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Why Is Fairness 'Grubby'? - Semantics, Etymology, and Perspectives in Dispute Resolution

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WHY IS FAIRNESS ‘GRUBBY’? — SEMANTICS, ETYMOLOGY, AND PERSPECTIVES IN DISPUTE RESOLUTION

Barbara Wilson and Alastair Wilson†

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I. INTRODUCTION

Delivering judgment in the House of Lords in the case of *White v White*¹ (subsequently a leading legal precedent in this jurisdiction) Lord Nicholls of Birkenhead famously opined: “Features which are important when assessing fairness differ in each case. And, sometimes, different minds can reach different conclusions on what fairness requires. Then fairness, like beauty, lies in the eye of the beholder.”²

His Lordship’s comment in this landmark divorce appeal is interesting in the context of this paper, which is written from the perspective of alternative dispute resolution (ADR) practice, specifically that of family mediation. The authors set out to provide a very brief overview of certain relevant case law, considerations of ideologies of law and ADR, and some of the concerns around mediation. Whether what constitutes fairness and justice is influenced—or even deter-

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1. *White v. White* [2000] UKHL 54, ¶ 1, available at <http://www.bailii.org/uk/cases/UKHL/2000/54.html>.

2. *Id.*

mined—by the etymology of these terms is then considered. The paper concludes that, incorporating this and earlier academic work related to group processes, clients' perceptions of "fairness" can be addressed and maximized within the mediation process. An increased understanding of these concepts might in turn benefit mediation practitioners in the conduct of their work.

Following in part the earlier lead of Birke and Fox,³ who alerted practitioners and legal scholars to the psychological principles most relevant to legal negotiation, this paper also offers synthesized elements which may inform negotiation, specifically mediation or ADR practice. The elements discussed are drawn from the linguistics field as well as from certain psychological perspectives and data. In this our purpose is to offer material which may assist and inform practitioners while recognizing, along with Birke and Fox,⁴ the necessarily speculative nature of some aspects of a work of this nature.

II. CASE LAW AND THE SEARCH FOR FAIRNESS

White's eminence in the matrimonial law landscape was established because it marked a turning point in how financial provision for divorcing wives should be determined. Prior to *White*, women's monetary awards (capital and maintenance) were generally based on need and the "reasonable requirements" of ex-wives, post-divorce. Before *White*, assets in excess of need were commonly retained by the former husband on the grounds that the ex-wife did not "need" them. Underlying this convention was the opaque concept of a suppliant wife seeking to divest her husband of assets which were rightfully his, based on an unarticulated ideology of protection of property and individual liberty.⁵

Mr. and Mrs. White were not only married but also business partners as farmers; they divorced after thirty-three years of marriage.⁶ The judgment of the House of Lords in their case introduced the concept of the "yardstick of equality of division" as the starting point in the distribution of matrimonial assets and cautioned judges to ensure the absence of discrimination.⁷ The *White* judgment also recognized that non-working wives and mothers often forfeit for life opportunities to build up careers and wealth in their own right as a result of the

3. Richard Birke & Craig R. Fox, *Psychological Principles in Negotiating Civil Settlements*, 4 HARV. NEGOT. L. REV. 1 (1999).

4. *Id.* at 3.

5. A. Diduck, Case Note, *Fairness and Justice for All? The House of Lords in White v. White* [2002] F.L.R. 981, 9 FEMINIST LEGAL STUD. 173, 174 (2001) (citing R. INGLEBY, SOLICITORS AND DIVORCE (1992)).

6. *White* [2000] UKHL 54, ¶¶ 4-5.

7. *Id.* ¶ 25.

traditional marital division of labor in respect of child-rearing and home-making, for which they should not be penalized on divorce.⁸

However, at this point it is interesting to consider Diduck’s analysis from a feminist scholar stance. She observes that the earlier judgment in this case (given by the Court of Appeal before the subsequent appeal to the Law Lords) also referred indirectly to equality principles—but only in the context of the couple’s business partnership as farmers and not in relation to gender equality as spouses.⁹ The settlement in the court below was therefore actually based on Mr. and Mrs. White’s legal business partnership, rather than any non-discriminatory entitlements arising from marriage.¹⁰

Lord Nicholls was to turn his attention again to considerations of fairness in two more recent appeal cases: *Miller v. Miller* and *McFarlane v. McFarlane*.¹¹ The judgments were delivered together although the issues and facts were dissimilar. As in *White*, both couples’ circumstances involved what is commonly termed “big money,” but the court addressed different circumstances in each case.¹² The marriage in *Miller* was a short, childless union while *McFarlane* was a substantive marriage during which three children were born.¹³ The challenging issue of “fairness” thrown up by *White* had not disappeared, however, as is evident from his Lordship’s comments when giving judgment in 2006:

Fairness is an elusive concept. It is an instinctive response to a given set of facts. Ultimately it is grounded in social and moral values. These values, or attitudes, can be stated. But they cannot be justified, or refuted, by any objective process of logical reasoning. Moreover, they change from one generation to the next. It is not surprising therefore that in the present context there can be different views on the requirements of fairness in any particular case.¹⁴

In the *Miller* and *McFarlane* opinions, totalling some sixty pages, the word “fair” appears thirty times, while “fairness” is employed thirty-one times.¹⁵ “Unfair” is mentioned eight times.¹⁶ With a total of almost seventy references as to what is fair or unfair, it is obvious their Lordships were greatly exercised in this regard. By contrast, “justice” receives four mentions and “injustice” and “just” a mere five

8. *Id.* ¶¶ 24, 26.

9. See Diduck, *supra* note 5, at 181.

10. *Id.*

11. *Miller v. Miller* and *McFarlane v. McFarlane* [2006] UKHL 24, ¶ 1, available at <http://www.bailii.org/uk/cases/UKHL/2006/24.html>.

12. *White* [2000] UKHL 54, ¶ 2.

13. *Miller* [2006] UKHL 24, ¶¶ 41, 74.

14. *Id.* ¶ 4.

15. See *id.*

16. See *id.*

each (i.e., in the sense of the word as discussed here).¹⁷ It is to this topic we now turn.

III. WHAT IS "FAIR" IN FAMILY LAW DECISIONS — AND HOW WOULD WE KNOW?

It is not intended to add to the considerable legal analysis and comment which these cases have attracted, except to make a limited number of points. Meehan notes that "in addition to the requirement in the Matrimonial Causes Act 1973 for first consideration to be given to the welfare of the children of the marriage, their Lordships identified three "strands' of fairness," namely needs, compensation, and sharing."¹⁸ Meehan examines these and finds them wanting in terms of offering significant help to legal advisers instructed by matrimonial clients. He ends his commentary with a rather dismal prediction: "Consequently, the judgment is almost certain to provoke further litigation from parties wishing to explore the concept of fairness and different judges' interpretations of that and further guidance will need to be given in subsequent cases."¹⁹

Meehan's complaint is that the senior judiciary did not seize the opportunity provided by these cases to offer determinative guidance to practitioners. One could argue that *Miller* and *McFarlane* instead reinforce the subjectivity of legal judgments as a result of a certain lack of internal cohesion in these opinions, although the combined judgment goes a little further than *White* towards grasping the nettle of defining fairness.²⁰

Hodson also criticises aspects of the judgment, particularly lamenting those where he feels that certain "references and principles are fraught with uncertainties and problems" as well as the "inconsistency" demonstrated by their Lordships with regard to what is to be considered matrimonial property.²¹ The commentators are disappointed not only at their Lordships' lack of clarity, but perhaps more importantly because, despite enunciations that fairness should be defined by needs, compensation, and sharing, their Lordships actually failed to advance their definitions of fairness much beyond the "eye of the beholder" vagaries of *White*.

More recently, Hodson cites Harriet Harman, Minister of State for Justice, speaking at the launch of the long-awaited government consultation on reporting restrictions in the family courts (where proceed-

17. *See id.*

18. Andrew Meehan, *Miller and McFarlane: An Opportunity Missed?*, 36 *Fam. Law* 566, 568 (2006).

19. *Id.* at 574.

20. *See id.*

21. David Hodson, *The Miller's Wife and the Breadwinner: Lessons for Lawyers in Daily Practice*, *FAM. LAW WK.*, May 31, 2006, <http://www.familylawweek.co.uk/library.asp?i=2078>.

ings are typically held in chambers).²² He quotes the Minister as commenting:

People don't understand the complexity and importance of the work of the family courts, but that is an unfortunate yet inevitable consequence of sitting in secret and making judgments behind closed doors. Public confidence depends on public scrutiny. It has to be seen to be believed and justice not only has to be done, it has to be seen to be done - including in the family courts.²³

The Minister's terminology here is interesting in that she employed "visual" terms such as "scrutiny," "seen to be believed," and "justice . . . has to be seen to be done."²⁴ Whether she intentionally selected these words or was instead speaking intuitively, her language focuses on what might be termed the *visibility* of fairness (i.e., back to the "eye of the beholder" issue again—albeit in another guise). Visibility as a means of determining fairness therefore goes to the heart of the issues addressed here and is a topic to which we shall return.

IV. PERSPECTIVES — SEEING MEDIATION AND LAW AS IDEOLOGIES

Some authors, specifically Nader,²⁵ criticize ADR and mediation processes as arising from "harmony ideologies," a stance with which Davidheiser takes issue, at least in relation to its application to non-Western dispute resolution in The Gambia, West Africa.²⁶ Regrettably, criticisms of ADR generally do not offer better alternatives than reversion to adversarial court processes which, it is suggested, are also flawed, although for different reasons and notably those advanced by feminist legal analysts. The formal justice system is reluctantly defended as the "least-worst alternative" available for pursuing claims to social justice.²⁷

Sypnowich et al. offer a short thesis on the ideology of law in which she comments "the rule of law can have an ideological effect, even if it is not ideological in essence."²⁸ They explore Marxist notions of legal ideology as well as later critiques explaining law as the effects of polit-

22. David Hodson, 'Confidence and Confidentiality: Improving Transparency and Privacy in Family Courts': *consultation published*, FAM. LAW WK., July 11, 2006, <http://www.familylawweek.co.uk/library.asp?i=2237>.

23. *Id.*

24. *Id.*

25. See Laura Nader, *Harmony Models and the Construction of Law*, in CONFLICT RESOLUTION: CROSS-CULTURAL PERSPECTIVES 41, 51-54 (Kevin Avruch et al. eds., 1991).

26. See Mark Davidheiser, *Harmony, Peacemaking, and Power: Controlling Processes and African Mediation*, 23 CONFLICT RESOL. Q. 281, 281 (2006).

27. C. Neil Sargent, *Understanding the Critiques of Mediation: What is All the Fuss About?*, 2 JUS IN RE (1999), <http://www.carleton.ca/law/JusInRe/v2/2-1-understanding.htm> (last modified Feb. 2007).

28. See *Law & Ideology*, Stan. Encyclopedia of Philosophy (Oct. 21, 2001), <http://plato.stanford.edu/entries/law-ideology/>.

ical ideas and societal opinions.²⁹ The same view subsequently emerges within the Critical Legal Studies movement, informed by feminism, environmentalism, and anti-racism. Synnowich et al. observe that the “more subtle critiques of ideology grasp the extent to which both liberation and manipulation can be embodied in the law.”³⁰ They state, nevertheless, that legal guarantees of a procedural kind can be appreciated for the genuine protection they offer subjects of the law, whilst simultaneously conceding the quietist politics proceduralism might engender.³¹ Hocking provides an overview of a range of feminist critiques, which in summary generally object to the law as gendered because (it is argued) it assumes norms based on historically masculine qualities and interests such as ownership, assertiveness, competitiveness, and competence.³²

Hensler challenges what she terms the ideology of alternative dispute resolution and mediation with particular regard to civil suits for money damages within the United States.³³ While she does not deny the appeal of mediation in many circumstances, she speculates as to the origins of the courts’ use of ADR, which she believes might arise *inter alia* from “a critique of litigiousness and other times as a critique of lawyers.”³⁴ Hensler writes: “[T]he legitimacy of anti-litigation arguments for court-mandated mediation is undercut by extensive empirical evidence demonstrating that the litigation explosion is largely mythical and that most Americans never consider claiming when they are injured and only rarely pursue rights claims.”³⁵

This assertion (unfortunately unreferenced or supported by citations or data in Hensler’s text) does not concur with a Tillinghast-Towers Perrin study conducted in 2005, which estimated that costs of the tort system in the United States reached \$260 billion annually in 2004.³⁶ Whereas this study’s methodology and findings have been disputed by the Association of Trial Lawyers of America,³⁷ Hensler’s portrayal of a quiescent population reluctant to litigate is not univer-

29. *See id.*

30. *Id.*

31. *Id.*

32. *See* Barbara Ann Hocking, *Feminist Jurisprudence—The New Legal Education*, 18 MELB. U. L. REV. 727, 730–31 (1992).

33. *See* Deborah R. Hensler, *Suppose It’s Not True: Challenging Mediation Ideology*, 2002 J. DISP. RESOL. 81, 82–85 (2002).

34. *Id.* at 84.

35. *Id.*

36. TILLINGHAST-TOWERS PERRIN, *US Tort Costs and Cross-Border Perspectives: 2005 Update 3* (2006), http://www.towersperrin.com/tillinghast/publications/reports/2005_Tort_Cost/2005_Tort.pdf.

37. *See* Am. Ass’n for Justice, *New Study Espouses “Tort Tax” as Fabrication of Insurance Industry* (May 17, 2005), <http://www.atla.org/pressroom/FACTS/tortreform/episummary.aspx> (disrupting the cost exacted upon the United States economy by tort claims).

sally espoused, at least by the Tillinghast-Towers Perrin report.³⁸ Further, her assertions are challenged by Dauer's 2004 paper, which argues that the primacy of the civil justice system within American culture is not the result of the population's litigiousness but, rather, the cause of it.³⁹

Hensler also quotes the work of Thibaut and Walker.⁴⁰ This was based on research investigating procedural justice ratings with regard to satisfaction and fairness.⁴¹ The authors' students were given facts about a dispute and assigned roles from which to respond and from which envisaged situations the research data were drawn.⁴² Essentially, their research showed that people care as much about how disputes are resolved as the actual outcomes they receive.⁴³ These findings have since become very influential in understanding distributive justice processes.

Thibaut and Walker initially examined hypothetical criminal proceedings, although their later research explored their subjects' responses to civil actions.⁴⁴ Application of their work to mediation is problematic, despite attempts to extrapolate their findings to the ADR field. Indeed, Hensler notes that the authors and their colleagues later stated that "non-adversary procedures would diminish rather than enhance public esteem for the legal process."⁴⁵

As Hensler observes, the research simulations are diverse, vary in kind and description, and have differently constructed and measured conceptual variables.⁴⁶ In any event, none of this work was conducted in the UK, where mediation has developed discretely from North American practice, especially in relation to family matters. Further, family mediation in this jurisdiction has been regulated and publicly funded (based on evidence of means) for some years,⁴⁷ providing it with a formalised structure and degree of accountability perhaps not comparable with the United States.

38. TILLINGHAST-TOWERS PERRIN, *supra* note 36, at 4–5 (citing the high ratio of tort costs to GDP in the U.S. and forecasting growth in tort costs in several areas).

39. See Edward A. Dauer, "Accountability" and Legal Responses to Medical Error, The Greek Conference – Crete (May 2004), <http://www.greekconference.com.au/papers/2004/dauer.htm>.

40. See Hensler, *supra* note 33, at 85–94 (discussing the work of John Thibaut and Laurens Walker in studying individual preferences for different forms of dispute resolution).

41. See *id.* at 85.

42. See *id.* at 85–86.

43. See *id.* at 87.

44. See *id.* at 85–86.

45. Hensler, *supra* note 33, at 88 (citing Laurens Walker et al., *The Relation Between Procedural and Distributive Justice*, 65 VA. L. REV. 1401, 1420 (1979)).

46. Hensler, *supra* note 33, at 92.

47. See Marian Roberts, *Family Mediation: The Development of the Regulatory Framework in the United Kingdom*, 22 CONFLICT RESOL. Q. 509, 509 (2005).

With due respect to Hensler, some of her key points are unsubstantiated by evidence. For instance, her comment that “many mediators paint trials in the most negative light possible” is anecdotal and admittedly so.⁴⁸ This is not necessarily true of mediators in this jurisdiction, although the Legal Services Commission (this government’s agency, which underwrites publicly funded family mediation) requires practitioners working with mediation clients to notify them of the likely costs of contested court proceedings and to record that they have done so.⁴⁹ This is commonly the first time that divorcing clients have been given this information—many come to their assessment meeting with the mediator mistakenly believing that the initial costs of petitioning for divorce (around \$1,500–2,000 to include court fees) are global, *i.e.*, this sum will also fund ancillary relief matters relating to property, finance, and minor children. It usually comes as a great shock when they learn that contested proceedings in relation to these issues will cost them considerably more than the basic expense of getting divorced—probably in the region of at least \$8,000–15,000 each as a minimum. Mediators cannot be held to blame for the unpleasant facts of litigation, which may indeed result in clients viewing trials in a “negative light” as a result of meeting mediators. Even people who are not especially amicable towards each other may decide to mediate instead of litigate because of the deterrent nature of costs. Having said that, this paper does not argue that all ancillary relief matters on divorce should be mediated; indeed, it is within a mediator’s remit to refuse mediation where circumstances dictate and, ultimately, within the client’s power to decline ADR processes.

Finally, Hensler’s own findings that clients *like* trials do not accord with her earlier assertions about the non-litigious nature of the American public.⁵⁰ As observers from across the Atlantic we are puzzled that the United States population could be perceived as non-litigious, while of course conceding immediately that our own nation is not known for being peaceable. Logically it could be expected that many United States citizens—raised on westerns, Star Wars, and battle movies too numerous and diverse to recite here—might be oriented towards conflict and court trials. This argument has already been well made by Benjamin who asks rhetorically “would John Wayne negotiate?”⁵¹ That the very possibility is inconceivable serves to make the point.

Finally, in this matter we borrow from Zalewski (writing in respect of international relations theory), who considers that, despite the ef-

48. Hensler, *supra* note 33, at 96.

49. See generally Legal Services Commission, <http://www.legalservices.gov.uk/> (last visited Mar. 22, 2007).

50. See Hensler, *supra* note 33, at 90.

51. Robert Benjamin, *The Movies—Constructions of Reality and Sources of Metaphors* (Apr. 2001), <http://www.mediate.com/articles/benjamin2.cfm>. 802

fects of psychological, physical, and social training, a standpoint feminist position is open also to men:

The core claim is not that women are any less fallible than men, but instead that knowledge is a social construction which is crucially constituted by human beings in disparate social locations. These social locations are indeed variable, but one of their defining characteristics is that they display clear hierarchies. Some social locations and identities are, unfortunately, more equal than others.⁵²

The knowledge embodied by the law is therefore understood as ideologically based, reflecting a largely "male rights" perspective of the world rather than inalienable "truth." It is conceded that ADR and mediation similarly are ideologies, founded on alternative perspectives as to how conflicts may be addressed. As is argued in relation to other matters in this paper, both may be understood as fundamentally based on perceptions. While not automatically adopting a standpoint feminist position with regard to the law (or, indeed, a standpoint stance in relation to any of the matters discussed here) we find Zalewski's view very persuasive.

V. CONCERNS ABOUT MEDIATION

Some critics of mediation have advanced concerns about power and control issues in mediation, especially in relation to the private ordering of family law. Family mediation in England and Wales is not mandatory, although there is in practice considerable pressure on parties to settle family law disputes before trial with an expectation that they will consider mediation as one of a range of resolution routes available. Referral of clients by solicitors to a mediation intake "assessment" meeting is automatic if clients seek public funding for family disputes, although exemption is possible at this stage if there is a history of violence. Further, clients can choose to attend the assessment meeting alone (without notification to the other party); this provides a further safeguard and opportunity for them to opt out of mediation and choose the court process instead.

Mediators conducting assessment meetings automatically undertake mandatory screening regarding abuse, including previously undisclosed concerns.⁵³ Subject to certain safeguards (which are agreed individually), clients may still elect to mediate if they choose and some do so on the grounds that they feel mediation offers them voice and choice as to how they settle their issues with the other person, based

52. Marysia Zalewski, *Feminist Standpoint Theory Meets International Relations Theory: A Feminist Version of David and Goliath?*, 17 FLETCHER F. WORLD AFF. 13, 24 (1993).

53. See THE LAW SOCIETY, FAMILY LAW PROTOCOL § 6.2 (2d ed. 2006), available at <http://www.lawsociety.org.uk/documents/downloads/dynamic/familylawprotocol.pdf>; CODE OF PRACTICE FOR FAMILY MEDIATORS § 4.8.1 (2000), <http://www.ukcfm.co.uk/page81.asp> (follow "Code of Practice for Family Mediators" hyperlink).

on their own personal definition of what is fair. As a client once remarked when choosing to mediate with her ex-husband, whom she was divorcing on the grounds of his unreasonable behaviour (which had involved physical assault), “I want him to know that I am his equal and that I can negotiate with him myself.”

There is a body of work specific to mandatory custody mediation in the state of California, which is considered by Boxer-Macomber.⁵⁴ She acknowledges that legislation within that State has progressed in terms of protecting the safety of victims of domestic abuse in mandatory mediation, while arguing, however, for a “victim’s choice” statute enabling choice between multiple dispute resolution processes. She states:

Where appropriate, California mediation laws also offer opportunities for victims of domestic violence to participate in the legal decision making process without the assistance of counsel. Under a traditional adversarial system, victims’ attorneys may take complete control of litigation. As a result, victims’ attorneys may end up repeating the pattern of dominance that victims of domestic violence previously experienced in their relationships with their abusers.⁵⁵

A full discussion of these very important and complex issues is beyond the scope of this paper, which does *not* argue that the example given above should serve as a template for other cases—the wife discussed here had a long and detailed interview with the mediator concerning safety, as well as legal advice, before voluntarily entering mediation. The point is made, however, that the paternalistic ideology underlying the law can protect rights but may also frustrate the pursuit of equality if clients are not free to make their own choices about how they deal with conflict. It may also reinforce existing inequalities.

VI. THE LANGUAGE OF JUSTICE AND FAIRNESS

Earlier references in this paper to justice and fairness alluded to the role that linguistics might play in understanding their conceptual constructions, which have occupied philosophers and jurists over many centuries. According to Maiese, the words “justice” and “fairness” are often used interchangeably;⁵⁶ similarly, the late John Rawls famously defined “justice” as “fairness.”⁵⁷

The interchangeability that Rawls observes reflects the mixed parentage of English, which is Germanic at its heart (German *fair*, Old

54. Lauri Boxer-Macomber, *Revisiting the Impact of California’s Mandatory Custody Mediation Program on Victims of Domestic Violence through a Feminist Positionality Lens*, 15 ST. THOM. L. REV. 883 (2003).

55. *Id.* at 891.

56. Michelle Maiese, *Justice Versus Fairness* (July 2003), [http://www.beyondintractability.org/essay/principles_of_justice/%20\(2003\)](http://www.beyondintractability.org/essay/principles_of_justice/%20(2003)).

57. JOHN RAWLS, *A THEORY OF JUSTICE* 11 (1971).

Norse *fagr*, both corresponding to "fair") with Romance around the edges (French *juste*, Latin *iustus*, corresponding to "just").⁵⁸ Indeed, pairings of a similar heritage, such as "anger/ire," "loving/amorous," "sadness/misery," "mistake/erratum," and "two-handed/ambidextrous" show differences in meaning which are often hard to characterize. For example, "ambidextrous" is restricted to humans (or at least higher mammals), whereas "two-handed" applies to tools and other inanimates; likewise, a dog may be loving where it may not be amorous.⁵⁹ In such pairings there is a sense that Germanic words, longer embedded in the lexicon than their Romance equivalents, feel somewhat "grubbier" than Romance words; indeed, Vice, writing in relation to ombudswork, suggests that "'fairness' is somehow more earthy than justice . . ."⁶⁰ Therefore, English may seem, on the surface, to corroborate Rawls's view, wherein differences between "fairness" and "justice" can be chalked up to cultural perception. Taken to an extreme, this is the view that "fairness is the common man's justice."

However, there is evidence to suggest that the radical approach taken by Rawls does not account for differences in the actual usage of these words. The indiscriminate interchange of "fair" and "just," or attempts to distinguish or define their meaning in terms of descriptive application, appear to leave unmined their etymological roots. This is a pity, as it is these roots which assist us to comprehend the concepts which underlie and provide their meaning and which may even explain why our Minister of Justice intuitively grasped at terms of visibility when referring to the formal justice system. The linguistic legacy of the Norman Conquest in modern day English includes the automatic association of certain "learned" (and, by and large, Romance) words with the legal and political establishment; where there is semantic deviation between two closely related terms, it is molded by the politics and sociology of etymology. It is therefore no accident that "justice" mixes subjective judgments (such as righteousness) with objective, legal facts and truths, where "fairness" is associated with subjective visual properties such as clarity, unbiased alignment, beauty, and so forth. Conversely, "fairness" is perhaps felt to be more malleable and open to social evolution than "justice," a word whose linguistic evolution is dependent on the evolution of the legal structures by which it is defined.

Maiese appears to account for such factors, considering justice (in its narrower sense) as fairness "being action that pays due regard to the proper interests, property, and safety of one's fellows . . . [w]hile justice in the broader sense is often thought of as transcendental, jus-

58. THE CONCISE OXFORD DICTIONARY OF ENGLISH ETYMOLOGY (T.F. Hoad ed., 1993).

59. *Id.*

60. James W. Vice, Neutrality, Justice, and Fairness, <http://www.ombuds.uci.edu/JOURNALS/1997/neutrality.html> (last visited July 19, 2006).

tice as fairness is more context-bound.”⁶¹ Reflecting the difficulties in defining “fairness” encountered by Lord Nicholls of Birkenhead, the Australian Law Reform Commission found that fairness “resists easy definition.”⁶² The Commission offers some examples of what constitutes fairness, although concerns are expressed about the possibility that formal justice can result in unfair outcomes (for example, where legal representatives are incompetent or the costs of representation increase, all while legal aid becomes less accessible).⁶³

As a result, “earthy fairness,” which is intangible and intuitive, contrasts with the multi-stranded and highly conventionalized notion of “justice” presented in Meehan,⁶⁴ a multi-stranded approach to understanding a word which is echoed in works such as Coleman and Kay (in relation to lying).⁶⁵ Attempts to define these concepts seem to find that the deviation between “fair” and “just” is too great to justify a uniform approach. Although Germanic and Romance words may overlap, the unfolding of history has created the feeling that Germanic words are considered to be “public property” to a greater extent than their Romance counterparts, with the consequential conceptual distinctions arising between the words.

The English language makes provisions for unfair justice and unjust fairness as well as those situations which are considered to be both “fair” and “just”—and those considered to be neither. The words thus reflect social and legal development, both historically and synchronically. However, language comparison cannot be overlooked if the debate is to encompass the conceptualisation of these ideas in the human mind in general; it may not be accurate to assume that other languages behave in a comparable manner. For instance, the Algonkian language Ojibwe, spoken in Canada and the United States, has the word *gwaiak* or “just,” which is associated with visual properties in the same way as the English “fair.” There does not appear to be a distinct word for the concept of fairness in the Ojibwe language;⁶⁶ similarly, the constructed language Esperanto translates both “fair” and “just” as *justa*.⁶⁷

Language comparison, therefore, illuminates differences which demonstrate not only that speakers conceptualize notions in a variety of ways, but also that social aspirations for the legal system affect the

61. Maiese, *supra* note 56.

62. The Austl. Law Reform Comm’n, *Fairness in Federal Civil Litigation*, <http://www.austlii.edu.au/au/other/alrc/publications/issues/20/14fairne.html> (last visited Feb. 17, 2006).

63. *See id.*

64. *See Meehan, supra* note 18, at 568.

65. Linda Coleman & Paul Kay, *Prototype Semantics: The English Word Lie*, 57 LANGUAGE 26 (1981).

66. FREDERIC BARGA, A DICTIONARY OF THE OJIBWAY LANGUAGE (Minn. Historical Soc’y Press 1992) (1853).

67. J. C. WELLS, ESPERANTO DICTIONARY (1992).

terminology which such a system employs. However, lexical comparison is only one side of the coin; there are also grammatical differences in the way that languages realise the concepts under discussion. English "fair" and "just" are both adjectives, suggesting that the most basic construals of these concepts are that they are states or properties, like "stupid" or "blue." There is some behavioural evidence that "fair" and "just" are less state-like than personal or structural qualities (for instance, English speakers can say "I am being fair," whereas "I am being blue" is highly questionable). Nevertheless, entities such as "fairness" and "justice" (as well as predications such as "he is fair" and "she is just") are longer in duration and more complex in form than the states "fair" and "just," suggesting that the most basic mental category for these English language concepts is that of state or property.

The English data can be contrasted with data from Chickasaw, a language in which grammatical evidence makes no suggestion that these notions are states, in their unmodified forms. Unlike English, Chickasaw has *aahlpisa* or "(s)he/it is fair," and *biika* or "(s)he/it is just" as the most basic forms for the concepts under consideration.⁶⁸ The English phrases "a fair trial" and "a just outcome" can only be translated by something similar to relative clauses in Chickasaw (that is, "a trial which fairs" and "an outcome which justs"). The difference between these two languages suggests that the assumption of a universal construal of these notions as states or properties constitutes a (linguistically) Eurocentric stance. Furthermore, it should not be assumed that languages will treat similar notions as grammatical siblings; "fair" may be a state in its most basic grammatical form where "just" is an event, or vice versa. Given that, in English, such concepts are concretely secured to the category of adjective, it might seem hard to imagine this; however, English does show that similar concepts can be construed differently (for instance, the action "envy" contrasts with the synonymous state "jealous"). States and actions are not universally prescribed by the mind and are sensitive not only to language-internal differentials but also to cross-linguistic diversity.

VII. WHERE DOES FAIRNESS COME FROM?

The "nature or nurture" debate is so well-known as to make providing a description here unnecessary. However, in relation to the topic of fairness, it is interesting to consider Finkel, Liss, and Moran's exploration of the development of proportional justice in children.⁶⁹ Contrary to adult equalist justice tenets (such as where the principal

68. PAMELA MUNRO & CATHERINE WILLMOND, *CHICKSAW: AN ANALYTICAL DICTIONARY* 53, 67 (1994).

69. See Norman J. Finkel et al., *Equal or Proportional Justice for Accessories? Children's Pearls of Proportionate Wisdom*, 18 *J. OF APPLIED DEVEL. PSYCHOL.* 229 (1997).

and accessories in felony-murder are punished equally), they cite research showing that children in the first grade take into account sophisticated legal excusing conditions to intentional harmful acts. Further, and referring to the work of Bruner and Perner, they posit that there is strong evidence that four-year olds can distinguish actions from intentions and, within the latter, differentiate accident from intentions.⁷⁰

They conclude "*the view that blameworthiness ought to be graded proportionately to perceived culpability is already present in the kindergarteners, albeit in nascent form.*"⁷¹ As every parent knows, protests against circumstances or actions seen as being "not fair" emerge very early in life.

There is a considerable body of literature pertaining to the moral and reasoning development of young children which is beyond the scope of this paper and some of which is cited in these authors' work. Having discussed their findings, we suggest that the early developmental grasp of "fairness" as opposed to "justice" could be taken as evidence that words with intuitive "fuzzy" boundaries" are unproblematic in child language acquisition.⁷² Because "fairness" is primarily a proportional concept, it could be argued that its understanding can be easily developed without (and therefore before) a parallel understanding of legal structures.

Birke and Fox point out that in certain jurisdictions and areas of practice, "precedents exist that favour a particular norm of fairness over others."⁷³ They concede, however, that "in the privately ordered world of settlement negotiations and contract interpretation, the norms are no better defined than in the world at large, and lawyers are not trained to be better judges of fairness than are architects, dentists, musicians, or chefs."⁷⁴ Citing a range of sources, they suggest that the most common norms of distribution invoked in negotiation include equality, egalitarianism, equity, need, and past practice or precedent. They find "no consensus in the legal community about what fairness means or how it should be determined."⁷⁵ The subjectivity of people's perceptions is also the topic of Turchin's recent text, a thesis which posits that differing expectations arise from a failure to recognise that one's own views of fairness are not necessarily shared by others, which, in turn, leads to poor negotiation outcomes and stalemates.⁷⁶

70. *Id.* at 233.

71. *Id.* at 240.

72. WILLIAM CROFT & D. ALAN CRUSE, *COGNITIVE LINGUISTICS* 77 (2004).

73. Birke & Fox, *supra* note 3, at 34.

74. *Id.*

75. *Id.* at 34–35.

76. See generally J. MCGUIRE TURCHIN, *THE IMPORTANCE OF BEING ON THE SAME PAGE: PERCEPTIONS OF FAIRNESS IN CONFLICT RESOLUTION* (2006) (on file with author).

VIII. THE FOUR-COMPONENT MODEL OF PROCEDURAL JUSTICE;
APPLICATIONS FOR ACHIEVING "FAIRNESS"
IN MEDIATION

Returning to Hensler, it is noted that she is not alone in taking up the work of Thibaut and Walker.⁷⁷ Writing thirty years later than these authors, MacCoun⁷⁸ considers the process effects first documented by them to have proved remarkably robust. Thibaut and Walker's findings also inform the work of Blader and Tyler,⁷⁹ who tested a theoretical model specifying the concerns on which people focus when evaluating procedural justice. In their model, they directly link procedural justice elements with the broader "groups literature," arguing that the four-component model is "more complete and conceptually rigorous than previous approaches to understanding what people consider when evaluating process fairness" (e.g., in group situations).⁸⁰ They cite Forsyth as identifying within the groups literature two distinct, key issues faced by human groups, notably (a) task issues and (b) socio-emotional issues.⁸¹

The application of procedural justice models to group situations as expanded by Blader and Tyler makes their work of particular interest in relation to mediation. Summarised, they postulate the four fairness concerns as addressing:

- 1) Formal decision-making (evaluations of formal rules and policies related to how decisions are made in the group)
- 2) Formal quality of treatment (evaluations of formal rules and policies that influence how group members are treated)
- 3) Informal qualities of treatment (evaluations of how particular group authorities treat group members)
- 4) Informal decision-making (evaluations of how particular group authorities make decisions)⁸²

In defining—for this purpose—mediation as a "group" process we adopt O'Sullivan, Hartley, Saunders, Montgomery, and Fiske's definition of *group*: "[a] collection of people who have some shared interest or goal. . . . [which] can be formal or informal in terms of intimacy and role playing between the members, and . . . can be relatively structured in recognizing leaders" ⁸³ Among examples of groups they

77. See Hensler, *supra* note 33, at 95.

78. See Robert J. MacCoun, *Voice, Control, and Belonging: The Double-Edged Sword of Procedural Fairness*, 2005 ANN. REV. OF L. SOC. SCI. 171, 182.

79. Steven L. Blader & Tom R. Tyler, *A Four-Component Model of Procedural Justice: Defining the Meaning of a "Fair" Process*, 29 PERSONALITY & SOC. PSYCHOL. BULL. 747 (2003).

80. *Id.* at 747.

81. Blader & Tyler, *supra* note 79, at 748.

82. *Id.* at 749.

83. TIM O'SULLIVAN ET AL., KEY CONCEPTS IN COMMUNICATION AND CULTURAL STUDIES 131 (2d ed. 1994).

offer are panels, juries, and therapy groups.⁸⁴ While it is accepted that mediation is none of these, neither is it the court or arbitration—thus for this purpose “group” may be an appropriate generic descriptor for mediation fora. In extrapolating Blader and Tyler’s⁸⁵ work to mediation in terms of a “group” experience, an attempt is made here to understand how their research might assist with the management of mediation processes to the satisfaction of the disputants and based on their own perceptions of “fairness,” which, we have argued, is a “visible” (that is, an “eye of the beholder”) quality.

It is possible to see Blader and Tyler’s first two “fairness” concerns as embodied in professional codes of conduct regarding how the mediation process is to be conducted and the manner in which mediation clients are to be treated. Quite properly, these issues have become the subject of considerable debate and ethical positioning which have been articulated in various jurisdictions where ADR has become commonplace. For example, government-franchised mediation services here must be run in accordance with the Mediation Quality Mark Standard (MQMS). The MQMS mandates “fair treatment,” not only of clients but also of staff and—where applicable—volunteers.⁸⁶ This document does not, however, define what is meant by “fair.” The UK College of Family Mediators’ Code of Practice for Family Mediators states, under the heading of “impartiality,” that “[m]ediators must at all times remain impartial as between the participants. They must conduct the process in a fair and even-handed way.”⁸⁷

In the United States, the Uniform Mediation Act draft of 2001 states with regard to fairness:

Because the privilege makes it more difficult to offer evidence to challenge the settlement agreement, the Drafters viewed the issue of confidentiality as tied to provisions that will help increase the likelihood that the mediation process will be fair. Fairness is enhanced if it will be conducted with integrity and the parties’ knowing consent will be preserved.⁸⁸

The Law Reform Commission of New South Wales, Australia states that mediators “must ensure that agreements reached between parties are fair and equitable.”⁸⁹ Whereas this document does not attempt to define the mechanics of how fairness is either constructed or perceived, it mandates the mediator to inform the parties of the difficulties which she sees in any agreements. The Commission permits an

84. *Id.*

85. Blader & Tyler, *supra* note 79.

86. See QUALITY MARK STANDARD FOR MEDIATION 15, 52, 87 (2002), http://www.legalservices.gov.uk/docs/fains_and_mediation/mediation_qual_mark.pdf.

87. CODE OF PRACTICE FOR FAMILY MEDIATORS, *supra* note 53, at §4.3.1.

88. UNIF. MEDIATION ACT, Prefatory Note (2001), <http://www.pon.harvard.edu/guests/uma/> (follow “The Uniform Mediation Act, PDF Format” hyperlink).

89. LAWLINK NSW, ENSURING QUALITY OF MEDIATION SERVICES § 7.40 (2005), <http://www.lawlink.nsw.gov.au/lrc.nsf/pages/r106chp07>.

alternative strategy of mediator withdrawal in the event that she believes that an agreement reached is either illegal, grossly inequitable to one or more of the parties, the result of false information, the result of bad faith bargaining, or impossible to carry out. In other words, and within this context, the mediator is expected to make value judgments about mediated outcomes.

These formal codes of practice and guidelines are publicly accessible and sit relatively comfortably within Blader and Tyler's first two categories regarding formal decision-making and formal treatment of participants. The guidelines are also probably largely uncontroversial in terms of what they seek to achieve in respect of client protection, although not all mediators would agree that they should be asked to form professional judgments about mediated outcomes. However, the more subtle elements of fairness explored by these authors are less easy to identify when applied to mediation. They write:

One of the most significant contributions of the four-component model is the explicit representation of two previously unrecognized categories of procedural concerns. Specifically, the research literature has not considered the important influences of formal quality of treatment and informal quality of decision making. Doing so acknowledges the important role of group factors on the treatment perceptions of group members as well as the notable influence of group authorities on evaluations of decision making. Prior approaches obscure these two ideas by only comparing formal decision making and informal treatment.⁹⁰

Undoubtedly these concepts can be applied to the mediator's sphere of influence within the negotiation process. Most ADR training courses routinely teach what may be loosely termed impartiality skills, such as establishing equal eye contact with each participant, balancing "air-time" for clients to speak, the management of interruptions and guidelines regarding seating arrangements, etc. The sequence in which the issues are dealt with is less frequently addressed apart from, for example, guidance as to how the mediator should make their own opening address.⁹¹ Mediators' informal conduct should be the subject of a high level of self-reflection and awareness,⁹² although in practice, no training course or textbook can fully prepare

90. Blader & Tyler, *supra* note 79, at 756; *see also* John Thibaut and Laurens Walker, *A Theory of Procedure*, 66 CAL. L. REV. 541 (1978); Robert J. Bies, *International (In)Justice: The Sacred and the Profane*, in *ADVANCES IN ORGANIZATIONAL JUSTICE* 89-118 (Jerald Greenberg & Russell Cropanzano eds., 2001); Robert J. Bies & Joseph S. Moag, *International Justice: Communication Criteria of Fairness*, in 1 *RESEARCH ON NEGOTIATION IN ORGANIZATIONS* 43, 43-55 (Roy J. Lewicki et al. eds., 1986);

91. CHRISTOPHER W. MOORE, *THE MEDIATION PROCESS: PRACTICAL STRATEGIES FOR RESOLVING CONFLICT* 212 (3d ed. rev. 2003).

92. *See* MICHAEL D. LANG & ALISON TAYLOR, *THE MAKING OF A MEDIATOR: DEVELOPING ARTISTRY IN PRACTICE* 120 (2000).

practitioners for the reality of the miniscule nuances and variables of mediation practice.

Leventhal proposed six possible rules for establishing procedural justice in decision-making processes:

[c]onsistency of the procedure across persons and across time; [s]uppression of bias by the decision maker; [a]ccuracy of information; [c]orrectability (*e.g.*, through appeal procedures); [r]epresentativeness, in that all phases of the procedure must represent the basic concerns, values, and outlook of the individuals concerned; [and] [e]thicality, so that the procedure conforms to personal standards of ethics and morality.⁹³

Blader and Tyler also make reference to Leventhal, although they suggest his work did not grow out of a strong theoretical tradition.⁹⁴ Nevertheless, for the purpose of this paper it is suggested that these principles have a high degree of relevance for mediators and the mediation process.

Many aspects of Leventhal's rules have obvious and immediate application to ADR fora. Examples are the need for professional facilitators to treat people on an equidistant basis and in a consistent and respectful manner to have sufficient vigilance and self-awareness to recognize if bias arises and willingness also to take appropriate steps to suppress any deviance from evenhandedness. This might include, if necessary, discontinuing their own involvement as the mediator.

The sequencing of issues and questions in mediation has significant implications for the process and, potentially, the achievement of outcomes. Moore describes as "grand strategies" the decisions made by parties or intermediaries with regard to the approach, emphasis, and sequencing of issues.⁹⁵ Depending on the circumstances, history, and nature of the concerns and relationships involved, Moore offers a "decision tree" approach aimed at ordering the process in a manner potentially most conducive to the circumstances.⁹⁶ As might be expected, he concludes that no single grand strategy is universally appropriate, suggesting instead that, ultimately, mediators must use their own best judgment in such matters.⁹⁷ A useful aperçu of how mediators use questions as a means of achieving outcomes is provided

93. Ludo Van der Heyden et al., *Fair Process: Striving for Justice in Family Business*, 4 FAM. BUS. REV. 1, 4, available at http://www.solvay.edu/PDF/cours/van%20der%20heyden/060509/fair%20process%20_%20FBR%20march2005.pdf (last visited Feb. 17, 2007); see also Gerald S. Leventhal, *What Should Be Done with Equity Theory? New Approaches to the Study of Fairness in Social Relationships*, in SOCIAL EXCHANGE: ADVANCES IN THEORY AND RESEARCH 27, 39-46 (Kenneth J. Gergen et al. eds., 1980).

94. See Blader & Tyler, *supra* note 79, at 747-48.

95. MOORE, *supra* note 91, at 393.

96. See *id.* at 396-99.

97. *Id.* at 400.

by Jacobs.⁹⁸ However, Bush and Folger criticize the mediators in the "adjacent gardens" case study (discussed at length in their seminal "transformative mediation" text) for having themselves made a procedural decision regarding who should participate in the mediation and thus deprived the disputants of the opportunity to address this issue for themselves.⁹⁹

Such blatantly directive actions on behalf of mediators are not universal, although they may be found in certain jurisdictions or settings. Riskin postulates a grid of behaviours and approaches to enable mediators' orientations, strategies, and techniques to encapsulate some of the underlying orientations that might determine mediators' behaviours.¹⁰⁰ These can be interpreted as representing the behaviour and attitudes of mediators with regard to Blader and Tyler's "informal decision-making and qualities of treatment" referred to above.¹⁰¹ Riskin's work received a rejoinder from some commentators located within the transformative model of mediation, notably Kovach and Love, who object to the grid on a number of counts and especially as a template guide as to what mediators should and can do.¹⁰²

IX. DISCUSSION AND CONCLUSION

It is, again, beyond the scope of this discussion to further this debate, except to suggest that Blader and Tyler's research raises at the very least the necessity to pay attention to how the issues raised by both Riskin, Kovach, and Love are addressed. To summarise, understanding the impact on clients of mediators' informal decision-making and the informal qualities of treatment they receive are critical factors in establishing whether or not the process is perceived as fair by those participating in mediation. To reiterate our leitmotif, fairness must be seen in order to qualify as such.

In this paper we have attempted to explore some key themes regarding how the courts struggle to construe fairness and, ultimately, why fairness is in the "eye of the beholder." In investigating the etymology and semantics of the words "fairness" and "justice," we have sought to elicit their nuanced meanings, which, we argue, derive from their historic locations within two major strands of the English language, *i.e.*, its Romance and German heritage. Rather than merely highlighting these differences for the purposes of academic or esoteric

98. Scott Jacobs, *Maintaining Neutrality in Dispute Mediation: Managing Disagreement While Managing Not To Disagree* 34 J. PRAGMATICS 1403, 1410-11 (2002).

99. See ROBERT A. BARUCH BUSH & JOSEPH P. FOLGER, *THE PROMISE OF MEDIATION: RESPONDING TO CONFLICT THROUGH EMPOWERMENT AND RECOGNITION* 115 (1994).

100. See Leonard L. Riskin, *Understanding Mediators' Orientations, Strategies, and Techniques: A Grid for the Perplexed* 1 HARV. NEGOT. L. REV. 7, 38-48 (1996).

101. See Blader & Tyler, *supra* note 79, at 749.

102. See Kimberlee K. Kovach & Lela P. Love, *Mapping Mediation: The Risks of Riskin's Grid*, 3 HARV. NEGOT. L. REV. 71, 71-110 (1998).

interest, we posit that there is a very real sense in which fairness is “grubby” as a result of its Germanic lineage. In passing we should note that this characteristic does not of course apply to all Germanic words nor, conversely, are all Romance words associated with the establishment. We suggest, however, that these roots continue to influence our intuitive thinking processes and may explain some of the problems the judiciary and other legal professionals have with eliciting and applying the “grubbiness” of fairness concepts within the formal justice system’s Romance-influenced “justice” language.

Mediators and others dealing with conflict can benefit from this fundamental understanding of why fairness is visceral and needs to be “seen” by disputants. By exploring any potential criteria for resolution which take account of the earthy nature of fairness as understood from this vantage point, we argue that third party interventions will more closely appreciate and elicit the deeply-held sense of what fairness means to each person involved in a dispute. In doing so, we believe mediators and other conflict resolution practitioners will be better placed to assist those with whom they interact.

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