CAN MEDIATION DELIVER JUSTICE?

*Sherif Elnegahy**

ABSTRACT

Can mediation deliver justice? This article seeks to answer this controversial question by exploring the idea of justice through a number of perspectives, including the historical, philosophical, and religious perspectives. After reaching an understanding on the idea of justice, the article discusses two main means of delivering justice: formal justice—including an analysis of its strength and limitations—and creative justice. The article proceeds to demonstrate the relationship between mediation and justice and mediation's ability to deliver several justice outcomes, which include procedural justice, distributive justice, and restorative justice. The article concludes by highlighting the possible challenges that can accrue when attempting to deliver such justice outcomes using mediation.

I. INTRODUCTION

A. *The Idea of Justice*

> *The need for justice grows out of the conflict of human interests. That is to say, if there were no conflict of interests among mankind we should never have invented the word justice, nor conceived the idea for which it stands.*†

"It is not fair" is the statement that reflects a feeling which often leads to conflict, whether it is as small as a young boy shouting it out to his older brother who got a much bigger piece of the cake, or as big and complicated as a businessman complaining that his partner did not comply with his duties in a million dollar transaction.[1] Such bitter feelings of injustice occur when the harmony

* Sherif Elnegahy is a Chief Judge in the Egyptian Ministry of Justice and a Law Tutor and PhD Candidate at the University of Strathclyde. He obtained his LLM in Dispute Resolution from Pepperdine University; he is a Fulbright and Chevening Alumni and was awarded the prestigious JAMS Weinstein and Rotary Peace Fellowships.

† THOMAS NIXON CARVER, ESSAYS IN SOCIAL JUSTICE 3 (1915).

[1] Morton Deutsch & Janice M. Steil, *Awakening the Sense of Injustice*, 2 SOC. JUST. RES. 3 (1988); Morton Deutsch, *Justice and Conflict*, *in* THE HANDBOOK OF CONFLICT RESOLUTION: THEORY AND PRACTICE (2011).

that governs a situation or relationship is being threatened by conflicting interests. When in conflict, man often seeks a sense of justice to restore balance and bring harmony back to its place.

As important as justice can be, it is a challenging quest to search for a reliable, steady, and clear definition of the concept. In the search for a definition, many dictionaries define justice with other similarly hard to define concepts such as fairness or righteousness, thereby creating an endless circle.[2] Many scholars are influenced by the Aristotelian school of thought and urge that the best way to understand justice is by examining the absence of justice, leading to many studies defining different types of injustice and consequently types of justice.[3] Yet, this leaves us without a concrete definition of the core concept itself. This article is not claiming to settle this debate; rather, it proposes an acceptable ground regarding the idea of justice as a first step towards answering the question "can mediation deliver justice?" by briefly examining the notion of justice in ancient history, philosophy, and religion.

B. *The Ancient Egyptians*

The ancient Egyptians used to adorn their temples walls with Ma'at, the goddess of Justice—a beautiful lady with an ostrich feather on her head—where she is often representing other supreme values such as ethics, truth, and most importantly, balance.[4]

FIGURE 1

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[2] *See, e.g.*, *Justice*, CAMBRIDGE DICTIONARY, http://dictionary.cambridge.org/dictionary/british/justice (last visited June 12, 2014); *Justice*, FREE DICTIONARY, http://legal-dictionary.thefreedictionary.com/justice (last visited June 12, 2014).

[3] *See, e.g.*, Janice Steil et al., *A Study of the Meanings of Frustration and Injustice*, 4 PERSONALITY & SOC. PSYCHOL. BULL. 393, 398 (1978); Morton Deutsch & Janice M. Steil, *Awakening the Sense of Injustice*, 2 SOC. JUST. RES. 3 (1988); Morton Deutsch, *Justice and Conflict*, *in* THE HANDBOOK OF CONFLICT RESOLUTION: THEORY AND PRACTICE (2011).

[4] SIEGFRIED MORENZ, EGYPTIAN RELIGION 273 (ANN E. KEEP trans. 1973); *see also* JOHN H. TAYLOR, JOURNEY THROUGH THE AFTERLIFE, ANCIENT EGYPTIAN BOOK OF THE DEAD 209 (2010).

Ma'at, as a principle, was formed to meet the complex needs of the emergent Egyptian state that embraced diverse people with conflicting interests. The ancient Egyptians held a strong conviction that Ma'at, or justice, had the power to maintain the "cosmic harmony," which if disturbed could have negative consequences for the individual as well as the state.[5] Therefore, the pharaoh or the ruler would describe himself as the "lord of ma'at" who decreed with his mouth the Ma'at he conceived in his heart.[6] For the individual, Ma'at played an important role in faith and belief regarding his journey to the afterlife. The hearts of the dead were said to be weighted against the single "Feather of Ma'at" as the most significant court and last stage of their journeys to the afterlife. Hearts were left in Egyptian mummies while their other organs were removed, as the heart was seen as the part of the Egyptian soul where all bad deeds rest. From the ritual of the weight of the heart, explained on the papyrus from the Book of the Dead,[7] it can be understood that the ritual involves placing the heart of the deceased on one side of the scale and the Ma'at feather on the other side. Only when the heart was found to be lighter than or equal in weight to the feather of Ma'at had the deceased led a virtuous life and would go on to Aaru, or heaven. (As shown in Figure 2).

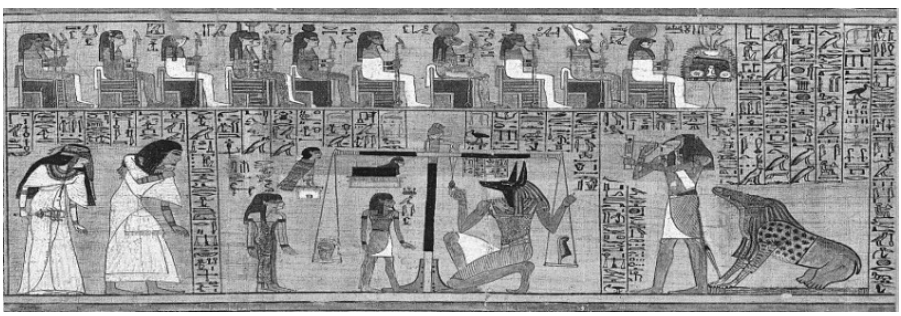

FIGURE 2

Several observations can be made here: since the dawn of civilization, humanity recognized the importance of justice as the cornerstone for any viable balanced society.

Ma'at—the Goddess of Justice in ancient Egypt—has also been used as a symbol of other supreme values such as truth and

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5 *See* Mahmoud Mandawary, الصدق والعدل أساس المُلك بحث كامل عن المعبودة ماعت, http://www.civilizationguards.com/2014/09/god-maat.html?m=1 (last visited Mar. 4, 2017).

6 NORMAN COHN, COSMOS, CHAOS AND THE WORLD TO COME: THE ANCIENT ROOTS OF APOCALYPTIC FAITH 9 (1993).

7 TAYLOR, *supra* note 4, at 209.

balance, which does not mean that the meaning of justice is a mix of several essential values, but rather teaches us that the concept of justice is actually the guardian or assurance that many vital values are in place and protected.

Lastly, from absorbing the meanings behind the "weight of the heart," it is fair to conclude that the ancient Egyptians started the line of thought that suggests that a man's conscience power and connection to his faith and beliefs are the best drives for justice. In this paradigm, the heart, innate nature, and morality are the best indicators for the values that justice must protect. Further, the balance within a man's inner self and his self-discipline are the best ways to maintain such values, which in result would lead to a just society.

C. *Greek Philosophy*

Greek philosophy took a very similar approach, where Plato formed his ideas from the works of his teacher Socrates, arguing that real justice is not to be found in external actions, but in a man's inward self.[8] Accordingly, justice shall be achieved if a man manages to balance and control three elements that make up his inward self. The three elements are: reason, spirit, and irrational appetitive impulses.[9] The rational reflects man's mind and all it can entail with logic and reason. The spirited indicates the man's heart, with all the associated feelings, especially courage and bravery. The appetitive represents the man's stomach, with all the irrational and animalistic desires. Keeping all three in tune, man is ready for action of any kind in a just manner, whether personal, financial, or political. Plato extended the concept of balancing the three elements to society, where the ruling class is the rational, soldiers are the spirited, and the working class are the appetitive. To maintain a balanced and just society, every individual must understand and respect his role and carry his duties in a just manner.

Aristotle wrote that justice could be defined using two concepts: proportionality and rectification:[10]

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[8] *See* PLATO, THE REPUBLIC (Tom Griffith trans., Cambridge, 12th ed. 2009).

[9] *See id.*; William J. Byron, S.J., *Ideas and Images of Justice*, 26 LOY. L. REV. 439, 442–43 (1980).

[10] ARISTOTLE, NICHOMACHEAN ETHICS 209–15 (W. Ross ed. 1956). Aristotle started the line of thought of introducing retribution and creating a system that involves punishment as a way of bringing balance and achieving justice. Indeed, the idea of setting standards for the fair distribution of resources along with appointing man's conscience as the source and the guardian

> The concept of "*proportionality*" entails that the unjust is what violates the proportion. Hence, one team becomes too great, the other too small, as indeed happens in practice; for the man who acts unjustly has too much, and the man who is unjustly treated, too little, of what is good. In the case of evil, the reverse is true; for the lesser evil is reckoned a good in comparison with the greater evil, since the lesser evil is rather to be chosen than the greater and what is worthy of choice is good, and what is worthier of choice is greater good.

The remaining concept of justice is "*the rectificatory*," which arises in connection with transactions both voluntary and involuntary—for it makes no difference whether a good man has defrauded a bad man or a bad man a good one, nor whether it is a good or a bad man that has committed adultery, the law looks only to the distinctive character of the injury and treats the parties as equal, if one is in the wrong and the other is being wronged, and if one inflicted injury and the other has received it.[11]

Such a view urges that justice requires us to find the right balance between rights and duties by establishing a system that can exact a remedy when such balance is jeopardized.[12] This approach placed the foundation for establishing the concept of "formal justice," or "justice based on the law," and emphasizes the importance of the law. Perhaps this school of thought explains why the Greeks personified justice as the goddess Themis—her image is usually used to adorn courts all around the world—holding the scale in one hand representing proportionality, and the sword in the other hand representing rectification, with a blindfold representing equality.[13]

II. Background

A. *In Religion*

I have always found that mercy bears richer fruits than strict justice.[14]

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of justice; where the good conscience has the ability to urge the man to discipline himself, recognize right from wrong and identifies and embraces all the essential values needed for a just behavior; this is rather powerful, yet too idealistic. Man's conscience can become corrupted or silenced, which requires a certain kind of force to redirect man to the right path.

11 *Id.*

12 Joseph L. Daly, *Justice and Judges*, 1988 BYU L. Rev. 363, 365–66, 365 n.10 (1988) (citing Joseph L. Daly, *Thinking About Justice*, *in* Enhancing Constructional Studies 3–5 (1987)).

13 Daly, *Justice and Judges*, *supra* note 12, at 365–66.

14 Quote from Abraham Lincoln's speech in Washington D.C. circa 1865.

One can argue that the concepts of proportionality and rectification are clearly embodied in religions' philosophies of justice; furthermore, it can also be observed that the concept of mercy has been invited to be part of the justice equation with the evolution of religions and societies throughout time.

Looking at the Abrahamic religions, it can be argued that they started with adopting the concepts of proportionality and rectification in a clear and strict manner when it perhaps seemed that people were in a desperate need for order and deterrent placing the foundation of "retributive justice." As the Torah states: "eye for eye, tooth for tooth, hand for hand, foot for foot, burning for burning, wound for wound, stripe for stripe."[15]

Yet, after establishing such goals, one could argue that society became very materialistic and lacked flexibility and compassion and there was a need to soften such societies. By adopting the concepts of mercy, forgiveness, and love, such societies introduced a much deeper layer of justice by placing forgiveness as part of the "restorative justice." That is why the Bible states that: If someone slaps you on one cheek, turn to the other also. If someone takes your coat, do not withhold your shirt from them.[16]

As society continued to evolve, it was the time to blend the three concepts and perceive justice as the balance between proportionality, rectification, and mercy. As the glorious Quran states:

> And We ordained for them therein a life for a life, an eye for an eye, a nose for a nose, an ear for an ear, a tooth for a tooth, and for wounds is legal retribution. But whoever gives [up his right as] charity, it is an expiation for him. And whoever does not judge by what Allah has revealed—then it is those who are the wrongdoers.[17]

Additional observations can be offered. First, each religious school of thought affirmed Aristotle's concepts of proportionality and rectification. Yet, they suggest that applying these concepts without integrating different aspects of humanity—such as mercy, forgiveness, and empathy—can turn justice into revenge, and fail to protect the values needed to restore harmony and balance. Second, and most importantly, the evolution of the idea of justice in religion affirms the importance of participation, people's ability to make choices, and their references as an essential part of the justice equation. Here, people have the power to decide on the values

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15 *Exodus* 21:24–25 (King James Version).

16 *Luke* 6:29 (New International Version).

17 *Quran*, *Al Maeeda* 5:45 (Saheeh Version).

that matter and can better achieve the balance, especially when choosing between deterrence and forgiveness, in the manner that fits in the party's sense of justice according to the situation. Finally, one's likelihood to choose forgiveness over punishment seems to be linked to a sense of detachment from materialism, and the transient nature of this worldly life. The reward of the next life or responding to one's natural sense of morality is worth more to a person than the fleeting satisfaction of retribution in this life. This thought will be discussed in greater detail under retributive justice later in this article.

B. *Conclusion on the Idea of Justice*

People are naturally social beings that have to deal with many conflicting interests when dealing with one another.[18] Many have written on the meaning of justice,[19] yet it seems there is no concrete definition for justice.

The image or the symbol of the scale has always been used to represent justice. Perhaps the reason for this imagery is that the concept of justice has always been orbiting around the idea of balance. Such a notion can be found in the examination of ancient history, philosophy, and religion, albeit, each has taken slightly different approaches. Nonetheless, they all perceive justice through the lens of balance, and all these different views agree that the main objective of justice is to restore and maintain balance between parties, leading to the establishment of balance in society's fabric.

It can also be proposed that the concept of justice is more than the constitution of a number of supreme, timeless, immutable, and universal values that are built in our innate nature.[20] Rather, justice is the protection and assurance that such values have been honored. This line of thought is in compliance with the ideas of natural law, which "manifests our constant striving for objective

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[18] *See* Aristotle's concept that "Man is a political animal." Aristotle, *supra* note 10, at 209–15.

[19] *See, e.g.*, JOHN RAWLS, A THEORY OF JUSTICE (1999); *see also* AMARTYA SEN, THE IDEA OF JUSTICE (2009); HANS KELSEN, WHAT IS JUSTICE?: JUSTICE, LAW, AND POLITICS IN THE MIRROR OF SCIENCE (1957).

[20] An experiment by Frans de Waal on moral behavior in animals shows that even monkeys can feel injustice and react to unequal pay (12:30 min.). Frans de Waal, *Moral Behavior in Animals*, TED, http://www.ted.com/talks/frans_de_waal_do_animals_have_morals#t-754498 (last visited Mar. 10, 2016).

and universal values. . . ."[21] It is hard to name and define all of these values, and it is even more challenging to prioritize certain values over others. Therefore, justice shall always be a very subjective matter determined by a variation of values.

Therefore, this paper proposes that justice is the art of restoring and maintaining balance between the conflicts of human interests by embracing, applying and protecting the needed standards and values.

Who decides which standards and values should govern justice? The question remains: who sets such standards and decides on the values that matter and need protection in connection with restoring and maintaining the balance? In answering such a question, scholars revealed two means of delivering justice: justice based on the law—formal justice—and justice based on the parties' perceptions and acceptability—creative justice.

C. *Formal Justice—Justice Based on the Law*

> *The strictest following of law can lead to the greatest injustice.*[22]

When the policy maker decrees laws, she decides for the people which values matter the most for society, the priority and importance of each value, and how the values can be protected. In this manner, the policy maker sets the law as the standard of justice, creating justice based on the law. Many scholars have used different terms when explaining justice based on the law.[23] In this

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[21] "From early on, the Greek notion of natural law . . . . involved both the idea of natural rules universally binding men . . . and the idea of man as a naturally social being who could fulfill his potential in society. Cicero and the Stoics further developed the [ideas of natural law] so that man could live a just life by ascertaining the universal laws of nature through reason. In the Middle Ages, the scholastics stressed the transcendent version of natural law, only to be followed by humanist concepts of virtue in the Renaissance." Joe W. Pitts II, *Judges in an Unjust Society: The Case of South Africa*, 15 DENV. J. INT'L L. & POL'Y 49, 54 n.21, 69 (1986).

[22] MARCUS TULLIUS CICERO, DE OFFICIIS.

[23] Menkel-Meadow calls it "*Formal Justice.*" Carrie Menkel-Meadow, *Regulation of Dispute Resolution in the United States of America: From the Formal to the Informal to the 'Semi-formal,' in* REGULATING DISPUTE RESOLUTION: ADR AND ACCESS TO JUSTICE AT THE CROSSROADS 419, 420 (2013); *see also* Michael J. E. Palmer, *Formalisation of Alternative Dispute Resolution Processes: Socio-Legal Thoughts*, *in* FORMALISATION AND FLEXIBILISATION IN DISPUTE RESOLUTION (Joachim Zekoll et al. eds., 2014) (viewing formal justice as the values that are protected by the involvement of the state and its authoritative institutions); Jonathan M. Hyman & Lela P. Love, *If Portia Were a Mediator: An Inquiry into Justice in Mediation*, 9 CLINICAL L. REV. 157, 160 (2002–03) (calling the institution "justice from above," where justice comes "from the appli-

work, Menkel-Meadow's term "*formal justice*"[24] is the term used to refer to justice based on the law.

Some firmly believe that formal justice is the accepted definition of justice where justice must be in alliance with the terms of the legal merits of a given case,[25] as "what justice requires . . . is what the law requires."[26] Arguably, justice through the law shall always be the best fit to implement Aristotle's proportionality and rectification concepts.[27] It can protect several important aspects related to public interests, such as the public declaration of acceptable and unifying norms and values in the society, validation of the rule of law,[28] the power to restore order in society through public accountability, and deterrence by enforcing the courts' judgments. This is especially important when protecting the weak against the strong and achieving equal treatment and equalizing the power of the disputing parties.[29] Moreover, formal justice presents another important dimension of justice, which is consistency.[30]

With that in mind, others believe that justice must be perceived in a much broader sense and cannot be limited within any particular action of the lawmaker. They assert that "law is only politics,"[31] and the lawmaker often fails to capture and protect immutable timeless values needed for justice. Daly, for example, in his search for justice, identified two schools of thought: "The Traditional Western View of Justice" and "The Critical Legal Studies View of Justice." These schools of thought maintain that the law is political, where those in power to make the law are people whose missions are often vulnerable to several factors, such as self-aggrandizement and political agendas, and who are influenced by social values, such as the economy and society's wealth. These

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cation by a judge, jury or arbitrator of properly created standards or rules to 'facts'"); Linda Singer, *Interest-Based Types of Justice—Video*, MEDIATE.COM (Jan. 2011), http://www.mediate.com/articles/singerdvd10.cfm (explaining "rights based justice" enforced by courts).

24 Menkel-Meadow, *supra* note 23.

25 *See, e.g.*, Robert W. Gordon, *The Radical Conservatism of the Practice of Justice*, 51 STAN. L. REV. 919 (1999); WILLIAM H. SIMON, THE PRACTICE OF JUSTICE: A THEORY OF LAWYERS' ETHICS (1998).

26 Robin West, *The Zealous Advocacy of Justice in a Less than Ideal Legal World*, 51 STAN. L. REV. 973, 976 (1999).

27 Daly, *supra* note 12, at 365 (citing ARISTOTLE 209–15 (W. Ross ed. 1956)).

28 David Luban, *Settlements and the Erosion of the Public Realm*, 83 GEO. L.J. 2619 (1995).

29 Judith Resnik, *Courts: In and Out of Sight, Site and Cite*, 53 VILL. L. REV. 771 (2008).

30 *See* Michael Giudice, *Asymmetrical Attitudes and Participatory Justice*, 4 CARDOZO PUB. L. POL'Y & ETHICS J. 15, 18 (2006).

31 Steven J. Burton, *Reaffirming Legal Reasoning: The Challenge from the Left*, 36 J. LEGAL EDUC. 358, 359 (1986).

factors and values do not reflect or capture the timeless values needed for justice.[32] To address such limitations, the traditionalist philosopher may propose that the answer is in the hand of the judges. They propose that the judges, as the ones applying the law, have the power to use their discretion to overrule laws that they deem unfair or economically or socially biased. They argue that the judges should apply a system based on societal and communal values, rather than on the economic and the social influence of lawmakers, as reflected through their writing of laws.[33] This line of thought is very unsettling and has troubled some thinkers. Dworkin, who has written extensively on the link between the law and moral principles, confirms that while there are laws that are in fact "unjust," he rejects the idea that an unjust law is not a law.[34] Moreover, many confirm that judges have no discretion in any strong sense; judges settle cases based strongly on doctrine.[35]

Giudice developed his research[36] on the work of Rosenbaum,[37] identifying a gap between the public and legal officials when it comes to the experience and expectations arising out of the law. Where Rosenbaum writes:

> The law and its practitioners simply wish to streamline the system in search of the bottom line, to move cases along, to create a process that allows rules to develop and precedents to evolve, and, most important of all, to achieve the correct legal result. Legal, and not moral, outcomes occupy the legal mind. But the public cares little about the efficiency of court administrations and the evolution of legal rules. People look to the law to provide remedies for their grievances and relief from their hurts, to receive moral lessons about life, to better themselves and their communities. What most people don't realize is that judges and lawyers are motivated by entirely different agendas and mindsets.[38]

Giudice focused on such gaps and identified important limitations of formal justice given the law's function and characteristics.[39] One of the limitations identified is *generalization not particulariza-*

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[32] Daly, *supra* note 12, at 365–69.

[33] *Id*.

[34] *See* RONALD DWORKIN, TAKING RIGHTS SERIOUSLY (1977).

[35] *See* Alvin B. Rubin, *Does Law Matter? A Judge's Response to the Critical Legal Studies Movement*, 37 J. LEGAL EDUC. 307 (1987).

[36] *See* Giudice, *supra* note 30.

[37] *See* THANE ROSENBAUM, THE MYTH OF MORAL JUSTICE: WHY OUR LEGAL SYSTEM FAILS TO DO WHAT'S RIGHT (2004).

[38] *Id*. at 5.

[39] Giudice, *supra* note 30.

tion. This is the idea that "[i]t is not feasible for a modern legal system to offer tailor-made guidance and instruction to each individual or for every particular occasion."[40] Instead, the law develops general standards applicable across groups and individuals in society. Judges, lawyers, and other officials, in applying such general standards set by the law, classify or subsume fact-specific situations and disputes under general categories. This leads to generalizations and often requires only a minimal understanding of the circumstances of a particular dispute. The cost of recognition of the particular nature of the wrong done in a particular case is creating the harm of stripping away multifaceted and diverse emotional elements from actual disputes, especially because emotional responses and reactions to events typically have no place in the legal assessment of cases; only the legally relevant and established facts of the dispute are of any importance.[41]

Another limitation is referred to as the *range of remedies*:

> The familiar conventional legal remedies available are quite narrow and include mainly monetary damages to winning parties in civil cases, and fines or physical limits on the liberty of citizens convicted of criminal wrongdoing . . . . whether the range of remedies is more or less narrow, the remedies granted in cases are determined by existing law. Officials, themselves, are bound to make decisions according to what the law provides.[42]

The circumstances that give rise to disputes are multifaceted and diverse. Individuals might demand remedies that best address their dispute, but are not available in their range of legal remedies. "Unconventional remedies identified by Rosenbaum include the opportunity for individuals to give public apologies and for individuals or groups to tell their story to truth and reconciliation commissions."[43] With the same line of thought, Bryan Clark noted "[a] pluralistic notion of justice recognises that justice is not the monopoly of the law and legal remedies but rather may be found in a whole range of social norms and considerations," and that the courts, with the application of legal norms to relevant facts, may often fail to deliver justice on the parties' terms.[44] Studies and

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40 *See* H.L.A. HART, THE CONCEPT OF LAW 21–22 (2d ed. 1994).

41 Giudice, *supra* note 30, at 17–20.

42 *Id*. at 21.

43 *Id*.

44 Bryan Clark, *The Fusing of Mediation, Lawyers and Legal Systems*, *in* LAWYERS AND MEDIATION 139, 151 (2012).

surveys reveal that plaintiffs may wish to sue for a whole range of extra-judicial needs such as an apology.[45]

In conclusion, formal justice has great importance, yet comes with serious limitations. In addressing such limitations, scholars recognize the need to give parties the opportunity to embrace and set the standards and values that matter the most for them and to agree on an outcome with much wider and more creative remedies in the search for the balance and achieving justice on their own terms.

D. *Creative Justice—Justice Based on the Parties' Perceptions and Acceptability*

When parties are invited to act creatively in crafting an outcome that presents their own sense of justice, they get the opportunity to use whatever standards they wish, and are not limited to standards that have been adopted by the legislature or articulated by the courts. They create another form of justice arising from perceived limitations of formal justice. Scholars recognize that parties' mutual agreement over the value of fairness is a valid form of justice and have used many terms to refer to it.[46] In this work, this

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45 *See, e.g.*, SCOTTISH CONSUMER COUNCIL, CONSENSUS WITHOUT COURT: ENCOURAGING MEDIATION IN NON-FAMILY CIVIL DISPUTES IN SCOTLAND 23 (1997), http://webarchive.nationalarchives.gov.uk/20090724135150/http:/scotcons.demonweb.co.uk/publications/reports/reports01/rp09cons.pdf.

46 Jonathan M. Hyman and Lela P. Love called it "justice-from-below" where "[t]he rules, standards, principles and beliefs that guide the resolution of the dispute . . . are those held by the parties. The guiding norms . . . may be legal, moral, religious or practical . . . parties are free to use whatever standards they wish, not limited to standards that have been adopted by the legislature or articulated by the courts. Consequently, justice in [such manner] comes from below, from the parties." Hyman & Love, *supra* note 23, at 160–62. Menkel-Meadow called it "*Informal Justice*" or "*Semi-Informal Justice*" when it is regulated or linked to the courts. Menkel-Meadow, *supra* note 23. *See also "[i]nterest-based justice*," which is based on the interests of the parties, where the standards and the outcome are not imposed by an authority figure, but agreed by the parties as Linda Singer suggests. Singer, *supra* note 23. *See also* Jacqueline M. Nolan-Haley, *Court Mediation and the Search for Justice Through Law*, 74 WASH. U. L.Q. 47, 63 n.78 (1996), referencing P.S. Atiyah, *From Principles to Pragmatism: Changes in the Function of the Judicial Process and the Law*, 65 IOWA L. REV. 1249, 1259 (1980) (lamenting the modern trend away from the deterrent function and toward the dispute settlement function of law, there is an assumption that "[j]ustice can only be done by the individualized, ad hoc approach, by examining the facts of the particular case in great detail and determining what appears to be fair, having regard to what has happened;" characterizing this trend as the move from principles to pragmatism.) Moreover, the concept of individualized justice has been the subject of much discussion in connection with the settlement of mass tort cases for example. Carrie Menkel-Meadow, *Ethics and the Settlements of Mass Torts: When the Rules Meet the Road*, 80 CORNELL L. REV. 1159,

form of justice will be termed "*creative justice*." This article will explore how this form of justice can help parties to better understand and address the different dimensions of disputes. Focusing on the underlying needs or the noneconomic values of the conflict, Jeffrey Rubin, a student of Morton Deutsch, presented the concept of the triangle of conflict and settlement where a successful and satisfactory outcome must address the three sides of the triangle. The three sides, or the three "Es," are economic, emotional, and environmental. The *emotional* refers to the internal pushes and pulls created by the conflict that affect how we feel about ourselves in relation to others. The *environmental* is the setting and social considerations, including how others will view what is going on and how the resolution will appear to third parties. This can be simply referred to as "saving face." The *economic* side is basically the substantive legal rights set by the law.[47] To better explain how this form of justice is able to address the triangle of conflict, the following case can be presented. In August 1997, Scott Krueger arrived to start his freshman year at Massachusetts Institute of Technology ("MIT"). Five weeks later, he passed away in an accident involving alcohol poisoning following an initiation event at a fraternity. Almost two years later, Krueger's parents sent MIT a demand letter stating their intent to sue. The letter alleged that MIT had caused their son's death by failing to address what they claimed were two longstanding campus problems: a housing arrangement that they said steered new students to seek rooms in fraternities, and what their lawyer called a culture of alcohol abuse at fraternities. On the other side, MIT lawyers argued that they were in a strong legal position and that an appellate court would rule that a college is not legally responsible for an adult student's voluntary drinking. MIT officials felt, however, that a narrowly drawn legal response would not be in keeping with the university's values. This was especially

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1203–05 (1995). Michael Giudice, in connection with the law commission report in Canada, called it "*participatory justice*," where it committed to the belief that participation from parties to a dispute is an essential part of any dispute resolution, as it requires that those involved have a greater say in how disputes are resolved. Understanding harm in terms of its actual impact and consequences requires input and consideration from those affected. Likewise, a flexible approach to justice recognizes the importance of tailoring solutions to meet the needs of those affected, which again requires their participation. Finally, the parties to relationships must be given full opportunity to discuss resolution if relationships are to be reconstructed. Giudice, *supra* note 30, at 28. *See also* the term "*Private Justice*," Judith L. Maute, *Mediator Accountability: Responding to Fairness Concerns*, 1990 J. Disp. Resol. 347, 354, 368–69.

47 *See* Morton Deutsch, The Resolution of Conflict: Constructive and Destructive Processes (1973); Jeffrey Z. Rubin, *Some Wise and Mistaken Assumptions About Conflict and Negotiation*, 45 J. Soc. Issues 195 (1989).

so when they recognized that their policies and practices, including those governing student use of alcohol, could have been better. MIT responded with a personal letter from Charles M. Vest, MIT's President, inviting Krueger's parents to negotiate a settlement. In the negotiation, the Kruegers vented their anger to President Vest. "How could you do this?" they shouted at Vest, "You people killed our son!" They also challenged Vest on a point that bothered them terribly: Why, they asked him, had he come to their son's funeral, but not sought them out personally to extend his condolences? Vest responded that he was following advice that it would be better not to approach them in the light of their anger at the institution. That advice was wrong, he said, and he regretted following it. Vest went on to apologize for the university's role in what he described as a "terrible, terrible tragedy." "We failed you," he said, and then asked, "what can we do to make it right?" Mrs. Krueger cried out again at Vest, but at that point her husband turned to her and said, "the man apologized. What more is there to say." Their counsel, Leo Boyle, later said that he felt that, "there's a moment . . . where the back of the case is broken. You can feel it . . . And that was the moment this day."

In the end, the parties reached a settlement agreement. MIT paid the Kruegers $4.75 million to settle their claims, and contributed an additional $1.25 million to a scholarship fund that the family would administer. Most importantly, President Vest offered the Kruegers a personal unconditional apology on behalf of MIT. At the conclusion of the process, Vest and Mrs. Krueger hugged each other.[48] For MIT, the settlement, although expensive, made sense—it minimized the harm that contested litigation would have caused to the institution, and the university felt that it was the right thing to do.[49]

The three Es in this case can be identified as economic: the legal liability issue and the compensation issue; emotional: the Kruegers' grief; and environmental: MIT's reputation. In this example, justice based on the law would have only focused on the legal matters, thus ignoring or even harming essential needs of the parties. For the Kruegers, there was an urge to address their noneconomic values, such as the need to "obtain[ ] admissions of fault, acknowledgments of harm, retribution for defendant con-

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[48] *See* FOLBERG & GOLANN, LAWYER NEGOTIATION THEORY, PRACTICE, AND LAW 7 (1st ed. 2006).

[49] *Id.*

duct, prevention of reoccurrences, answers, and apologies . . . ."[50] For MIT's officials, their essential need was to maintain their good reputation and public image. Both parties recognized that seeking justice based on the law and going to court would not just fail to address the parties' needs, but might cause a tremendous emotional toll for the Kruegers and damage MIT's public image. Consequently, the parties' needs were addressed by creatively crafting a process similar to mediation, and a resolution that embraces the values and standards that matter for restoring the balance of justice.[51]

Justice is the art of restoring and maintaining balance between humans in their interactions and conflicts of interests, which requires protecting as well as embracing certain values and standards. When the policy maker decides such values, it constitutes formal justice, and when the parties are the ones who decide on the values, then creative justice is formed. The most important conclusion to be made here is "justice is not the monopoly of the law and legal remedies but rather may be found in a whole range of social norms and considerations,"[52] where granting the parties the option and the privilege of deciding on the standards and values that better address their sense of justice, can be essential in the quest of seeking justice and the enhancement of its delivery.

It is immediately obvious that formal justice works best when adjudication methods are used, and conversely, creative justice works best when non-adjudication methods such as mediation are applied. However, both forms of justice are not limited to a certain method, i.e., the court can deliver, or at least support delivering, creative justice. For example, the Egyptian law states that "[t]he litigants may request to the judge at any stage of the litigation to recognize what they had agreed upon regarding the settlement of their disputes and their agreement shall enjoy extra judicial enforcement powers and bring the claim proceedings to an end."[53] On the other hand, mediation can deliver formal justice to some extent when the process involves lawyers, the mediator adopts an

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50 *See* TAMARA RELIS, PERCEPTIONS IN LITIGATION AND MEDIATION: LAWYERS, DEFENDANTS, PLAINTIFFS, AND GENDERED PARTIES 34 (2009).

51 This form of justice and the example given to explain it is not free from criticism and does have its own limitation as discussed in Section III.

52 Clark, *supra* note 44, at 151.

53 A rough translation of Article 103 of the Egyptian civil and commercial procedural law:
"للخصوم أن يطلبوا إلي المحكمة أية حالة تكون عليها الدعوى إثبات ما اتفقوا عليه في محضر الجلسة ويوقع منهم أو من وكلائهم فإذا كانوا قد كتبوا ما اتفقوا عليه الحق الاتفاق المكتوب بمحضر الجلسة وأثبت ويكون لمحضر الجلسة في الحالتين قوة السند التنفيذي وتعطي صورته وفقا للقواعد المقررة محتواه فيه. لإعطاء صور الأحكام."

evaluative approach, and the focus is on the economic legal matters. In this case, mediation has the potential for producing an outcome similar to adjudication.[54]

Courts around the world are adorned with Lady Justice or Iustitia, the Roman goddess of justice, and judges in many legal systems are called justice; these aspects highlight that adjudication methods, especially litigation, carry the burden and the responsibility of delivering justice. The question that arises here is: does mediation share the same responsibility as litigation, where delivering justice is the main concern and principle duty when functioning to resolve disputes?

III. MEDIATION AND JUSTICE

By standing on solid ground regarding the idea of justice, and the two means of delivering justice, formal and creative justice, we have moved a step forward in answering our initial question: can mediation deliver justice? In order to take a further step, there is a need to study the relationship between mediation and justice, in other words there is a need to answer the question: does mediation have the responsibility of assuring justice? Answering this question is essential because some in the mediation field may argue that justice is not part of the game. Indeed, "[t]here is little dispute that fairness is the fundamental goal of any dispute resolution process including mediation."[55] Perhaps the main reason used to justify such a point of view is the fact that the mediator has no decision-making power. Adding to mediators' neutrality prevents them from imposing or even considering their sense of justice to the mediated outcomes, where they give weight in respect of the outcomes to only the acceptability of the parties.[56] In other words,

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[54] Some scholars recognize this fact and even are in favor of such a conclusion. Judith Maute, for example, argued that "[t]he benchmark for evaluating fairness is whether the agreement approximates or improves upon the probable adjudicated outcome." Maute, *supra* note 46, at 368.

[55] Jacqueline M. Nolan-Haley, *Informed Consent in Mediation: A Guiding Principle for Truly Educated Decisionmaking*, 74 NOTRE DAME L. REV. 775, 787 n.57 (1999). "Fairness is a predominant concern in the mediation community. Few commentators would disagree that it is the normative standard governing mediation." *Id*. at 775–78, 778 n.12.

[56] Stulberg recognized this in his research where he commented on the work of Hyman & Love, and challenged such an approach where he argued that there must be a system to assure justice or fairness even with parties' acceptance, as he named situations where parties might accept an unfair outcome. *See* Joseph B. Stulberg, *Mediation and Justice: What Standards Govern?*, 6 CARDOZO J. CONFLICT RESOL. 213 (2005); Hyman & Love, *supra* note 23.

some scholars have argued that mediators are not accountable for the outcome because the parties control it, as the principle of parties' self-determination governs mediation.[57] Moreover, mediators might argue that justice is not part of the game because they simply do not understand what the word justice means in general, or in mediation in particular. Similarly, Pollack remarks that she considers justice to be in the eye of the beholder, rather than a uniform set of beliefs held by each party.[58]

Shapira, in his research, examined the relationship between mediation and justice in both mediation codes of conduct and mediation literature.[59] He provides significant evidence from numerous codes of conduct in which the word "fairness"[60] is often used, thereby indicating the importance and the connection between mediation and justice.[61] Yet, he noted that it is without a straight line or without consistency when it comes to the meaning of justice in mediation.[62] Moreover, he concluded from reviewing the media-

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57 *See* Omer Shapira, *Conceptions and Perceptions of Fairness in Mediation*, 54 S. TEX. L. REV. 281, 290, n.75 (2012) (citing Joseph B. Stulberg, *The Theory and Practice of Mediation: A Reply to Professor Susskind*, 6 VT. L. REV. 85, 88–91 (1981)).

58 Phyllis Pollack, *Seeking "Justice,"* MEDIATE.COM: PGP MEDIATION BLOG (June 2015), http://www.mediate.com/articles/PollackPbl20150606.cfm ("Plaintiffs file lawsuits seeking 'justice'. Defendants respond, stating they are seeking 'justice' as well. Both come to mediation, seeking 'justice.' When I am told this, that each side wants 'justice,' I am not sure how to respond because I do not know exactly what that word means.") (explaining the importance of starting this chapter by dealing with the idea of justice and its two forms).

59 Shapira, *supra* note 52, at 283–90.

60 *Id*. at 286. Shapira mentioned in his research: "I use the *terms fairness and justice* interchangeably." *Id*. (emphasis added).

61 *Id*. at 283 n.2.

62 *Id*. at 284–85 (Stating:

> The following review of selected codes of conduct aims to illustrate the numerous and bewildering meanings of fairness in the codes and the difficulty of finding a unifying rationale for these meanings. Fairness according to the codes of conduct is connected to the mediator's competence to conduct the mediation (*E.g.*, GEORGIA STANDARDS § V, at 32.) and the duty to 'exercise diligence in scheduling the mediation.' Fairness requires the mediator to remain impartial, (*E.g.*, OREGON STANDARDS, *supra* note 2, § III, at 3.) to avoid conflicts of interests, (*E.g.*, NEW YORK STANDARDS, *supra* note 2, § II.B, at 5.) and to avoid unfair influence that results in a party entering a settlement agreement. (*E.g.*, *Alabama* MEDIATOR CODE OF ETHICS § 4(b)) Fairness is connected to the quality of the process (*See* FED.INTERAGENCY ADR WORKING GRP. STEERING COMM., A GUIDE FOR FEDERAL EMPLOYEE MEDIATORS § VI, at 9–11 (2006)) and its integrity. (*See* GEORGIA STANDARDS, *supra* note 3, § IV, at 3032; REVISED STANDARDS OF PROF'L CONDUCT FOR MEDIATORS § V.E, at 5 (N.C. Dispute Resolution Common 2011).) Fairness requires that parties have an opportunity to participate, (JAMS, MEDIATORS ETHICS GUIDELINES § V, at 2 (2013),) that their participation is meaningful, (*E.g.*, FAMILY MEDIATION Canada., MEMBERS CODE OF PROF'L CONDUCT art. 9.3, at 2 (2013),) and that they have an

tion literature that the issue of justice has received much attention in mediation literature,[63] where scholars often distinguish between justice in relation to the process and justice in relation to the outcome.[64] He also points to the work of scholars such as Susskind, Maute, and Gibson, who have argued that mediators are accountable for the quality and fairness of the mediation outcome.[65] With the same line of thought, Peachey in his research, "What People Want from Mediation,"[66] affirms:

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opportunity to speak, be heard, and articulate their needs, interests, and concerns. Fairness demands that parties make voluntary, un-coerced decisions (*E.g.*, CAL. R. CT. 3.857(b),) without undue influence (*E.g.*, FAMILY MEDIATION CANADA CODE, art. 9.1,) on the basis of knowledge (*See, e.g.*, GEORGIA STANDARDS, § IV.A Recommendation, at 31.) or informed consent (*E.g.*, MCI PROF'L STANDARDS OF PRACTICE FOR MEDIATORS § III.E (Mediation Council of Illinois (2009),) and have an opportunity to consider the implications of their decision. (FAMILY MEDIATION CANADA CODE, art. *9.5*; GEORGIA STANDARDS, § IV.A Recommendation; ETHICAL GUIDELINES FOR THE PRACTICE OF MEDIATION § 1.3). In a fair mediation, the parties may terminate the mediation at any time. (*E.g.,* GEORGIA STANDARDS § V.) The fairness of mediation is preserved when participation is not to gain an unfair advantage (*E.g.*, MODEL STANDARDS OF PRACTICE FOR FAMILY *&* DIVORCE MEDIATION § XI.A.6 (Association of Family & Conciliation Courts 2000)), when manipulative or intimidating negotiating tactics are not used, (*E.g.*, FAMILY MEDIATION CANADA CODE, art. 9.4,) and when the parties avoid nondisclosure or fraud. (*E.g.*, N.C. STANDARDS, § V.E; VIRGINIA STANDARDS, § K.4). Fairness is violated when the agreement is grossly (*E.g.,* N.C. STANDARDS§ V.E) or fundamentally unfair, illegal, or impossible to execute, (*E.g.,* GEORGIA STANDARDS, § IV.A) and when the parties do not understand the agreement and its implications on themselves (*E.g.*, FAMILY MEDIATION CANADA CODE, art. 9.6, and; GEORGIA STANDARDS, § IV.A Recommendation) and on nonparticipants (third parties). (*E.g.*, GEORGIA STANDARDS, § IV.A Recommendation)).

63 Shapira, *supra* note 57, at 286–90.

64 *Id*. at 286 n.33 (citing Joan Dworkin & William London, *What Is a Fair Agreement?*, 7 MEDIATION Q. 3, 5 (1989) ("There are two broad categories of fairness: procedural and substantive. Procedural fairness relates to the question of whether the *process* of reaching an agreement was fair. Substantive fairness relates to the issue of whether the *content* of the agreement or the *outcome* of the mediation is fair.") (Emphasis added); Joseph B. Stulberg, *Fairness and Mediation*, 13 OHIO ST. J. ON DISP. RESOL. 909, 911–12 (1998); Nancy A. Welsh, *Making Deals in Court-Connected Mediation: What's Justice Got to Do with It?*, 79 WASH. U. L. Q. 787, 817 (2001)).

65 *Id*. at 288 n.63, 290 (citing Kevin Gibson, *Mediator Attitudes Toward Outcomes: A Philosophical View*, 17 MEDIATION Q. 197, 207–09 (1999) (arguing that mediators sometimes have a duty to question the mediated agreement); *see* Maute, *supra* note 46, at 358 ("[T]he mediator is accountable for the quality of private justice . . . ."); Lawrence Susskind, *Environmental Mediation and the Accountability Problem*, 6 VT. L. REV. 1, 14–18 (1981) (arguing that mediators of environmental disputes should ensure that mediated agreements take into account the interests of third parties)).

66 Dean E. Peachey, *What People Want from Mediation*, *in* MEDIATION RESEARCH: THE PROCESS AND EFFECTIVENESS OF THIRD-PARTY INTERVENTION 300 (1989).

> The rising interest in mediation in the past decade has often been expressed as part of the elusive search for justice. Mediation has been presented as making justice accessible . . . or providing a low-cost and expeditious forum for achieving it . . . Some mediation services are even called neighborhood *justice* centers or community *justice* centers.[67]

Indeed, the two teams behind the modern development and emergence of mediation—legal elites and peacemakers—shared the same foundation and expectations of mediation: that mediation can enhance the quality of justice.[68]

Delivering justice should always be the fundamental concern of any dispute resolution process; after all, restoring and maintaining the disturbed balance is the main purpose of resolving disputes. This is the core of the established understanding of justice, thus mediation, as a method of resolving disputes, must uphold delivering justice as a main concern of its function especially that many evidences have been provided in that regard. The question that remains is: how can mediation deliver justice?

A. *Mediation Delivering Justice*

The two means of delivering justice, formal justice, and creative justice can fall under the category of: what is the value system that governs the means of delivering justice? That is, whether justice is governed by the values stated in the law or the values according to parties' perceptions and acceptability.

There is another important category that should be offered here to better answer the question: how can mediation deliver justice? The category is the expected outcomes from delivering justice. Referring to Peachey's work three main outcomes can be explained; procedural justice, distributive justice, and restorative

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67 *Id*. at 301.

68 The idea of the two teams draws on the work of Silbey and Sarat. Susan Silbey & Austin Sarat, *Dispute Processing in Law and Legal Scholarship: From Institutional Critique to the Reconstruction of the Juridical Subject*, 66 DENV. U. L. REV. 437 (1988–89) (explaining that the two teams had different approaches though as the legal elites looked at mediation from the lances of efficiency and mediation ability to improve justice offered by the court by help clearing the docket by settling the less significant cases outside the court system. On the other hand, the peacemakers' views mediation with the quality proponent mind sit expecting mediation to provide better justice throughout creative justice.).

justice.[69] The following sections explain each outcome and examine mediation's ability to deliver each one.

1. Procedural Justice and Mediation

> *Giving people an opportunity to speak about what happened to them, and to confront those who are responsible for their hurt, is an indispensable part of what it means to do justice, and to administer a legal system that is just*.[70]

Using the following part of my story, "Can't Get No Satisfaction," can be an excellent introduction to the meaning of procedural justice:[71]

> The Sheriff with his thick Scottish accent called forward the first case starting the Small Claim proceedings at Glasgow Sheriff Court; my interest was stirred when a sole man stepped forward. Clearly uncomfortable in his newly bought suit for the occasion he declared himself to be the self-representing defendant. After the clerk had called for the claimant in the hallways it became clear that the claimant was not present.
>
> "*According to the law, in the absence of the pursuer at this stage the defendant has the right to ask for the dismissal of the case*," the Sheriff said. "*I assume that you wish to do so?*"
>
> I was surprised when the defendant replied, "*no your honour I wish to defend my case*."
>
> "*You understand that you will win the case when it is dismissed*," the Sheriff said.
>
> "*I understand, your honour, but I wish to defend my case and I wish to do so in the presence of the claimant*," the defendant replied.
>
> Despite the defendant's wishes the case was eventually dismissed. It was clear that the defendant wasn't satisfied even though the procedural laws have been fairly enforced and the outcome was in his favour.

This story indicates that procedural justice[72] is more than just providing uniformity and transparency through legal proceedings. "*Procedural justice* refers to the individual's perception of the fair-

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69 Peachey, *supra* note 66, at 301–04.

70 *See* ROSENBAUM, *supra* note 37, at 58–59.

71 *See* Sherif Elnegahy, *Can't Get No Satisfaction*, *in* STORIES MEDIATORS TELL WORLD EDITION (Lela Porter Love and Glen Parker eds., forthcoming 2017).

72 The term or sense of procedural justice is usually connected to due process in the U.S. legal system, fundamental justice in the Canadian legal system, procedural fairness in the Australian legal system, and natural justice in other common law jurisdictions. *See* TOM R. TYLER,

ness of the rules or procedures that regulate a process or give rise to a decision," or more simply, the right application of the right rules that govern the process.[73] Such understanding leads to the question: what are the people's perceptions or expectations regarding fair procedures?

In answering this question, researchers have recognized that procedural justice matters profoundly as disputants' perceptions on the quality of justice, delivered by a process by which conflicts are resolved and decisions are made, relies heavily on their evaluation of the fairness of the procedures of the process. Once the disputants conclude that they have been treated in a procedurally fair manner, they tend to view the outcome as substantively fair and are more likely to comply with it, even when the outcome is unfavorable to them.[74] Nancy Welsh demonstrated three principal characteristics that enhance perceptions of procedural justice: (1) Opportunity for voice: that the disputants had the opportunity to present their views, concerns, and evidence to a third party and had control over this presentation; (2) Being heard: disputants are more likely to perceive procedural justice if they perceive that the third party considered their views, concerns, and evidence; (3) Treatment: disputants' judgment about procedural justice is affected by the perception that the third party treated them in a dignified and respectful manner and that the procedure itself was dignified.[75] The question remains: can mediation provide procedural justice?

Some have argued that there is evidence that parties often prefer a decision to be made by an authoritative third party, be-

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WHY PEOPLE OBEY THE LAW 3–7 (1990) (explaining how the term "procedural justice" has been defined).

73 Peachey, *supra* note 66, at 301 (citing William Austin & Joyce M. Tobiasen, *Legal Justice and the Psychology of Conflict Resolution*, *in* THE SENSE OF INJUSTICE: SOCIAL PSYCHOLOGICAL PERSPECTIVES 227 (1984)); Morton Deutsch, *Equity, Equality, and Need: What Determines Which Value Will Be Used as the Basis of Distributive Justice?*, 31 J. SOC. ISSUES 137 (1975); Gerald S. Leventhal, *Fairness in Social Relationships*, *in* CONTEMPORARY TOPICS IN SOCIAL PSYCHOLOGY 211 (1976).

74 *See* Robert J. MacCoun, *Voice, Control, and Belonging: The Double-Edged Sword of Procedural Fairness*, 1 ANN. REV. L. SOC. SCI. 171, 178 (2005); E. ALLAN LIND & TOM R. TYLER, THE SOCIAL PSYCHOLOGY OF PROCEDURAL JUSTICE (1988); Ellis M. Johnston, *Once a Criminal, Always a Criminal? Unconstitutional Presumptions for Mandatory Detention of Criminal Aliens*, 89 GEO. L.J. 2593, 2619 (2001); *see also* TOM R. TYLER & YUEN J. HUO, TRUST IN THE LAW: ENCOURAGING PUBLIC COOPERATION WITH THE POLICE AND COURTS (2002) (noting that most initial research in the area of procedural justice has focused on the criminal justice field); TYLER, *supra* note 72, at 3–7; MICHAEL ADLER, ADMINISTRATIVE JUSTICE IN CONTEXT (1st ed. 2009) (noting the recent shift in focus towards civil disputes).

75 Welsh, *supra* note 64, at 820–25.

cause it is perceived as better with respect to procedural fairness than a process in which parties retain decision control.[76] On the other hand, scholars in the field of mediation assess such evidence as "equivocal."[77] As Nancy Welsh reveals, "the literature [actually] suggests that disputants are less concerned about receiving formal due process during their experiences with the courts than they are about being treated in a manner that is consistent with their everyday expectations regarding social relation and norms."[78] Thus, procedural justice norms need to be embedded in all types of dispute resolution,[79] whether in processes where the decision rests with the parties themselves, or in processes where the decisional control is handed to a third party. Any type of method or process will only be deemed procedurally fair when the core elements of voice, being heard, and dignity are present.[80] With such an understanding, "mediation has the potential to score highly in terms of procedural justice."[81] Indeed, mediation can provide the parties with a better and safer space to speak their minds and hearts and be heard. Thus, mediation fulfills the elements of the voice, and being heard better than adjudication where the parties tend to hide behind their lawyers and let them do all the talking. The treatment element is easily addressed when the mediator maintains his neutrality.

Two points can be raised for the mediators to consider in delivering procedural justice when it comes to the use of caucuses. First, mediators should be careful about the amount of time they spend in caucuses and should try to spend relatively equal time with each party. If this is not possible, they should at least explain why they had to spend more time with the other party. Second, parties might reveal facts or evidence to the mediator in caucuses under the protection of confidentiality. If that occurs, mediators should not implement any evaluation approaches or offer a mediator proposal without having the permission to reveal such information to the other party. This gives the revealing party the chance to comment on the information learned before any evaluation or mediator proposals take place.[82]

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76 MacCoun, *supra* note 74, at 175.

77 Clark, *supra* note 44, at 154.

78 Welsh, *supra* note 64, at 826.

79 Nancy A. Welsh, *Disputants' Decision Control* in *Court-Connected Mediation: A Hollow Promise Without Procedural Justice*, 2002 J. DISP. RESOL. 179 (2002).

80 Clark, *supra* note 44, at 154–55.

81 *Id*. at 154.

82 These two points have been developed throughout my own practice as a mediator.

Mediation has the capacity to deliver and capture the core three elements of procedural justice—voice, listening, and dignified treatment—as long as the mediator successfully carries out his main responsibility of enhancing communication channels between the parties, maintaining neutrality, and carefully applying caucusing as part of the mediation process.

2. Distributive Justice and Mediation

> *On a semi-primitive island where the population relies on fishing as the main source of food, one fisherman used to throw away all of the big fishes he caught back into the ocean and keep the small ones. When he had been asked the reason for doing this he replied "the single cooking pan that I own is relatively small and only small fishes can fit in it."*[83]

Peachey explains the concept of distributive justice as justice that can be applied to conflicts related to resource allocation.[84] He provides examples for resources to be allocated, such as wage disputes, sharing household income, and international fishing treaties.[85] The question here is: what are the criteria that constitute the basis of distributive justice? The answer is equality, equity, and need.[86] Distributive justice based on *equality* is where all parties receive an equal share of goods.[87] Distributive justice based on *equity*, on the other hand, is influenced to a greater extent by the principle of proportionality, where each person's outcome is proportional to his or her inputs.[88] Another proportional approach defines justice as a distribution based primarily on *need* with little regard for other factors.[89]

Delivering distributive justice with the application of the criteria of need can be very satisfying, as it will reflect the parties' sense of justice by addressing his or her needs. Nonetheless, it can be very challenging for adjudication methods to apply the need criterion when delivering distributive justice; perhaps this emphasises the limitation of formal justice. In elaboration, one can only imagine that it would be almost impossible for a modern legal system to offer tailor-made guidance and instruction to each individual or for

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84 Peachey, *supra* note 66, at 301.

85 *Id.* at 301–02.

86 Peachey, *supra* note 66.

87 *Id.* (citing Edward E. Sampson, *On Justice as Equality*, 31 J. OF SOC. ISSUES 45 (1975)).

88 *Id.* (citing ELAINE WALSTER ET AL., EQUITY: THEORY AND RESEARCH (1978)).

89 *Id.*; *see also* Deutsch, *supra* note 73.

every particular occasion. Instead, the law develops general standards that are applicable across groups and individuals in the society. Therefore, the equality and equity criteria complies better with the generalist nature of the law, whereas the criteria of need struggles to cope with this generalization concept: that justice is based on the law on which it relies.

Indeed, neutrals in the adjudication process are bound to make decisions according to what the law provides. To support this, it is easy to witness that the law provides predetermined, clear, and strict standards based on equality and/or equity, which must be applied with no discretionary power or any further interpretation from the neutral side at certain cases. For example, the inheritance disputes.[90] Even when the law gives the judge space to apply his or her discretion in some disputes, such as those concerned with damages and compensation,[91] judges tend to apply the equality and/or equity criteria rather than the need criterion. Perhaps the reason is that judges in litigation can barely understand or capture the need criteria, as parties tend to be overshadowed by their lawyers. Additionally, only the legally relevant and established facts of the dis-

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[90] For example: many Arab countries apply Sharia Law to family matters and one of the main bases of the inheritance provisions providing the shares of each deserver is the following verse from Glory Quran:

> Allah instructs you concerning your children: for the male, what is equal to the share of two females. But if there are [only] daughters, two or more, for them is two thirds of one's estate. And if there is only one, for her is half. And for one's parents, to each one of them is a sixth of his estate if he left children. But if he had no children and the parents [alone] inherit from him, then for his mother is one third. And if he had brothers [or sisters], for his mother is a sixth, after any bequest he [may have] made or debt. Your parents or your children—you know not which of them are nearest to you in benefit. [These shares are] an obligation [imposed] by Allah. Indeed, Allah is ever Knowing and Wise.

4 Sura 411 (An-Nesâ' or The Women) (Sahih Translation.)

See, e.g., Succession Act 1964, § 2(1)(a) (U.K.) (stating that legal rights reserve a proportion of a person's heritable estate to their spouse and children without giving the person liberty to remove these rights through writing a will).

[91] An example can be given from the Egyptian Civil Code, articles 168, 169, and 170. "Whoever causes damage in order to avoid a bigger damage threatening him or another, shall not be liable except to the extent seen by the judge as adequate," Civil Code, art. 168; "Whenever there are several persons who are responsible for the tortuous act, they shall be jointly liable in damages; the liability shall be equally shared between them, unless the judge determines their respective proportions of payable damages." Civil Code, art. 169;

> The judge evaluates the extent of damages related to the prejudice suffered by the injured party, according to the rules prescribed by article 221 and 222, he shall take associated circumstances into his consideration, if, at the time of the ruling, it has not been possible for him to make a final determination of the extent of damages, he shall be entitled to allow the injured to demand, within a given period to review the evaluation of the extent of damages.

Civil Code, art 170.

pute are of any importance, as compared to multifaceted and diverse emotional elements of the disputes.[92] Even if the judge managed to go beyond the legal boundaries of the dispute and understand more about the parties' needs with respect to the fair distribution of resources, the limited range of remedies offered by the law would still be a great challenge for the judge to apply the need criteria.

Against such a backdrop, mediation can offer a space for the parties to tailor their outcome according to the need criterion, with much broader and more creative remedies as compared to adjudication. In other words, mediation can more easily address the generalizations and limited remedies that hold back adjudication, preventing it from delivering the need criteria. Mediation has flexibility, enhanced communications, empowerment, and encourages creativity.[93] Delivering distributive justice through the need criteria can be very satisfying for the parties as it best addresses exactly what they might need.

In the exploration phase of the mediation process, parties can learn about the different criteria of distributive justice—equality, equity, and need. Then, they can adopt the negotiation style that fits better with the criterion that can address their senses of justice, as long as they are well informed about the other criteria.[94] Several writers have pointed out that the need criterion is a common expression of fairness in established social relations, particularly

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92 Giudice, *supra* note 30, at 17–20.

93 *See* Sherif Elnegathy, Answering the Question, What is Mediation? (unpublished PhD thesis, University of Strathclyde) (on file with author).

94 In one case, a mechanic who lost both of his hands while repairing a combine harvester claimed that a manufacturing flaw of the interior of the machine caused the accident. When the case went to mediation, the representatives of the company that manufactured the combine harvester played hardball in the negotiation phase, leading to a final offer that was perceived to be unjust by the mediator. Many precedents suggested that the claimant could get more money if the case went to court, leaving the claimant better off with the equality criteria. Furthermore, the amount would in no way compensate for the fact that the man could no longer make a living for the rest of his life, reflecting the equity criteria. To the mediator's dismay, the claimant accepted the offer. In caucus, the claimant mentioned that he had been diagnosed with terminal cancer and that all he wanted in life was to leave enough money for his two children. Therefore, the settlement amount was fit for this purpose and perceived as fair by the party who did not wish to spend the remainder of his life fighting a lawsuit. Thus, the criteria of need was the desired criteria for the claimant. This case was shared by mediator Bruce A. Edwards in a conversation about his point of view regarding justice in mediation. He shared with me that he concluded that as long as the party is well informed about all of his options and perceives the outcome as just according to his references and accepts it, that is all that matters. Interview by Sherif Elnegahy with Bruce A. Edwards.

among friends, relatives, and family members.[95] Indeed, mediation can score highly in the distributive justice arena by appreciating the need criterion and by helping the parties to reflect need in their outcomes. This can be vividly noticeable in family[96] and business disputes. In one study,[97] dedicated to answering the question of why business lawyers and executives believe in mediation, the research concluded that mediation allowed parties in business disputes to better address their needs by saving time and money,[98] preserving business relations,[99] and gaining closure.[100]

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95 Peachey, *supra* note 66, at 302 (citing Melvin J. Lerner, *The Justice Motive: Some Hypotheses as to Its Origins and Forms*, 45 J. PERSONALITY 1 (1977) and John H. Berg & Margaret S. Clark, *Differences in Social Exchange Between Intimate and Other Relationships: Gradually Evolving or Quickly Apparent?*, *in* FRIENDSHIP AND SOCIAL INTERACTION (Valerian J. Derlega & Barbara A. Winstead eds., 1996).

96 For example, a study tested 71 couples who were randomly assigned to mediate or litigate their child custody dispute and determined that one of the main factors in determining the parties' satisfaction and view of fairness of the process is the decisional control by the parties and the criteria of need. *See* Katherine M. Kitzmann & Robert E. Emery, *Procedural Justice and Parents' Satisfaction in a Field Study of Child Custody Dispute Resolution*, 17 L. & HUM. BEHAV. 553 (1993). Another study summarizes a selected group of family mediation studies published over the past twenty years. The study focuses on four custody mediation programs in the public sector, two studies of public and private sector comprehensive divorce mediation, and three court-connected programs for mediation of child protection or dependency disputes. This study examines several issues, but most importantly determining mediation success. The criteria used to determine the success of the mediation process have included settlement rates, satisfaction of participants, efficiencies in time and cost, and, to a lesser extent, evidence of changes in relationships and durability of settlement. Most of these criteria are closely connected to the application of the criteria needed in distributive justice. *See* Joan B. Kelly, *A Decade of Divorce Mediation Research: Some Answers and Questions*, 34 FAM. & CONCILIATION CTS. REV. 373 (1996).

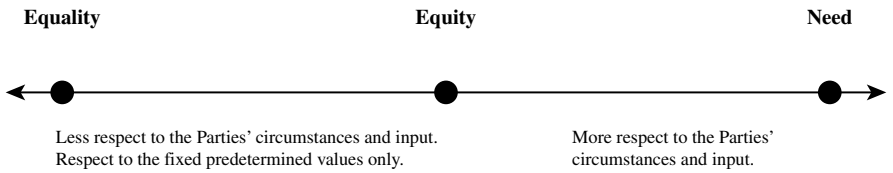
97 For supporting evidence, see, for example, a study based on a methodology that consisted of two complementary data analyses: (1) qualitative analysis of in-depth interviews, and (2) quantitative analysis of survey interviews. The qualitative interviews capture a richer expression of the respondents' opinions, including some of their own analyses of how their views are interrelated. The respondents were a large number consisting of three groups: inside counsel, outside counsel, and non-lawyer executives who are influenced by their clients' needs. *See* John Lande, *Getting the Faith: Why Business Lawyers and Executives Believe in Mediation*, 5 HARV. NEGOT. L. REV. 137 (2000).

98 As a typical testimonial of general counsel of a major manufacturing firm states, "ADR is far less expensive than litigation in resolving disputes, and that's ultimately what litigation is all about. I think you can get to the heart of the matter a lot quicker and again with a lot less expense." *Id*. at 177. "[T]he difference in relative evaluations is a reflection of executives' greater distaste for litigation than greater absolute satisfaction with ADR." *Id*. at 178. "Another [executive] described how ADR provides relief from the frustrations of delay, expense, and uncertainty of adjudication." *Id*. at 185.

99 "The respondents in this study generally believe that mediation is sensitive to business needs and helps preserve business relationships." *Id*. at 186. These findings are consistent with a survey of 606 inside counsel of Fortune 1000 companies, which found that more than 80% of them believed that mediation saves time and money. *See* David B. Lipsky & Ronald L. Seeber,

Disputes that might be orbiting around the allocation of resources, such as civil cases, would require distributive justice to bring back balance between the disputing parties by the application of a fair distribution of such resources. Distributive justice is governed by three criteria—equality, equity, and need—placed somewhere on what can be called the distributive justice criteria spectrum.

i. The Distributive Justice Criteria Spectrum



A distributive justice criteria spectrum starts with the equality criterion, where the distribution is based on pre-determined fixed values with almost no regard to the parties' circumstances and inputs. On the opposite end of the spectrum lies the need criterion, with much respect for the parties' inputs and circumstances, and where the distribution is based on a flexible set of values that address the wide range of parties' aims and needs. Mediation, with its ability to empower parties and enhance communication between them, would allow the parties to put the three criteria of distributive justice on the negotiation table for consideration. Mediation can appreciate and capture the need criterion, which can present a deeper, more satisfying, sense of justice; which in return can overcome adjudication's limitations of generalizations, limited remedies, and reliance on only the equality criterion.

3. Restorative Element of Justice and Mediation

Restorative justice is a term developed by Peachey with a much broader sense as he acknowledges that although the term[101]

In Search of Control: The Corporate Embrace of ADR, 1 U. PA. J. LAB. & EMP. L. 133, 139 (1998).

[100] An additional study is consistent with these findings and emphasizes that the need for closure complements the need of preserving relationships in business disputes. One inside counsel who was interviewed during the study stated, "most disputes are resolved immediately in the interest of the relationship." Craig A. McEwen, *Managing Corporate Disputing: Overcoming Barriers to the Effective Use of Mediation for Reducing the Cost and Time of Litigation*, 14 OHIO ST. J. ON DISP. RESOL. 1, 14 (1998).

[101] *See* RESTORATIVE JUSTICE ON TRIAL PITFALLS AND POTENTIALS OF VICTIM-OFFENDER MEDIATION— INTERNATIONAL RESEARCH PERSPECTIVES (Heinz Messmer & Hans-Uwe Otto

is typically used in relation to crime, its concepts are also directly relevant to the harms suffered in the course of everyday life and routine conflict where the issue is not classified as a crime.[102] The idea for the right to restorative justice has also been recognized and developed by the international community in relation to peace and conflict resolution fields. In this circumstance it is called reparation.[103] Reparation can be defined as "[t]he action of making amends for a wrong one has done, by providing payment or other assistance to those who have been wronged."[104] Under international law, "reparation must, as far as possible, wipe out all the consequences of the illegal act and re-establish the situation which would, in all probability, have existed if that act had not been committed."[105]

To maintain the broader discussion in this article, and to avoid being committed to a certain term and all its associated particular and technical meanings, this article discusses the restorative element in justice. The meaning of the restorative element of justice is not only to respond to conflicts of interest, but also to respond to the grievances, pain, and negative psychological experiences caused by a party who unilaterally acted outside of established rules or norms leading to damaging or even stealing resources.[106] Indeed, some disputes require more than simple financial compensation and a fair distribution of the disputed resources in order to address the needed corrective aspect and desired emotional relief with respect to restoring balance back to the situation. It is worth referring back to the triangle of conflict and settlement mentioned

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eds., 1992) [hereinafter RESTORATIVE JUSTICE ON TRIAL] (explaining more about the term restorative justice).

102 *See* Peachey, *supra* note 66, at 302; *see also* Dean E. Peachey, *Restitution, Reconciliation, Retribution: Identifying the Forms of Justice People Desire*, *in* RESTORATIVE JUSTICE ON TRIAL, *supra* note 101, at 551 [hereinafter *Restitution*].

103 *See, e.g.*, G.A. Res. 60/147 (Dec. 16, 2005).

104 See *Reparation*, ENGLISH OXFORD LIVING DICTIONARIES, https://en.oxforddictionaries.com/definition/reparation (last visited May 3, 2017).

105 *See* Factory at Chorzow (Ger. v. Pol.), Judgment, 1928 P.C.I.J. (ser. A) No.17, at 47 (Sept. 13); Military and Paramilitary Activities in and against Nicaragua (Nicar. v. U.S.), Judgment, 1986 I.C.J. Rep., 14, ¶ 113 (June 27); Corfu Channel (U.K. v. Alb.), Judgment, 1949 I.C.J. Rep. 14 (Apr. 9); Reparation for Injuries Suffered in the Service of the United Nations, Advisory Opinion, 1949 I.C.J. Rep. 174, 184 (Apr. 11); Interpretation of Peace Treaties With Bulgaria, Hungary and Romania (second phase), Advisory Opinion, 1950 I.C.J. Rep. 221 (July 18); "Every internationally wrongful act of a State entails the international responsibility of that State." *Draft Articles on Responsibility of States for Internationally Wrongful Acts*, UN GAOR Int'l L. Comm'n, 56th Sess. U.N. Doc., A/CN.4/L.602/Rev.1, 26 (2001).

106 *See* Peachey, *supra* note 66, at 302–03.

earlier in this article,[107] to emphasize the fact that there are other dimensions linked to conflicts and settlements that go beyond the legal matters. This proves the importance of addressing the emotional aspects of a dispute and shows that justice should be concerned with addressing emotional needs as well as legal needs.

Peachey argues that restorative justice's main goal is to remedy wrongs and restore balance by adopting four significant approaches to be applied either exclusively or combined. The four approaches are: retribution, restitution, compensation and forgiveness.

> Retribution:
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> The injured party requires that the person responsible for creating the injustice suffer in a way that is commensurate with the way the victim has suffered. Retribution can be either limited ("an eye for and eye") or unlimited ("death for insult"). The crucial element is that justice has been served when the perpetrator has been punished. Retribution need not be administered by the actual victim. Indeed, retribution is very often carried out by a powerful third party, such as a parent, teacher or the state.[108]

As explained before, under the idea of justice in this section, retribution is a well-recognized form of justice in philosophy—Aristotelian concepts of proportionality and rectification[109]—and in religion[110]—Judaism and Islam—as it can play an important role in societies by achieving deterrence and correction. Yet, it can be argued that seeking or applying retribution without the use of wisdom and the mercy that underpins retribution can turn it into an ugly form of revenge.

> Restitution:
>
> Another way to 'make things right' is to replace or renew whatever has been damaged. The smashed fender is taken to the body shop and repaired, with the offending driver paying the bill. The damaged fence is rebuilt, or the injured person receives payment for lost wages resulting from a fight. Whereas retribution is frequently executed by the third party, restitution is more likely to directly involve the second party (the victim or recipient of the injustice). The victim receives some material good or service to repair or replace that which was damaged,

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107 *See* DEUTSCH, *supra* note 47.

108 *See* Peachey, *supra* note 66, at 304.

109 *See* discussion *supra* Section I.C.

110 See discussion *supra* Section II.A.

> while with retribution the satisfaction realized by the victim is primarily psychological or emotional.[111]
>
> Compensation:
>
> Like restitution, compensation focuses on the needs of the victim. However, it may not always be possible to restore that which was lost or damaged. Grandma's broken china cannot be replaced, nor can a severed arm or a dead relative. In such a situation, it is still possible, nevertheless, for the perpetrator to attempt to address directly the needs of the victim through some form of compensation, such as money, material aid, or performing a service for victim. For example, people frequently claim financial compensation for "pain and suffering." Compensation is also frequently administered by third parties such as insurance companies or criminal injuries compensation programs.[112]
>
> Forgiveness:
>
> A fourth way to restore justice is through forgiveness. Although rarely discussed in the social sciences literature, this approach nevertheless is important, particularly in established relationships. Justice is restored when the debt is cancelled, usually following an admission of wrongdoing or demonstration of remorse. However, forgiveness can also be a unilateral act that is not contingent on any particular response by the culprit.[113]

Indeed, one can view forgiveness as a much deeper level of justice, as explained in religion's philosophy of justice. Scholars affirm that forgiveness is often misunderstood as something that happens in an immediate, all or nothing manner.[114] On the contrary, forgiveness is a process that often takes place over a considerable period of time.[115] This process can be related to further actions on the part of the offender, or it can be driven by events and needs in the healing process of the victim. Finally, forgiveness is not something that the injured party does for the benefit of the defendant. Real forgiveness is the process wherein the claimant lets go of the rage and pain of the injustice so that he or she can resume living, freed from the power of the hurt and all the negativity associated with the conflict.[116]

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111 *See* Peachey, *supra* note 66, at 304–05.

112 *See id*. at 305.

113 *See id*.

114 *See Restitution*, *supra* note 102, at 551. *See also* LEWIS B. SMEDES, FORGIVE & FORGET: HEALING THE HURTS WE DON'T DESERVE (1st ed. 1984).

115 *See id*.

116 *See id.*

> Retribution, restitution, compensation and forgiveness are distinct ways to restore justice, but they are not mutually exclusive. For example, someone who has been injured in a car accident may desire restitution for lost wages as well as a retributive sanction in the hope that it would deter the offending driver from future drinking and driving.[117]

It seems that the broader concept of restorative justice developed by Peachey is built upon the concept of the triangle of conflict as developed by Deutsch and Rubin.[118] That is, Peachey appreciates the importance of addressing the economic aspects side-by-side with the non-economic—emotional and external—aspects of the dispute to truly restore the balance of justice and leave the parties satisfied. Peachey sought to provide a much broader scope of justice by providing more tools that go beyond the economic dimension of the triangle of conflict and thus was able to address the non-economic aspects of a dispute. It is also noticeable that the compensation and the restitution approaches of restorative justice address the economic aspect of the dispute, and that these two approaches together can constitute distributive justice. Peachey added the retribution and forgiveness approaches to allow restorative justice to address the emotional and external dimensions of the dispute that distributive justice alone could not resolve.

The question that arises is what are the elements that determine which approach(es) of restorative justice are more appropriate in any given context? A study that involved interviewing victims with regards to restorative justice[119] indicated that the three main elements that can be very influential in the disputant's orientation towards the different approaches of restorative justice are: relationship between the disputing parties, reason for behaviour, and nature of offence.[120]

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117 Peachey, *supra* note 66, at 305.

118 *See* DEUTSCH, *supra* note 47. *See also* Rubin, *supra* note 47.

119 The data for this study were drawn from 140 interviews conducted in the victims' homes or another location of their choosing. The interviews generally occurred two to six weeks after the victimization. The interviewees had been subjected to offenses drawn from three general categories: breaking and entering into residential premises (20%), domestic and neighbourhood assaults or harassment (54%), and assorted serious offenses involving weapons, serious bodily injury, etc. (26%). *See* STEVEN D. BROWN & DEAN PEACHEY, MINISTRY OF THE SOLIC. GEN. OF CAN., EVALUATION OF THE VICTIM SERVICES PROGRAM IN THE REGION OF WATERLOO, ONTARIO (1984).

120 *See* Peachey, *supra* note 66, at 309–15 (offering these three elements by generating multiple hypotheses supported by findings from his studies).

i. Relationship Between the Disputing Parties

The type of relationship between the parties can be significant in shaping the parties' orientation toward one approach of justice over another. Scholars affirm that interpersonal relations can be the key for deterring the use of distributive justice,[121] while in turn relationships can hold the same importance in the arena of restorative justice.[122] While relationships can fall into one of three categories: strangers, casual relationships, and close relationships,[123] it is hard to predict the effect of each type of relationship on parties' perception of justice. One can expect that intimate relationships may generate a tendency toward seeking forgiveness. However, close relationships can also yield some of the most intense and violent conflicts,[124] leading to a demand for retribution. The same can be true with casual relations or interactions with strangers, and the preferred form of justice can vary considerably.[125] Peachey offers the following observations to predict the effect of relationships in connection to the appropriate approach of restorative justice:

> In violations between strangers, compensation will be preferred. In intimate relationships, the victims will often experience a strong ambivalence between forgiveness and retribution. The strongest desire for retribution will result when victims have [a] casual relationship with the offender. In such situations, the victim sees the offense as having been targeted specifically at himself or herself rather than at an anonymous stranger. Yet there is not a close enough emotional bond to produce a strong concern for the offender's welfare. Also among these victims, their relationship to the offender was a significant factor in determining justice orientations. When the offender was a stranger, the victims tended to focus upon what would best restore the loss, such as some type of compensation. When, however, the offense violated a prior relationship between the two individuals, the victims tended toward retribution. But when it was an intimate relationship, a significant number of victims moved toward forgiveness and alternated between retribution and forgiveness.[126]

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121 *See* Melvin J. Lerner, *The Justice Motive: Some Hypotheses as to Its Origins and Forms*, 45 J. OF PERSONALITY 1 (1977); *see also* Melvin J. Lerner & Linda A. Whitehead, *Procedural Justice Viewed in the Context of Justice Motive Theory*, *in* JUSTICE AND SOCIAL INTERACTION (Gerold Mikula ed., 1980).

122 *See* Peachey, *supra* note 66, at 310.

123 *See id.*

124 GWYNN NETTLER, KILLING ONE ANOTHER (CRIMINAL CAREERS) (1982).

125 *See* Peachey, *supra* note 66, at 310.

126 *See Restitution*, *supra* note 102, at 554.

It seems that forgiveness can be an appealing approach when there is a desire to preserve the relationship, especially when the love or attachment to the other party is more significant than the harm done. Also, if both the relationship and the harm are not significant, forgiveness or compensation might be the desired approach. On the other hand, retribution can be sought when the harm is more significant than the relationship, or when an element of the relationship has been translated in a negative manner, such as through betrayal or personalized harm. All of this reflects the close link between the strength of the relationship and the other two elements. In order to put the element of relationship into an accurate perspective, there is a need to investigate the effect of the other two linked elements by explaining and understanding the reason for behaviour and nature of offence.

ii. Reason for Behavior

An additional element linked to the relationship element, which will also likely affect justice orientation, is the psychological meaning that one party imputes the other's behavior or simply the motives behind such behavior.[127] Understanding the motives for other's behavior can reveal the *intentionality* and possibility of repeating *the behavior.*[128] As for the intentionality of the behavior, the party might ask: did the person intend the injury or damage, or was it caused by accident or negligence? Further, if the injury or damage was intended, was it an act of deliberate malice toward me or did I just happen to be the victim of the offence? A desire for retribution would likely be stronger when the offence is personalized. In other words, when the victim perceives the offenders as trying to harm him or her in particular, then retribution can be the desired approach.[129]

The other critical perception is the likelihood of the behavior being repeated. Victims who attribute the offender's behaviour to external or temporary stresses and pressures or momentary weakness on the part of an otherwise upstanding citizen would indicate that the offender is not likely to continue to engage in such behavior. When such a conclusion is reached, the victim can prefer compensation or even forgiveness when the offender demonstrates remorse. On the other hand, when the others' behavior is perceived to originate from an enduring trait, this can lead to the con-

127 *See* Peachey, *supra* note 66, at 311.
128 *See id.*
129 *See id.*

clusion that such behaviors can be repeated. Typically, in such a scenario, there is a much desire for retribution to address several needs such as protection, deterrence and reasserting society's values.[130]

It is important to note that these findings assume that victims will be able to come up with a reasonable and logical attribution regarding the two perceptions of the *intentionality of the behavior* and the *possibility of repeating such behavior*, which require gathering enough knowledge and developing a solid understanding, which in turn all require a decent level of communication between the parties. When there is lack of communication and such understanding cannot be acquired to answer why the event happened, or why the perpetrator acted as he or she did, then the only possibility that the victim may see for restoring justice is through retribution.[131] Lerner's justice motive theory offers more insights into that meaning. As he suggests, with a lack of knowledge and understanding regarding the motives behind the behavior, the victim will resort to retribution, as he might believe that "at least the perpetrator will suffer as I have suffered." The victim may even dehumanize the perpetrator, thereby justifying a harsher treatment and retribution.[132]

iii. Nature of Offence

Another obviously connected aspect to consider is the type of harm that has been suffered. Injustice can refer to the damage or injury that is seen to be unwarranted or illegitimate to oneself or one's resources.[133] Several empirical investigations suggest that:

> [d]amage to symbolic resources like status, esteem, or reputation (or highly symbolic goods such as mementos and heirlooms) will be more likely to lead to demands for retribution than for restitution or compensation. On the other hand, damage to concrete resources will result in an orientation toward restitution or compensation. Within any given type of resource,

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130 *Id*. at 313 (offering such findings based on a survey study followed by a laboratory investigation).

131 *See id.*

132 *See* Lerner, *supra* note 95; *see also* Lerner & Whitehead, *supra* note 121.

133 It is important to note here that this section is absorbing restorative justice within a broader sense to capture its application to civil cases and not limiting it to the criminal cases. In particular, the definition of harm or offence can go beyond the physical injury and property damage that is the focus of criminal laws. For example, Vidmar describes violations of one's perceived rights or failure to honor contractual or implied obligations as an event that also gives rise to a sense of injustice. *See* Neil Vidmar & Dale T. Miller, *Social Psychological Processes Underlying Attitudes Towards Legal Punishment*, 14 L. & SOC'Y REV. 565 (1980).

> the greater the value or quantity of the resource that is damaged, the more likely it is that retribution will be seen as the appropriate form of justice.[134]

When asked what would be the fairest thing to happen, the subject of the investigation frequently mentioned rehabilitating the offender. Such frequent use raised questions of whether rehabilitation should be an additional approach to restorative justice.[135]

Restorative justice is concerned with restoring the disturbed balance between parties by addressing the different economic and non-economic elements (emotional and external) of the harm caused to the party. There are four approaches to restore the balance—retributive, restitution, compensation, and forgiveness. These approaches can be explained very simply as: retribution, if I suffered, they have to suffer too; restitution and compensation, if they broke it, they have to replace it, fix it, or compensate me; and lastly forgiveness, I will let it go and forgive. One might believe that people tend to prefer retribution to restore the balance, but in fact, it can be the opposite, especially given that taking a quick review of research efforts in various countries indicate that people are not as geared towards retribution as conventional wisdom might hold.[136]

Researchers suggest that both victims and the general public desire a broader range of approaches to justice than the legal system typically offers with respect to retribution. For example, victims in the United Kingdom have been reported to often favor reparation over retribution,[137] as have victims in New Zealand,[138] as well as several areas in the United States,[139] specifically including Minnesota.[140] There is growing evidence that retribution is only one of the routes people choose for seeking justice in the af-

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134 *See Restitution*, *supra* note 102, at 554.

135 *See* ROBERT B. COATES & JOHN GEHM, VICTIM MEETS OFFENDER: AN EVALUATION OF VICTIM-OFFENDER RECONCILIATION PROGRAMS (1985); *see also* Peachey, *supra* note 66, at 315 (citing E. Cohn & V. C. Rabinowitz, *Restitution: The Egalitarian Sentence*, Paper presented at the Annual Meeting of the Int'l Pol. Psyc. Soc. (June 1980)).

136 Martin Wright, *What the Public Wants*, *in* MEDIATION AND CRIMINAL JUSTICE: VICTIMS, OFFENDERS, AND COMMUNITY (Martin Wright & Burt Galaway eds., 1989).

137 *See id.*

138 Burt Galaway, *The New Zealand Experience Implementing the Reparation Sentence*, *in* RESTORATIVE JUSTICE ON TRIAL, *supra* note 101.

139 Robert B. Coates & John Gehm, *An Empirical Assessment*, *in* MEDIATION AND CRIMINAL JUSTICE: VICTIMS, OFFENDERS, AND COMMUNITY, *supra* note 136.

140 Imho Bae, *A Survey on Public Acceptance of Restitution as an Alternative to Incarceration for Property Offenders in Hennepin County, Minnesota, U.S.A.*, *in* RESTORATIVE JUSTICE ON TRIAL, *supra* note 101.

termath of an injury.[141] Studies suggest that there are three elements—the relationship, the reason of the offence, and the nature of the offence—that can be very influential on the parties' orientations towards a certain approach to restoring the balance. Building on the last two points, one can only hope that people are good and peaceful by nature, and the three elements can in fact be ways for the wronged party to validate and reciprocate that the other party is a good person despite the harm they caused and which in turn does not deserve a harsh treatment. By gathering enough knowledge and understanding the other party's explanation, the wronged party can achieve such a conclusion. This can help the party to move from the retribution position to the other approaches more naturally. Even when parties fail to gather the needed information and explanation in connection with the three elements, or the input suggests that the other party is evil or bad and retribution is the only appropriate approach, there is an additional element which can appear to shift the perspective away from retribution. This fourth element can represent a positive, interactive role that the other party can present to prove that he or she is in fact a good person, or at least they can shift back towards their good nature. This conclusion is drawn from several studies that reports that victims often seek rehabilitating the offender.[142] These findings have led scholars to link rehabilitation to the forgiveness approach as a necessary step for the party to witness contingent changes by the offender for the victim to resort to compensation or forgiveness instead of retribution.[143] To apply this on a larger scale beyond criminal cases, the fourth element that can be added is a positive interactive role for the defendant to play and to prove that he is a good person after all, and such harm is not to be repeated. There needs to be an acknowledgement of the pain and suffering that the claimant has to deal with, and offering possible, creative solutions to ease such suffering can be very influential for the parties to restore peace and move away from the retribution orientation toward the other approaches. The positive interactive role can be as

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141 *See Restitution*, *supra* note 102, at 551.

142 For example, in a study evaluating a victim-offender reconciliation program, when victims were asked to rank their priorities with respect to a fair outcome, the respondents ranked 'help the offender' as their secondary goal, with 'recover restitution for loss' as their primary goal. *See* Coates, *supra* note 167. A similar study found that 23% of victims preferred rehabilitation to retribution. *See* BROWN, *supra* note 119. Seeking rehabilitation can be additional proof that people are not eager for retribution and are in fact are good and peaceful by nature.

143 *See* Peachey, *supra* note 66, at 315.

simple as an act of sincere apology,[144] or it can be a creative remedy addressing the emotional aspects such as establishing a scholarship in the MIT case.[145]

B. *Can Mediation Deliver Elements of Restorative Justice?*

The question now is: can mediation deliver the restorative element in justice with its four approaches of retribution, restitution, compensation, and forgiveness?

It has been established how mediation can score highly in delivering restitution, compensation, and forgiveness through the means of creative justice and enhancing the level of communication. The true challenge that faces mediation in delivering restorative justice is the retribution approach. The crucial obstacle that can hold mediation back from meeting with the retribution approach is that retribution entails pain of one type or another, and suffering is rarely undertaken voluntarily. Mediated settlements are based on parties' participation and acceptability rather than an imposed decision, which explains why retributive sanction provisions are rarely established in settlement agreements.[146] Yet, there are two possibilities where mediation can deliver retributive justice: creative retribution and transformation from the retribution orientation, as explained below.

C. *Mediation Delivering Creative Retribution*

Mediation possesses the potential to deliver a creative, unique version of retribution, which causes less violence and preserves

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144 John O. Haley, *Victim-Offender Mediation: Japanese and American Comparisons*, *in* RESTORATIVE JUSTICE ON TRIAL, *supra* note 111 (drawing upon Haley's observations of Japan, where letters of apology from offenders to their victims are frequently followed by letters from the victims to the police asking that criminal proceedings be dismissed).

145 The MIT case presented in this paper is titled: *Creative Justice (Justice Based on the Parties' Perceptions and Acceptability)*.

146 Other general obstacles that can face mediation are based on the voluntary and parties' self-determination characteristic of mediation, which can present other sets of obstacles such as the parties' reluctance to face someone with whom they are in conflict, especially when much pain, suffering, and emotion is involved. Moreover, parties might desire revenge or want their position to be vindicated by an authoritative third party. Lastly, disputes that expect retribution in the outcome can be claimed by the state to deal with it exclusively without allowing the parties to tackle them as a matter of public policy, such as many criminal cases.

lives. To elaborate, a case study of the revenge killing in Upper Egyptian villages can be offered.

1. The Conflict Analysis of Revenge Killing in Upper Egyptian Villages

Using a hybrid of the conflict analysis tools,[147] along with recent anthropological studies,[148] and international studies on the topic,[149] several elements can be presented about the conflict.

i. General Information About the Conflict

The studies were located in rural villages in Upper Egypt, where the population is highly influenced by the clans' culture, which is very family-oriented.[150] In murder cases where the murderer belongs to one family and the victim to another family, the family of the victim refuses to accept any condolences until justice is served.[151] To them, justice can only be served by killing the murderer.[152] It is a matter of honor that a member of the victim's[153] family, usually the victim's son,[154] should take such vengeance. This begins a vicious cycle of attack and counter-attack in the name of vengeance and family honor.[155]

ii. Important Elements

There are several reasons that can be identified as to why the revenge takes place, begetting a vicious cycle. The reasons start with the culture of the clans and the strong sense of family, where ones family is a fundamental element of one's identity. Justice to these families only translates to retribution, or, in other words, an eye for an eye; who committed the murder must be killed. Seeking justice through the law and court system is considered a sign of

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147 *See* SIMON FISHER ET AL., WORKING WITH CONFLICT: SKILLS AND STRATEGIES FOR ACTION (2000).

148 *See* فتحي عبدالسميع في كتابه "القربان البديل .. المصالحات الثأرية في صعيد مص الدار المصرية اللبنانية. Translated roughly the citation is: FATHEY ABD ELSAMEAH, THE ALTERNATIVE SACRIFICE; CONCILIATIONS FOR REVENGE KILLINGS IN UPPER EGYPT (2015) [hereinafter THE ALTERNATIVE SACRIFICE].

149 Immigration & Refugee Board of Canada, *Al-Tar Vendetta Feuds; Underlying Philosophy and Principles; Areas or Groups that Participate in it; How Egyptian Law Addresses it; Reaction of Authorities to Violence Committed in this Tradition*, EUR. COUNTRY OF ORIGIN INFO. NETWORK (Mar. 2, 2004), http://www.ecoi.net/local_link/100442/196860_en.html.

150 THE ALTERNATIVE SACRIFICE, *supra* note 148.

151 *Id.*

152 *Id.*

153 *Id.*

154 *Id.*

155 *Id.*

weakness, which would dishonour the family. The reasons behind this mentality are that the legal system is very slow and, most importantly, the death penalty is only applied in very rare, legally complex situations. Lastly, it is related to the family honor and status, meaning there is a need for such family to establish deterrents, otherwise they can be seen as a weak family that can be taken advantage.

2. The Khauwda Ritual

There is only one possibility to stop such a cycle of violence; the Khauwda ritual.[156] The ritual is effectively a power mediation process ending with a symbolic death for the killer, and leading to the victim's family forgiving such person.[157]

i. Explaining the Mediation Process and the Khauwda Ritual

The most important element of this type of mediation is the mediator himself, usually called the "Agaweed." The Agaweed must enjoy a significant status among all the families of the village.[158] Such status can be translated to power, wealth, age, wisdom belonging to the most powerful and influential family, and not to mention skills and charisma. According to this culture, the success of the Khauwda ritual depends on the mediator's power and authority.

The *convening phase* of the mediation starts with the Agaweed interfering and calling for the initiation of the Khauwda ritual. With this call and with the influence of the Agaweed's status and authority, the vengeance is postponed and the killer is given a promise of safety. This part of the mediation is crucial because the victim's family usually spends a long time resisting mediating. Readily accepting the mediation is culturally taboo and seen as a disrespectful to the victim.

The *exploration phase* is usually conducted in a number of caucuses with the killer and with the victim's family. On some conflicting points of the dispute, the mediator is usually asked to conduct an investigation so both parties can be clear on all points.

The *negotiation phase* is when the parties start to negotiate about the obligations and rights of each party, the date, time, and location of the Khauwda celebration, and the person performing

156 THE ALTERNATIVE SACRIFICE, *supra* note 148.
157 *Id.*
158 *Id.*

the ritual—usually the killer themselves or the most significant member of the killers family.

The *concluding phase* is the Khauwda celebration or ritual itself. The ritual starts with a large space that is equipped to host as many people as possible from all around the village and surrounding villages to witness the ritual. The victim's family usually sends invitations, similar to a wedding invitation, to as many people as possible as shown in Figure 3.[159]

FIGURE 3[160]

The "top table" of the event hosts the Agaweed, a government official, such as the mayor of the village, the chief of police of the district, a man of religion, such as the imam of the local mosque, and a representative from the victim's family. One of the most important roles of the Agaweed at this stage is to inform the table of the people in attendance who have the potential to resist the process. Together they ensure the smooth running of the ritual.

The killer arrives, passing through the large crowd toward the family. In a culture where status and appearance are everything, he berates himself by appearing barefoot and with his head uncovered to show his humility and shame. He dresses in all black and carries his funeral shroud in his outstretched hands, presenting it to the family of his victim as seen in Figure 4.

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159 هشام مى ,6 مراسم لم تعرضها في الأفلام رحلة إنهاء الثأر بصعيد مصر :تقديم كل ليس الكفن شيء ,,اليوم المصرى ,,http://lite.almasryalyoum.com/lists/76004/.

160 *Id.*

FIGURE 4[161]

In some cases, the Agaweed leads the killer through the crowd by a rope around his neck and presents the rope to the victim's family, announcing that the killer is at their mercy. The Agaweed speaks about the importance of forgiveness before allowing the killer space to apologize and show remorse. The family of the victim, on accepting the Khauwda, say, "for the sake of God, the sake of the Prophet, the sake of the mediator and for those in attendance you are forgiven." Upon hearing these words, the crowd rejoices and celebrates as seen in Figure 5.

FIGURE 5[162]

161 *Id.*

162 *Id.*

Complimentary rituals to the Khauwda can include asking the killer to change to white clothes and cover his head and feet as the victim's family begins to accept condolences on the death of their loved one. Some families bury the shroud of the killer, while other keep it as a witness to the legacy of their dead family member and proof that they sought vengeance for their death. Depending on the strength of the mediator and the intensity of emotions during the Khauwda ritual, the killer may be banished from the village for a period of time, or, conversely, can be welcomed into the victim's family as an honorary member, offered protection, housing, or marriage.

In conclusion, in some cases it is very hard to shift the parties from the retribution orientation, yet mediation can offer a less violent manner of retribution, which satisfies the injured party. In this case study, the culture revealed that people would rather die than perform the Khauwda ritual due to its unbearable humiliation. With such an understanding, it seems that the killer has actually undergone a symbolic death, which somehow addresses the victim's family's need for retribution without shedding blood. This example may be an extreme case,[163] yet it shows the possibility for mediation to provide creative solutions that can satisfy the parties and meet their needs for retribution.

D. *Mediation Shifting the Party Retribution Orientation*

Scholars and policy makers recognize that there are benefits associated with bringing the parties to mediation, even in cases

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163 Many other examples can be used in this respect, including the story from of Rwanda's Gacaca courts as a local initiative to restore justice, reconciliation, and peace after the Rwandan genocide of 1994. Here, where a community court hears suspects, and if the last suspect confesses about his crime, seeks asked for forgiveness, and sought reconciliation with the community, the Gacaca court can send him home with no penalty. *See Background Information on the Justice and Reconciliation Process in Rwanda*, U.N., http://www.un.org/en/preventgenocide/rwanda/about/bgjustice.shtml (last visited Mar. 10, 2016). One such story is told in the documentary In the Tall Grass, directed by Coll Metcalf. *See In the Tall Grass* (Internews Networks 2005) (telling the story of a woman who accused a man of killing her grandchildren. The Gacaca court hears from a witness who claims to have seen the accused bury the children and orders him to dig. Upon finding the bones, the woman asks the accused to wash them and bury them correctly. Because the accused still did not confess, he was sent to official courts. After his sentencing, the Gacaca court returns to the woman to reveal the accused's sentence. She refuses to listen, claiming justice was done when he washed the bones and buried them. She was convinced he had felt her pain as he did so and this was more than enough for her. This represents another example that retribution can take more creative forms than killing or jailing the perpetrator.).

which typically call for retribution, such as criminal cases.[164] The mediation process can be very beneficial in several manners even when it can be assumed that the outcome will not meet with retributive justice. One manner where mediation can be beneficial is when the mediator helps the parties to explore their orientation, needs, and expectations in order for them to better determine if a retributive approach is really what is needed for them to restore the balance. Indeed, people can be very confused as to what would really bring balance and harmony back to their lives when in dispute. Their true orientation might be misguided,[165] or they might appear to seek a certain orientation such as restitution or compensation but are actually seeking another orientation such as retribution,[166] or they simply might be torn between many different orientations.[167] If it has been concluded that retribution is what is needed, then one can suggest that the mediator can appropriately refer them to the court or other forums that can rule on the legitimacy of the retributive claim. But, if it has been concluded that restitution or compensation is the required approach, then the me-

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164 For example, mediation has been used in the criminal setting since the 1970s, and today there are over 300 programs in the U.S. *See* Mark S. Umbreit et al., *Victim-Offender Mediation: Three Decades of Practice and Research*, 22 CONFLICT RESOL. Q. 279, 279–81 (2004).

165 *See* William L. F. Felstiner et al., *The Emergence and Transformation of Dispute: Naming Blaming Claiming . . .* , 15 L. & SOC'Y REV. 631 (1981) (explaining that disputes are transformed into legal cases through a process of naming, blaming, and claiming, where lawyers counsel their clients about the available remedies in the legal system and redirect their orientation to fit into the legal system's remedies).

166 COATES & GEHM, *supra* note 135 (identifying that parties often spoke of the restitution as if it were a punishment).

167 To elaborate, a study was conducted on Canadian medical negligence mediation where 131 in-depth interviews were conducted with plaintiffs, defendants, lawyers for both sides, and mediators. The study concluded that the claimant had a wide range of aims when pursuing legal action for the search of relief and balance. When asked to prioritize their aims for the outcome, claimants responded as follows: admitting fault (59%); preventing this happening again (59%); finding answers and explanations (53%); retribution for conduct (41%); apology (41%); monetary compensation as a secondary goal (35%); acknowledging harm (35%); punishment (24%); monetary compensation as a primary goal (18%), and; monetary compensation as the sole aim (6%). *See* Tamara Relis, *It's Not About the Money: A Theory on Misconceptions of Plaintiff's Litigation Aims*, 68 U. PITT. L. REV. 701, 723 (2007). It is worth mentioning that the study suggested that lawyers could not quite capture the claimants' aims and needs as physicians' lawyers saw very little besides financial demands when they asked about their views on the claimants' litigation aims. The study shows: money alone (90%); answers (10%); admit fault (0%); never again (0%); apology (0%), and; retribution for conduct (0%). *Id.* at 714. Correspondingly, the study also suggests that the hospital lawyers and the claimants' lawyers tend to have a slightly better understanding of the claimants' aims and needs, though neither where able to fully capture the diverse needs of the claimant as the majority of lawyers saw the primary goal as money. These findings can affirm the wide range of orientations that parties can bring with them to the dispute, and more importantly, the misunderstanding of each other's orientation.

diator can help them by delivering distributive justice by allowing the parties to negotiate the allocation of resources using any of the equality, equity, and need criteria.

The second place where mediation can be beneficial is in the restorative justice arena, which requires recognizing that the four elements—relationship between the parties, reason of the offence, the nature of the offence, and the positive role for the claimant to play—influence the parties' orientation toward restorative justice's different approaches—retribution, restitution, compensation, and forgiveness. Mediation is communication, which allows for the gathering and sharing of information to come to a solid understanding and find answers and explanations for the aforementioned questions. With that being established, mediation can be very useful for the parties to enhance the communication level between them. Once the communication level has been enhanced, relationship importance can be recognized, reasons for behavior can be revealed, and the defendant can carry on a positive role by showing remorse, demonstrating that such behaviour is to not be repeated, etc., all of which may lead the parties to accept compensation, restitution or even forgiveness rather than retributive sanctions. Lastly, mediators can engage in public education aimed at fostering a broader understanding of restorative justice and reducing society's reliance upon retribution.[168]

IV. Conclusion

Mediation can be the champion of creative justice and has the ability to restore the balance and harmony between the disputing parties. With such an orientation, mediation can meet with the core aspects of procedural justice: voice, being heard, and dignified treatment. Moreover, mediation can deliver distributive justice by allowing the parties to negotiate the allocation of resources using any other criteria such as equality, equity, and most importantly need. Lastly, mediation can be very valuable as it meets with the elements of restorative justice—restitution, compensation, and forgiveness. As for the element of retribution, mediation can deliver a unique untraditional version of retribution that is less violent, or at least assists the parties in discovering their true orientation and shift it away from retribution. In the end, it is important to note

168 *See* Peachey, *supra* note 66, at 307–08.

that society, culture, policy makers, and courts continue to treat the law as the definitive source of norms despite all of its limitations. Until this mindset evolves and we start to recognize and appreciate creative justice as a parallel normative order that can be as beneficial to the society as it is to individuals. It is vital for mediation to allow the parties to develop "creative" settlements as long as they remain within the orbital sphere of formal justice. Thus, creative justice delivered by mediation must not contradict the standards of the law.[169]

169 For futher discussion, see my work on the relationship between mediation and the law in chapter three of my PhD thesis, titled "Mediation and Justice" and my work; Sherif Elnegahy, Mediation and the Law; A Love Hate Relationship for the Sake of Justice (on file with author).