COMMENTARY

ADR, Jurisprudence, and Myth

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I. INTRODUCTION

The frequently lengthy process of a courtroom trial, with its rule-laden formality, was historically the only available means of dispute resolution. To move cases to resolution more quickly, private parties began to search for new mechanisms.[1] An alternative process developed, and some cases now move at a faster pace through the use of alternative dispute resolution (ADR) processes. Because one of the ADR processes—mediation—requires the active participation of the parties in resolving their dispute, the view held by the lay person about the legal system takes on an importance that did not exist historically. For example, I have a friend who recently remarked, "The court is a white man who goes to work and puts on a black robe." Absent reference to a judge, this statement puts the jurisprudence of the country at issue and communicates a core belief that is too critical to the success of ADR to be ignored.

A view of the court system as white and male burdens the process at the outset with perceived power imbalances. In ADR, where the parties are pivotal to the outcome, power issues will arise more overtly and less implicitly than in the classical litigation forum. In their participatory discussion, the parties will speak from their personal backgrounds and experiences. For persons who, because of their life experiences, feel they have little or no power, the mediation experience will begin from the perspective of a skeptic. How the mediation experience ends will result from a complex set of case-specific dynamics that are active within the particular mediation.

The parties will bring their personal backgrounds and experiences to the mediation forum expecting the jurisprudence of the specific location and culture to be either helpful or damaging to their positions. My response to my friend is that our jurisprudence is not as white and male as it was one hundred years ago; it fortunately continues to shift and change, becoming multi-racial and including

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[1] *See* David B. Lipsky & Ronald L. Seeber, *Top General Counsels Support ADR: Fortune 1000 Lawyers Comment on its Status and Future*, BUS. L. TODAY, Mar.–Apr. 1999, at 24, 26.

women. A slight change in our jurisprudence carries significant weight in the ADR process, because some resolutions are reached either by intensive use of prevailing case precedent or with a knowing agreement to disregard case precedent and customize a settlement outside the box of precedent.

This Commentary focuses on mediation as an ADR process and how resolutions and the country's jurisprudence are impacted by individually held myths.[2] Many persons look at myth as stories without a factual base. However, myth is used in this Commentary to mean institutionalized customs, traditions, and mores that have become individually accepted as our own, which in turn form our personal core values and beliefs. A myth can be worldwide, local to a culture or a location, or personal to a family. In forming core values and beliefs, a myth can be accepted or rejected by an individual. When enough individuals reject a myth, a paradigm shift occurs, and a critical mass of the culture accepts a different myth. A good example of myth and paradigm shift is laid out in this Commentary through its discussion of sexual harassment and hostile working environment. The sexual harassment issue also provides a good working platform for discussion of the power issue in mediation.

In the academic field of jurisprudence, Pierre Schlag[3] and Steven Winter[4] write about a universal person they refer to as a constitutive "I." Schlag's

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[2] The terms "ADR" and "jurisprudence" recur in this Commentary. ADR is "the use of private parties to resolve disputes that might otherwise be litigated. [The term] includes various techniques of third-party assistance, including mediation, arbitration, fact finding, mini-trials and ombudspersons." *Id.* at 24. The term jurisprudence is used in this Commentary to mean a system of law that exists as the result of a gradual amalgamation of myths, large and small, over the years.

[3] *See generally* PIERRE SCHLAG, THE ENCHANTMENT OF REASON (1998) [hereinafter SCHLAG, THE ENCHANTMENT OF REASON] (examining contemporary normative legal thought from a different perspective than the norm); PIERRE SCHLAG, LAYING DOWN THE LAW: MYSTICISM, FETISHING AND THE AMERICAN LEGAL MIND (1996) [hereinafter SCHLAG, LAYING DOWN THE LAW] (providing a compilation of articles that analyze the legal thought process); Pierre Schlag, *Normative and Nowhere To Go,* 43 STAN. L. REV. 167 (1990) (examining contemporary legal thought); Pierre Schlag, *Normativity and the Politics of Form*, 139 U. PA. L. REV. 801 (1991) (tracing the role and effects of normative legal thought); Pierre Schlag, *The Problem of the Subject*, 69 TEX. L. REV. 1627 (1991) (examining contemporary normative legal thought).

[4] *See generally* Steven L. Winter, *Bull Durham and the Uses of Theory*, 42 STAN. L. REV. 639 (1990) (examining and dissecting Stanley Fish's legal views); Steven L. Winter, *Forward: On Building Houses*, 69 TEX. L. REV. 1595 (1991) [hereinafter Winter, *On Building Houses*] (focusing on the ever changing legal process); Steven L. Winter, *An Upside/Down View of the Countermajoritarian Difficulty*, 69 TEX. L. REV. 1881 (1991) [herinafter Winter, *An Upside Down View*] (describing how the legal process works with "normative orientation" to shift with social changes).

universal person is the "relatively autonomous self" that is always and only relative to its culture.[5] Winter argues that cultural norm and context form an "I" who is always living in "normative precommitment."[6] Winter uses the term to refer to the always existing circumstance of cultural norms that precommit the "I" to a position before the "I" arrives on a scene.[7] Taken together, this means that as individuals, we act according to myths that we have either accepted or rejected. It naturally follows that when parties to litigation walk into a mediation forum, they do not drop personal myths by which they live their lives. Without the constraints of a presiding judge and courtroom formality, the parties can be expected to verbalize positions that conform to underlying values and beliefs structured by their myths, but that do not necessarily conform to case precedent.

My intent with this Commentary is to demonstrate myth as we might expect its presence to be displayed in the mediation process. The Commentary also explores how law—the jurisprudence specific to the case—can clash with the desires of the parties born of their personalized backgrounds, their life experiences, and their values. Said simply, the parties' desires are born of their myths. Part II.A. briefly discusses mediation as a process and provides a thesis of why it works. Bargaining markers are set out in Part II.B. to establish the concepts of consistency, custom, and tradition as the functional backdrop against which bargaining and power issues are leveraged. Part III addresses myth itself, relates myth to the bargaining markers of Part II.B., and describes how the myth itself becomes a marker in mediation. Part IV builds on Parts II and III by addressing the variables that appear in all cases and discussing how these variables, the bargaining markers, and myth contribute to a case-specific fact situation of sexual harassment. In using a case ultimately decided by the United States Supreme Court, Part IV illustrates myth as a functional piece of the law and asks how mediation might proceed to reach a resolution determined by the parties themselves.

II. MEDIATION AS AN ADR PROCESS

Section A provides a basic description of the mediation process and a theory of explaining mediation's success as a resolution process. Subsequently, section B illustrates that markers of bargaining are directly connected to myth and can be considered just another name for myth.

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[5] Pierre Schlag, *Fish v. Zapp: The Case of the Relatively Autonomous Self*, 76 GEO. L. J. 37, 39–52 (1987).

[6] Winter, *On Building Houses*, *supra* note 4, at 1610.

[7] *Id.* at 1607.

A. *Mediation Works and Why*

Bargaining can, and often does, involve only negotiations between lawyers. However, mediation goes beyond these "lawyers only" bargaining sessions and brings in a third party with no personal interest in the outcome of the case to serve as a "neutral"—literally, a go-between for the parties.[8] The process provides a forum for attempted settlement of the case by the parties with the facilitation of a "neutral."[9]

Significantly, mediation is preferred to arbitration in most types of disputes.[10] In the initial stage of the mediation process, the neutral asks each party to outline the fundamentals of his or her position with the other parties present.[11] At a later stage in the process, the parties discuss their positions with only the neutral present.[12] Outside the presence of other parties, confidential information may well be revealed to the neutral.[13] The neutral discusses the case with one party and subsequently with the other, perhaps over a period of hours,

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[8] *See* MODEL STANDARDS OF CONDUCT FOR MEDIATORS Standard II (American Arbitration Association et. al. 1999)

[9] "While there is widespread use of the whole gamut of techniques, it is clear that the corporate view of ADR is primarily limited to their experiences with meditation and arbitration." Lipsky & Seeber, *supra* note 1, at 24.

> Corporate policy toward the use of ADR also varies by type of dispute. For example:
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> There is widespread use of both mediation (78 percent) and arbitration (85 percent) in commercial disputes.
>
> There is also extensive use of mediation (79 percent) and arbitration (62 percent) in employment disputes.
>
> There is limited use of ADR in corporate finance, financial reorganization, and workout disputes (8 to 13 percent).

Id. at 26.

[10] *Id.* at 24–26.

[11] This session is called a "joint caucus." DICTIONARY OF CONFLICT RESOLUTION 69–71 (Douglas H. Yarn ed., 1999).

[12] This session is called an "individual caucus." *Id.*; JAMES J. ALFINI ET AL., MEDIATION THEORY AND PRACTICE 131–33 (2000).

[13] DICTIONARY OF CONFLICT RESOLUTION, *supra* note 11, at 69–71; ALFINI ET. AL., *supra* note 12, at 131–33.

days, or weeks,[14] until a settlement is reached, or the neutral and the parties agree that they have reached an impasse.[15]

It is recognized that both state and federal courts are embracing ADR with unprecedented enthusiasm and frequency.[16] One might think that cases will never settle or that all cases will settle with a tilt to the party walking into the mediation holding the most power, often thought of as the party with the "bigger bucks." However, there seems to be another force present that operates to bring about resolution of a legal dispute.

> Thoughtful mediation theorists and practitioners have given much consideration to identifying mediation's unique powers. In their comments, two points consistently are expressed regarding the capacities of the mediation process.
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> The first special power of mediation, and what some call "[t]he overriding feature and . . . value of mediation," is that "it is a consensual process that seeks self-determined resolutions." Mediation places the substantive outcome of the dispute within the control and determination of the parties themselves; it frees them from relying on or being subjected to the opinions and standards of outside "higher authorities," legal or otherwise.[17]

The value of this "consensual, self-determined resolution" is surely more than a dialogue wherein the parties merely parrot substantive law to each other; the value, I believe, rests in the parties' ability to access their personal norms and

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[14] The neutral's movement back and forth to each party is often referred to as shuttle diplomacy. DICTIONARY OF CONFLICT RESOLUTION, *supra* note 11, at 395–96.

[15] An impasse can sometimes occur after months of mediated negotiation. For example, the federal government's anti-trust litigation against Microsoft failed to settle after four months of work with a mediator. For media accounts, see generally Lee Gomes, *After the Verdict, Companies Consider the Impact*, WALL ST. J., Apr. 4, 2000, at A16; Michael Orey et al., *Courtroom Battles Will Continue But Time Is on Microsoft's Side*, Apr. 4, 2000, at A16; *States, Feds Trying to Settle Differences*, ATLANTA J. & CONSTITUTION, Apr. 4, 2000, at 5C; John R. Wilke & Rebecca Buckman, *Microsoft Settlement Efforts Collapse*, WALL ST. J., Apr. 3, 2000, at A3.

[16] Harry N. Mazadoorian, *Building An ADR Program: What Works, What Doesn't*, BUS. L. TODAY, Mar.–Apr. 1999, at 37, 40.

[17] Robert A. Baruch Bush, *Efficiency and Protection, or Empowerment and Recognition?: The Mediator's Role and Ethical Standards in Mediation*, 41 FLA. L. REV. 253, 267 (1989) (citations omitted).

customs, their highly individualized personal myths, and, based on those myths, to speak to components of the case they value most highly.

The second special power of mediation was described classically by Professor Lon Fuller:

> 'The central quality of mediation [is] its capacity to reorient the parties to each other . . . by helping them to achieve a new and shared perception of their relationship, a perception that will redirect their attitudes and dispositions toward one another.'" . . . Others also have stressed this special power of mediation to 'humanize' us to one another, to translate between us, and to help us recognize each other as fellows, even when we are in conflict.[18]

Robert A. Baruch Bush refers to this humanization aspect of mediation as the "recognition function of mediation."[19]

The litigation process as we know it is not designed to further the relationship of the disputing parties. The litigation process is designed to end the dispute without regard to continuing the relationship. It is no wonder that mediation is an efficient process of dispute resolution, which leaves clients with a greater sense of satisfaction. Mediation gives the parties an opportunity to discount the "law" and formulate a nexus between the settlement agreement reached and their personal myths that are foundational to their in-court and out-of-court behavior. The parties can see and feel some of their everyday reality in the settlement. [20] This discounting of the law to resolve disputes in favor of self-determined resolutions serves as a highly active agent of resolution. Encouraging lawyers to give mediation a try, Jeffery Kichaven observes that in litigation where clients are not allowed to voice their personal perspective about the case and verbalize their feelings concerning the matter, they "are left frustrated, whether or not they win on the merits of the legal case."[21] Kichaven further explains,

> These clients are likely to remember the cost, the delay and the inconvenience of litigation more than their victory, which they see as incomplete. . . . By contrast, in mediation the lawyer can permit the client to talk about [his or her personal perspective], whether or not relevant to the

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[18] *Id.* at 269–70 (citations omitted) (quoting Lon Fuller, *Mediation—Its Forms and Functions*, 44 S. CAL. L. REV. 305, 325 (1971)).

[19] *Id.* at 270.

[20] KATHERINE V.W. STONE, PRIVATE JUSTICE: THE LAW OF ALTERNATIVE DISPUTE RESOLUTION 19–20 (2000).

[21] Jeffrey G. Kichaven, *Mediation's Not a Four-Letter Word: It Can Work in Your Business Case*, BUS. L. TODAY, Mar.–Apr. 1999, at 18, 20.

> issues in the pleadings . . . [W]herever the discussion takes place, the more frank it is, . . . the more sincerely satisfied the client is likely to feel with the result and the process . . . .[22]

This concept of allowing the party to completely tell a story is an important concept to capture in mediation. In thinking through the reason for the client's dissatisfaction with the legal process, it is likely that the dissatisfaction in some portion always stems from the absence of the client's personal perspective in traditional litigation.[23] For example, the human side of the story that is not being told invariably contains information founded on and legitimated by a myth left invalidated by the evidentiary rulings. Mediation works, because parties in settled resolutions can leave the conference table feeling that they were heard. Specifically, mediation allows the parties the chance to tell their stories even if some pieces of the stories would be considered immaterial, irrelevant, and hearsay in a courtroom.

B. *Bargaining Markers*

Parties to litigation will not forego bargaining simply because the case is in mediation. Bargaining tactics and strategies will be used in the mediation process. The role of the mediator entails moving parties away from unrealistic expectations, helping parties shape a more realistic evaluation of the case, and recognizing tactics and strategies for what they are.[24] Once the individual caucus begins, it is likely that each party will be more forthcoming with the mediator about expectations and will have a more realistic valuation of the case.[25]

When money is the issue, the standards and norms of an industry carry significant weight in courtroom litigation.[26] We bring these standards into the

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[22] *Id.*

[23] *Id.*

[24] For a discussion of the role played by party expectations see Leandra Lederman, *Which Cases Go to Trial?: An Empirical Study of Predictors of Failure to Settle*, 49 CASE W. RES. L. REV. 315, 333–34 (1999).

[25] ALFINI ET. AL., *supra* note 12, at 131–34

[26] Richard Shell provides the following example:

> Global financial markets set interest rates for borrowing money. Used-car buyers consult a buying guide for average car prices—then negotiate final prices based on factors such as the actual condition of the car, the buyer's budget, and the seller's need for cash. Real estate brokers talk about "comparable transactions." And investment bankers argue over the true value of a business based on discounted cash flows and earnings multiples.

trial process of resolving disputes by calling "expert witnesses" to testify and address what is customary in the industry. In other words, experts address customs and traditions, which are myth. Outside of the trial process, however, mediation enables the parties to use

> fancy terms and complex analyses [as] nothing more or less than techniques that help buyers and sellers form opinions [about outcome]. These standards . . . bracket the bargaining zone and permit all participants to talk about their preferred end of the range without appearing, at least in their own eyes, to be unreasonable.[27]

Nonetheless, if these bracket standards disempower one of the parties inordinately, the party will not see or hear his or her preferred individualized myth and will balk at accepting the standard as legitimate for the party's specific case. Richard Shell's thesis is that "normative leverage" in negotiation is gained from the appearance that one's bargaining demands are consistent with the norms of the industry.[28] "You maximize your normative leverage when the standards, norms, and themes you assert are ones *the other party views as legitimate and relevant to the resolution of your differences*."[29]

Notice that it is consistency that provides the comfort.[30] When the other party views a position as consistent with agreed-upon norms, there will be no feelings of disempowerment. This is "normative precommitment"[31] set in motion by some then-existing, perhaps now unremembered, myth. "Standards and norms rely on the consistency principle for their power in negotiation. But some standards and norms are more powerful than others, especially in market transactions. The strongest market standards act as anchors or focal points in bargaining."[32] These anchor standards and norms discussed by Shell are outgrowths of custom and tradition that themselves evolved from myth. They are the deeply-entrenched norms of a culture that should be considered as life-defining norms from which individuals seldom stray. Thus, the standard rises to the bargaining marker level of anchor—a standard of non-negotiability. Lawyers accept case precedent as institutionalized bargaining standards, the strongest of

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G. RICHARD SHELL, BARGAINING FOR ADVANTAGE: NEGOTIATION STRATEGIES FOR REASONABLE PEOPLE 41 (1999).

[27] *Id.*

[28] SHELL, *supra* note 26, at 42–43. "Normative leverage is the skillful use of standards, norms, and coherent positioning to gain advantage or protect a position." *Id.* at 43.

[29] *Id.*

[30] Winter, *On Building Houses*, *supra* note 4, at 1620–23.

[31] *Id.* at 1610.

[32] SHELL, *supra* note 26, at 49.

market standards. In *Bargaining in the Shadow of the Law*, a seminal article on the influence of the law in bargaining in divorce cases, the writers discuss substantive law's impact on settlement. [33] The term "shadow" is used to bring up the visual image in the reader's mind of the not-to-be-forgotten "law" at the bargaining table.[34]

In mediation, using precedent as the controlling law of the case could keep bargaining inside "the box." "A feeling arises that it is slightly insulting or presumptuous to negotiate a variance from the standard."[35] The "law" of precedent certainly carries power and the ability to tilt the table in favor of its proponent.[36] "But often that is not enough. A purely legal discussion frequently does not permit the clients to deal with . . . 'the *rest* of the story'."[37] A mediator likely pushes the parties further because "this unspoken aspect, [the unspoken myth] that the drafter of pleadings had to leave outside the courthouse, may be centrally important to the clients and may need to be acknowledged before a more rational discussion of the settlement of the lawsuit can take place."[38] Mediation successfully moves the parties out of the law's shadow, out of the precedent box, and into the parties' self-determined resolutions, because "[m]ost market standards are not so preemptive. Instead, they serve as range finders, bargaining devices that bracket the bargaining zone within which parties can haggle to settle an issue."[39]

"Good" mediators are "good" negotiators.[40] In *Bargaining for Advantage*,[41] Shell explains that both effective negotiators and effective mediators draw from a wide range of talents.[42]

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[33] Robert Mnookin & Lewis Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 YALE L.J. 950 (1979).

[34] *Id.*

[35] SHELL, *supra* note 26, at 50.

[36] DAVID A. LAX & JAMES K. SEBENIUS, THE MANAGER AS NEGOTIATOR: BARGAINING FOR COOPERATION AND COMPETITIVE GAIN 249–58 (1986).

[37] Kichaven, *supra* note 21, at 20.

[38] *Id.*

[39] SHELL, *supra* note 26, at 49.

[40] This is speculation on my part gleaned from having served as a mediator in diverse settings.

[41] SHELL, *supra* note 26.

[42] *Id.* at 78.

> From effective leaders they borrow the habit of committing themselves to specific, ambitious goals. From good advocates they get the skill of developing arguments based on standards and norms. From effective salespeople, they acquire the gift of valuing relationships and seeing the world as the person they are trying to influence sees it.

Mediators utilize all of the skills of a good negotiator and facilitate the most difficult task of all—seeing the situation through the lens of the other party.[43] The task of the mediator is to get the parties beyond their "partisan perceptions" of how their position fits a bargaining marker or standard and into the realm of perception of the other party.[44] If seeing clearly through the lens of the other party proves to be impossible, at a minimum, the parties with the facilitation of a mediator begin to see the litigation as it might be seen by a fact-finder—not altogether skewed in favor of one party or the other.[45]

Sometimes the snag between the parties is not money. For example, Shell writes, "Experienced negotiators often report that price can be a relatively easy term to resolve compared with less obvious but more explosive issues such as control, turf, ego, and reputation."[46] When the issue is not money—"turf, ego, control, and reputation" symbolize outward manifestations of a value and belief system. These other-than-money issues also symbolize overt power displays. For example, parties may state that "justice demands" or "equality requires" a

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> Research suggests that the ability to understand your bargaining opponent's perspective may be the most critical of these skills and one of the hardest to use in practice.

Id.

Contrarily, seeing the world through the lens of one's cumulative personal experience is ordinary human behavior that "negotiation theorists call partisan perceptions." *Id.* at 78.

[43] *Id.*

[44] In the anti-trust litigation brought by the United States Justice Department against Microsoft Corporation, moving Bill Gates to become willing to "unbundle" its Explorer Browser from its Windows Software, over the four months of mediation, was itself a Herculean task for the mediator, Judge Richard Posner. Wilke & Buckman, *supra* note 15 at A3. Without knowing with certainty that the government was willing to trade breakup of the company for an unbundling of software, a close read of the remarks the mediator made in his referral of the case back to the trial judge seems to indicate that the trade was on the table. The move of the government to a "no breakup" posture was also a major task for the mediator. When asked by the judge to submit its proposed remedy for Microsoft's antitrust violations, the government, however, proposed a break up of the corporation into two companies. Wilke & Buckman, *supra* note 15, at A3.

[45] SHELL, *supra* note 26, at 63.

[46] *Id.* at 30.

> In the legendary fight over RJR Nabisco chronicled in *Barbarians at the Gate* . . . a multibillion-dollar bid from one of Henry Kravis's rivals for RJR collapsed when two major investment banking firms—Drexel Burnham Lambert and Salomon Brothers—could not agree on which firm's name would appear on the left-hand side of the *Wall Street Journal* ad announcing the financing of the transaction. The position of the firm's name in the ad would signal to the financial community which of the two banks was the "lead bank" in the deal and neither would accept second place status.

Id. at 30–31 (citing BRYAN BURROUGH & JOHN HELYAR, BARBARIANS AT THE GATE: THE FALL OF RJR NABISCO 30–31 (1990)).

specific outcome.[47] These phrases are markers of ego and reputation involvement. The parties within the mediation forum who haggle within a bargaining zone carry with them their values and beliefs and all else which makes them human. With ego and reputation involved and turf and power at stake, trust might well be non-existent.[48] Mediators diminish the need for trust between the parties during the dispute resolution process. The mediator becomes a repository for trust and can gently nudge the parties away from bargaining markers into a range of options that satisfy each party's interests.[49] The mediator can also work to assuage bruised egos and create options of value that are acceptable substitutes for relinquished turf.[50] The mediator addresses the value, myth-laden statements of justice and equality, ego, and reputation bargaining markers.[51]

III. MEDIATION INSIDE THE MYTH EXPERIENCE

A. *Myth*

This part describes the birth of a myth and the paradigm shift that can occur in a culture when the "new" custom is widely accepted. This part also relates myth to the bargaining markers described in Part II.B. and demonstrates a myth as an active participant inside mediation.

"[M]yths are our self-interpretation of our inner selves in relation to the outside world. They are narrations by which our society is unified. Myths are essential to the process of keeping our souls alive and bringing us new meaning in a difficult and often meaningless world."[52]

Myth-inspired customs and traditions in turn inspire the values that we learn and inculcate into our belief systems.[53] Which comes first, the custom and tradition or the myth? Much like the chicken-or-the-egg question, this myth query cannot be answered, because we cannot go back to the beginning of time. It is logical to reason that a happenstance event became a custom, and the custom repeated itself enough to become a tradition. The custom likely became such,

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[47] *See* SCHLAG, THE ENCHANTMENT OF REASON, *supra* note 3, at 135–40.

[48] "At the core of human relationships is a fragile interpersonal dynamic: trust. With trust, deals get done. Without it, deals are harder to negotiate, more difficult to implement, and vulnerable to changing incentives and circumstances." SHELL, *supra* note 24, at 59.

[49] ALFINI ET AL., *supra* note 12, at 128–31.

[50] *Id.*

[51] SHELL, *supra* note 26, at 58–88.

[52] ROLLO MAY, THE CRY FOR MYTH 20 (1991).

[53] *Id.* at 30–49.

because it contained some structure for a situation that would have otherwise been chaotic, confusing, or conflicting. With a custom to rely upon, individuals for a moment knew the comfort of exactly what they were to do, how to act, and what could be expected of others.[54] It is at this juncture of relying on custom to anticipate actions that the nexus of myth and bargaining markers become evident. The description of myth as narrations by which society is unified also describes a bracket standard and an anchor standard. Too much disruption of a standard that is usually relied upon challenges the other party to examine the underlying value the party places on the standard. If the myth upon which the value is based flexes easily, the party will negotiate the standard. If the myth that forms the basis of the value is deeply entrenched and life-defining, the party will not budge on the standard—the party will choose to litigate because of the perceived importance of the principle. Knowing the controlling myth enables the party to know the bargaining range.

All that needs to happen for a myth to exist is for a piece of the story to be thrust into the spotlight, and the value, almost automatically, gains complete recognition of meaning—not necessarily agreement—among persons within the listening audience. Today, the Civil Rights Movement story in the United States is a myth of world-wide scope. Rosa Parks [55] is an archetype, and the Civil Rights Movement in its scope clearly provides a narration by which some of United States society is unified. This Movement disrupted custom and traditions about segregation. The anchor standards to which Shell referred were challenged.[56] Narrations of segregated society were erased. An underlying myth of "better than" and "lesser than" was ripped to shreds in bombing, murders, and jailed heroes. So deep and complete was the rip, the country experienced a paradigm shift with a new myth about civil rights. Values based on race shifted in a critical mass. The Civil Rights Movement fits perfectly with Rollo May's definition of myth—"a way of making sense in a senseless world."[57] Rights born of disrupted narrations have now become the anchor standards described by Shell.[58] Were one of these rights challenged in a mediation, the party relying on the norm in question would feel the inordinate disempowerment mentioned earlier in Part II.B. of this Commentary.

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[54] If you insert "law" for the word "custom" in this sentence, you could be describing parties in a courtroom process.

[55] *See generally* DOUGLAS BRINKLEY, ROSA PARKS (2000).

[56] SHELL, *supra* note 26, at 49.

[57] MAY, *supra* note 52, at 15.

[58] SHELL, *supra* note 26, at 49.

This is a complete picture of how myth is born and later goes into the mediation forum as a life-defining value. Thus, the picture reveals the ongoing presence of myth within mediation.

J. C. Smith and David N. Weisstub in *The Western Idea of Law*[59] give an account of the myth-law relationship. The authors claim that, although lawyers are likely to use the word "myth" to mean a story that is untrue, and while in contemporary legal systems the term itself is not often used, "it is a fact of history that law emerged from mythology and was at one time doubtlessly intertwined with mythopoeic conceptions of the universe."[60] In claiming that myth is but human effort to organize existence into stories that are less threatening than the perceived chaos that surrounds them,[61] Smith and Weisstub argue that through establishing cultural beliefs and value systems, myths become the mother of law.[62] Therefore, the authors argue, it follows that "law is a deeply human product that is inextricably bound up with, and unavoidably contingent upon, wider cultural forms."[63]

In the authors' discussion of values, they put forward the following argument:

> Myth, through its offspring, law, is the most powerful statement of values to which any society commits itself. Law, furthermore, is the most conservative statement of these values, bearing an intimate relationship to the existing power structure. In all cultures the resolution of conflict and law, as the embodiment of systematic principles around which authority is organized, may be seen as the rationalizing process according to which obedience and respect for hierarchy are developed. Myth, in functional terms, is a pragmatic reaction to the resolution of problems which affect the individual in the social environment; it legitimates institutions and their rituals.[64]

In functional terms this is an excellent definition of mediation itself.

The argument of myth's inextricable relationship with the law brings to the forefront a discussion of a culture's values and how various values come together to form standards and norms that become law. One author says the following in a comment on values: "Values are *grounds* to the extent that they are shared within a community and to the extent that they establish the shared identities and self-

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[59] THE WESTERN IDEA OF LAW (J.C. Smith & David M. Weisstub eds., 1983).

[60] *Id.* at 119.

[61] *Id.*

[62] *Id.* at 120.

[63] *Id.*

[64] *Id.*

definitions that make dialogue and deliberation possible."[65] Shared identities and self-definitions exist as outward manifestations of myth. These shared identities are traceable to Smith and Weisstub's myth in functional terms—pragmatic reactions to resolutions of problems which affect the individual in the social environment.[66]

The institutions and rituals grow and develop over time, become law, and contrary to Smith and Weisstub who say that law bears "an intimate relationship to the existing power structure,"[67] it can easily be said that these institutions and rituals form the power structure and become themselves the embodiment of the culture's power structure. Said differently, rituals are the law, and the law is an amalgamation of myths. As clients and lawyers enter mediation, values and their underlying myths will drive the bargaining process. As any singular piece of the sought-after agreement falls into place at the table, although a bargaining marker, if it is out of harmony with the customs and traditions of the clients or their lawyers, discomfort results and the individualized composite of myth will demand time for discussion and space for inclusion in the agreement. "The contrast is between value-laden, abstract formulation of . . . rights, and fact-driven, pragmatic decisions about the remediation of these rights."[68]

IV. CASE SETTLEMENT: VARIABLES THAT INFLUENCE RESOLUTION

Variables, both general and case specific, are present in all cases. Section A briefly touches upon an empirical study of these variables. Section B illustrates Parts II and III at work in a specific case of sexual harassment.

A. *General Variables That Influence Resolution*

The discussion of general variables will provide helpful information on aspects of all cases that facilitate or hinder case settlement. It is useful to understand that the variables are always present, because a shift in one can either create or hinder resolution. A mediator must remain mindful of the variables as much as being aware of bargaining tactics and strategies being used by the parties.

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[65] SCHLAG, LAYING DOWN THE LAW, *supra* note 3, at 44–45.

[66] THE WESTERN IDEA OF LAW, *supra* note 59, at 120.

[67] *Id.*

[68] Daryl J. Levinson, *Rights Essentialism and Remedial Equilibration*, 99 COLUM. L. REV. 857, 869 (1999).

One author broadly states that"[t]he process that determines whether and when a legal dispute will settle has two elements: evaluation and bargaining."[69] Moving from the broad to the specific, we can identify specific variables independently affecting the power of the parties and leading to resolution of a dispute.[70] In an empirical study on settlement probability, specific variables were found to be statistically and independently "significant in predicting an increased likelihood that a case would go to trial."[71] The study looked at nine variables and determined that five were the most compelling: appeals, stakes, judgetype, decade, and background.[72]

The more one understands the study, the more one understands that the five specifics can be collapsed into two, judgetype and stakes, which carry more weight than any other.[73] Decade and background, as variables, came to be used as predictors of the type of judge one could expect (i.e., an activist with a "hands on" participation in encouraging settlement discussions, or one who allows the parties to go their own way[74] with settlement discussions or none).[75] Stakes, influenced by the likelihood of appeal, played a major role in determining the risk aversion of either party.[76]

Background, as a variable, simply increased or decreased the likelihood that the judge would be an activist. In addressing the judgetype variable as the most significant, the study concludes,

> Overall, the importance of the judge variables indicate that judges affect which cases settle. Activist judges may assist the parties or their attorneys in overcoming some barriers to settlement. It is possible, for example, that activist judges give parties more information about the likely outcome at trial, or discourage 'optimism,' which reduces parties' estimation errors, or helps parties avoid strategic behavior or lawyer-client agency problems.[77]

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[69] Stephen M. Bundy, *Commentary on "Understanding* Pennzoil v. Texaco"*: Rational Bargaining and Agency Problems*, 75 VA. L. REV. 335, 337 (1989).

[70] *See* Lederman, *supra* note 24, at 328.

[71] *Id.* at 332. "Although the specific results of this study are not necessarily generalizable outside of Tax Court, the insights into the applicability of the leading theories on suit and settlement should be." *Id.* at 343.

[72] The study also looked at four additional variables: party, taxpayer, region, and counsel. *Id.* at 328.

[73] *See id.* at 333–41.

[74] *See id.* at 336–37.

[75] *See id.*

[76] *Id.* at 333–34.

[77] *Id.* at 337 (citations omitted).

Regardless of whether the judge is an activist, he or she will have a functional myth regarding whether to be a "hands on" or "hands off judge."

The study directs the reader's attention to the "stakes" variable with the statement that "higher stakes cases were much more likely to go to trial."[78] In any discussion of stakes, risk aversion[79] of the parties must be considered one of the pivotal issues.[80] Directly impacting risk aversion for any party are outcome expectations.[81] When the parties widely diverge in their expectations about the outcome of the case, they fail to create a settlement range.[82] It is the occurrence of such a divergence that makes the case likely to go to trial.[83] The variable study, as it concerns stakes, concludes, "In sum, the results tend to support the importance of information in parties' formation of expectations about the likely outcome at trial. The stakes variable supports the importance of divergent expectations as possible causes of trials."[84] It is here, as observers, that we can see that the management of party expectations by an activist judge minimizes

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[78] *Id.* at 333.

[79] "Risk aversion" is a phrase of art used by negotiation theorists to capture in two words the amount of damage a party believes it will suffer if the outcome of a case goes against them. High risk aversion is a factor that will push a party to settle. An example would be negative publicity in the area of public safety for a corporation that manufactures tires for cars. When a party believes that its damage will be minimal upon a loss, risk aversion is low and the party is not as likely to settle. Risk aversion is one of the factors that would be considered under the category of evaluation in Bundy's theory. *See id.* at 338.

[80] Professor Leandra Lederman, in her article, *Which Cases Go To Trial?: An Empirical Study of Predictors of Failure to Settle*, stated,

> If risk aversion increased with the stakes involved, this would suggest that higher stakes cases settle disproportionately, a result which in fact did not occur. On the other hand, optimism models and asymmetric information models, both of which are models based on parties' "divergent expectations" about trial outcomes, postulate that parties fail to settle when their estimates of the expected outcome of a trial differ to such an extent as to preclude a settlement range, that is, a difference of greater than or equal to the sum of the parties' litigation costs. Divergent expectations theories suggest that cases with higher stakes may be more difficult to settle (assuming litigation costs remain fixed) because the same difference in opinion translates into a larger difference in the expected outcome of the case. The results for STAKES supports divergent expectations theory and the importance of estimation errors to the settlement/trial decision. The results may reflect that litigation costs do not rise proportionately to the stakes, thus magnifying the effects of estimation differences at higher stakes levels.

Lederman, *supra* note 24, at 333–34 (citations omitted).

[81] For example, in the antitrust litigation the federal government brought against the Microsoft Corporation, stakes were high.

[82] Lederman, *supra* note 24, at 333–34 (citations omitted).

[83] *Id.*

[84] Lederman, *supra* note 24, at 341.

divergent expectations and can alter strategic behavior. Thus, we see how the judge variable and the stakes variable either intercept and give rise to a synergy that is more likely to push a case to settlement or intercept with no impact, because the judge is "hands off," and the parties are left with divergent expectations.[85]

The trial predictors bring concrete specifics to the theoretical models of suit and settlement by directing our attention to the discrete segments of the evaluation component of case settlement.[86] The predictors confirm the significance of outcome expectation that is informed by as much gathered information as possible about the facts of the case.[87] The predictors also reflect the judge's influence on the stakes variable, party estimates, and strategic behavior.[88]

Notwithstanding the backdrop of an activist judge, stakes and the importance of outcome expectation seemingly make, break, or significantly lower settlement possibility.[89] Outcome expectation in high stakes litigation is evaluative, founded largely on case precedent and that which is customary in the industry. The bargaining aspect of litigation is founded largely on myth and issues other than money—power, ego, control, turf, and the like. For example, a client may ask, "What exactly will happen to my reputation if I settle or fail to settle?" A further consideration is the parties' risk aversion.[90] In mediation, developing remedies is a matter, sometimes not routine, of making judgments about achieving a desired end—judgments politically influenced by myth and resulting value systems.[91] The nature of the remedy may shape the right and the definition of a right may effectively incorporate a remedy.[92]

This is especially true with respect to outcome expectations. A settlement range can be reached on the basis of agreement around objective number crunching. A settlement range is merely an area that melds within each party's

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[85] Within the practicing bar, it is not unusual for lawyers to "research" the judge to learn of prior rulings and the proclivities of the specific judge. In addition to activism, a representation of a judge as "liberal" or "conservative" also weighs in on expected outcomes, inclination to settle, and "strategic behavior." *Id.* "The APPEALS variable results also suggest that the parties settle early in cases in which they have similar expectations about the outcome." *Id.*

[86] Lederman, *supra* note 24, at 336–37.

[87] *Id.*

[88] *Id.* at 337.

[89] *Id.* at 341

[90] *See* source cited *supra* note 80.

[91] THE WESTERN IDEA OF LAW, *supra* note 59, at 926.

[92] *Id.*

outcome expectation, a spectrum of acceptable resolution. Within the range, numbers may overlap and desirable options may converge. Outcome expectation is less clear, and, in fact, is the point where the parties can totally diverge on numbers within the spectrum. Inside the numbers, bargaining will take on the values and egos of the parties. At the moment we become cognizant of the egos at the bargaining table, we must simultaneously recognize that myth is present. Myth, reputation, and ego begin to show at the bargaining table in the degree of client satisfaction with the agreement that is beginning to take shape. A myth left out of pleadings, may need to be acknowledged in mediation before a more rational discussion[93] can proceed.

B. *Sexual Harassment and Mediation*

The focus of this section is on the Supreme Court's assessment of hostile working environment in sexual harassment litigation, how this assessment mirrors a definition of myth, and how the standards laid out by the Court will become bargaining markers for mediated resolutions. Finally, the section looks at how a case with a sexual harassment issue might be mediated.

A case with a sexual harassment allegation is front-loaded with cultural myths of sexuality, power, and the workplace. The Supreme Court said as much in its *Faragher v. City of Boca Raton*[94] decision, although the decision does not specifically refer to employee behavior as a ritual of myth. In *Faragher*, the Court recognized sexual harassment as a workplace plague, stating, "It is by now well recognized that hostile environment sexual harassment by supervisors (and for that matter, co-employees) is a persistent problem in the workplace."[95] In another statement that qualifies the harassment as a cultural myth, the Court wrote, "'Everyone knows by now that sexual harassment is a common problem in the American workplace.' . . . An employer can, in a general sense, reasonably anticipate the possibility of such conduct occurring in its workplace . . . ."[96]

When a practice is "well recognized," one that "everyone knows by now" and one that "an employer can reasonably anticipate"—the practice is a custom and a tradition, a functioning myth in the culture. Sexual harassment functions on a belief that women in the workplace belong elsewhere. This value perpetuates itself as institutionalized tradition—a myth.

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[93] See Part IV of this Commentary for a discussion of whether any of the bargaining discussion is rational, or whether the discussion is simply an ongoing effort to reach an agreement that fits within the schematic of norms and customs (i.e., myth).

[94] Faragher v. City of Boca Raton, 524 U.S. 775 (1998).

[95] *Id.* at 798.

[96] *Id.* (quoting Jansen v. Packaging Corp. of Am., 123 F.3d 490, 511 (7th Cir. 1997)).

A myriad of possible standards and norms exist in the workplace concerning the sexuality of both women and men. Norms will vary according to geographical location and according to industry-specific traditions giving rise to power issues between employees. Stakes concerning money or reputation can be high for an employer.[97] Perceived power based on conflicting values about women in the workplace, or men working in a traditionally female workplace, will be the determinative element on whether sexual harassment did or did not occur.

Power is one of the myths in sexual harassment cases that mediators must grapple with in attempting to bring the parties to a resolution.[98] Esteem for women in the workplace empowers women, but a lack of esteem, which is demonstrated through harassment, disempowers women. Serving "as a rhetorical medium to command at least minimal consensus and minimal reciprocal recognition among members of the community,"[99] values in an idealized posture aid parties in feeling that their positions are well-grounded. These rhetorical resources are evident as consensus and spectrums that overlap and in mediation can be used by the mediator to move the parties to a settlement range. In sexual harassment mediation, the mediator must utilize minimal consensus that another's sexuality is not available for demands as quid pro quo for work.

The Supreme Court's decision in *Meritor Savings Bank, FSB v. Vinson*[100] brought demands for sex to the forefront as a power issue and raised another issue—whether hostile working environments create a cause of action for sexual harassment. Although the employee, Vinson, was performing her assigned job tasks in an acceptable manner, she testified that she thought she would lose her job if she did not give in to her supervisor's sexual demands.[101] The bank manager used the power of his position to coerce the employee into acquiescence.[102] Sexual harassment litigation arises out of conflicting values on the right to be in the workplace without suffering through sexual demands. The challenge to the "everyone knows" myth is a contention for a new myth and a workplace paradigm shift. Sexual harassment litigation vividly captures the concept of abstract formulation and the value of gender equality rights in conflict with fact driven, pragmatic decisions remedying a rights violation. Women in the

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[97] *Id.* at 798.

[98] For a discussion of the concept of power and its relation to sexual harassment, see generally CATHERINE A. MACKINNON, SEXUAL HARASSMENT OF WORKING WOMEN: A CASE OF SEX DISCRIMINATION (1979).

[99] SCHLAG, LAYING DOWN THE LAW, *supra* note 3, at 45.

[100] Meritor Sav. Bank, FSB v. Vinson, 477 U.S. 57 (1986).

[101] *Id.* at 60.

[102] *See id.*

workplace cause fellow workers to come face-to-face with their values and how these values fit with long-standing customs and traditions—myth about "a woman's place." The battle of conflicting myths, gender equality, and power occurs in each allegation of sexual harassment. The situation is even more prevalent in mediation because the parties are working to reach some self-determined resolution, and their normative precommitment[103] will have already assumed a position at the conference table.

The *Meritor* decision began a sequence of cases decided by the Court on hostile environment sexual harassment law. The language in *Meritor* set out a standard for identifying hostile working environments due to sexual harassment.[104] The *Meritor* opinion is written in such a way as to possibly lead a lawyer to conclude that a plaintiff must prove: (1) the "practice of creating a working environment 'heavily charged'"[105] with actions or words that harassed sexually; and (2) "a working environment so heavily polluted with discrimination as to destroy completely the emotional and psychological stability of minority group workers . . . ."[106]

In *Meritor*, the working environment for the plaintiff was heavily polluted with sexual harassment, so the opinion could easily define heavy pollution.[107] But, the language, "heavily charged,"[108] could easily be taken as the litmus test for determining whether sexual harassment occurred. Not suprisingly, the *Meritor* language concerning destruction of emotional and psychological stability was relied on by the defendant in the next case to reach the Court on the issue of a hostile working environment.

The case of *Harris v. Forklift Systems* [109] followed *Meritor* for decision by the Court. At its outset, the *Harris* decision tells us that in order for a claim to be actionable under Title VII, the environment must be one that is objectively hostile, which invokes the reasonable person standard.[110] "Conduct that is not severe or pervasive enough to create an objectively hostile or abusive work environment—an environment that a reasonable person would find hostile or abusive—is beyond Title VII's purview."[111] Objectively hostile or abusive cannot be proven if the language or action cannot be reasonably perceived as

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[103] *See generally* Winter, *An Upside Down View*, *supra* note 4, at 1881.

[104] *Meritor*, 477 U.S. at 65–69.

[105] *Id.* at 66 (quoting Rogers v. EEOC, 454 F.2d 234, 238 (1971)).

[106] *Id.* (quoting *Rogers*, 454 F.2d at 238).

[107] *See generally id.*, 477 U.S. at 57.

[108] *See generally id.*

[109] Harris v. Forklift Sys., 510 U.S. 17 (1993).

[110] *Id.* at 21.

[111] *Id.*

disempowering the complaining employee.[112] Thus, it would require an extraordinary fact pattern for a supervisor to claim sexual harassment by an employee who the supervisor has "power over." Theoretically, if one has "power over" another employee, the supervising employee can simply fire the employee attempting harassment. With this latter statement the *Harris* decision begins to establish parameters that were not established in *Meritor*. Also, the *Harris* decision established parameters that strengthened the hand of a mediator in dealing with sexual harassment litigation.[113] Knowing what *Meritor* established as precedent and in hindsight, what the *Harris* decision held, the next section is devoted to a possible mediation of *Harris*.

C. *A Mediation of Harris*

How might the mediation of *Harris* have proceeded? What would have been the likely arguments of each party? Clearly Forklift would have started at the same point the defendant started at the trial court—with a reading of *Meritor* as requiring conduct that "seriously affected plaintiff's psychological well-being or led her to suffer emotional injury."[114] Harris did not claim that either of these injuries existed. Briefly stated, the facts that would have been presented to a mediator are the following:

Harris, a female, sued Forklift Systems, Inc. claiming that the conduct of Hardy, Forklift's president, toward her constituted sexual harassment in the form

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[112] *Id.* at 21–22.

[113] These are the three parameters set out in *Harris*:

> [1] A discriminatorily abusive work environment, even one that does not seriously affect employees' psychological well-being, can and often will detract from employees' job performance, discourage employees from remaining on the job, or keep them from advancing in their careers. Moreover, even without regard to these tangible effects, the very fact that the discriminatory conduct was so severe or pervasive that it created a work environment abusive to employees because of their race, gender, religion, or national origin offends Title VII's broad rule of workplace equality [;] [2] The appalling conduct alleged in *Meritor*, and the reference in that case to environments 'so heavily polluted with discrimination as to destroy completely the emotional and psychological stability of minority group workers' merely present some especially egregious examples of harassment. They do not mark the boundary of what is actionable[; and] . . .
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> [3] Certainly Title VII bars conduct that would seriously affect a reasonable person's psychological well-being, but the statute is not limited to such conduct. So long as the environment would reasonably be perceived, and is perceived, as hostile or abusive, . . . there is no need for it also to be psychologically injurious."

Harris, 510 U.S. at 22 (quoting *Meritor*, 477 U.S. at 67).

[114] *Id.*

of an abusive work environment.[115] Harris worked as a manager at Forklift Systems, an equipment rental company, from April 1985 until October 1987, for a total of two years and five months.

> [T]hroughout Harris' time at Forklift, Hardy often insulted her because of her gender and often made her the target of unwanted sexual innuendos. Hardy told Harris on several occasions, in the presence of other employees, "You're a woman, what do you know" and "We need a man as the rental manager;" at least once, he told her she was a dumb ass woman. Again in front of others, he suggested that the two of them "go to the Holiday Inn to negotiate [Harris'] raise". . . .
>
> In mid-August 1987, Harris complained to Hardy about his conduct. Hardy said he was surprised that Harris was offended, claimed he was only joking and apologized. He also promised he would stop, and based on this assurance Harris stayed on the job. But in early September, Hardy began anew. While Harris was arranging a deal with one of Forklift's customers, he asked her, again in front of other employees, "What did you do, promise the guy some [sex] Saturday night?" On October 1, Harris collected her paycheck and quit.[116]

Were the statements just good-natured joking (i.e., normal work horseplay in the equipment rental business)? The president's remark that the company needed a man as rental manager and that she was "a dumb ass woman"[117] clearly portrays a bias against women in workplace management positions. When the employee spoke out against the president's remarks, he declared he was "only joking and apologized."[118] He also promised he would stop, but did not.[119] The absence of a cessation in the remarks forecloses good-natured joking as a defense.

The facts in *Harris* are excellent for the purposes of this Commentary. They display the myths earlier stated as present in sexual harassment litigation, sexuality, power, and workplace availability.[120]

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[115] *Id.* at 19.

[116] *Id.*

[117] *Id.*

[118] *Id.*

[119] *Id.*

[120] The sexuality myth is that sexuality is always present when both men and women are present. The power myth is one in which the sexual harasser always believes him or herself to be in a position of power that allows for the demand of sexual favors or to make sexual remarks that must be suffered through. The workplace myth is an old and very tired

The trial judge agreed with the Forklift position. With an activist judgetype[121] such as earlier discussed[122] Harris would have come under considerable pressure to reach a settlement for much less relief, if any, than a plaintiff would expect *after* the Supreme Court's decision in *Harris*. Not until the decision in *Harris* was there an enunciated standard that "Title VII comes into play before the harassing conduct leads to a nervous breakdown."[123] The *Harris* decision established an anchor standard addressed by Shell and discussed in Part II.B of this article.[124] It is likely that the *Harris* Court would have started with the position that the *Meritor* requirements were met because Forklift's conduct was "so severe or pervasive that it created a work environment abusive to employees."[125]

This case would have been tough for the mediator—tough, but not impossible. The task would have been tough because *Meritor* was controlling law, the "shadow of the law".[126] Therefore, stakes were high because a win for either party before the Supreme Court would either shift jurisprudence enough to cause an employer paradigm shift in favor of employees, or could continue a "don't bother with the situation" attitude. The outcome expectation of each party would have been pivotal in mediation.[127] Because of *Meritor*, Forklift believed that its position was the one supported by precedent, and therefore, not assailable.[128] At the same time, Harris was convinced that she could prevail based on a hostile work environment without having had to suffer psychological or emotional injury.[129]

Without benefit of the *Harris* decision, Harris would have had to assume the posture in mediation that ultimately became the Supreme Court's decision in *Harris*.

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myth that we have all heard: women have no place in the workplace. A woman's place is in the kitchen and in the bedroom.

[121] Lederman, *supra* note 24, at 335–36.

[122] *See infra* Part IV.A.

[123] *Harris*, 510 U.S. at 17, 22.

[124] SHELL, *supra* note 26, at 49.

[125] *Harris*, 510 U.S. at 22–23.

[126] *See* Mnookin & Kornhauser, *supra* note 33, at 951 (examining "how rules and procedures used in courts for adjudicating disputes affect the bargaining process that occurs between [parties] *outside* the courtroom").

[127] *See* Lederman, *supra* note 24, at 333–34, 341 (noting that higher stakes cases and cases in which the parties have divergent expectations are more difficult to settle).

[128] *See Harris*, 510 U.S. at 22–23.

[129] *See id.*

> A discriminatorily abusive work environment, even one that does not seriously affect employees' psychological well-being, can and often will detract from employees' job performance, discourage employees from remaining on the job, or keep them from advancing in their careers. Moreover, even without regard to these tangible effects, the very fact that the discriminatory conduct was so severe or pervasive that it created a work environment abusive to employees because of their race, gender, religion, or national origin offends Title VII's broad rule of workplace equality.[130]

This position, however, had not been enunciated and *Meritor's* language, which included terms such as "heavily charged" and "a work environment destructive of emotional and psychological stability", would have controlled with the power of persuasion had there been an ongoing mediation of *Harris*.

A mediation of *Harris* would most likely include, in addition to Harris and a Forklift representative, two attorneys, for a minimum total of four individuals. The bargaining, therefore, would have to frame a minimum of four cultural norms and standards concerning sexuality, power, and the workplace. These are spicy ingredients for a working mediation environment. Ultimately, a confluence of the four sets of standards must occur in order for the parties to reach a settlement. Out of such a confluence, the mediator must facilitate the origination of a value spectrum to produce the spectrum of overlap discussed in Part II of this Commentary—the settlement range.[131] *Harris* makes a novel case to study for possible mediation results because the factual situation did not have a deeply entrenched "shadow of the law" hanging over the table to enhance bargaining chips held by Harris or Forklift. In mediation, the parties would each attempt to persuade the mediator that precedent favored their position, while the mediator would attempt to persuade the parties that their position was assailable. We now know that the Harris position was the one chosen by the Court. A mediator would have been a valuable resource for these two parties, especially Forklift, in shaping outcome expectations and ultimately, a self-determined resolution.

The measure of harassment required for a favorable plaintiff's finding depends on a specific culture's beliefs and norms—myth about behavioral expectations in the workplace that vary from one workplace to another. Because a trier of fact will be asked to look objectively at the work environment and make a decision about whether the plaintiff's perception of the behavior as offensive was reasonable, the reasonable person doctrine (more likely the reasonable woman standard) will be invoked to examine the culture and norms of the

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[130] *Id.* at 22.

[131] SHELL, *supra* note 26, at 49–51.

relevant community.[132] The culture and norms will be based on myth. Once the culture and time of the conduct have been identified, the question of whether the conduct created a hostile working environment is answered by examining what the norms permit.[133] The power to tilt the bargaining table in one's favor cannot be verbalized as a standard that is universal in scope because the norms and standards will vary from culture to culture.

The *Harris* decision uses language that, for the purposes of mediation, creates soft boundaries for a settlement range and could be said to weaken outcome expectations for either party. The following language from *Harris,* whereby the Court *intentionally and specifically* looks to normative culture, is broad enough to establish a settlement range within which the parties can agree.

> [W]hether an environment is "hostile" or "abusive" can be determined only by looking at all the circumstances. These may include the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance. The effect on the employee's psychological well-being is, of course, relevant to determining whether the plaintiff actually found the environment abusive. But while psychological harm, like any other relevant factor, may be taken into account, no single factor is required.[134]

By advising us that a mathematically precise test does not exist,[135] and by its subsequently delineating factors to be considered,[136] we are clearly thrust by the Supreme Court into common law fact-finding and the myths under which we all live. Only through self-interpretation of our inner selves in relation to the outside world can it be determined whether a remark was humiliating and qualifies as

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[132] The trial court in *Harris* applied a reasonable person test, and the Supreme Court did not explicity adopt or reject this standard. Jane Goodman-Delahunty, *Pragmatic Support for the Reasonable Victim Standard in Hostile Workplace Sexual Harrassment Cases*, 5 PSYCH. PUB. POL. & L. 519, 529 (1999). While the Supreme Court in *Harris* used the "reasonable person" standard, the language in the opinion "implied that a gender-specific test was approved or required." *Id.* at 536.

[133] *See generally* Janet Sigal & Heidi Jacobsen, *A Cross-Cultural Exploration of Factors Affecting Reactions to Sexual Harassment: Attitudes and Policies*, 5 PSYCH. PUB. POL. & L. 760 (1999) (exploring the relationship between attitudes towards women and the development of policies prohibiting sexual harassment); Amy L. Wax, *Caring Enough: Sex Roles, Work and Taxing Women*, 44 VILL. L. REV. 495 (1999) (discussing the impact of sex role norms or customs on women).

[134] *Harris*, 510 U.S. at 23.

[135] *Id.* at 22–23.

[136] *Id.*

sexual harassment or whether it was a mere offensive utterance which does not so qualify. Mediation would be particularly helpful in resolving the interpretations and perception or myths of party conduct in the sexual harassment context. By discussing with each party the underlying values of the acts at issue, mediation enables an ongoing discussion that reveals the paradigm shift our culture has undergone with respect to the older myths about a woman's place in the workplace, and it also enables discussion regarding whether the conduct would be reasonable in the new paradigm culture. A mediator making each of these points would gradually enable the attorneys to see through the lens of the other party—a mediation goal that this article has emphasized.

If the parties agree on a settlement that is within the spongy boundaries of the operative myth,[137] the trial judge will almost certainly approve the settlement as the order of the court even though the judge does not personally agree with the settlement.[138] The inherently vague statutory language Justice Scalia speaks to in

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[137] In the *Harris* decision, the concurring opinion of Justice Scalia bemoans the absence of a clear standard for the bench and practicing bar. *Harris*, 510 U.S. at 24 (Scalia, J., concurring). The statutory language at issue in Harris, "abusive work environment", is inherently vague because of the necessary evidentiary proof concerning the impairment of working conditions. *Id.* at 21–23. One can easily see that evidence might well vary from location to location, and from workplace to workplace. The necessary proof will be found in location-specific employment, or specific culture. Evidentiary proof of the culture's expectation is evidentiary proof of its myth. For the same reason, the Supreme Court's decision lacks certitude.

[138] For this reason, some observers of the mediation process maintain that cases that involve issues of sufficient public interest ought not be allowed to settle according to the interests of the private parties of the litigation without intervention of a public trial. *See* STONE, *supra* note 20, at 22 (excerpting articles written by skeptics of ADR. One of these articles, written by Judge Harry T. Edwards, argues that ADR is not appropriate for constitutional issues or issues of great public concern. Harry T. Edwards, *Alternative Dispute Resolution: Panacea or Anathema?*, 99 HARV. L. REV. 668 (1986) *in* STONE, supra note 20, at 22–25 ("if ADR is extended to resolve difficult issues of constitutional or public law . . . there is real reason for concern. An oft-forgotten virtue of adjudication is that it ensures the proper resolution and application of public values.")). Judge Edwards also noted that

> [i]nexpensive, expeditious, and informal adjudication is not always synonymous with *fair* and *just* adjudication. The decision makers may not understand the values at stake and parties to disputes do not always possess equal power and resources. Sometimes because of this inequality and sometimes because of deficiencies in informal processes lacking procedural protections, the use of alternative mechanisms will produce nothing more than inexpensive and ill-informed decisions. And these decisions may merely legitimate decisions made by the existing power structure within society. Additionally, by diverting particular types of cases away from adjudication, we may stifle the development of law in certain disfavored areas of law. Imagine, for example, the

his concurring opinion[139] inherently creates space for mediation. Given a good faith questioning of liability, outcome expectations may greatly differ. Considering the discussion on outcome expectations and stakes in this article, if the parties cannot be brought to see the case through the lens of the other party,[140] and their outcome expectations greatly diverge,[141] the case will not settle. Reliance on a reasonable person test serves up fodder for litigation. The parties in sexual harassment litigation can hold myth expectations that give rise to divergent outcome expectations.[142]

Harris would have needed leverage—some fact or circumstance that would have made a sufficient impact on Forklift and provided the mediator with discussion points helpful to Harris. If Forklift assumed an intractable stance in mediation, the likelihood of a settlement would have been slight to none because of *Meritor*. The same can be said if Harris assumed an intractable competitive stance in mediation. Prior to the *Harris* decision, *Meritor* allowed the parties to assume a competitive stance by choosing to read the case in a way most favorable to their respective positions. Thus, there would have been no settlement. But, it is also possible that each party could have assumed a cooperative stance by reading *Meritor* for the case it was—a framework that shapes the parameter of rights in a case involving a hostile work environment and leaves the facts to determine the remedy. If Harris and Forklift assumed a cooperative stance, the case might well have settled.

We now know that the *Harris* position was chosen by the Court when it further established the criteria necessary to prevail in an action alleging a hostile work environment. A mediator would have been a valuable resource for these two parties, especially Forklift, in shaping outcome expectations and ultimately, a self-determined resolution.

Thus the litigation would not have proceeded to the Supreme Court and employer and employee court watchers would have had to await some other

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> impoverished nature of civil rights law that would have resulted had all race discrimination cases in the sixties and seventies been mediated rather than adjudicated. The wholesale diversion of cases involving the legal rights of the poor may result in the definition of these rights by the powerful in our society rather than by the application of fundamental societal values reflected in the rule of law.

Harry T. Edwards, *Alternative Dispute Resolution: Panacea or Anathema?*, 99 HARV. L. REV. 668, 679 (1986).

[139] *See Harris*, 510 U.S. at 24 (Scalia, J., concurring).

[140] SHELL, *supra* note 26, at 78 ("Research suggests that the ability to understand your bargaining opponent's perspective may be the most critical of these skills and one of the hardest to use in practice.").

[141] Lederman, *supra* note 24, at 333–34.

[142] *Id.*

litigation with a fact pattern that allowed the Court to clarify *Meritor*. A settled *Harris v. Forklift* is a case that public-interest court observers would urge as the type that ought not be left to settle according to private-party interests.[143]

According to the Smith and Weisstub concept that myth is the mother of law,[144] myth provides a commonality upon which a minimum of three persons in the mediation conference room can draw. The three—two lawyers and the mediator who is likely to be a lawyer—will embrace myth garbed in law's robes as a frame of reference to form the needed spectrum of overlap for a settlement range. "In one sense, the law's dominion and control is extended through a process of *strategic compliance*. This entails both the conscious and unconscious inscription of law's metaphors, categories and concepts within the institutions and within the agents subject to law."[145] It is this conscious and unconscious inscription of the law that moves into the mediation conference room with the parties. Bargaining provides a vehicle for the strategic compliance sought by parties in mediation, and it is in this strategic compliance that Shell's consistency web theory[146] yields what he calls normative leverage.[147] "There are too many situational and personal variables for a single strategy to work in all cases."[148]

These personal variables make for the relatively autonomous self that Schlag writes about.[149] The following description by Schlag of his relatively autonomous self construct sounds much like a party in mediation seeking an overlap in consensus and, therefore, a settlement range that satisfies the party's existing and deeply embedded cultural myths.

> Of course the *relatively* autonomous self (as its name indicates) is not entirely stable. Being only relatively autonomous, it is constantly called upon to adjudicate the boundaries of its own autonomy. . . . This constant struggle . . . can lead the relatively autonomous self to ask itself some strange questions. It can ask, for instance, how it knows what is is doing. The answer is that the self doesn't really know what it is doing, because it is embedded in interpretive constructs that it cannot know about. It just sort of groks its way through life . . . .

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[143] *See* discussion *infra* Part II.B.

[144] THE WESTERN IDEA OF LAW, *supra* note 59, at 120.

[145] SCHLAG, LAYING DOWN THE LAW, *supra* note 3, at 150.

[146] SHELL, *supra* note 26, at 42–43.

[147] "Normative leverage is the skillful use of standards, norms, and coherent positioning to gain advantage or protect a position. You maximize your normative leverage when the standards, norms, and themes you assert are ones *the other party views as legitimate and relevant to the resolution of your differences.*" *Id.* at 43.

[148] SHELL, *supra* note 26, at xii.

[149] SCHLAG, LAYING DOWN THE LAW, *supra* note 3, at 98–99, 103–04.

> Having admitted that it cannot know what it is doing, the relatively autonomous self might begin to wonder just what it is that keeps it together as a unified, more or less stable and generally continuous entity throughout the day. The answer is that the relatively autonomous self is kept whole by a meaning structure which, of course, is always embedded in interpretive communities.[150]

Schlag's description shows clearly that the self will lean heavily on customs and traditions that operate as major persuaders. Shell speaks of "range finding" standards and in so doing spotlights the self as a party who is relatively autonomous.

> Institutionalized standards aside, most norms in market negotiations are contestable. These are the range-finding standards. They provide a basis for arguing in a civilized way about preferred results, but they do not dictate what the final agreement will be. They legitimize offers and demands and narrow the range within which bargaining will take place.[151]

Shell's social roles,[152] Winter's constitutive "I,"[153] and Schlag's autonomous self,[154] each live and relate to others according to their embedded life-defining values—their myths.

V. CONCLUSION

Myths begin as ideological constructs that bring harmony and organization to situations of potential chaos and conflict. Piece-by-piece the constructs grow into full-blown space, time, and location-specific cultural myths of custom and tradition as persons seek parameters for appropriate behavior. In its relationship to law, myth forms the basis of a culture's beliefs and values. Over extended periods of time, the myth-spawned values become institutionalized as codified legislation and common law case precedent—the law of the land. This commentary goes beyond a recognition that norms commit us to a path that is always relative. Exploration of myth and its spawnings takes us, I believe, to the primal level of American jurisprudence. Myth, I claim, accounts for the generative history of our values, and answers the question: Where does the original source of the constitutive "I" lie? Shlag discounts attempts to reduce our cultural values to their generative history by referring to these attempts as

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[150] *Id.* at 103 (citation omitted).

[151] SHELL, *supra* note 26, at 50.

[152] *Id.* at 53.

[153] Winter, *On Building Houses*, *supra* note 4, at 1610.

[154] SCHLAG, LAYING DOWN THE LAW *supra* note 3, at 98–99, 103–04.

"rhetoric of a romanticized past" and "authorial moments."[155] What is missing, he says, is "any historical recollection of how these particular values came to be values for us, individually and collectively."[156]

Myth built upon custom, tradition and the generation of values has shifted and changed, if only in two areas, for black America and women. Most black Americans and women would argue that these shifts and changes are not enough. Maybe not. The ultimate issue of sufficiency is, however, not the subject of this Commentary. I intended only to demonstrate that myth constitutes the roots of our culture and thereby shapes and molds our law. Myth has, in the year 2000, moved us to a jurisprudence that is not altogether a white man in a black robe. Therefore, our jurisprudence experienced a paradigm shift that brought with it some shift in cultural power. As customs and traditions shift, so do our myths. When we hit a critical mass, another subtle shift occurs. When all those in workplace environments understand that a power shift has occurred, which allows for women in the workplace to go about work free of sexual innuendo, advances, and demands, a different myth will have taken hold spawning different value systems.

Parties and lawyers alike are likely to parrot "the normative jurisprudential world, built of arguments upon arguments upon arguments—just hanging there on the threads of normative structures marked out with concepts like fairness, consent, oppression, neutrality, and policed by aesthetic criteria like coherence, consistency, certainty, elegance"[157] and other abstract values that mirror myth. Each of these terms requires definition. Through that definition, parties may bring forth their foundational myths.

Normative structures—myth, and tribal customs—remain important because they are performatively effective.[158] Normative values "are institutionally and cognitively embedded."[159] So much are our life defining values institutionally and cognitively embedded that we sense and instinctively espouse "some of the key political, ethical, and aesthetic values of contemporary American law"[160] because we have grown up hearing of their value in context-laden situations. These values include the following: "Justice, goodness, rightness, truth, fairness, efficiency, order, progress, freedom, equality, security, tolerance, neutrality, community . . . ."[161]

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[155] *Id.* at 44.

[156] *Id.* at 43.

[157] *Id.* at 30–31.

[158] *See id.* at 31–33.

[159] *Id.* at 40.

[160] *Id.* at 43.

[161] *Id.*

Lamenting the separation of values from their root origin, Schlag recounts: "[T]hroughout all these various uses of values, there is one thing that is not much talked about: the action of valuation, the generative history of values. What is missing is any historical recollection of how these particular values came to be values for us, individually and collectively."[162] The language that Schlag scripts as language of legal thinkers becomes the language of the lawyer and client in mediation.

Parties often state that "justice requires" or "equality requires" a specific result. In this kind of rhetoric, values become the self-evident starting points and grounds of legal conversations. In this jurisprudential world, it is at once impossible and beside the point to ask about the generative history of value or values. It is impossible because values are taken to be self-evidently self-grounding and it is presumed that participants in the legal conversation already take values to be the primary source of authority."[163]

Schlag writes disdainfully of what he terms the "rhetoric of the romanticized past."

> [T]he rhetoric of the romanticized past, [occurs when] the generative history of values is supplanted by a mythic and highly idealized rendition of the authorial moment—the moment at which values become accepted as values. In this rhetoric, generative history is reduced to discrete authorial moments. For instance, the authoring of values in American law is ascribed to mystical foundational moments (e.g., "1789"), to venerated authoritative texts (e.g., "The Constitution"), to politically revered authors (e.g., "The Framers"), or to the sophisticated constructions of moral and political philosophy . . . .[164]

I am not disdainful of a generative history that speaks to authorial moments. Instead, I think that authorial moments are the ideological constructs I commented on earlier in this work. Authorial moments explain exactly how our values come to be. These authorial moments and our derived values arrive on the scene in smaller, more discrete components than Schlag references. I absolutely agree with Schlag when he says, "Values are *context-transcendent* to the extent that they enable judgment or evaluation in a variety of different situations and circumstances. The abstract character of values establishes the possibility of context-transcendence, while the idealized character of values legitimates abstraction from the concrete specifics of particular contexts."[165] There is however, a layer deeper than values to be reckoned with. Because values lie

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[162] *Id.*

[163] *Id.* at 43–44.

[164] *Id.* at 44.

[165] *Id.* at 45.

embedded in myth as custom and tradition, it is the myths that are context transcendent.

The generative history[166] of values is myth. It is the myths that are institutionally and cognitively embedded and police the black-robed judges. The judges cannot unshackle themselves. Myths built piece-by-piece, situation by situation, hold the response to Schlag's lament about the severance of values from their generative history.

It may simply be impossible to have "any historical recollection of how these particular values came to be values for us, individually and collectively."[167] Values evolve as the situational story grows and multiplies. Look at my example of the civil rights movement. An argument concerning a seat on the bus led to sit-ins, which led to murders and eventually the taking down of "white" and "colored" signs above water fountains. Today the myth is racial equality.

Unlike the bus seat incident that is so well documented, no one person may know or remember the first situational story that required the culture to shift and change its verbalized value. We can conclude, however, that myths provide checks and balances to absolute authority and unbridled power. Judges, including white men in black robes, live their myths as we live ours. As our collective societal paradigms evolve and shift, our own myths along with those of the judges upon which we rely, evolve and shift, even if at first only understood at some subtle conscious, almost unconscious level.

After all, "[t]he self knows that interpretation is a social practice and that there will always be something about practice that cannot be reduced to rules, theory, or reason."[168] This something to which Schlag refers is, for me, myth so deeply, thoroughly, institutionally, and cognitively embedded that a settlement in mediation is reached only when the parties come face-to-face with their fundamental myths in the normative language of the other party.

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[166] *Id.* at 43.

[167] *Id.*

[168] *Id.* at 98.