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THE EVALUATIVE-FACILITATIVE DEBATE IN MEDIATION: APPLYING THE LENS OF THERAPEUTIC JURISPRUDENCE

ELLEN A. WALDMAN*

I. INTRODUCTION

"To evaluate or not to evaluate;" for many mediation scholars and practitioners, "that is the question."1 Of the numerous controversies surrounding mediation today, none has generated quite as much heat as the propriety of mediator evaluation.2 While some mediators stead-

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1. Julie Greenberg, Len Riskin, Ken VandeVelde, David Wexler and Lois Waldman read and helpfully commented on earlier drafts. My research assistant, Elke Crabbe performed yeoman service, as did the Thomas Jefferson School of Law library staff. My thanks to all.

2. See Carrie Menkel-Meadow, When Dispute Resolution Begets Disputes of its Own: Conflicts Among Dispute Professionals, 44 UCLA L. REV. 1871, 1887 (1997) (“The current, most heated debate concerns the question whether mediation is facilitative or evaluative or both.”); Joseph B. Stulberg, Facilitative Versus Evaluative Mediator Orientations: Piercing the “Grid” Lock, 24 FLA. ST. U. L. REV. 985, 986 (1997) (“If the debate were simply a terminological quibble about the use of a particular term, “mediation,” then people would
fastly avoid expressing any opinion about the strength or viability of a disputer’s position, others incorporate such judgments into their standard arsenal of conflict resolution techniques. As Leonard Riskin has explained, mediators at the extreme end of the evaluative spectrum adopt strategies “intended to direct some or all of the outcomes of the mediation.” At the other end of the continuum, highly facilitative mediators adopt strategies “intended simply to allow the parties to communicate with and understand one another.” In discussing the differing assumptions underlying the choice of an evaluative or facilitative stance, Riskin notes:

The mediator who evaluates assumes that the participants want and need her to provide some guidance as to the appropriate grounds for settlement. ... Conversely, the mediator who facilitates assumes that the parties are intelligent, able to work with their counterparts, and capable of understanding their situations better than the mediator and, perhaps, better than their lawyers.

While the use of evaluation in mediation is common, and growing, this development has not been received with universal celebration. Advocates of a pure facilitative style maintain that evaluative mediation is oxymoronic. In their view, the essence of mediation lies in encouraging disputants’ unfettered autonomy in the resolution of their dispute.

3. See James J. Alfini, Trashing, Bashing, and Hashing It Out: Is This the End of “Good Mediation?” 19 FLA. ST. U. L. REV. 47, 66-72 (1991) (identifying “trashing” and “bashing” styles of mediation that are strongly evaluative, as well as the “hashing” mediative approach which is highly facilitative).


5. Id.

6. Id.


9. See JAY FOLBERG & ALISON TAYLOR, MEDIATION: A COMPREHENSIVE GUIDE TO RESOLVING CONFLICTS WITHOUT LITIGATION 35 (1984) (“Adjudicatory procedures ... are too often used coercively to supplant self-determination with no evidence that the disputants have been encouraged and helped to resolve their differences ... Using mediation to facilitate conflict resolution and encourage self-determination thus strengthens democratic values and enhances the dignity of those in conflict.”); James J. Alfini, Evaluative Versus Facilitative
Further, they note that mediation aims toward the creation of needs-based agreements. The parties must trust the mediator in order to reveal the needs and interests underlying their stated position. This trust can only be established if the mediator maintains strict neutrality. Evaluation by the mediator, they maintain, vitiates this neutrality and destroys the rapport necessary for truly productive interactions.

Proponents of evaluative mediation counter that disputants often seek out the opinion of a neutral third party—that the mediator’s opinion often helps, rather than hinders, the construction of settlements. Discussing how each disputant’s position accords with existing social and legal norms makes for more informed decision making, and, in the long run, more equitable agreements. Further, they note that much of what goes by the name of mediation today involves some evaluative ac-
tivity by the mediator. To construct a definition of mediation that excludes most of what the practitioner and lay communities understand to be mediation would spawn needless confusion.

This essay does not seek to resolve the debate. Rather, it seeks to "reframe" the issues by viewing them through the lens of therapeutic jurisprudence. Mediation theory teaches that seemingly intractable issues may be reconfigured in ways that permit a resolution. While the frame of therapeutic jurisprudence may not end the evaluative/facilitative debates, it may help illuminate some previously unexamined aspects of the controversy and point the way toward future points of convergence.

II. THERAPEUTIC JURISPRUDENCE

Therapeutic jurisprudence is the study of the role of the law as a "therapeutic agent." It views legal rules, legal procedures, and the roles of legal actors (such as lawyers and judges) as social forces that often produce therapeutic or antitherapeutic consequences. Therapeutic jurisprudence calls for the study of these consequences in order to identify them and to ascertain whether the law's antitherapeutic effects can be reduced, and its therapeutic effects enhanced, without subordinating due process and other justice values.

Therapeutic jurisprudence originated in the field of mental health


17. See Riskin, supra note 4, at 13 (1996) ("It is too late for commentators or mediation organizations to tell practitioners who are widely recognized as mediators that they are not, in the same sense that it is too late for the Pizza Association of Naples, Italy to tell Domino's that its product is not the genuine article. Such an effort would both cause acrimony and increase...confusion...").

18. See MARK D. BENNETT & MICHELE S.G. HERMANN, THE ART OF MEDIATION 87 (1996) ("The ability to reframe is a skill that is essential to the art of mediation. A reframe is a response to a message being sent from one party to another that intends to redirect, limit, or shape the perception of the message so that the message and its response become more constructive.").


20. Id.
law. Initial writings analyzed the psychological consequences of civil commitment hearings, the effects of incompetency labeling, and the standards used to assess juveniles' competence to stand trial in a criminal matter. The scope of therapeutic jurisprudence however has expanded beyond the core content areas of mental health law to include sexual orientation, disability, healthcare, contracts, and commercial law. While earlier commentary urged the creation of laws that would function therapeutically, more recent writings have considered how existing law might be interpreted and applied in a therapeutic manner. For example, one recent article, applying a therapeutic jurisprudence approach to the confidentiality provisions of the Americans with Disabilities Act, suggests that employees who keep their disabilities confidential will likely be perceived as odd or unfriendly, perceptions that will increase their social isolation and sense of alienation. Consequently, the author recommends that disabled employees waive the confidentiality protections of the Act and involve co-workers in the process of designing reasonable accommodations for the workplace. Another article takes up the question of whether a fault-based or no-fault compensation system is more likely to restore the mental health of an injured plaintiff and concludes that a fault-based system offers greater potential for making the plaintiff emotionally whole.

Remarkably, no commentator, as yet, has focused the lens of thera-

25. See Kay Kavanagh, Don't Ask, Don't Tell: Deception Required, Disclosure Denied, 1 PSYCHOL. PUB. POL'Y & L. 142 (1995).
27. See Bruce J. Winick, Rethinking the Health Care Delivery Crisis: The Need for a Therapeutic Jurisprudence, 7 J. L. & HEALTH 49 (1993).
29. See Daly-Rooney, supra note 26, at 101.
30. See id. at 90-91.
III. MEDIATION: CONFLICT RESOLUTION IN A THERAPEUTIC KEY

The mediation movement, in large measure, represents a reaction to the psychological brutality of the adversary system. Repelled by the emotional toll litigation exacts from participants, mediators seek to provide a less traumatic means of resolving conflict. While some mediators hawk their wares by stressing time and costs savings, most also see their role as generating solutions more creative and satisfying than a court could award. Recognizing that disputants often emerge from a court battle dissatisfied with both the process and the result, most mediators seek to focus disputants on the needs and interests underlying their stated positions. This approach is designed to ensure that dispu-

32. The phrase "in a therapeutic key" is borrowed from David Wexler and Bruce Winick's book LAW IN A THERAPEUTIC KEY, supra note 19.

33. See O.J. Coogler, STRUCTURED MEDIATION IN DIVORCE SETTLEMENT 7, 24 (1978) ("Unfortunately the parties seldom visualize in advance how their situation could possibly turn into a bitter competitive struggle." ... "Difficult as it often is for them to talk to each other, it is a wise decision when couples choose to work out their own settlement instead of abdicating that power to others. Even though divorcing couples often feel helpless and confused, all but the more severely dysfunctional can negotiate a settlement if a structure is provided within which to do so.").


35. JAMES C. FREUND, THE NEUTRAL NEGOTIATOR: WHY AND HOW MEDIATION CAN WORK TO RESOLVE DOLLAR DISPUTES 11 (1994) (Describing evaluative mediation and touting the time and costs savings the client will enjoy); Robert Fitzpatrick, The War in the Workplace Must End, But Arbitration Is Not the Answer, SC59 ALI-ABA 779, 786 (March 12, 1998) (describing mediation as "a cost effective and cost efficient method of resolving disputes."); Raymond L. Ocampo, Jr., Critical Path to Mediating High-Tech Disputes, Practicing Law Institute, 507 PLI/ PAT 1081, 1083 (February 1998) (explaining that mediation is the alternative dispute resolution mechanism of choice in high-tech disputes because "the short compressed business cycles (often referred to as 'Internet years') of intellectual property products greatly increase the importance of prompt, cost-beneficial resolution of disputes.").

36. Dana Wordes, The Art of Construction Mediation Practicing Law Institute, 425 PLI/REAL PROPERTY 137, 139, 143 (April 1998) (stating initially that "[i]nformality, civility, privacy, speed, and cost" are the key to mediation's appeal, but later noting, "[t]he greater potential for direct client involvement, as compared to litigation or arbitration, makes it more likely that the parties will adopt a business or technical, as opposed to a legal solution"); Ocampo, supra note 35, at 1083 (quoting mediation professional Cathy Yanni, "With the help of the mediator, the parties in mediation strive to find common interests to allow them to resolve their dispute.").

37. Wordes, supra note 36 at 143; Ocampo, supra note 35, at 1083.
tants emerge from their dispute feeling that they received what they needed, rather than a third party's assessment of what was required.\footnote{38}

Additionally, mediation relies heavily on social science inquiries into the psychology of procedural justice, a body of work which has been extremely influential in the therapeutic jurisprudence literature. This work suggests that people are more satisfied and comply more fully with the outcome of legal proceedings when they perceive those proceedings to be fair and have an opportunity to participate in them.\footnote{39}

Research reveals that three elements—participation, dignity and trust—play a large role in people's assessment of procedural fairness. Foundational studies in the therapeutic jurisprudence literature demonstrate that disputants perceive a judicial process as fair when they can present evidence, voice their own views and/or share in the decision-making process.\footnote{40} Presenting evidence and one's own view appears to favorably affect perceptions of fairness, even when it is clear such presentations will not influence the outcome of the proceedings.\footnote{41} The degree to which a disputant is treated with respect and dignity also influences perceptions of procedural fairness.\footnote{42} Finally, studies reveal that people feel as if they are treated fairly when they trust that the authorities with whom they are dealing are concerned about their welfare and want to treat them fairly.\footnote{43}

The mediation process is structured to provide enhanced disputant participation and dignity and to foster trust between the mediator and disputants. The mediation process includes an introductory stage in which the mediator strives to secure the trust of the disputants. Explaining the mediator's role as a neutral, maintaining informality, and explaining the chronology of the process are all ways the mediator

\footnote{38. See Carrie Menkel-Meadow, Pursuing Settlement in an Adversary Culture: A Tale of Innovation Co-opted or "The Law of ADR", 19 Fl. St. U. L. Rev. 1, 7 (1991) (arguing that "the limited remedial imagination of courts... restricts what possible solutions the parties could develop" and that "alternative forms of dispute resolution, or new conceptualizations of old processes, could lead to outcomes that were efficient in the Pareto-optimal sense of making both parties better off without worsening the position of the other.").}


\footnote{40. E. Allan Lind et al., Voice, Control, and Procedural Justice: Instrumental and Non-instrumental Concerns in Fairness Judgments, 59 J. Personality & Soc. Psychol. 952, 952-59 (1990).}

\footnote{41. See id.}

\footnote{42. E. Allan Lind et al., In the Eye of the Beholder: Tort Litigants' Evaluations of Their Experiences in the Civil Justice System, 24 L. & Soc'y Rev. 953, 968-71 (1990).}

works to gain the disputants' confidence and faith.44 The mediator calls upon each disputant to describe the dispute from his or her own perspective.45 If there are attorneys present, they are often advised to take a back seat to their clients.46 Disputants are further encouraged to work together to develop options for resolution.47 While it is permissible for mediators to offer suggestions, ideally the mediator encourages the parties to generate the options themselves.48 Further, one common ground rule in mediation is that all participants will treat one another with respect throughout the process, thus ensuring that, at least during the confines of the mediation, individuals feel protected and respected.49

While some mediators and mediation organizations de-emphasize mediation’s psychic benefits for clients, advertising, instead, its cost-effectiveness and efficiency,50 these providers remain in the minority.51

44. See BENNETT & HERMANN, supra note 18, at 35-40 (explaining that the mediator outlines the structure, rules and goals of mediation to the parties in the initial “contracting stage” and that this stage represents the mediator’s “first opportunity to gain credibility with and trust from the parties.”).

45. See ROGERS & SALEM, supra note 11, at 22.

46. See BENNETT & HERMANN, supra note 18, at 13-14 (portraying mediation as a process where lawyers have little or no involvement). But see John Lande, How Will Lawyering and Mediation Practices Transform Each Other? 24 FLA. ST. U. L. REV. 839, 843-44 (1997) (observing that lawyer participation in mediation differs dramatically depending on locale. In some areas, lawyers are intimately involved, while in others they are precluded from attendance.); DWIGHT GOLANN, MEDIATING LEGAL DISPUTES: EFFECTIVE STRATEGIES FOR LAWYERS AND MEDIATORS 66 (1996) (“If the parties are represented by counsel, the attorneys will almost always make the opening statements. This usually produces the most effective and efficient presentations. At times, however, it is more effective to encourage the lawyers to outline the case, then let a key participant speak directly.”). See also John Lande, Lawyers' Routine Participation Directs Shape of 'Liti-Mediation' in 16 ALTERNATIVES TO THE HIGH COST OF LITIG. 53 (April 1998) (discussing risks and benefits associated with lawyers' increasing participation in mediation).

47. See FOLBERG & TAYLOR, supra note 9, at 49-51 (describing the goal of the third stage of mediation as helping the participants articulate the options they know or want, as well as develop new options).

48. See BENNETT & HERMANN, supra note 18, at 56-57 (listing mediator tasks during option-generation stage as staying out of the parties’ way and “remember[ing] that it is the parties' ultimate responsibility to resolve their conflict”; GOLANN, supra note 46, at 263 (suggesting that offering a proposal should not be the mediator's first response to impasse because it discourages the parties from being creative); FOLBERG & TAYLOR supra note 9, at 51 (cautioning that “ a mediator who is offering too many new options too fast will inhibit the participants' own expression and views.”).


50. See Robert Fitzpatrick, Non-Binding Mediation of Employment Disputes: An ADR Method That is Consistent With the American Promise of Fairness, American Law Institute-American Bar Association Continuing Legal Education, SC59 ALI-ABA 791, (Mar. 12, 1998) ( describing a mediation process that does not involve the exploration of party needs
To the extent that mediation as a field continues to encourage disputant voice, participation, respect and dignity, mediation may be described as conflict resolution in a "therapeutic key." By focusing on disputant needs and fostering procedural justice, mediation seeks to deliver agreements that better meet disputant needs through a process that is itself designed to enhance disputant mental health.

IV. THE EVALUATIVE/FACILITATIVE DEBATE

If we assume that most theorists and practitioners conceive of mediation as an effort to approach conflict resolution in a "therapeutic key," then we may frame the evaluative/facilitative debate as a disagreement over which mediation style will have the greatest therapeutic

and interests, and highlighting its cost savings for the client).

51. Even mediators of the most utilitarian bent conceive of mediation as offering the potential for more humane disputing. See id. at 623 (noting that mediation is confidential and consistent with the American ideal of fair play).

52. See supra note 32.

53. See, e.g., Craig A. McEwen & Richard J. Maiman, Small Claims Mediation in Maine: An Empirical Assessment, 33 ME. L. REV. 257, 256-257 (1981); ("[P]eople whose cases were mediated expressed higher levels of satisfaction 'with their overall experience in mediation/court' than those whose cases were adjudicated: 66.6% of the former group indicated they were completely or mostly satisfied compared to 54% of the latter."); Robert E. Emery & Joanne A. Jackson, The Charlottesville Mediation Project: Mediated and Litigated Child Custody Disputes, MEDIATION Q., (Summer 1989), at 11-12 ("Mediation clearly led to greater satisfaction in a large number of areas, including issues where adversary settlement would be expected to be superior (for example, feeling that one's rights were protected."). However, some data casts doubt on the assumption that disputants necessarily experience mediation to be fairer and more satisfying than more formal judicial procedures. See Lind, supra note 42, at 953-80. In a three site study, researchers explored disputant reaction to traditional civil trials, court annexed arbitration, and judicial settlement conferences by comparing reactions to each procedure with reactions to bilateral settlement. Disputants were asked to rate both the procedural fairness of the process they experienced, as well as their satisfaction with the outcome attained. The disputants who pursued resolution through trial or arbitration reported higher procedural fairness ratings than those who settled. These higher ratings reflect the disputant's perceptions that trials and arbitration procedures are more dignified and more carefully orchestrated than bilateral settlements. They further reflect the litigants' sense that they understood the litigation process and felt they participated more than did disputants in bilateral settlements. Neither cost, nor delay, nor case outcome appeared to correlate with procedural justice judgments. By contrast, disputant procedural fairness ratings for judicial settlement conferences were lower than those for bilateral settlement, though the difference was not statistically significant. Significantly, disputants routinely attended the trial and arbitration sessions, but were excluded from settlement conferences. This data confirms the insight that disputants' quest for procedural justice is best satisfied when they participate in a dignified dispute resolution process that gives them a sense of control and involvement. The data further suggests that adjudicatory processes might serve those functions better than previously believed. See id. at 980-86.
Arguably, proponents of a purely facilitative mediation style emphasize the emotional benefits associated with autonomous decision-making, while ignoring other possible emotional effects that might occur during and following the conclusion of the mediation. Supporters of evaluative mediation take a wide angle view of the emotional repercussions of mediation, considering the stress associated with making decisions in an informational vacuum and the possible "buyer's remorse" that may result.

When facilitative mediators defend their mediation methodology, they stress the benefits to disputants in making their own decisions, free of coercive influences. They stress the confidence and feelings of well-being engendered when people solve their own problems during mediation, and note that such feelings of empowerment may allow people to better cope with other conflictual situations that arise. They suggest that a mediator possesses a great deal of power simply by virtue of her position as mediator and that any expression of opinion will prove very influential in the party's negotiations, thus curtailing party autonomy. If a mediator brings legal or social norms into the discussion, it is argued, these norms will assume a predominant role in the discussion.

54. David Wexler, one of the architects of therapeutic jurisprudence, notes that the theory leaves the concept of what is "therapeutic" intentionally vague, thereby allowing scholars "to roam within the intuitive and common sense contours of the concept." Wexler, supra note 21, at 221.

55. See BUSH & FOLGER, supra note 13.

56. See Nolan-Haley, supra note 15, at 86 ("If my opponent sues me for one thousand dollars and I settle in mediation by paying him one hundred dollars, I might be personally quite satisfied. If I learned afterward, however, that my opponent's claim is time barred, I might feel otherwise about the result.").


58. See BUSH & FOLGER, supra note 13, at 28-32; Love, supra note 57, at 944-45 ("If we allow mediation and mediators to slip into the comfortable (because it is the norm) adversarial mind-set of evaluation, we kill the turbo-thrust of the jet engine of idea generation.").

59. See James Alfini, supra note 9, at 930 (presenting explanation provided by Donna Gebhart for why she won't put a dollar value on cases: "I believe very strongly that when, or if, I evaluate the case, because they generally value what I say, it will affect their decision. They may be settling for something that they wouldn't really be happy with."); Love, supra note 57 at 942-43, 945-46 (arguing that a mediator's evaluation "carries enormous weight" and may effectively "shut down" the negotiations); John Lande, supra note 16, at 874 ("Some advocates of empowerment argue that mediators should not express opinions about the substantive issues because doing so inevitably favors one side or another and excessively pressures the principals.").
The conversational focus will shift from the parties' own values and definitions of fairness to consideration of the norms inscribed in judicial decisions, statutes, and the literature of relevant professional disciplines. Decisions reached will conform, to a greater or lesser degree, with these external norms, but the parties' sense that they are crafting agreements that correspond with their own notions of equity will be lost. When mediators evaluate the parties' situation, critics maintain, the parties will feel railroaded and dispossessed, not empowered.

Additionally, these critics note that mediator evaluation serves a useful purpose only if one defines the goal of mediation to be settlement. Another, and for many, more important process goal, is expanding the consciousness of the disputants. Mediation may enable people to become more aware of their own needs, while simultaneously attaining a better grasp and appreciation of the needs of others. Mediation can only effect these therapeutic transformations by centering negotiations on the parties' interests, and encouraging open, forthright, and often intimate disclosure. Reorienting discussion to the mediator's perspective of the parties' dispute limits the possibilities for true self-knowledge or empathy with the other. The dispute may settle, but the potential for personal empowerment, transformation, and healing will be lost.

Those who endorse evaluative mediation take a different tack.

60. See Kovach & Love, supra note 8, at 31-32; Stulberg, supra note 2, at 988 (summarizing arguments that evaluative mediation undermines the parties' "understanding of one another's situation" and ability to "develop concrete resolutions of their [own] tangible concerns").

61. Stulberg, supra note 2, at 1002 ("Bargaining—negotiating—and mediated negotiations require conversation, dialogue, and interaction with perceived opponents. The processes require extending a fundamental respect to one's counterpart in order to create the possibility for striking a deal. Evaluative mediation distorts those values and behaviors and effectively denies their possibilities.").


63. See Stulberg, supra note 2, at 991 (arguing that evaluative mediation can only be assessed in terms of the efficiency with which the parties reach settlement).

64. See BUSH & FOLGER, supra note 13, at 81-112; see also Kovach & Love, supra note 8, at 32. ("Such approaches [predicting unfavorable litigation outcomes] settle cases, but they are not consonant with mediation's primary goals of enhancing understanding between parties and encouraging parties to create outcomes that respond to underlying interests.").


66. BUSH & FOLGER, supra note 13, at 110-11.

67. See id.
While they also support autonomous decision making, they contend that one cannot make a truly autonomous decision without knowledge of relevant legal and social norms. Additionally, they maintain that disputants who bind themselves to agreements in ignorance of prevailing social norms will not experience the mediation process as therapeutic. They will be wary and uncertain about their decisions. Further, it is likely that disputants will receive information about how the conflict would have been resolved in a courtroom. If one disputant settles in mediation for a result less favorable than the one she would have received in court, she will likely suffer "buyer's remorse." Far from feeling empowered and enlightened, they will feel exploited and undercut. Advocates of evaluative mediation also argue that dispute closure has therapeutic effects and thus, to the degree that evaluative mediation helps bring about settlement, it is therapeutic, even if the parties are not the sole captains of the process. Thus, evaluative mediators claim their methodology is more therapeutic than the pure facilitative model be-


69. See Clark Freshman, Privatizing Same-Sex "Marriage" Through Alternative Dispute Resolution: Community-Enhancing Versus Community-Enabling Mediation, 44 UCLA L. REV. 1687, 1694-95, 1742 (1997) (arguing that a purely facilitative mediation model that ignores community norms (what the author terms a "private-ordering understanding" of mediation) may "neglect the many ways in which individuals may want to know how various communities they respect might understand their disputes ... [M]ediation may only expose individuals to a relatively cramped set of values that might inform how they order their lives.").

70. See Jeffrey W. Stempel, Beyond Formalism and False Dichotomies: The Need for Institutionalizing a Flexible Concept of the Mediator's Role 24 FLA. ST. U. L. REV. 949, 972-73 (1997) (arguing in favor of evaluation in court-sponsored mediation because parties in these programs will assume that "whatever occurs under the auspices of the mediation is within the range of outcomes that would result from litigation. If the mediator permits the parties to reach settlements that fall outside this admittedly broad range of 'adjudication default probabilities,' at least one of the parties may pay a heavy price for the mediator's assiduously facilitative approach.").

71. See GOLANN, supra note 46, at 270 (arguing that "responsible use of evaluation is consistent with the goals of mediation to assist parties in reaching a negotiated agreement that is better for them than their alternatives."); see also Deborah M. Kolb & Kenneth Kres- sel, The Realities of Making Talk Work, in WHEN TALK WORKS: PROFILES OF MEDIATORS, 470-74 (Deborah Kolb & Assoc., eds. 1994) (noting that some mediators adopt a directive evaluative style because they believe they can best benefit the parties by helping them achieve settlement); John Lande, Stop Bickering! A Call for Collaboration, in 16 ALTERNATIVES TO THE HIGH COST OF LITIG. 1, 12 (1998) ("Some mediators believe that disputants are primarily interested in ending their disputes, and thus settlement is the only or primary goal of mediation.").
cause it provides disputants with enough information to make decisions confidently in mediation and to avoid subsequent feelings of loss or disappointment.  

V. CONCLUSION

Though mediation could be described as conflict resolution in a "therapeutic key," to date, the mediation community has made little use of therapeutic jurisprudence. This essay seeks to remedy this oversight by applying the insights of therapeutic jurisprudence to the current debate over the use of evaluation in mediation. Assuming that both the evaluative and pure facilitative schools envision mediation to be a therapeutic process, this paper argues that the debate stems from each schools' differing judgment of which mediation techniques and interventions have the greatest therapeutic effect on disputants. Put another way, the two schools differ in their understanding of what disputants experience as therapeutic when they are in conflict. Facilitative mediators emphasize the healing aspects of autonomous decision making and maintain that a process which considers only party norms and values will yield the greatest therapeutic effect. 

72. It is important to note that many mediators and theorists support evaluative mediation because they believe that evaluative mediation generates fairer, more equitable agreements, and thus is more "therapeutic" for society generally. Based on the assumption that social and legal norms embody principles important to the health of the body politic, these theorists support the creation of private agreements that are informed and, to some degree, constrained by these social norms. See, e.g., Robert P. Schuwerk, Reflections on Ethics and Mediation, 38 S. Tex. L. Rev. 757, 764 (arguing that mediators should not allow the creation of a "clearly unjust" agreement). See also Ellen A. Waldman, Identifying the Role of Social Norms in Mediation: A Multiple Model Approach, 48 Hastings L.J. 703, 742-53 (1997) (describing practice of norm-advocating mediation in which mediators inform disputants of existing social and legal norms and advocate for the inclusion in the resulting agreement).

73. As noted, there are some mediators who downplay the therapeutic aspects of mediation, highlighting instead the opportunity to take a cheap and quick "short cut" to resolution. See supra note 35 and accompanying text. Most mediators, however, are committed to providing disputants a litigation alternative that is less expensive psychically, as well as financially.

74. Facilitative mediators may encourage parties to obtain information about relevant social or legal norms from another source, but will avoid providing the information themselves. If, however, the parties choose not to obtain information from an outside counselor, the mediator refrains from providing the information, leaving the parties to bargain in a normative vacuum. See Kimberlee Kovach & Lela Love, Mapping Mediation: The Risks of Riskin's Grid, 3 Harv. Negotiation L. Rev. 71, 79 n. 175 and accompanying text (1998). See also Ellen Waldman, The Role of Legal Norms in Divorce Mediation: An Argument for Inclusion, 1 Va. J. of Soc. Pol'y & L. 87, 101-07, 134-41 (1993) (arguing that family mediation model that precludes mediator discussion of legal norms often results in disputants determining post-divorce arrangements in ignorance of legal principles and guidelines).
value autonomous decision making, but maintain that such decision making will be more empowering and satisfying if it is informed by relevant social norms.\textsuperscript{75} Additionally, these mediators point to the healing effect of reaching resolution and hold that evaluative mediation, if it enhances the likelihood of settlement, is more healing for that quality alone.

While the mediation community continues to debate which form of mediation is purest and most therapeutic, few efforts have been made to survey disputants themselves on the question.\textsuperscript{76} While numerous studies exist documenting the higher levels of satisfaction experienced by dis-

\textsuperscript{75} Those who recognize facilitative mediation as the only "true" form of mediation tend to assume that mediator evaluation necessarily entails mediator coercion and pressure. See Robert A. Baruch Bush, "What Do We Need a Mediator For?: Mediation's "Value-Added" for Negotiators," 12 OHIO ST. J. ON DISP. RESOL. 1, 35 (1996) ("evaluation can easily turn into direction and pressure, and there is considerable evidence that, in practice, it often does."); Kovach & Love, supra note 74, at 80, 100 ("Evaluative behavior 'may usurp the parties' role as evaluators of their own alternatives to negotiation. . . .'") If mediator evaluation were entirely non-coercive and did not detract from party participation or decision-making, then arguably evaluative mediation would not conflict with party self-determination. However many ADR processes depend on the potency and impact of neutral evaluation for their efficacy, evidence of the power of evaluation.") By contrast, those who endorse evaluative mediation define it as a mediative approach which gives the parties more information with which to structure superior agreements. This vision of evaluative mediation does not include coercive or pressure tactics, See Stempel, supra note 70, at 982 ("more value is added to the process when the mediator not only gives the parties a forum and assists them in new ways of assessing the dispute, but also provides some yardstick for assessing the options and some information about the range of default options if the matter is adjudicated rather than settled.")

\textsuperscript{76} Robert A. Baruch Bush has argued, based on mediation evaluation and "procedural justice" studies, that mediation disputants value the degree and quality of participation, expression and communication afforded dispute resolution procedures as much, or more, than the substantive outcome reached. Bush, supra note 75, at 35. However, the mediation evaluation studies compare mediation disputant satisfaction with the satisfaction of disputants who pursued resolution through litigation. These studies merely indicate that disputants in mediation prefer the level of participation and control they enjoy in mediation to the much-diminished levels they experience in court procedures. Additionally, while the procedural justice studies indicate that disputants value the ability to express their views, even where it is clear that such expression will not affect the substantive outcome, See Bush, supra note 75, at 19, n.19, they also reveal that disputants value the ability to voice their views to a greater degree when they believe such expression will favorably affect the substantive outcome. Lind, supra note 42, at 952-57. Thus, these studies support the conclusion that disputants value the ability to participate in dispute resolution procedures both for symbolic non-instrumental reasons, and because they think their input will be instrumentally useful in producing a more favorable outcome. This insight validates the use of an evaluative mediation style that allows disputants free rein to express themselves, but also provides information that helps disputants locate their negotiations within a mutually acceptable normative framework.
putants who mediated, as opposed to litigated, their conflicts, no study to date has examined disputant satisfaction when participating in an evaluative mediation, as opposed to a facilitative mediation. Moreover, while early studies assessed the mental health functioning of mediation disputants post-mediation versus litigants post-trial no study to date has systematically examined the mental health functioning of those who have experienced evaluative versus facilitative mediation.

Mediators and mediation scholars have always had a therapeutic focus. Questions of how conflict might be transmuted into an opportunity for growth, renewal and healing have long been at the core of many mediators’ practice. And, in debating that point, scholars continue to make assumptions about what disputants experience as therapeutic. It is time to construct a research agenda that includes systematic examination of mediation procedures that are both evaluative and facilitative. Partisans on both sides of the debate should eschew speculation and work to develop a concrete knowledge base about the effects of evaluative and facilitative techniques on disputant satisfaction. It is time to stop speaking for disputants and allow them to speak for themselves. As the mediation field wrestles with divergent visions of mediation’s goal and method, it is important to attend to its own rhetoric of disputant autonomy and control. Only by listening to what disputants them-

77. Jessica Pearson and Nancy Thoennes, Divorce Mediation: Reflections on a Decade of Research in Mediation Research: The Process and Effectiveness of Third-Party Intervention 19 (Kenneth Kressel and Dean G. Pruitt and Assoc., eds. 1989) (More than three-fourths of the disputants who mediated their custody dispute expressed extreme satisfaction with the process, while the percentage of litigants who were satisfied with the court process ranged from 30-40 percent.); Joan B. Kelly, Mediated and Adversarial Divorce: Respondents’ Perception of their Processes and Outcomes, MEDIATION Q., (Summer 1989) at 71, 85-86 (comparing perceptions of 212 mediation and 225 adversarial respondents to their divorce process and outcome and concluding that “[o]n no single item measuring process or outcome did adversarial women express more satisfaction or more favorable perception of their attorneys, their divorce process, or their agreements”).

78. Existing data reveals that attorneys representing clients in mediation expect mediators to assess the strength and weaknesses of their client’s case and offer a proposed settlement range. See Barbara McAdoo & Nancy Welsh, Does ADR Really Have a Place on the Lawyer’s Philosophical Map? 18 HAMLINE J. OF PUB. L. AND POL’Y 376, 384 (1997); David B. Keller, Negotiatory Alchemy: The Court Special Master as Scientist and Mediator, 13 NEGOTIATION J. 389, 395 (1997) (“Generally, I found that the more evaluative and narrow I become, the more receptive were the attorneys, since this played more to a position-based distributive bargaining theme common to settlement conferences with judges (an extreme evaluative narrow approach)”).

selves have to say about mediator approach and technique can we fashion effective and sensible policies regarding the role of evaluation in mediation.