the common
law courts.

Fourth, while the research suggests that mediation generally saves litigants money in the
long run, at least if they are willing to consider a reasonable settlement, the use of mediation is
somewhat constrained by its visible out-of-pocket costs, since litigants pay mediator fees. A
litigant who brings a lawyer may be paying both for the lawyer’s time and the mediator’s. By
contrast, the actual costs of a seemingly “free” public justice system (except for the filing fee)

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65 Id. at 404-05 (detailing the criteria espoused at the Pound Conference on how to judge the success of court-connected mediation).
66 See ROBERT A. BARUCH BUSH AND JOSEPH P. FOLGER, THE PROMISE OF MEDIATION; RESPONDING TO CONFLICT
THROUGH EMPOWERMENT AND RECOGNITION 22-23 (1994). (noting the power and “broad strategic control” mediators have over discussions between the parties and the mediation as a whole).
67 But see Bobbi McAdoo, A Mediation Tune-Up for the State Court Appellate Machine, 2010 J. DISPUTE RES. 327,
363-64 (2010)(noting there have been mixed results in increasing the rate of settlement in cases in which no fees were charged); see also Wayne D. Brazil, Should Court-Sponsored ADR Survive? 21 OHIO ST. J. ON DISP. RESOL.
241, 252-53 263(2006) (noting that private litigants pay substantial fees up to $10,000 a day, which suggests to
mediators that their goal is to “get a deal.” Brazil urges court-connected mediation to be offered free or at a reduced
cost.)
may not be as visible to litigants until late in many conflicts, perhaps because of their optimism about succeeding in court. This “upfront” cost may obviate the likelihood that litigants might willingly flock to mediation in numbers required to pose a challenge to the legal preeminence of the common law courts.

Finally, there has historically been some selection in the subject matter for cases using mediation, not dissimilar to the subject matter limitations that found their way into equity jurisdiction. While some jurisdictions have mandated mediation in a wide variety of civil cases, more commonly, mandatory court-annexed mediation has been primarily employed in a few subject areas, such as family law or commercial disputes. In this way, mediation has become a “door” in the courthouse for subject-specific disputes in the way that the equity courts became the “door” for suits involving trusts, specific kinds of real property transactions, and so forth.

C. Equity and Mediation: Ethical Commonalities

Equity and mediation share important ethical dimensions that suggest that mandatory mediation or a related restorative process may be an appropriate substitute for cases involving demonstrated injustice that cannot be adjudicated in a traditional court system, for constitutional or other reasons. As suggested, one parallel can be found in the function that both equity and

68 See, e.g., Bobbi McAdoo, All Rise: The Court is in Session: What Judges Say about Court-Ordered Mediation, 22 OHIO ST. J. DISP. RES. 377, 387 (2007) (noting that mediation is “a routinely expected step for most civil litigation.”); see also Nancy Welsh, supra note 35, at 23 (noting early court experiments with mediation in small claims cases, custody and visitation, and finally in contract, personal injury and employment cases.)

69 See Nancy Welsh, Making Deals in Court-Connected Mediation: What’s Justice Got to Do with It, 79 WASH U. L. Q. 787, 798 n. 59, 809 (2001) (noting early use of mediation for family and neighborhood disputes, and citing a study showing that more than two-thirds of mediated cases involved personal injury and contract disputes)

70 See, e.g., THOMAS E. SCRUTTON, THE INFLUENCE OF THE ROMAN LAW ON THE LAW OF ENGLAND 156-59 (discussing Chancery jurisdiction over uses and trusts, mortgage redemption, the law of infants and mentally ill persons.)
mediation serve with respect to their “rival,” the common law courts. However, these two systems of justice also share some ethical commitments that suggest the possibility that mandatory mediation may be fairly expected of those who act unjustly but are not currently accountable in the common law system.

Even though court-annexed mediation has become institutionalized authority, we should recognize the deliberate and necessary tension between mediation as practiced in recent years in the U.S., and the common law court system, not unlike that attending the battles between the law and equity courts for ascendancy. While both struggles certainly have involved some economic and political aspects, there is a moral, even ideological, aspect to the tension as well. Historically, we can see the common law courts and equity each challenging the other as a moral force, criticizing the other to check its abuse. In equity’s challenge to the common law, we see the frequently used image of the chancellor as the “keeper of the king’s conscience” because even the sovereign, from whom all justice flows, may be tempted to respond unjustly to friends and enemies, as Holdsworth suggests was the case. Even the king may be tempted to demand payment for justice. And thus it is the chancellor’s responsibility to challenge the sovereign to regain his moral footings and do justice to the poor and powerless who cannot win the king’s

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71 For a discussion of the struggle between the equity and common law courts, see Potter, supra note 55, at 4-5, 11-15.
72 See, e.g. Goodwin, supra note 20 at 15 (noting that from Anglo-Saxon times, the king was perceived as “the guardian of justice and equity as against the ignorance and oppression of the presiding officers of the public courts . . . caused in part by the strictness of the law or the influence of one of the parties); Hudson, supra note 22 at 10 (discussing how the Courts of Equity were often the “court of conscience” with the Lord Chancellor being described as the “keeper of monarch’s conscience.”)
73 Goldsmith, supra note 19 at 22 (describing the chancellor as the king’s primary chaplain, confessor, and person who knows the king’s will better than anyone, who serves as “the keeper of the king’s conscience”). Goldsmith quotes Lord Ellesmere’s description of the chancellor as “the mouth, the ear, the eye, and the very heart of the prince . . . “ Id.
favor or the court’s ear with money or influence.\textsuperscript{74} And, as Cowper put it, equity will “assist the law where it is defective and weak in the constitution . . . and defends the law from crafty evasions, delusions, and new subtleties, invested and contrived to evade and delude the law . . . this is the office of equity, to support and protect the common law from shifts and crafty contrivances against the justice of the law.”

So too, the rise of the modern ADR movement has posed a prophetic challenge to the common law courts for their repeated failure to achieve either justice or peace in many cases, or to free themselves from the restrictions of limited remedies. Perhaps the most poignant illustration of that challenge has been the flowering of mediation to manage the difficult journey of divorce. In these legal proceedings, commonly tempestuous and cruel, the common law courts have famously failed too often either to achieve equitable outcomes for families or to assist divorcing couples through fierce conflict into truly cooperative future relationships. Court-annexed mediation has offered a moral critique of both the law and procedure of divorce, and granted some temporary respite to divorcing couples while divorce law slowly undergoes revision to accommodate modern family formation and dissolution.

Conversely, law has had an important role to play in challenging equity, as well as mediation. The image of justice as a blind goddess, dispensing favors to the powerful and powerless, favored and disfavored alike, has resonances in the tension between the common law courts and the ADR movement as well. In equity, the battle is captured in the dispute between

\textsuperscript{74} Id. at 23, 26 (describing equity as “the refuge of the poor and afflicted . . . the altar and sanctuary for such as, against the right of rich men and the countenance of great men, cannot maintain the goodness of their cause and truth of their title. . . . \textquotedblright)
Lord Coke (for the law) and Lord Ellesmere (for equity) during the reign of James I.\(^75\) Coke invoked the right of Parliament to make and enforce the rule of law, arguing that equity could not interfere with a legal ruling consistent with Parliamentary law.\(^76\) Ellesmere claimed that when, due to the “hard conscience of the party,” one litigant insisted on his legal rights, the equity courts could enjoin him from enforcing the judgment.\(^77\) Although Ellesmere’s views eventually obtained the upper hand,\(^78\) the common law’s critique of the equity courts for corrupt practices and dilatory justice\(^79\) eventually curbed the jurisdiction of the Chancellor.

In the development of court-annexed mediation practices, a somewhat different dynamic has occurred. Although mediation settlements have not gained the same authority to overrule the common law that Lord Bacon awarded the equity courts, they have largely become enforceable by law even when the parties have created a settlement not obtainable at the common law, even one that countermands a result that the common law might likely have ordered. Indeed, mediation is regularly praised for identifying creative solutions that provide more justice “in fact” to the parties than the limited remedies of the law may be made to give. Conversely, the law has challenged mediation by identifying mediation provisions that are so unjust or violative

\(^75\)See also KURTZ, supra note 22, at 26.
\(^76\) More specifically, Coke claimed that when equity issued an injunction interfering with a lawful decision, the party disobeying the injunction could not be imprisoned for violating it. HOLDSWORTH, supra note 25, at 461, 463.
\(^77\) Id. at 462.
\(^78\) Holdsworth noted that James I referred this dispute to Lord Bacon, then the attorney general, and it went on for a long time until the House of Commons intervened in 1677, by trying to strip Chancery of any cases where the common law normally would have jurisdiction. Id. at 464. The attempt was a failure because lawmakers became convinced that such a plan would strip equity of its ability to be effective. Id.
\(^79\) Holdsworth discusses a number of corrupt practices in the Chancery facilitated by life appointments. HOLDSWORTH, supra note 25 at 426. Staff members were paid by fees from the business done and positions in the Chancery were sold or given to friends. Id. Deputies concealed and kept some of the fees they received, or sought bribes. Lawsuits in equity often lasted many more years than common law actions—up to 20 years, unless money was paid to expedite them. Id. at 426. Staff made money copying documents s required by court practice, and many of the chancellors were incompetent to settle what the procedures of the courts should be. Id. at 427-28. With such significant discretion and little supervision, abuses in the use of the equity court’s lavish discretion abounded. Id. at 42. See also POTTER, supra note 55, at 19-20 (discussing the abuses of equity officials and inadequacy of their staff until Lord Eldon’s Chancellorship).
of public policy that they should not be enforced by the courts, such as failure of divorce mediations to award adequate child support. 80 In this way, mediation has challenged the adequacy of the law, and law has been available to check putatively abusive practices that occur in mediation settings, whether procedural or substantive.

Beyond this mutual checking dynamic between the common law and equity/mediation, we can see some similarities between the two systems’ ethical values about the process and outcomes of conflict resolution. Historians of equity have attempted to describe the animating principles that informed the law of equity as a “form of natural justice.”81 As practiced, however, the interpersonal dynamic in equity is quite different than in the common law. Although equity is routinely described as a response coming from “the conscience of the king,” equity has performed a role distinct from the particular religious understanding that was employed by the Lord Chancellors in these early years.82 The scholastics, following Aristotle and Aquinas, understood the conscience as something within the intellectual or rational part of man’s nature, a “remnant of [his] original uncorrupted nature.”83 In their terms, the synteresis of the king’s conscience held the moral precepts that guide human wellbeing,84 most commonly stated as the principle that we must do good and not harm to others. The workings of practical reasoning, or

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80 See, e.g., Coben and Thompson, supra note 56, at 80, 88 (discussing cases in which mediation agreements were not enforced because of fraud, duress, undue influence, mistake or unconscionability).
81 See Goldsmith, supra note 19, at 2 (describing equity as a system of natural justice based on the principles underlying its creation.) See also Hudson, supra note 22 at 6 (arguing the same point as Goldsmith, and referring to equity as “a form of natural justice . . . .”)
82 Id. at 10 (noting the religious understanding of the idea that equity courts were the keepers of the King’s or Queen’s conscience, employed by the bishops who served as chancellors).
83 See Michael Baylor, Action and Person: Conscience in Late Scholasticism and the Young Luther 47-49, 130-31 (1977). Holdsworth suggests that this was the prevailing understanding of the nature of conscience, as evidenced in St. Germain’s dialogue between a doctor of canon law and student of the common law. Sir William Holdsworth, Essays in Law and History 190-191 (ed. A. L. Goodhart and H.G. Hanbury, 1995).
the syneidesis, helped the king or his chancellor to use those premises to make a moral judgment on actions of the litigants before him, and to determine how his power should be employed to do justice.\textsuperscript{85} As so understood, the conscience would instruct the king about the fair result he was morally bound to deliver, even though an uncaring or stubborn monarch could dissent from the conscience in favor of evil. \textsuperscript{86}

However, equity in the early days evidenced a complex dynamic sounding more in Emmanuel Levinas’ profound description of ethical reality than the abstract reasoning in the medieval world described as “conscience.”\textsuperscript{87} The dynamic of early equity is interpersonal and asymmetrical, not abstract and logical.\textsuperscript{88} For Levinas, the “moment of conscience,” if one may, is not the moment when the monarch deductively applies moral principles “found in nature” using his conscience to solve a specific problem placed before him. Rather, the “moment of conscience” is that every-moment when the Other stands over us in his need and his infinity, demanding our response.\textsuperscript{89} In Levinas’ words, “Conscience welcomes the Other. To welcome the Other is to put in question my freedom.”\textsuperscript{90} For Levinas, it is the face of the Other that forces justice by calling me to responsibility to that Other; it is that call that makes reasoning about

\textsuperscript{85} \textit{Baylor}, supra note 77, at 131.
\textsuperscript{86} \textit{Id.} at 131.
\textsuperscript{87} \textit{See, e.g., Emmanuel Levinas, Totality and Infinity: An Essay on Exteriority} (1969).
\textsuperscript{88} Indeed, one of the key maxims of equity is that equity acts in personam and not in rem. \textit{Kurtz}, supra note 22, at 28; \textit{Hudson}, supra note 22, at 8. Kurtz suggests that this rule comes from the fact that the chancellor adopted the ecclesiastical court model, and these courts had no jurisdiction over property, but only religious punishments such as excommunication. \textit{Kurtz}, supra note 22, at 30-31. \textit{But see Long, supra} note 115, at 115(arguing that equity had not sufficiently protected personal rights).
\textsuperscript{89} \textit{Levinas}, supra note 81, at 83. \textit{See Goldsmith}, supra note 19, at 26 (describing the equity jurisdiction as originating in cases of oppression where the rank or position of the wrongdoer was an obstacle to getting justice in ordinary courts, whereas the Privy Council took up the cause of the poor “‘for God and in work of charity . . .’”).
\textsuperscript{90} \textit{Id.} at 84-85.
justice possible, rather than reason that makes the Other and his situation intelligible to the decision-maker through deduction. 91

So too in equity, it is the call of those in front of the king, the demand they make for justice in their very vulnerability before him that he cannot resist. He appears to stand over them; in fact, in calling out to his conscience they stand over him. For Levinas, it is this reality of conscience, which throws aside the moral reasoning of the common law resembling the interplay of synteresis and syneidesis. Equity overcomes law because of the Face-to-Face, the demand of the Other that the king cannot stifle or cabin or resist.

Because the key ingredients of equity are interpersonal and asymmetrical, the key maxims of equity are arguably nonsensical from a common law perspective in much the same way that mediation, particularly transformative mediation, 92 is nonsensical from a common law perspective. Both processes up-end the deductive and inductive, logical and analogical speculations of the common law about justice. We might look at just a few of equity’s core maxims to get some flavor of how radical equity truly is. Among the most famous equitable maxims are “he who seeks equity must do equity” and “he who comes to equity must come with clean hands.” 93 Like mediation, both of these maxims expand the legal understanding of a conflict from its narrow focus on delineating a right in one party which is breached by violation of a concomitant duty in another. Rather, conflict as understood by both equity and transformative mediation embraces the entire situation of the parties and their circles of

91 Id. at 201-204.
92 For general discussions of the differences between transformative and other styles of mediation, see BUSH AND FOLGER, supra note 60, at 15-32
93 HUDSON, supra note 22 at 24, 26-27.
relationship, with a more global vision of right, demand and need than the common law is prepared to recognize.

In both equity and mediation, the relationship between the conflicting parties is the paramount claim that calls for a litigant’s response, not the act of violation or even the damage it does. The equity court insists that a rights-holder must embrace and respond ethically to the need and situation of his neighbor before he asks the equity court to do the same for him. Mediation often similarly insists that each party hear the other side’s story before the parties move to identifying concerns or options for resolution. Indeed, in transformative mediation, the parties are required to be physically present because it is the encounter of each with the other that makes transformation possible.

To describe this critical aspect of mediation concretely, Bush and Folger have identified two key dynamics in successful transformative mediations: first, the subject moves from being fearful, confused, feeling “vulnerable and out of control,” to empowerment. She understands what matters to her, what her options are, and that she has choices about what to do, which she deliberately makes after a full assessment of her situation and her opponent’s. But in transformative mediation, a second dynamic reminiscent of Levinas’ Face-to-Face occurs: if the

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94 Id. at 26-27 (noting the fact “that a claimant will not receive the court’s support unless she has acted entirely fairly herself”).
95 Id. (noting that no remedy will issue unless the claimant has acted equitably.)
96 See Jessica Stepp, How does the Mediation Process Work? MEDIATE.COM (Feb. 2003) http://www.mediate.com/articles/steppj.htm (After the opening statement, the mediator will give each side the opportunity to tell their story uninterrupted. Most often, the person who requested the mediation session will go first. The statement is not necessarily a recital of the facts, but it is to give the parties an opportunity to frame issues in their own mind, and to give the mediator more information on the emotional state of each party.”).
97 BUSH AND FOLGER, supra note 60 at 81-85 (discussing the way in which transformative mediation works through the objectives and outcomes desired by mediation); see also McAdoo, Welsh and Wissler, supra note 18 at 35 (noting that litigants who are not present during mediation regard the process as less fair than those who are, though the allocation of responsibility between lawyer and client does not affect client views about fairness).
98 BUSH AND FOLGER, supra note 60, at 85; see also Pranis, supra note 16 at 48-49 (noting how conflict can cause deep fissures and hurtful strategies).
99 Id. at 90 (describing recognition in mediation).
mediation is successful, each party recognizes he can understand and reflect upon the situation of
the other, not just himself. 100 Each party gains the capacity to care about seeing his opponent’s
perspective and acknowledging it, making accommodations in his position when possible to
respond to the opponent’s need. 101 This may be essential to change: as Kay Pranis has argued,
“[f]ew can recover from trauma, take risks, or develop new behavior patterns without caring,
supportive relationships.”102

As just one more example of the similar ethical perspectives of equity and mediation, we
might look at two other maxims: “equity looks to the intent rather than to the form” and “equity
imputes an intention to fulfil an obligation.”103 These maxims suggest that the equity courts will
not just make an empirical inquiry into what the actual intentions of previously engaged parties
were with respect to the transaction that has birthed a conflict. Rather, the equity court will
implicitly assume (like a legal fiction) that the parties mean in good faith to do what they bound
themselves morally to do, even if that same outward form and the circumstances of the conflict
do not seem to substantiate an actual good faith willingness to keep faith with the other party.104
While we might look at these maxims as some sort of logical syllogisms, a more faithful way to
understand them is as equity’s call to the conscience to look at the need and the call of the other
to treat him justly, and the refusal to take “no” for an answer to that call.105

100 Id. at 90-91(describing the process of giving recognition in thought).
101 Id. at 91.
102 Pranis, supra note 16 at 170.
103 HUDSON, supra note 22 at 24.
104 Id. at 13, 28 (noting that the courts would require the defendant to act in good conscience, either to refrain from
exercising a right or giving a right to the plaintiff; and that the courts would give effect to the substance, not the
surface of a transaction, and the assumption that a person bound by an obligation will carry it out.) Hudson also
notes the related principle that “equity looks on as done that which ought to have been done.” Id. at 28.
105 See, e.g., HOLDSWORTH, supra note 25, at 249. Holdsworth describes Lord Ellesmere’s argument that when a
judgment has been obtained at law by “oppression, wrong and a hard conscience,” the chancellor will set it aside,
not because of a legal defect, “but for the hard conscience of the party.”” Id. But see HUDSON, supra note 22 at 5
In transformative mediation processes, mediation similarly aims for a deeper justice than the common law can give. Transformative mediation assumes that individual responses to conflict can be transformed from self-interested, fearful attempts to gain resources or power at the expense of the other person into genuine experiences of mutual understanding and affirmation.106 Transformative mediation assumes that when the immediate threat of the conflict is stripped away by story-telling, which paradoxically empowers through the vulnerability of the story, the parties will re-discover their innate desire to do justice to and for the other rather than standing on their legal rights.107 Even when circumstances do not permit a party in transformative mediation to accommodate the other party’s needs, the mediation process is designed to produce respectful acknowledgement both of the dignity of the opponent and the difficulties he has encountered that have contributed to creating the conflict that brings them into mediation.108

As we survey the practices of equity and mediation, other similarities appear. Perhaps first of them is what both systems claim as their “flexibility,” which we might also describe as “creativity.”109 Neither, at least in theory, is bound to rigid rules or solutions. Both permit the decision-maker---which in the case of mediation is the parties---to craft a solution which either

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106 BUSH AND FOLGER, supra note 60 at 89-90
107 Id. at 90-91.
108 Id. at 91.
109 See HUDSON, supra note 22 at 8 (arguing for the importance of flexibility in equity so that the law can keep up with social developments); BUSH AND FOLGER, supra note 60, at 16 (describing the “satisfaction story” of mediation as including flexibility that “can produce creative, ‘win-win’ outcomes that reach beyond formal rights to solve problems and satisfy parties’ genuine needs in a particular situation.”)
permits both parties to protect their interests, or balances and accommodates them in creative ways that the law has not been able to offer.110

Similarly, both equity and mediation, at least in its transformative version, attempt not only retroactive but also forward-looking relief, although in very different ways. The primary momentum of the common law is backward-looking: civil causes of action attempt to establish past rights or wrongdoing and award money to compensate for any breach of rights. In a similar way, criminal actions at the common law had a retributive focus: the purpose of criminal sanctions was law-regulated revenge, or in some theories, righting a lost balance by punishing the criminal in appropriate proportion to the crime he had committed.111

In equity, by contrast, the declarative judgment and the injunction, the most important remedies available, attempt to govern the relationship of the litigants in the present and the future.112 Similarly, the focus of transformative mediation is present and future-oriented: the primary focus of transformative mediation is not on identifying appropriate financial compensation for lost harm, but on empowering a litigant to understand her situation and goals and choose a solution that speaks to those goals,113 while helping her also to reach out to her opponent in understanding and accommodation of the opponent’s needs.114

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110 See HUDSON, supra note 22, at 5 (“Equity is the means by which a system of law balances out the need for certainty . . . with the need to achieve fair results in individual circumstances.”); BUSH AND FOLGER, supra note 60, at 16 (describing “win-win” solutions that meet parties’ needs).

111 See also PARK, supra note 24, at 24 (arguing that equity courts have administrative, declaratory and protective jurisprudence, while law courts are “principally courts of resolutory and retributive jurisprudence . . . ”); see also Vogel, supra note 16, at 566 (“[R]estorative justice shares with retributive justice the concern with making right the wrong that has been done, but restorative justice takes a broader and deeper approach because there is much more involved in crime and wrongdoing than law breaking.”)

112 See, e.g., STORY supra note 19, at 7-8 (1838)(noting that equity jurisdiction may be central or ancillary to a lawsuit, but “sometimes, it is merely of a precautionary or preventive nature, to avert meditated or threatened wrong” that may help a party “protect or defend himself from such wrong or mischief, whenever it shall be attempted to committed.”)

113 BUSH AND FOLGER, supra note 60, at 100-101

114 Id. at 91.
transformative mediation is that, going forward, each person will have gained the compassion and willingness to make her opponent’s concerns part of her own. In this way, the forward-looking impetus of transformative mediation is distinct from that in equity: equity declares who has the right and who has the duty, and forces compliance with the concerns of the opponent with the threat of contempt of court if an injunction is not followed, or further litigation if declaratory relief is ignored. Transformative mediation, by contrast, relies on the insight and willingness of the parties to comply with their own promises and to follow through on the compassion and respect achieved in the mediation with caring actions toward the other party.

III. IMAGINING MEDIATION OF CURRENTLY NON-JUSTICIABLE DISPUTES: TWO DILEMMAS

Before I discuss how court-annexed mediation or similar practices might work in traditionally non-justiciable disputes, we might consider whether there is any value in adding to the plethora of causes of action currently remediable in court. In order to answer that question, we might consider two of the most significant obstacles to requiring mediation in a very difficult conflict such as ones I began with, cases in which the values and world-views of those in conflict may seem incommensurable: the Nazis’ proposed march into Skokie, and the Westboro Baptist Church’s insistence on picketing military funerals. First, we might ask whether there is any point in forcing a wrongdoer into mediation. Given that mediation, and particularly transformative mediation, assumes the voluntariness of any resolution, why isn’t mandatory mediation doomed from the start if one or both of those entering it are coerced to be there?

Second, how can we expect a change of heart from someone like Frank Collin; isn’t mediation,

115 Id. at 29. (noting that “[t]ransformative mediation aims at creating a world where people are more human and humane, and where individuals voluntarily choose to become more “open, attentive, sympathetic, and responsive to the situation of the other party . . . ”) Id. at 89.
116 Id. at 91, 93.
especially mandatory mediation, certain to fail? In answering these questions, I will suggest that mandatory court-annexed mediation offers a valuable opportunity that the common law courts and other social institution do not.

Self-determination, in which mutual consent plays an important role, has been a core value of the mediation movement from the outset, which appears to make the concept of mandatory mediation a non-sequitur. Originally, mediation was imagined as an entirely consensual portal of justice: parties could not be forced into the mediation process, nor could a settlement be obtained without their voluntary and informed consent. Indeed, perhaps the core value of mediation is the willingness of the parties to participate throughout the process; in the mediation paradigm, parties can exit at any time if they are unhappy with the progress of the mediation. Moreover, because of its consensual nature, mediation has even been utilized to adjudicate claims that might not be justiciable absent the parties’ agreement, such as neighborhood disputes.

Nevertheless, a significant amount of current court-annexed mediation has eliminated the “voluntariness” requirement with respect to entrance into mediation, although these processes have not eliminated the requirement that any settlement be voluntary. The extent to which an unwilling party must participate in mediation varies from program to program. In some programs, attorneys are only required to consider mediation or discuss it with their clients, though in others the court may overrule their report that mediation will not be helpful in

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117 See Welsh, supra note 35, at 3 (describing self-determination as “‘the fundamental principle of mediation,’” which includes active and direct participation in communication and negotiation, control of substantive norms in the process, creating settlement options and controlling the decision whether to settle.); Dorcas Quek, Mandatory Mediation: An Oxymoron? Examining the Feasibility of Implementing a Court-Mandated Mediation Program, 11 CARDOZO J. CONFLICT RESOL. 479, 484 (2010).
118 Welsh, supra note 111, at 17.
119 Id.
120 McAdoo and Welsh, supra note 12, at 404; Quek, supra note 111, at 484 (describing the controversy over whether mandatory mediation is a temporary expedient or no longer needed because of the growth of ADR).
resolving the dispute. In others, clients are required to attend a first mediation meeting, and in still others, there is some notion that they must mediate “in good faith” in or suffer potential economic consequences when they return to court. But the fact remains that in some jurisdictions, courts may require parties to enter mediation at some level, even over their objection. (In an interesting parallel, Justice Story notes that in some of the earliest requests for equity relief, the plaintiff merely asked the chancellor to tell the defendant to appear or to be examined, without any other relief being sought.)

Moreover, success rates for what might be termed “involuntary mediation” seem to mimic the success rates for voluntary court-annexed or private mediation. Some studies have reported that parties forced into mediation are less satisfied with the process if their mediations fail, in part because of the seemingly duplicate cost of pursuing mediation and then going to court, where they wanted to be in the first place. However, for those who succeed, the fact that

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121 McAdoo, Welsh and Wissler, supra note 18, at 34-35; McAdoo and Welsh, supra note 12, at 408. See Quek, supra note 111, at 485-86 (noting Professor Sander’s view that mandatory mediation “is not an oxymoron” because there is a distinction between being coerced to enter the process and being coerced within the process, while other authors point out that mandatory mediation only requires parties to try to settle, and they have access to litigation if they fail).

122 See Quek, supra note 111, at 488-489. Quek describes systems which automatically refer some or may refer some cases at the judge’s discretion with no sanctions if the parties object (Central London County Court pilot); systems in which a court may require a court appearance (Queensland) or orientation session (Virginia) before the parties decide whether to mediate; and systems which refer all cases but permit an exemption through court motion (Ontario.) Id. Quek also notes that some Australian states may refer parties to mandatory mediation. Id.

123 Quek, supra note 111, at 489. (describing the U.K. system in which the court may take account of unreasonable conduct in refusing to mediate in determining costs assessed against the party, and may mandate mediation before a client is entitled to a Legal Aid lawyer).

124 STORY, supra note 19 at 9-10, 15-16. Story argues that interrogatories were later included in the bill, or complaint, with the goal to “sift more thoroughly the conscience of the defendant as to these facts.” Id. at 9-10. He divides bills in equity into those praying for relief (based on a right, interpleaders, or certiorari) and those not praying for relief (to perpetuate witness testimony and discovery.) Id at 15-16.

125 McAdoo, Welsh and Wissler, supra note 18, at 34 (noting that satisfaction rates do not vary by case type.)

126 Quek, supra note 111, at 485.
the proceeding was initially involuntary does not seem to be viewed as an unhappy violation of rights or breach of the litigants’ autonomy. 127

What might account for this seemingly incongruous result? One obvious answer is that as mandatory court-annexed mediation becomes part of the regular process for adjudicating conflicts, litigants and their lawyers have simply come to accept the fact that the mediation “step” is part of the process they must undergo to achieve a result, much like other equally distasteful aspects of litigation like filing pleadings and doing discovery. 128 Fighting against or complaining about the inevitable may be seen as a waste of time and energy that would be better spent trying to achieve one’s objective in mediation. Second, as mediation studies present good success and satisfaction rates129 and those are known to the public and the bar, even those who initially anticipated that mediation is a waste of time because they cannot imagine an agreeable solution may come to have faith in mediation as a more successful and less expensive route for dispute resolution.

Third, since remedy options are limited in common law courts, those forced into mandatory mediation may believe that they will have a higher chance of getting what they really want, perhaps because they have more control over the process rather than dealing with the “wild cards” of judicial interpretation.130 Perhaps because they are risk-averse, litigants might prefer an outcome that they can say “no” to rather than rolling the dice with an unknown judge or even

127 See McAdoo and Welsh supra note 12, at 422-423 (noting that parties perceive mediations as fair or are satisfied with them).
128 See McAdoo, Welsh and Wissler, supra note 18 at 24 (noting that the low rates of voluntary mediation were thought to be because clients or lawyers were unsure about an unfamiliar process or thought it would suggest they were too willing to settle): See also Quek, supra note 111, at 483-84 (reporting a study that “observed that parties [in mandatory mediations] probably get ’swept along by [mediation’s] power and forget how they got there initially.’”).
129 McAdoo, Welsh and Wissler, supra note 18 at 24 (noting the high success and satisfaction rates with mandatory mediation).
130 Quek cites a New York study where litigants agreed to participate because they thought their judge would be impressed and would not hold it against them if they tried to mediate. Quek, supra note 111 at 487.
more unknown jury. Perhaps they may believe that they will have more control in obtaining the other party’s assent in a direct encounter than they might with judicial interference between them and their adversaries. 131 As suggested earlier, this concern has troubled advocates for victims of domestic abuse132 and resulted in both political pushback and, in some cases, statutory exceptions to mediation requirements for such victims.133 But it is a potential asset for obtaining cooperation of the parties in entering court-ordered mediations.

Finally, mediation has been largely advertised as a “kinder, gentler” approach to dispute resolution. Parties have reported satisfaction with their ability to participate more directly in the process.134 For the many individuals who hate conflict, as well as those who are concerned about the spillover effects of conflict on children, family and friends, the prospect of a less damaging way to achieve closure may be attractive. The value of peace and continued good relationships with the other party may be worth giving up somewhat more financial gain that they might or might not get through the courts.

None of the available evidence to this point suggests that if legislators or courts develop new causes of action that can only be pursued through mediation, the mandatory nature of requiring a claimed wrongdoer to present himself for mediation will automatically result in a failed system of law that is not worth investing in.

131 If true, advocates’ concerns that mediation exacerbates an imbalance of power may be well-placed, see note 126 and accompanying text infra.
132 See, e.g., BUSH AND FOLGER, supra note 60, at 22-23 (describing the “oppression story” that mediation has increased the power of the strong over the weak, and magnified power imbalances).
134 Quek, supra note 111, at 482 (noting party endorsement of mediation because of their ability to tell their story and contribute to the outcome.)
The next legitimate concern, however, is whether introducing new causes of action that are only subjects of mediation will be a waste of time because the “defendants” in these causes of action will never have the incentive to settle when they know the “plaintiffs” cannot resort to court at all to obtain justice. In fact, it may be that many of those who agree to settlements in mandated mediations do so only because they believe that they will fare worse in court, or that the entire process will be so expensive that they are better off finishing the dispute in mediation.

However, there may be other incentives for cooperation for those hailed into a public mediation-only system of justice besides the threat of a lawsuit. From a self-interested point of view, for some defendants, public reputation is an important concern that causes them to settle lawsuits before they are filed. Indeed, plaintiff’s attorneys often give corporate defendants the opportunity to negotiate a settlement before filing to avoid reputational harm, but if an injured party is not represented by a lawyer, such defendants have much less incentive to settle. In these situations, mandatory mediation prior to more public litigation may be a welcome relief to prospective defendants, particularly those who deem themselves innocent.

Still other “defendants” may be unaware that their actions have injured others or not understand the magnitude of the injuries they have caused. Once they are apprised of the fact

135 An Arizona litigator gives as reasons for mediation the following: “Judges and juries make mistakes or may simply not agree with your position. . . . When you are leaving your fate in the hands of others, you are gambling with some of the most important decisions in your life. . . . In order to get to the point of letting someone else decide, you will likely have to spend a lot of time and money and energy first. Litigation is not free or quickly resolved. . . . If you think the other party is unreasonable, having a public (not confidential) battle is not the best choice. In mediation, the mediator helps both parties become reasonable and reach an acceptable agreement in a confidential and comfortable environment.” Mediation vs. Litigation: Choosing your Own Outcome, ARIZONA MEDIATION (July 17, 2011), available at http://azmediator.com/mediation-vs-litigation-choosing-your-own-outcome/ (last visited Apr. 4, 2012)

136 See Mediation vs. Litigation, supra note 128.
through such a filing, they might be willing to sit down voluntarily and talk with their victims about what happened, or offer redress. That response is less likely to occur if they have been served with a traditional lawsuit and been advised that their willingness to talk or cooperate may be used to obtain a court judgment over them. Similarly, we can imagine that some mediation “defendants” may feel obliged to fight litigation “on principle” or because of the broader ramifications of public conflict in subsequent cases. There are many such cases—for example, newspapers that fight libel lawsuits in order to preserve their First Amendment rights in future cases, and organizations that refuse to settle environmental lawsuits or employment claims because of the possibility that other plaintiffs will follow the first. Despite their principled stand, these “defendants” may yet be quite willing to sit down with those they have harmed and at the least give them a chance to tell their story and talk about what the “defendant” might voluntarily do to ameliorate the harms they have caused.

Finally, some adversaries will themselves want to tell their “side” of the story and to come to some kind of conciliation or reconciliation with injured or complaining parties, even if they are not willing to acknowledge wrongdoing or make monetary recompense for the harm they are alleged to have caused. It is therefore good to keep in mind that the chief purpose of mediation is not necessarily to reach a monetary or other settlement that will mimic what a plaintiff might have achieved in court. As transformative advocates have argued, something more is at stake in resolution of many conflicts than simply moving money from the harming party to the harmed party. 137 Particularly in disputes where the most critical harm is to the relationship between people, mediation may offer the chance for recognition and even sometimes

137 BUSH AND FOLGER, supra note 60, at 68-70 (describing limitations of problem-solving mediation).
reconciliation. In fact, settlement in the sense of economic closure is almost beside the point in transformative mediation, and its advocates will argue that mediation can be successful even if it does not come to closure on the specific legal cause that brought the parties into mediation.

To understand why, however, lawmakers will have to decide whether they can embrace the assumptions of transformative mediation about the nature of human conflict and the willingness of most individuals to try to resolve it. Transformative mediation assumes that most individuals who find themselves in conflict situations are willing to act in good faith to achieve a just outcome for all parties involved if they can be helped to take a step back from their own sense of threat that occurs in conflict situations, understand their own and others’ situations, and tap that reservoir of good faith. The events and circumstances that led up to the conflict instead cause them to respond as fearful individuals do—by reducing their vision of the circumstances to include and interpret the facts to match a self-interested understanding of the situation and to justify their demands (or refusal to meet others’ demands).

In a somewhat similar vein, the restorative justice movement describes conflict that results in victimization as follows: sometimes wrongdoers do not have the moral or emotional imagination to understand the nature and depth of injury they have caused their victims, and cannot tap into their deepest selves to acknowledge that wrongdoing. Restorative justice utilizes processes like victim-offender mediation, restorative circles, and the like to help the

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138 *Id.* at 96-97 (describing opportunity for recognition and distinguishing it from reconciliation, which may or may not occur.) See also Vogel, *supra* note 16, at 565 (noting “deep within every human heart there is a restorative impulse to seek social healing that is taking form in the world through the practices of restorative justice.”)
139 BUSH AND FOLGER, *supra* note 60 at 94-95 (describing successes of transformative mediation while attempting to define what the definition of “success” means when discussing transformative mediation).
140 *Id.* at 89 (describing the transition from threat to responsiveness).
141 *Id.* at 87-89.
142 See Zehr, *supra* note 13, at 16; HOWARD ZEHR, CHANGING LENSES 40-41 (1990) (noting how offenders construct rationales for their offenses in prison, try to divert blame for themselves and insulate themselves from victims by employing stereotypes about them.)
wrongdoer understand precisely how he has harmed the direct victim as well as members of the community who have suffered indirect consequences of his actions.  

Second, restorative justice processes require the offender to acknowledge from the heart that he bears responsibility for the wrong being done. In this respect, at least some restorative justice advocates thus embrace a slightly darker vision about human nature than transformative mediation: restorative justice can admit the possibility that human beings are not necessarily well-motivated, and still hold out examples of wrongdoers who have come to have a change of heart. It encourages offenders acknowledge not only the harm they have caused but also that they have committed a wrongful act, a much more difficult transition for most human beings who are wont to justify the harm they have caused as deserved, accidental, or otherwise not their fault.

Third, restorative justice processes move the offender to a genuine desire to repair that harm, much like transformative justice moves litigants to embrace the concerns of their adversaries as something that they are also responsible for alleviating if they can. And finally, victim, offender and any members of the community involved in restorative processes work together to find solutions that will both remediate the victim’s harm and restore the offender to full ethical membership in his community, which may require the community to help remediate the offender’s situation as well.

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143 See Pranis, supra note 16, at 34-45 (describing the core values of restorative justice);
144 Vogel, supra note 16, at 573 (detailing the six “‘guiding questions of restorative justice’”); Pranis, supra note 16, at 165-167.
145 Vogel, supra note 16, at 566 (“Restorative justice acknowledges the damaged relationships, as well as the injuries sustained by the victims, that result from any wrongdoing and focuses on healing for all those involved, including communities and offenders.”).
146 Pranis, supra note 16, at 10-14. Vogel, supra note 16, at 566 (“[T]ransformative possibilities for moving from the burden of past wrongdoing into the promise of a new future in which new relationships are forged so that all life might flourish.”).
Skokie and the Snyder cases present difficult tests of whether transformative mediation or similar restorative practices might actually work because it seems so impossible given the vastly different world views of the opposing sides. While we do not have enough information on Frank Collin, head of the Illinois Nazi Party, to fully predict his behavior, we do know that there are narrative touchpoints in his life that might have been utilized by a skillful mediator to help him understand and acknowledge the plight of the Holocaust victims emotionally traumatized by the proposed march into Skokie. Collin’s father was a Holocaust survivor, a fact ironically acknowledged by historians of this case,147 that does not seem to have been the subject of any transformative conversation between him and members of the community he was about to harm or their allies. Moreover, Collin’s family members were disgusted by his behavior;148 their involvement in a restorative process, their acknowledgement of issues that may have caused him to seek affirmation from the Nazi party, does not seem to have been explored through the litigation, nor is it likely that such concur would have been explored in a traditional process. Nor did anyone apparently probe with him the seemingly impulsive nature of his decision to march in Skokie after his requests to march in Chicago, targeting African Americans whom his party claimed were causing destruction in the city, were stymied by the high bond Chicago officials imposed on them.149 Here again, had Skokie or Chicago city officials been involved with him or his followers in a mediation or restorative process, it might have been possible to grant Collin the

147 Strum, supra note 2 at 4-5 (1999) (noting that Collin’s given name was Frank Cohn and his father Max had been in Dachau for three months, changing his name to Collin when he reached the United States and married an American Catholic). Frank Collin was later thrown out of his previous affiliation, the National Socialist White People’s Party, when they discovered that he was Jewish. Id. at 5.
148 Id. at 4-5 (noting that Frank’s family thought his Nazism was “incomprehensible and offensive,” and that his family “completely disapproved of his Nazi activities.”)
149 Id. at 16-18 (describing the politics around the bond requirements in Chicago and suburbs where Collin asked to march).
publicity he sought if he insisted on marching, without publicly traumatizing Skokie residents with the thought of a march through their hometown.\(^\text{150}\)

On the other side, mandatory mediation might have empowered the Skokie residents who heard that the Nazis were going to march in Skokie,\(^\text{151}\) some who hid themselves away,\(^\text{152}\) Others who were “in almost a catatonic state-- petrified—shaking—crying . . . trembling at the thought of ‘those swastikas and brown shirts and boots and Nazi insignia . . .',”\(^\text{153}\) still others enraged to the point of possible violence against the Nazis.\(^\text{154}\) Mandatory mediation might have allowed these victims to join those who understood this conflict as an opportunity to tell the story of this tragedy to the larger community and to help government officials understand why this march might be so painful for those whom the Nazis rounded up, imprisoned, and tortured.\(^\text{155}\)

Similarly, while it may be difficult to imagine that members of the Westboro Baptist Church would cease and desist in their activities, it is hard to know how they might have responded if they were forced to encounter the living Albert Snyder, to hear the real story of his son’s life and death, and to hear his pain. Like Frank Collin, in some of these picketing cases, the Church has painted itself as a victim, as the target of government attempts to suppress its speech because if its claimed “prophetic” character.\(^\text{156}\) A forced encounter with a real person

\(^{150}\) Of course, perhaps none of this would have worked: while Collin eventually repudiated his neo-Nazi beliefs in favor of a pre-Colombian mythology, it is more likely that his convictions for sexual activity with children severed his relationship with the party, which may tell us something about his possibility for a change of heart\(^\text{Id. at 14.}\)

\(^{151}\) \(^\text{Id. at 59-60}\) (describing the response of survivors at a meeting announcing that the Nazis were not coming.)

\(^{152}\) \(^\text{Id. at 8, 20.}\)

\(^{153}\) \(^\text{Id. at 59-60}\) (describing a meeting a community meeting after the trial court issued an injunction against the Skokie march).

\(^{154}\) \(^\text{Id. at 52-53}\) (detailing testimony from Frank Richter of the Synagogue Council of Skokie).

\(^{155}\) \(^\text{Id. at 20-21}\) (noting that some survivors felt guilt that they had not resisted enough during the Holocaust, and had an obligation to atone by taking action against the proposed assault on their community).

\(^{156}\) See, e.g., WBC’s webpost stating, “15 years ago, in a conspiracy between members of the police, media, city government, and a crooked lawyer/judge/strip joint owner/bloody jew, americ, sought to silence WBC by beating her members bloody on the sidewalks outside the Vintage Restaurant in Topeka. Every day since (not most every day, not every day except bad weather, not most days, but EVERY DAY), WBC has stood on those same sidewalks to remind you of your crimes and hatred, and that God will avenge our blood, which cries to him from that ground
damaged by their activities might turn the hearts of at least some members of that church away from their own paranoia and denial to consider the harm they are causing others.

Litigation does not generally serve the same purpose. Because of the public, isolated and occasionally dangerous position that a named victim in such cases occupies and the strong likelihood that the law will fail victims, the common law system requires extraordinary courage of individuals who serve as named plaintiffs in these cases. In the Skokie case, the litigation process failed to offer most Holocaust victims the opportunity or encouragement to speak about their trauma and their fears of a recurrence in a safe space.\footnote{While the trial judge Wosik, who had seen first-hand the horrors of the Nazis, ignored the First Amendment arguments in support of the Nazis, he hardly gave the City of Skokie the opportunity to present its entire case. STRUM, supra note 2, at 54-56. The Illinois Appellate Court attempted to give “half a loaf” by permitting the march but forbidding the display of the swastika. \textit{Id.} at 76-78. See Vogel, supra note 16 at 565 (noting that restorative justice offers the promise of a “‘safe place’[where] we are able to take action through dialogue to build community so that all life might flourish.”).} In \textit{Snyder}, the Supreme Court’s constitutional protection for speech left Albert Snyder exhausted and without remedy. By not offering a safer, less public opportunity to confront those who were about to harm them, they were deprived of the opportunity to describe their experience, and through telling their story to those who wanted to harm them and to the community, to gain a sense of empowerment.

Through transformative mediation or restorative processes, even if the Skokie Nazis had been recalcitrant, these victims could have named their experiences and their fears, and identified what they needed to reassure themselves that the wrongs they suffered would not occur again. They also may have been able to seek support from a wider community in shielding themselves from some of the harm that, individually, they were sure to experience. In other cities where anti-Semitic acts have occurred, non-Jewish citizens have stepped up to show solidarity with Jews and to let them know that they would not be singled out and taken away as the Nazis \textit{Id.}

For example, they have burned Chanukah candles in their homes, and they have worn yellow stars in public.\textsuperscript{158} Others have gathered in public places to show their support after attacks on synagogues.\textsuperscript{159} Indeed, a more robust community restorative process might have led the African Americans of Chicago and Jewish Americans of Skokie to form stronger bonds, recognizing that they were both targeted by this hate group. In Snyder’s case, requiring the WBC to enter mediation might have coalesced other church groups and military support groups to surround the Snyders with emotional and moral support, and further galvanized the kinds of cordons around military funerals that sprang up in the wake of the WBC’s activity to protect grieving family members from observing hateful slurs. Thus, in the worst case, even if the defendants were unmoved, the victims would still have had the opportunity to become empowered and seek creative solutions with others to ameliorate the harms they suffered.

As I have suggested, almost none of these possible outcomes is offered as a standard opportunity by the structure of traditional litigation, though occasionally it occurs because of wisdom of the attorneys, the judge, or the parties themselves. In litigation, parties are discouraged from telling their whole stories in context, because judges require litigants to identify particular concrete facts upon which relief can be granted and limit testimony to the relevant cause of action. In Skokie, those Jews who did step up as litigants struggled to describe


a justiciable harm for the courts to focus on, such as physical injury or economic loss,\textsuperscript{160} even though their symbolic and psychological harm was clear to most observers and much worse for many than any tangible injury. Indeed, especially in a constitutional case, some “state interests” which are really attempts to protect private parties may appear less than consequential because they are stated as abstractions in court cases, rather than evidenced by the testimony of real people whom the government is attempting to protect.

Moreover, for the most part, traditional litigation does not require litigants to acknowledge that they have caused harm to others. In fact, it arguably discourages acknowledgement and taking responsibility for one’s actions because an admission may be followed by remedial court judgments against the defendant. Lawyers of wrongdoers are, for the most part, neither schooled in nor comfortable with counseling clients to acknowledge responsibility and make amends; their primary impetus is to defend their client’s positions at all costs. Nor does traditional litigation help either party to develop a clear understanding of his interests, goals or vision for a future with the opponent, absent the intervention of extraordinary lawyers or judges. Trial lawyers traditionally have been trained to narrow their focus to those issues and concerns that are litigable, and refer or defer broader concerns of the client to others.

For all of these reasons, transformative mediation or other restorative practices may be able to offer both victims and those who have harmed them more “real” justice than the courts can give, even acknowledging that a mediation may flounder if a recalcitrant wrongdoer walks away. Indeed, at this juncture, there is sufficient evidence that ADR practices can transform

\textsuperscript{160}See STRUM, supra note 2, at 97-99 (describing testimony on emotional harm and court reactions to it)
even the most hardened wrongdoers. Perhaps one of the most astonishing restorative justice narratives documents the journey of the Streufert family who had to deal with a brutal rape and murder of their 18-year-old daughter Carin just after she came home from her first year in college. Because imprisoning her murderers did not bring closure to the family, they worked with mediator Mark Umbreit to confront the offenders about their daughter and their loss, and to learn more about what happened in her final moments. In coming to acknowledge these offenders as human beings worthy of dialogue, worthy of expecting accountability, the family was able to work through its grief to a better place, a result not usually available in the traditional justice system. There are many other less dramatic but equally surprising results: property victims of youthful offenders who become their mentors and parental figures, employees who were able to find a workable relationship with their supervisor after 15 years of tension, and so forth.

While transformative mediation or related restorative processes may offer hope of alternative solutions to those who have non-justiciable issues, we must still ask whether some wrongdoing, some conflict, is non-justiciable for reasons that would counsel against the creation of new “mediation-only” causes of action. To explore this concern, we must consider how such causes of action would be defined, and whether the deep public values that have blocked justiciability give enough reasons not to proceed with such a system.

III. DESIGNING A SYSTEM: PROCESSES AND FRAMING CAUSES OF ACTION

161 See, e.g., http://www.restorativejustice.org/editorials/2006/july06/videooverview; Vogel, supra note 16 at 569-70 (describing successes as various as Maori sentencing circles and the Truth and Reconciliation Commission in South Africa)
163 See, e.g., Doug Borch, Introduction to Stories of Reconciliation, CENTRE FOR RESTORATIVE JUSTICE, http://www.sfu.ca/crj/doug.html (discussing the story about how one homeowner who was a victim of a youth’s break-in learned of his family’s poverty and bought his family food for Christmas dinner; and another story involving an employer-based conflict mediated by Community Justice Initiatives).
While the specific parameters of a “mediation only” legal system for currently non-justiciable causes of action will need to be worked out, we might pose some initial criteria for how such causes of action should be defined, and describe at least one formula for handling such causes of action in the context of the current common law court system.

Consistent with the purpose for creating a separate mediation-only track for currently non-justiciable causes of action, lawmakers, whether legislatures or courts, would need to be able to clearly triage possible conflicts into three categories:

a) Some new conflicts should simply result in additions to “traditional” causes of action. These are emerging conflicts and harms that should be redressable through traditional judicial decision-making, for example, new torts of invasion of privacy or cyber-harms. For these harms, damages, injunctions and other traditional remedies should be available to plaintiffs regardless of whether they proceed to court-annexed mediation and achieve an outcome;

b) Some causes of action should be “mediation-only” claims, with a clear definition of the elements of those causes of action, either by statute or common law court definition. To use a contemporary example that is flummoxing lawmakers, schools have seen a rise in cyberstalking, cyberbullying, and threatening or demeaning commentary by students against other students, which has resulted in violence or hostile environments on school grounds.\textsuperscript{164} The line between criminal or civilly punishable unprotected behavior and protected First Amendment speech is

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still being drawn.\textsuperscript{165} However, a court or legislative body might determine that some hostile commentary is appropriate for mandatory mediation, even if it would be protected from criminal punishment or civil damages under the First Amendment.

c) Some conflicts are not appropriately dealt with by a public judicial system at all, not even by mandatory mediation, for a variety of public policy reasons ranging from manageability to public value concerns about privacy. As examples, even if mediation might be a helpful tool in resolving these kinds of conflicts, we would not imagine that a legislative body would order mediation in most cases of parent-child conflicts over the parent’s child-rearing decisions, or “trash-talking” between friends in a high school, or emotional antagonism between neighbors because one is using his property for purposes disliked by the neighbor, such as plantings or buildings.

What common elements would most mediation-only causes of action (category b) look like? To get some concrete sense of how mediation-only cases might work, we might identify two potential causes of action that have been largely blocked from judicial redress. The first cases, such as Snydedr, involve so-called “hate speech,” cases in which speakers exercising their First Amendment rights use language that causes severe emotional harm or fear in others, while not rising to the level of a currently unprotected category of speech, i.e., true threats, inciting words, fighting words or libel. \textsuperscript{166} The second are cases sounding in invasion of privacy: as an

\textsuperscript{165} \textit{Id.} at 339-43 (describing court responses to First Amendment defenses).

\textsuperscript{166} See RONALD L. K. COLLINS AND SAM CHALTAI, WE MUST NOT BE AFRAID TO BE FREE: STORIES OF FREE EXPRESSION IN AMERICA 172-73 (2011) (discussing public response to hate speech).
example, we will use publication of painfully embarrassing facts, such as the identity of a rape victim, also protected by the First Amendment if the information is lawfully obtained.167

These cases involve many of the standard elements of tort law. They include behavior widely considered morally wrong. The behavior is engaged in by one party with a culpable state of mind (although perhaps not intent, at least negligence). Finally, these conflicts involve some identifiable harm to an individual person which is widely regarded by society as beyond the pale. Yet, under current Supreme Court jurisprudence, they are non-justiciable, either civilly or criminally.

Why might we want to use elements similar to traditional torts to define those conflicts that now become “justiciable” only through mediation but not through the courts? First, unless the alleged behavior is widely considered morally problematic in society’s eyes, it is difficult to justify the use of public resources in responding. As hate speech and invasion of privacy cases have illustrated, it may sometimes be difficult to draw the line between morally offensive behavior and publicly acceptable or even publically laudable behavior. For example, both society and its legal institutions, all the way up to the Supreme Court in fact, have struggled over whether expression of disapproval of a minority group or its behavior---for example, “Islam threatens Western values” is hate speech or not.168 Similarly, there have been debates about whether disclosure of the name even of a rape victim is not only defensible but good because

lessens the stigma of the crime and promotes truth.\textsuperscript{169} Except as limited by constitutional or similar constraints, public policy as expressed by legislatures in statutes and those courts empowered to extend the common law should establish what is sufficiently morally wrongful as to require a defendant to at least enter mediation.

Similarly, both traditional criminal and civil tort traditions recognize the need for some wrongful state of mind, if only negligence, when the harm is interpersonal. While strict liability torts and crimes seem to be growing in number,\textsuperscript{170} legislative reasons for eliminating a wrongful state of mind in these new causes of action may be quite different than the reasons that may prompt lawmakers to hail a “defendant” into mandatory mediation. While both systems have elimination of future harm as a goal, strict liability accomplishes that goal through the use of a threat (i.e., deterrence) rather than seeking the wrongdoer’s voluntary and good faith desistance from the behavior, as in transformative mediation. Other torts are premised on the need for cost-shifting from an injured plaintiff to a defendant. By contrast, transformative mediation is not primarily about distributive justice, but about personal empowerment and interaction.

However, there will be some differences between new litigable tortious behavior and mediation-only causes of action. For example, both tort and criminal causes of action require a causal connection between the wrongful behavior and the harmful outcome.\textsuperscript{171} This element

\textsuperscript{169} Michelle Johnson, \textit{Of Public Interest: how Courts Handle Rape Victims’ Privacy Suits}, 4 COMM. L. & POL’Y 201, 201 (1999)

\textsuperscript{170} See, e.g., Jeffrey S. Parker, \textit{The Economics of Mens Rea} 79 VA. L. REV. 741, 786 (1993) (noting that “[R]ecent commentary . . . suggests that this regime of strict liability crime has begun to expand beyond its conventional domain . . .”); avid G. Owen, \textit{The Fault Pit} 26 GA. L. REV. 703, 705 (1992)(discussing the growth of both strict liability and negligence torts).

would not seem to be necessary in a mediation-only cause of action. In mediation, because the objective is restoration of a relationship, or prevention of future harm or some agreed-upon amelioration of past harm, a strict rule of proof of causation may not be as necessary, or may be relaxed. While mediation might be helpful to resolve conflicts that do not involve these elements, the goals of mediation do not require a causation element, because the goal of the mediation is not to establish with precision who caused what harm, but to change behavior and relationships.

A second modifiable element, one that has bedeviled lawmakers attempting to distinguish wrongs appropriate for adjudication from those that are not, is the problem of harm. The common law traditionally recognized as compensable only certain kinds of injury, many of which could be established in the material world—a physical injury or death that can be proven, or the loss of property that can be established. To be sure, the law recognized discrete kinds of especially damaging emotional harm that usually had reputational consequences, e.g., vulgar telephone harassment of (usually virtuous) women,\textsuperscript{172} slander, or, in an older era, alienation of affections.\textsuperscript{173} Yet, both courts and legislatures have been slower to extend legal protection to less tangible and less objectively provable injuries. Often, they have required that non-tangible harm be evidenced by tangible evidence—e.g., those who suffer emotional stress had often to

\textsuperscript{172} See, e.g., Brenner and Rehberg, \textit{supra} note 164, at 16 (discussing century-old crimes punishing vulgar and obscene telephone calls)

\textsuperscript{173} See \textsc{Rodney A. Smolla} \textsc{Law of Defamation} § 4:65 (2d ed. 2011 updated) (distinguishing emotional harm of intentional infliction tort from reputational harm redressed by libel); Shauna M. Deans, \textit{The Forgotten Side of the Battlefield in America’s War on Infidelity: A Call for Revamping, Reviving and Reworking of Criminal Conversation and Alienation of Affections}, 53 \textsc{How. L.J.} 377, 388 (2010) (discussing intangible harm redressed by alienation of affections and criminal conversation torts)
show that they had to seek medical help for it—or required emotional harm to be coupled with egregious behavior or significantly wrongful intent in order to warrant traditional legal redress. Thus, for example, intentional infliction of emotional distress claims involving malicious intent and egregious behavior have long been recognized, sometimes without proof of health consequences. However, negligent infliction of emotional distress, a relatively new tort in some jurisdictions involving both a less wrongful state of mind and usually less wrongful behavior, has been particularly hard to establish without a tangible manifestation of medical or other harm to the victim.

Once again, because the goal of mediation is not to assign blame and force one party to give up his property to his victim, the need to identify the precise nature of harm “objectively” and prove it convincingly is not as great. That is not to say that the law should recognize purely subjective slights that an unusually sensitive person might consider damaging---for example, a teasing remark about someone’s height or weight. However, there will be certain kinds of emotional or other non-tangible harm that society is prepared to acknowledge as severe enough to warrant some legal intervention, if not traditional adjudication. In addition to public disclosure of facts involving rape or incest involving a young person or child, for example, we

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174 See, e.g., Brenner and Rehberg, supra note 165, at 19-20, (discussing Missouri stalking statute requiring “significant mental suffering or distress that may, but does not necessarily, require medical or other professional treatment or counseling.”)
175 See, e.g. Kenneth W. Simons, A Restatement (Third) of Intentional Torts?, 48 ARIZ. L. REV. 1061, 1079 (2006) (noting that nominal damages and recovery for emotional harm are generally available even without physical harm) But see Brenner and Rehberg, supra note 165, at 22 noting that “emotional distress” stalking and harassment statute require more than “self-diagnosed psychic injury, but incorporate a “reasonable person standard to ensure that such conduct inflicts “an objectively ascertainable” harm.”
176 See Simons, supra note 168, at 1079 (noting that “Intentional wrongdoers,” as we tend to call them, are the worst type of tortfeasor, worse than merely reckless or negligent actors. (Indeed, on this view, intentional torts could be considered a highly aggravated subcategory of negligence: negligence is modestly unreasonable behavior, while an intentional tort is highly unreasonable behavior.); John J. Kircher, The Four Faces of Tort Liability for Emotional Harm, 90 MARQ. L. REV. 789, 831 (2007) (noting an early recovery barrier to negligent infliction of emotional distress was the requirement that “the plaintiff sustain some contemporaneous physical injury or physical impact to their person as a result of the negligent act” which is still followed in some states.) Kircher also notes that the Restatement Second of Torts requires physical harm as well.
might think about some of the other situations giving rise to legitimate social concern in recent
times—picketing Lance Corporal Snyder’s funeral, for example, or cyberbullying that does not
rise to the level of legal stalking or libel or threats, or Internet publication of photos of intimate
behavior by a person who was not aware he was being filmed, to use recent examples.177 All of
these situations might be ripe for, and indeed handled better by, court-annexed mediation than by
a traditional public trial where even more damage may be done to the victims.

Ultimately, through the techniques of mediation such as narrative, interest identification,
and option generation, the use of transforming processes may generate outcomes that are more
important to the parties than any outcome they might have achieved through litigation, even if
litigation had been available to the “plaintiff” in the conflict. In addition to the possibility of
some repair of an ongoing relationship that lessens the chance of conflict over future issues, a
“defendant” in such a process may be educated about the ways in which his or its practices cause
harm and may be motivated to find alternative ways to conduct business that do not result in
those harms.

Indeed, in some restorative processes, such as those involving Muslims whose employers
have violated their religious accommodation rights, victims and their advocates have been
moved to publicly praise former wrongdoers for mending their ways.178 In this way, victims are
empowered because they are the narrators who frame the story, and wrongdoers receive public
encouragement to continue to “do the right thing” in the future. As suggested, even if the
mediation is unsuccessful because a “defendant” is recalcitrant, a victim may find new power to

178 See CAIR-MN Website available at http://mn.cair.com/
name his victimization, and thus achieve some sense of personal power over the situation in which he finds himself, along with allies in his continual struggle to prevent future victimization.

Conversely, a “plaintiff” may be emotionally empowered to get past the wrong he has suffered when he is able to hear the “defendant’s” story and to learn that, for example, the “defendant’s” reasons for his behavior were not motivated by the ill will or disempowering intent that the victim assumes, but by other factors or constraints in his own life. Often in criminal justice restorative processes, the fear victims feel that a victimizer is larger than life and a continuing threat is ameliorated when victims can come to understand that their victimizers too are vulnerable and broken. \(^{179}\)

IV. Testing a “Mediation-only” Cause of Action: Constitutional Concerns

This article argues, as a matter of public policy, that courts and legislatures should create mediation-only “causes of action” for conflicts that currently are not adjudicated through the common law court system. However, there are almost always important reasons that some conflicts are not justiciable. In addition to the problem of establishing elements of wrongful behavior, intent, causation and harm that have traditionally been required to justify coercing a defendant or depriving him of his property, there can overriding public policy values that counsel against punishing even an admitted wrongdoer. Many times, they are constitutional constraints.

Using the two cases we have considered, the “hate speech” case we have considered in Snyder v. Phelps and “invasion of privacy/rape disclosure” cases, we should test whether these

\(^{179}\) See ZEHR, supra note 136, at 20-25 (describing victim feeling that she is in the perpetrator’s power, that she is vulnerable and powerless, and that she is degraded by being in the control of others.)
larger social concerns would prohibit lawmakers from requiring a defendant to enter mediation because of his behavior, even if a court would be barred from awarding damages or imposing criminal liability for that behavior.

Cynthia Cohn, a 17-year-old girl, was raped and suffocated to death in August 1971. During the indictment of six boys for the rape, a newsman for WBS-TV, owned by Cox Broadcasting, was shown a copy of the indictment naming Cynthia as the victim. He later identified Cynthia by name and showed her high school yearbook in a news broadcast, which was repeated the next day.\textsuperscript{180} William Lee writes, “[f]or Cynthia’s family, the public disclosure of her name turned life into a nightmare. Her brother and sisters were subjected to humiliating taunts. Cruel children posted graffiti that read FREE THE SANDY SPRINGS SIX. Hurt, mortified and angry,” Cohn’s father sued the TV station for invasion of privacy under a Georgia statute that forbids the publication of a rape victims name as a misdemeanor.\textsuperscript{181}

In each of these cases, the wrongdoers were protected by the Supreme Court under the First Amendment. In the \textit{Phelps} case, the trial jury found Phelps guilty of intentional infliction of emotional distress and invasion of privacy.\textsuperscript{182} However, the Supreme Court used a somewhat garbled version of the public forum doctrine to argue that WBC was legally entitled to parade its opinion on public property despite the emotional harm to LCpl. Snyder’s father.\textsuperscript{183} In \textit{Cohn}, after the Georgia high court ruled that Mr. Cohn could bring an invasion of privacy suit against the broadcasters, the United States Supreme Court held that the publication of legally obtained non-


\textsuperscript{181} See Johnson, \textit{supra} note 162 at 221-22(describing Martin Cohn’s suit against the broadcasting company).


\textsuperscript{183} Snyder, 131 S.Ct. at 1219-21.
libelous information was protected under the First Amendment, and that the statute protecting the name of rape victims was unconstitutional.184

The Court followed up the Cohn ruling with Florida Star v. B.J.F, overturning a Florida law prohibiting the publication of a rape victim’s name.185 The Jacksonville-based Florida Star that published B.J.F’s name obtained it from a copy of the crime report posted in the press room under the informal understanding that the press in the room would comply with the law. 186 As a result of this story, which B.J.F. learned about from friends, “[h]er mother received several threatening phone calls, and eventually the victim felt compelled to move, change her phone number, seek police protection and get counseling for mental health.”187 She was awarded $100,000 in damages for negligent violation of the non-disclosure law, but on appeal, the United States Supreme Court held that news organizations cannot be sued for printing legally obtained information unless the state has a compelling interest which takes into consideration the specific facts of the case.188

In these cases, the Supreme Court considered the larger public policy issues which would arise if putative First Amendment rights were suppressed. As every Constitutional Law student knows, this analysis considers not only what might happen in this particular case if a putative First Amendment right can be suppressed, but also what precedent it might set for the future if the Court suppresses the speech.

184 Johnson, supra note 162 at 222.
186 Johnson, supra note 162 at 226; see also Patrick McNulty, The Public Disclosure of Private Facts: There is Life after Florida Star, 50 DRAKE L. REV. 93, 125 (2001)(noting threats B.J.F’s mother received that she would be raped again)
187 Johnson, supra note 162, at 226-27.
188 Id. at 228. The Supreme Court followed this case up with two other cases upholding the right of newspapers to print the names of juvenile offenders which were legally obtained from police, witnesses and prosecutors despite a law prohibiting the publication of juvenile names. Id. at 228-32. Smith v. Daily Mail Pub. Co., 443 U.S. 97 (1979); Oklahoma Pub.’ Co. v. Dist. Ct. of Oklahoma, 430 U.S. 308 (1977).
In determining that such speech is protected under the Speech or Press Clause, the first and predominant considerations that the Court focuses on are foundational. In a simple version of this argument, free speech and freedom of the press are necessary to properly inform citizens in a democratic country. If the government is able to suppress speech, citizens will not have the correct information (the so-called truth-seeking rationale) or the opportunity to debate values and options to exercise their civic responsibilities to inform their legislators how they should vote (termed the self-government rationale).\(^{189}\) Moreover, no one will be able to stand up to an abusive or corrupt government and urge citizens to see that it is overreaching its power, the so-called checking rationale.\(^{190}\) The narratives that inform the foundational paradigm are various: an arbitrary government administrator or agency silencing an individual who is simply trying to tell the truth to his community or to state his opinion; a bureaucrat bent on calming the waters who suppressed speech because it causes conflict; the government as an efficient machine that bulldozes any dissent in the way of accomplishing its objective.

In the cases we are considering, the foundational rationale applies very weakly, particularly the “slippery slope” argument that if we allow the government to begin suppressing some arguably less valuable speech, it will use the opportunity to begin suppressing more valuable speech. In Cohn, the real antagonists are the TV conglomerate and the family of a rape victim, with the state acting as a surrogate and protector for individuals harmed by disclosure of such painful and sensitive information. In Snyder, although the Supreme Court determined that the speech was on a matter of public concern, the conflict and ensuing lawsuit are between a grieving family and the speakers who caused them emotional pain at a vulnerable time. Though

\(^{189}\) See Collins and Chaltain, supra note 159, at 43-44, 48 (discussing Meiklejohn’s theories of truth-seeking and self-government).

\(^{190}\) Id. at 54 (discussing Blasi’s “checking” argument).
many states have passed funeral picketing statutes in the wake of the travels the Westboro
Baptist Church members have made throughout the country to picket funerals, even these
statutes are primarily aimed at protecting vulnerable families, not suppressing the ideas or even
methods of the Church.\textsuperscript{191}

Moreover, the creation of a mediation-only cause of action against either hate speech or
speech that invades privacy does not seem to entail the concerns that the Courts cite in protecting
wrongful speech. In the case of individual speech, the Supreme Court’s main concerns have
been to avoid either prospective self-censorship or retrospective punishment of speakers, either
civilly or criminally.\textsuperscript{192} In the case of the press, which is usually also a business, the concern is
that permitting civil lawsuits for publication of information will make the business of news less
viable. Newspapers and other media will either be less courageous in ferreting out the truth, or if
they are willing to do their jobs, they will pay a heavy price that may destroy their business
operations and subsequently deprive the public of their voice.\textsuperscript{193} And, of course, if reporters and
editors can be jailed or criminally fined for what they write or print, the individuals who gather
news will be more timid about telling the truth to the public.\textsuperscript{194}

\textsuperscript{191} See, e.g., Major John L. Kiel, \textit{Crossing the Line: Reconciling the Right to Picket Military Funerals with the
First Amendment}, 198 MIL. L. REV. 67, 78-82 (2008) (discussing intent of funeral picketing statutes and noting a
court’s finding that the New York anti-picketing statute’s “primary motive was to provide a measure of ‘protection
and tranquility’ to funeral-goers, and not to suppress certain messages because the state disagrees with their
content.”)

\textsuperscript{192} See, e.g., LEE BOLLINGER, \textit{THE TOLERANT SOCIETY} 48-49 (1986)(discussing arguments against punishing
harmful speech); William T. Mabrey, \textit{Toward a Theory of First Amendment Process: Injunctions of Speech,
(discussing Milton’s view of self-censorship and its application in Supreme Court prior restraint cases)

\textsuperscript{193} \textit{Id.} at 253, 268-69 (noting that “the publication of speech is increasingly monopolized by cost-conscious
businesses that are not noted for “putting large capital to the hazards of courage.”)

\textsuperscript{194} See. e.g., Columbia Broadcasting System, Inc. v. Democratic Nat. Committee, 412 U.S. 94, 166 n. 14 (Douglas,
J., concurring, discussing use of subpoenas and jailing reporters to get anti-war information)
A mediation-only remedy does not threaten these prospects, though we should not pretend there is no cost to a speaker who can be hailed into mediation. The absence of a criminal penalty should lessen the concerns of either speakers or the press that they will be personally punished for what they say. They cannot be arrested or prevented from saying or printing what they will through a prior restraint. Moreover, neither of them will be “throwing the dice” in terms of civil damages either—since mediation cannot produce a settlement without their agreement, they are not subject to the judgment of either juries or judges that the damage they have caused should be ameliorated with a large money judgment.

Of course, any time a person can be hailed into court, even into mediation, there is a possible cost in terms of his time, and potentially money as he gets legal advice about his options. He may also be required to pay for the mediation, depending on how the funding structure for a mediation justice system would work. There is also the simple hassle of being subject to having to explain himself to his victim or a court reviewing whether there is a mediation cause of action, which might become burdensome on media organizations or on individuals engaged in repetitive speech harassment like the Westboro Baptist Church.

However, this cost seems minimal when balanced against the harm that this kind of speech has caused other individuals—not the government, but vulnerable persons who have no way to defend themselves against organized and sometimes powerful groups like churches and television conglomerates. While it is tempting to advocate for a bright line for the protection of speech and press—in some views, there should be absolutely no sanction except in the court of public opinion for harmful speech—in real life, some speech does cause harm.
Moreover, as I have sketched it, mandatory mediation would be ordered only where a specific cause of action is legislated or mandated as an appropriate outgrowth of the common law. The requirements that such a cause of action be explicitly defined, and its elements described, ameliorate much of the “guesswork” that a speaker might go through in deciding whether the threat that he may have to participate in a mediation might make him think better of his speech. In the cases we are considering, these states have already developed well-recognized torts or specific statutory prohibitions that give advance notice to speakers of the consequences of their actions. While there may be torts such as intentional infliction of emotional distress where the elements are not as specifically and concretely defined, state case law will be available to speakers to understand when they are stepping over the line from completely costless speech to engaging in speech that they stand to be haled into mediation for. In cases like *Snyder*, the likelihood that an individual will be repeatedly hauled into a mediation for his harassing or invasive speech is relatively small given that most of these situations are context-specific and many victims may choose to forget the slight and move on with their lives. Should an individual continue to harass or invade the privacy of another specific person, then already recognized criminal and civil causes of action like stalking come into play,¹⁹⁵ which do not raise the same First Amendment concerns as isolated instances of “candid” speech that we may want to protect.

Media organizations may raise a somewhat different concern already alluded to—that affected persons may make mediation-only claims that in themselves are not problematical but in the aggregate may be so costly as to chill speech. Given the tortious nature of the media mediation-only cases that are likely to surface, however, it is less likely that reputable media or other organizations will find the numbers of mediations they have to attend to be so significant.

that it will change their practices. Taking the Cohn and B.J.F. cases as examples, it may well be that the decision to name these rape victims was a thoughtless one by an inexperienced reporter or editor that, upon reflection, he or she may not have made again, especially after community outcry about the decision. Or, these reporters and editors may have decided that a particular case was so unusual that naming the victim was critical to the story—e.g., there was evidence that she had possibly made up the story, or she was a well-known person publicly linked to the perpetrator, or the victim’s identity was a matter of common knowledge in the community anyway. In these cases, requiring a media organization to attend a single mediation on such a case does not seem like an onerous burden on the organization.

Of course, there remains the possibility that individuals will file repetitive “nuisance” mediation-only cases against organizations, either because they imagine that a deep pocket is available, or because they so detest the organization’s behavior that they would like to use these cases as a method of getting the organization to stop, as in the Westboro Baptist situation. Once again, however, because the lack of coercive threats of a traditional lawsuit (like damages and discovery) to back up “nuisance” cases, one would anticipate that very few individuals who would find the cost of filing a mediation only suit is worth the possible value to them of creating a nuisance for their opponents. Similarly few “defendants” would feel forced to pay to settle because it was cheaper than attending a mediation. Moreover, since these causes of action would require sworn pleadings attesting to the specific elements of the case, if these are truly “nuisance” actions used to harass a defendant with no substantive validity, the court’s power to punish plaintiffs who bring frivolous suits would still come into play.
We might also consider whether the so-called “truth-seeking,” “self-fulfillment,” or “safety valve” rationales\(^{196}\) of the First Amendment are significant enough in these kinds of cases to outweigh the value to injured parties of requiring attendance at mediations. If indeed the First Amendment finds either the subjective expression of emotion or the objective explication of a fact, regardless of its value to public discourse, to be an unalloyed good regardless of its impact, then mediation causes of action in the First Amendment context pose real problems.

However, there is little evidence, even considering only First Amendment law, that these rationales are considered absolute arguments in favor of harmful speech. The “safety valve” and self-fulfillment rationales have been rejected in many of the exceptions that the Court has carved out and steadfastly maintained in the First Amendment area. For example, the “safety valve” argument has not stopped the Court from refusing to recognize protection for fighting words, true threats, libel, obscenity, or inciting speech,\(^{197}\) all of which might be justified under this rationale. Nor has the “self-fulfillment” rationale been considered sufficiently weighty to prevent states from punishing obscenity, child pornography, or the “angry speech” exceptions just mentioned, including fighting words, true threats, or inciting speech, much less libel.\(^{198}\) Each of these expressions recognizes that there is a point where self-expression and speaking to let off steam go too far and implicate personal or governmental interests too weighty to be overridden by possible chilling or slippery slope concerns.

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196\ See, e.g., BOLLINGER, supra note 193, at 45-48 (1986) (discussing the self-fulfillment, truth-seeking, and self-government theories of the first amendment); COLLINS AND CHALTAIN, supra note 159, at 35 (discussing Emerson’s “safety valve” and Bollinger’s “tolerance-producing” theories of the First Amendment).
197\ See BOLLINGER, supra note 197, at 176-186 (discussing the incitement, fighting words, libel, and obscenity exceptions); COLLINS AND CHALTAIN, supra note 159, at 203 (discussing the true threat exception).
198\ See notes 197-198 and accompanying text, id., at 317 (discussing the child pornography exception).
It remains to consider whether the “truth-telling” rationale for speech is sufficiently weighty to overcome mediation causes of action for truthful (or even misleading or false) information dissemination. Generally speaking, the truth-telling rationale has not limited the government from punishing or protecting with civil damages at least some speech that is truthful, including speech the content of which harms no one. Thus, for example, the Court permitted damages to be awarded to Zacchini against Scripps-Howard which filmed his entire act and broadcast it, thereby diminishing its economic value; and National Enterprises similarly had to pay President Ford’s publisher for printing too much of his copyrighted book. The same is true with many other examples of intellectual property, including the use of famous people’s likenesses or the publication of similar proprietary information. Apparently, the Court believes that the protection for property outweighs the “truth-telling” rationale of the speech clause in such cases.

But, we might consider whether this rationale loses its force when the harmed party’s property rights are not at stake. The Cohn and B.J.F. cases are good cases for considering this question, since in both cases, there was arguably some truth value in disclosing the name of the rape victim. It is, after all, a truthful statement. In each of these cases, the plaintiffs argued that their non-property rights were invaded—the right to keep certain information about themselves secret or at least private, an aspect of the right to autonomy; the right not to be openly shamed in public, and the right to live in dignity despite the terrible injustice that was done to them as

201 See Paul M. Schwartz and Karl-Nikolaus Peife, Prosser's Privacy and the German Right of Personality: Are Four Privacy Torts Better than One Unitary Concept?, 98 Cal. L. Rev. 1925, 1941(2010)(discussing Prosser’s explanation of the tort of appropriation of a plaintiff’s name and likeness.)
innocent persons. It is difficult, however, to imagine the nature and values of a society where economic rights like Zacchini’s are protected and dignitary and autonomy rights like B.J.F’s are not, although these Supreme Court cases suggest that that is exactly the society we find ourselves in.

On a more practical level, however, both federal and state laws protect the identity of certain victims of sexual abuse, if the trial court lays the appropriate predicate for the use of initials or pseudonyms in place of the victim’s true name. The fact that these laws have not been successfully overturned under any constitutional provision, even though most plaintiffs have lost their lawsuits for publication of their names, implies that the Cohn line of cases is not an absolute bar to the disclosure of embarrassing truthful information, only that suppression of such information must be based on context and in cases of substantial demonstrable harm or the likelihood of such harm.

When we move from a tradition al criminal or civil suit to a mediation-only cause of action, the rationale for protecting media and others who publish information that would violate a state law or common law right loses much of its force. Even assuming that a particular media organization decided that it had a First Amendment duty to the public or defendant to publish the name of every rape victim regardless of circumstances, it is not clear what harm or even chilling

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202 See, e.g., McNulty, supra note 185, at 125 (noting that BJF’s right was to “civilly protect the ‘essential dignity and worth of every human being—a concept at the root of any decent system of ordered liberty.’”)

203 See, e.g., 18 U.S. C. § 3509 (permitting the use of pseudonyms in federal cases where the judge determines that requiring the child to testify and be identified in open court would cause substantial psychological harm); Patrick Noaker, Using Pseudonyms in Sexual Abuse Cases, BENCH AND BAR OF MINNESOTA (Feb. 7, 2012) 16, 17-18 (describing federal court and Minnesota court provisions for the protection of the identity of victims in criminal and civil cases, while noting that the law for civil plaintiffs in Minnesota is not so clear in civil cases). But see Johnson, supra note 162 at 203 (noting that while courts have not invalidated state criminal statutes preventing disclosure of rape victims’ names, they have put into question whether such statutes can ever be constitutionally enforced).

204 Id. at 203-225.
effect the media outlet would suffer by being required to appear and explain to the women whom they had harmed why they felt ethically obliged to disclose their identities. If this policy is indeed a matter of principle, presumably the media outlet would have a strong incentive and desire to explain this principle to someone who felt unjustifiably harmed by the disclosure. And, essentially, that is more than mandatory mediation even requires of a wrongdoer in most states currently using court-annexed mediation, where a defendant could appear at the mediation and even refuse to speak or even to listen.

Similarly, as a poster child for those who use hate speech to harass, demean or intimidate their victims, the Westboro Baptist Church apparently had no interest in avoiding a mediation with the victims here, the Snyders. Those who use hate speech WANT their victims to hear their point of view, if not to win them over, then to harm them emotionally. Those who actually believe what they are saying to be the truth, those who stand on principle, as apparently the Church does, would be unlikely to find the opportunity to spew their views in even closer proximity to their victims to be a harm that would cause them to chill their speech or even to moderate it. Of course, to the extent that their purpose was not to tell the truth but to intimidate their victims, the mediation setting might be less conducive to that since there are others in the room who can buffer the coercive effects of their speech. But to suggest that requiring them to mediate after they engage in hate speech will chill their willingness to use it seems somewhat far-fetched. And, then, of course, the truth-telling rationale drops out as an excuse for protecting tortious speech.

Once again we might ask, however, what is the point in spending public resources to require a probably recalcitrant speaker to come into a meeting with his victim? If he stands on
principle, arguing that the public needs to know “as fact” the comments he is making, it might seem to be unlikely that he will change his mind after a meeting with his victim.

As earlier suggested, however, there may be many reasons that someone who has used speech to harm another might come to regret his actions. For example, the “defendant” may not have had the context to understand his victim’s situation and history. We can imagine that a “defendant” who must come face-to-face with the person he has harmed may discover someone with whom he may share interests or values and may change his mind about the truthfulness or value of his speech. Or, as in the Cohn and B.J.F. cases, a speaker may not have had the life experience to understand how what appears to be a seemingly innocent disclosure has damaged his victim; mediation might be his education into what a rape victim endures in the aftermath of such a tragedy. Or, he may persist in his belief that this speech was not wrongful, but agree that he will give up expressing it as a matter of respect or accommodation to his victim and his community. Any of these “change of heart” experiences may cause him to be willing to make an apology to his victim, which may be more important than damages or settlement. Or, the wrongdoer may find a way to work out an alternative for his victim that ameliorates some of the unintended consequences of his behavior. What difference would it have made for the Cohn family if Cox Broadcasting, having disclosed the name of their daughter, reported on all of the cruelty the family was experiencing and editorialized about the wrongfulness of the taunting that they suffered? Litigation could not obtain that remedy for the Cohns, but mediation can.

And, as suggested, even if the speaker is unmoved by the harms caused to his victims, as perhaps Westboro Baptist Church members seem to be, mediation can empower victims to reclaim their sense of dignity and control over their lives. By being able to express anger, to tell
their perpetrators face to face how they have been harmed, to see the poverty of their perpetrators’ lives, they may be able to put the wrongs they have suffered into perspective and move beyond them to a healthier emotional life. In some cases, such as in the Cohn case, being able to understand why a speaker would feel conscientiously obliged to engage in behavior that harmed them might take some of the sting out of the harm, as they realized that it was “not personal.”

V. CONCLUSION

Public voices have long decried the inability of the common law system to bring justice to many who have suffered wrongs that we all recognize as tragic for the victims, particularly those harms that wound the dignity and the spirit of vulnerable human beings. In some cases, relief exists in theory through private causes of action, but systemic flaws such as the lack of available counsel, inadequate judicial personnel, or public ignorance about rights stymie justice. In some, bringing a lawsuit or otherwise seeking justice simply prolongs the difficulties and pain of the victim, thus pouring salt into a wound that cannot heal through law. In some cases, the law is irredeemably inadequate to bring justice, because the injustice is beyond any repair.

But in some cases, we have decided to stay the hand of the law, preventing parties from bringing claims, because of larger public concerns that outweigh the injustice suffered by particular victims, such as cases where constitutional rights must be protected. In some of these cases, justice can be offered to victims through court-connected mandatory mediation if only we are willing to design a system and define the cases where we can properly expect those who do harm to face their victims.
As this article suggests, justice is much larger than a judgment, an award of damages or a court’s order to a wrongdoer to cease his behavior. Sometimes it means granting a victim an opportunity to face her wrongdoer, to express her pain, to seek explanation, to demand apology. Sometimes it means bringing the community to bear on a wrongdoer so that he can recognize the depth of suffering he has caused, accept responsibility for it, in some cases offer an explanation, and perhaps make some attempt to amend the wrong as best he can. Sometimes it means making the community aware of its own responsibility to both victim and wrongdoer to make ways for them to turn a new page in their lives.

These are the values that have undergirded the transformative mediation and restorative justice movements, and these are the values that court-connected mandatory mediation can bring if we only have the courage to admit that we need a new system not to replace but to supplement the work of the common law courts. Much like the breath of new life that equity once brought to the common law courts, court-connected mediation can serve the common law as a rival for justice. Indeed, such a system, with its defined causes of action and processes engaging conflict deep in its heart can serve as an inspiration to the common law that justice need not be broken at its edges.