

Schmediation and the Dimensions of Definition

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INTRODUCTION

In the Fall of 2002, a series of apparently random shootings occurred in the Washington, D.C. area. The shooter's tactics and weaponry led many to refer to these as "sniper" attacks. In a CNN interview prior to the arrest of any suspects, Stuart Meyers, an expert with years of personal experience as a police sniper declared, "This person is not a true sniper. This person is a murder[er]."¹

Definitions present both perils and opportunities when applied to complex human activities. Implied in the comment from Meyers is the idea that term "sniper" has, *by definition*, a set of practice parameters. Some of the parameters are technical descriptions of practice. Had the killer used a handgun or a crossbow, one could imagine a sniper expert going on television to pronounce that the killer was not a sniper because some aspect of his practice fell outside the technical parameters of the definition. In this case, however, the killer's actions bore many of the hallmarks of the technical practice of being a sniper.² The expert was not asserting that the killer was using an inappropriate weapon, inappropriate ammunition, or failed to deliver a lethal shot. Instead, Meyers' assertion illustrates that definitions often imply parameters that are moral constraints on practice. Even if the actions were otherwise consistent with those a sniper might take, the fact that the targets were morally unjustifiable meant that the entire enterprise ceased to be the actions of a "sniper," according to the definition prescribed by Meyers.

The literature describing mediation is filled with examples of similarly prescriptive definitions, and the debate surrounding these assertions is often heated. A mediator is someone who is X. A mediator does Y, and never does Z. "Mediators are impartial."³ "Mediators

1. *Larry King Live* (CNN television broadcast, Oct. 18, 2002) (CNN Transcript #101700CN.V22; transcript on file with the Harvard Negotiation Law Review) (note that the actual transcript reads "This person is a murder."). Many others in the sniper community echoed this sentiment. *See, e.g.*, Late Edition with Wolf Blitzer (CNN television broadcast, Oct. 20, 2002) (CNN Transcript #102000CN.V47; transcript on file with the Harvard Negotiation Law Review) (CNN Firearms Analyst Eric Haney, "[T]hese are a couple sniper wannabes.").

2. *See, e.g.*, "CNN Live Event/Special" (CNN Television Broadcast, Oct. 12, 2002) (CNN Transcript #101202CN.V54; transcript on file with Harvard Negotiation Law Review) (Derek Bartlett, President of the American Sniper Association, "[T]his is a person or persons who is using a long rifle, shooting from a concealed position at innocent civilians. That's not a sniper, that's a murderer.>").

3. *See, e.g.*, COLO. COUNCIL OF MEDIATORS, *MEDIATORS CODE OF PROFESSIONAL CONDUCT* (1995) ("Mediation is a process in which an impartial third party, a mediator, facilitates the resolution of a dispute by promoting voluntary agreement (or "self-

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are trained professionals.”⁴ “Mediators facilitate communication and negotiation.”⁵ “Mediators never evaluate or provide legal advice.”⁶

Despite the definitional voice in such statements, they are virtually never descriptive, empirical assertions. Speakers who assert that “Mediators never do Z” are not saying, “Those who hold themselves out to be mediators never engage in practice Z, according to my research.” Instead, those who offer prescriptive definitions are asserting their vision of what they *wish* were the popularly accepted boundaries of the practice in question. Perhaps their argument calls for the recognition of a new boundary. Perhaps their argument calls for the re-instatement of a currently disfavored boundary. They want either the technical or the normative concept of “mediation” to be understood in a particular way. Just as Meyers decried the murderer’s actions as not being those of a “real sniper,” one hears voices within the mediation community calling for – and even more frequently, asserting – an understanding of what “real mediation” is and who “real mediators” are.

Were this argument merely semantic, few would lose sleep over the question. In application, however, how one draws the boundaries

determination”) by the parties to the dispute.”); N.J. SUP. CT., STANDARDS OF CONDUCT FOR MEDIATORS IN COURT-CONNECTED PROGRAMS (2000), *available at* <http://www.judiciary.state.nj.us/notices/n000216a.htm> (last visited Feb. 20, 2005) (“Mediation is a process in which an impartial third party neutral (mediator) facilitates communication.”).

4. See EEO RESOLVE Program home page, *at* http://www.dlis.dla.mil/EEO/adr_1.asp (last visited Dec. 30, 2004) (“A mediator is a trained professional in conflict resolution.”); Mediation Works Incorporated Divorce Mediation Questions & Answers website, *at* http://www.mwi.org/services/div_qa.htm (last visited Dec. 31, 2004) (“A mediator is a trained professional who helps people with differences have productive conversations.”).

5. See, e.g., UNIF. MEDIATION ACT § 2(1) (2001) (“‘Mediation’ means a process in which a mediator facilitates communication and negotiation between parties to assist them in reaching a voluntary agreement regarding their dispute.”); N.J. SUP. CT., *supra* note 3 (“Mediators promote understanding, focus the parties on their interests, and assist the parties in developing options to make informed decisions that will promote settlement of the dispute.”). One finds more examples of prescriptive definitional assertions with respect even to the *goals* of mediators. See, e.g., AMERICAN ARBITRATION ASSOC., MODEL STANDARDS OF CONDUCT FOR MEDIATORS, Standard IV, *cmt.*, *available at* <http://www.adr.org/sp.asp?id=22118> (last visited Feb. 20, 2005) (“The primary purpose of a mediator is to facilitate the parties’ voluntary agreement.”).

6. One of the most frequently cited journal articles in the long-standing debate over proper mediation activities illustrates (in its title) the tendency to resort to prescriptive definitional argumentation. See Kimberlee K. Kovach & Lela P. Love, *Evaluative Mediation is an Oxymoron*, 14 ALTERNATIVES TO HIGH COST LITIG. 31 (1996).

around practices carries enormous stakes. This article does not suggest that definitions are unimportant. Indeed, it suggests the contrary – definitions can be very important. However, not all *types* of definitions are helpful in identifying appropriate boundaries.

In this article, I use the context of mediation to explore further the dimensions of definitional line-drawing with respect to practices or roles. In Section I, I describe what I call the “schmediation phenomenon,” calling particular attention to ways in which scholars and practitioners have addressed the enormous variety of practices currently labeled “mediation.” In Section II, I provide a framework for understanding various types of definitional practice, and I illustrate each type with reference to current conversations within the mediation community. Finally, in Section III, I highlight the important, but too often unspoken, stakes involved when people offer competing definitions of a practice like mediation. I conclude by cautioning against relying too heavily on any definitional form when the topic is as complex a human activity as mediation. And in particular, I argue that one specific form of definition – the prescriptive-acontextual definition – too often clouds important conversations, unnecessarily and dangerously masking what is truly at stake.

I. MEDIATION, SCHMEDIATION, AND DEFINITIONAL GYMNASTICS

A. *Doctoring and Schmoctoring*

Every practice or profession faces questions about where its boundaries rest. Lawyers, courts, and state bar committees spend considerable energy defining the boundaries of the practice of law. Many people provide information and advice relevant to others’ rights and responsibilities. At what point does their conduct cross into the separately-regulated, definitionally distinct “practice of law”? The same issues arise regarding those who provide information, advice, or services related to the health of their clients. Many seek to make their clients healthier. Only some of those service providers engage in conduct that we have formally defined as the practice of medicine.

Even with practices or professions that operate with definitional restrictions, not all members of the practice or profession adopt identical approaches to their craft. Some lawyers conceive of their roles in terms of being “client-centered” counselors.⁷ Others view the lawyer-client relationship as that of friend, of advocate, of joint venturer,

7. See DAVID A. BINDER ET AL., *LAWYERS AS COUNSELORS: A CLIENT-CENTERED APPROACH* (1991).

or even of hired gun.⁸ Each of these practices may differ without necessarily stepping outside of the boundaries of the practice of law. Similarly, doctors vary in their approaches to medical practice. One doctor may be homeopathic, another traditional, another focused on spiritual healing, and still another on traditional Eastern approaches to medicine. Despite these variations, none of them necessarily ceases to be a doctor when he or she practices. Yet practice variation among professionals helps to highlight and test definitional boundaries.

To illustrate one part of the drive to construct practice definitions, let me introduce the concept of “schmoctoring,” as it was originally coined. In a footnote in his book *Anarchy, State, and Utopia*, Robert Nozick uses the term “schmoctor” as part of an illustrative argument against state-determined allocation of professional resources.⁹ Nozick challenges the argument that the state ought to require doctors to allocate their talents and resources according to medical need (rather than according to some other criterion). He suggests that one could conceive of schmoctoring as “an activity just like doctoring except that *its* goal is to earn money for the practitioner.”¹⁰ If one conceives of schmoctoring this way, then either one would have to accept the argument that schmoctors should allocate their talents according to need, or one must reject the argument that services should be allocated according to the essentialist goal of the practice. Nozick clearly favors the latter course. I am not particularly interested in visiting Nozick’s larger arguments about the proper role of state in society. Instead, I offer his concept of the schmoctor as a springboard into considering the morality of practice variation.

Arthur Applbaum uses Nozick’s schmoctor gambit in his book, *Ethics for Adversaries*, to examine the propriety of so-called role morality.¹¹ According to role morality, one’s actions may be defensible

8. See generally Charles Fried, *The Lawyer as Friend: The Moral Foundations of the Lawyer-Client Relation*, 85 YALE L.J. 1060 (1976) (describing lawyer as friend to the client); WILLIAM H. SIMON, *THE PRACTICE OF JUSTICE: A THEORY OF LAWYERS’ ETHICS* (1998) (exploring lawyer as advocate and the boundaries of that conception); Monroe Freedman, *The Morality of Lawyering*, in DEBORAH L. RHODE & DAVID LUBAN, *LEGAL ETHICS* (4th ed. 2004) (describing the applicability and limitations of the conception of lawyer as hired gun); Judith Maute, *Allocation of Decisionmaking Authority Under the Model Rules of Professional Conduct*, 17 U.C. DAVIS L. REV. 1049, 1066-1108 (1984) (describing a view of “lawyer and client as joint venturers”).

9. ROBERT NOZICK, *ANARCHY, STATE, AND UTOPIA* 235 (1974).

10. *Id.* at 235 n.“*” (italics in original).

11. ARTHUR ISAK APPLBAUM, *ETHICS FOR ADVERSARIES: THE MORALITY OF ROLES IN PUBLIC AND PROFESSIONAL LIFE* (1999).

not by reference to the nature of the action in the abstract, but instead by reference to the role the actor was playing at the time he or she took the action. To illustrate his point regarding role morality, Applbaum uses the character of Claude-Henri Sanson, the executioner of Paris. In Applbaum's rendition of Sanson's apologia, Sanson says, "[Y]ou are wondering how I can detach people's heads for a living? I will tell you. It is my profession."¹² Sanson goes on to call on roles as sufficient to explain any external criticism, saying, "[O]ne of the marks of a true profession is that excellent practice can only be judged by fellow practitioners. You are not an expert of a court opinion or of a surgical procedure; why do you think that you can appreciate the niceties of the executioner's craft?"¹³ Role morality asks whether one can judge, from outside of a role, the decisions of a person within that role.

Applbaum uses the case of *Spaulding v. Zimmerman*¹⁴ to illustrate the modern day challenges of role morality in the context of a more familiar professional practice. Spaulding was a teenager in a car driven by Zimmerman. The car was involved in a very serious accident, and Spaulding wound up filing a claim with Zimmerman's insurance company. Spaulding sought and received treatment from his own doctor. Then, as part of the claims procedure, a doctor from the insurance company examined Spaulding as well. The insurance company doctor confirmed the injuries Spaulding's doctor had discovered: broken ribs, fractured clavicles, and a severe concussion. The insurance company doctor also discovered a life threatening aortic aneurysm about which Spaulding and his doctor knew nothing.¹⁵ Among the questions posed by the case is whether the insurance company doctor had any duty to disclose the discovery to Spaulding.¹⁶ To disclose the injury would subject the doctor's employer to far greater liability. But to say nothing about the discovery would risk Spaulding's life.

Does the insurance company doctor have an obligation to disclose information to a claimant, if such a disclosure would be harmful to

12. *Id.* at 28. See also Arthur Isak Applbaum, *Professional Detachment: The Executioner of Paris*, 109 HARV. L. REV. 458, 474 (1995).

13. APPLBAUM, *supra* note 11, at 29.

14. *Spaulding v. Zimmerman*, 116 N.W.2d 704 (Minn. 1962).

15. *Id.* at 707-08.

16. *Spaulding* is commonly used in legal ethics courses to explore the boundaries of lawyer's responsibilities. In the *Spaulding* case, the insurance company doctor called the insurance company's lawyer. The lawyer was the one who ultimately made the decision not to disclose. In an action brought against the lawyer, the state Supreme Court upheld the lawyer's decision not to disclose.

the insurance company? According to a view akin to natural law, a natural-role view would suggest that doctors are bound by some overarching principles that demand the protection of patients' health. Such a view would not be sympathetic to the hair-splitting suggestion that perhaps this doctor was off the hook because Spaulding was not technically the doctor's "patient" by some definition. Adherents of the natural-law-like view of doctoring, as well as those within other meta-ethical camps such as utilitarianism, would also probably reject an argument that draws a distinction between an "examining physician" (who would hold no duty to disclose) and a "treating physician" (who would have a stronger obligation to Spaulding).¹⁷

Applbaum suggests that a different view, one more akin to legal positivism, would have the doctor responding,

If doctoring is indeed a practice governed by such stringent rules and exclusive ends, then call what I do *schmoctoring* – a different practice with different ends and different role obligations. It's not merely that Spaulding isn't my patient, but that I am not (at least not in this capacity) a doctor. Why am I not free to fashion some other way of employing my science and skill, as long as I do not violate the law or any preprofessional moral obligations that apply to all occupations? I may not lie, cheat, steal, or coerce, just as plumbers and sales clerks may not. But as long as Spaulding is properly informed that, as a *schmoctor*, my role obligations commit me to serve the insurance company, not Spaulding, what is wrong with occupying the role of insurance company *schmoctor*?¹⁸

Applbaum goes on to suggest that practice positivism provides a useful perspective on the question of role morality.¹⁹

My purpose in describing Applbaum's treatment of *schmoctoring* is not to explore the depths of role morality, but instead to use Applbaum's *schmoctor* as an example of the limits of prescriptive definitions. In the *Spaulding schmoctor* case, Applbaum builds on Nozick's hypothetical and describes a person with medical training who opts to take on a reduced set of ethical constraints. The *schmoctor* is not merely a doctor with different ethics. The *schmoctor* is a doctor with

17. For a comprehensive and fascinating treatment of the issues raised by the *Spaulding* case, see Roger C. Cramton & Lori P. Knowles, *Professional Secrecy and its Exceptions: Spaulding v. Zimmerman Revisited*, 83 MINN. L. REV. 63 (1998).

18. APPLBAUM, *supra* note 11, at 50.

19. *See id.* at 58 ("Though role realism is wrong, the doctrine of practice positivism, on the model of legal positivism, is right: a role simply is what it is, and not what it ought to be."). For Applbaum's treatment of his notion of practice positivism, see *id.* at 76-109 (Chapter 5, *Are Lawyers Liars? The Argument of Redescription*).

fewer ethical duties. In this regard, perhaps, the use of the schm-reduplicative label is appropriate. (Putting “schm-” in front of a word, a convention adopted in spoken Yiddish several centuries ago, is generally understood as a sign of derision, belittling, disfavor, or disrespect.²⁰) Schmoctors – professionally beholden to their employer insurance companies, rather than to those a doctor might view as a patient – probably deserve relatively less social admiration. One can imagine a scenario in which society would tolerate the practice of schmoctoring, though it is doubtful that society would hold schmoctors (and their reduced ethical duties) in as high esteem as doctors (with their un-reduced duties).

I am interested in even broader possibilities for adaptations derived from a foundational definition. Schmoctoring is not the only variation one could imagine. “What I practice is very close to doctoring, but it is not entirely within the boundaries you have established for doctoring. So I’ll call it schmoctoring or phloctoring or gloctoring or any other Dr. Seussian label.” One can imagine a staggering number of interlocking definitional circles, each representing the boundaries a given practitioner might prefer to embrace. And not all of them resemble the ethics-shedding of schmoctoring. “I am like a doctor, except I take my patients’ care so seriously that I am willing to lie to insurance companies and hospitals in order to secure them the best care.”²¹ “I am like a doctor in most regards, except that I prescribe pain medicine in doses that will permit a patient suffering from a terminal illness to end her life.” Are these the practice of medicine?

B. *Practice Variation in a World without Schmediation*

With respect to health care, the state has created a system of practice monopoly. Because of this authority, the state can define

20. For a brief history of Yiddish, see LEO ROSTEN, *THE JOYS OF YIDDISH* xxi-xxiii (1968). The most extensive treatment of shm-reduplication comes from Andrew Nevins and Bert Vaux. See, e.g., Andrew Nevins & Bert Vaux, *Metalinguistic, shmetal-linguistic: the phonology of shm-reduplication*, paper presented at the Chicago Linguistic Society 2003, available at <http://www.people.fas.harvard.edu/~nevins/schm.pdf> (last visited Dec. 31, 2004); Andrew Nevins & Bert Vaux, *The Shm-Reduplication Survey*, available at <http://www.ai.mit.edu/projects/dm/shm/index.php> (last visited Feb. 20, 2005). The appropriate phrase is “shm-reduplication.”

21. It is generally understood that many physicians currently engage in such practices. See Rachel M. Werner et al., *The “Hassle Factor”: What Motivates Physicians to Manipulate Reimbursement Rules?*, 162 *ARCHIVES OF INTERNAL MED.* 1134 (2002); Sydney T. Bogardus et al., *Physicians’ Interactions with Third-Party Payers: Is Deception Necessary?*, 164 *ARCHIVES OF INTERNAL MED.* 1841 (2004); Rachel M. Werner et al., *Lying to Insurance Companies: The Desire to Deceive among Physicians and the Public*, *AM. J. OF BIOETHICS*, Fall 2004, at 53.

practice parameters narrowly and precisely. To say that “doctors do not do X” is not necessarily a resort to natural-role, prescriptive definition crafting. Instead, it is a recognition that through the vehicles of licensure and the threat of sanction for unlicensed practice, the state controls the boundaries of doctoring – at least the regulatory boundaries of the practice.²² With this degree of control, therefore, it may be possible for the state to squelch most practice variations. Other than in Oregon, we do not call a physician who prescribes lethal doses of medicine a doctor *or* a schmoctor. We call her a felon.²³

Why do we see comparatively less conspicuous practice variation, as a descriptive matter, among physicians? One possibility, an unlikely one in my estimation, is that virtually all physicians share a common moral conception of their roles. Positive law probably provides a more significant part of the explanation. Regulation fixes the outer parameters of medical practice, severely limiting opportunities for practice variation. The relative uniformity we see among physicians is likely a sign that physicians perceive practice variation as a risky endeavor.

Compared with the medical profession, the practice of mediation operates with virtually no regulation. One would expect, therefore, to see far more practice variation among mediators, and anyone who has spent much time in the field can confirm that this variation exists. Mediators do a wide range of things, all without ever taking off their “mediator” hats. Indeed, because mediators operate without much risk of sanction for variation, positive law provides no reason for mediators to resort to the gambit of titular re-description. Mediators who want to do things differently from their colleagues need not announce, “I am now a schmediator.” They simply engage in whatever practices they want, free to call the enterprise mediation.²⁴ Without stiff controls, practices like mediation adapt to market demands, to developing theories, and perhaps to practitioners’ whims.

22. One could still imagine that a natural-role view would restrict the practice boundaries beyond those established by the state. A doctor might view certain practices as inconsistent with the natural-role morality of the practice, even if the state licensure regime would permit the practices.

23. See Death with Dignity Act, OR. REV. STAT. tit. 13, §§ 127.800-895 (1996) (amended 1999); Roger S. Magnusson, *Underground Euthanasia and the Harm Minimization Debate*, 32 J. L. MED. & ETHICS 486 (2004).

24. It is true that some mediators provide definitional sub-categories. “I am an X-type mediator.” I consider these efforts at sub-categorization further below in the article in section II.D. For purposes of this section, what interests me is the ability of each of these actors to describe their foundational practice as “mediation,” despite their enormous variation in practice.

As a result, we now see an extraordinary collection of people who self-describe as mediators. A retired judge offers her services as a mediator to parties in a high-stakes litigation. Jimmy Carter offers his services in mediating the settlement of an international crisis. A seventh-grade student trained in peer mediation proudly wears a t-shirt that says “Mediator.” A therapist mediates in helping a couple to work through their misunderstandings of each other. These people continue to use the same description of their role, though none would deny that they are engaged in activities that are quite distinct. And each currently can use the “mediator” label without fear that the state will sanction his or her activities, provided they cause no injury.

Because the specter of state sanction does not loom over practitioners, mediators operate without the strict need to consider the definitional boundaries of their practices. Yet many practitioners and scholars have spent considerable time developing definitions, categories, and arguments about the boundaries of mediation. Many in the mediation community care passionately about the boundaries attached to the practice of mediation, and there is very little consensus regarding appropriate limits and definitions. The efforts of those who would define mediation (one way or another) serve as a springboard for exploring some of the most important patterns of definition-crafting – the topic to which section C turns.

C. *Patterns in Definitions*

Most of us grew up imagining that in order to discover the meaning of a word, one needed only to ask a parent or perhaps to look in a dictionary. Adult life taught us that words can have profoundly different meanings.²⁵ The formal study of law teaches, if nothing else, that even relatively simple looking words and phrases can have complex and controversial definitions.

The science and art of constructing definitions poses rich and complex questions, and my purpose here is not to summarize all of the relevant considerations. I would like, however, to call attention to two aspects of definitions that are relevant to the current debates

25. Perhaps some of us would credit Alice in Wonderland:

“When *I* use a word,” Humpty Dumpty said, in a rather scornful tone, “it means just what I choose it to mean, neither more nor less.”

“The question is,” said Alice, “whether you *can* make words mean so many different things.”

“The question is,” said Humpty Dumpty, “which is to be master – that’s all.”

LEWIS CARROLL, *THROUGH THE LOOKING GLASS AND WHAT ALICE FOUND THERE* 94 (1946).

about the appropriate definitions of mediation and mediators: the *prescriptive-descriptive* definitional divide and the *contextual-acentual* definitional divide.

1. *Prescriptive or Descriptive Definitions*

The distinction between prescriptive definitions and descriptive definitions hinges primarily on the intent of the definer. In giving the definition of a word, does one intend to say what the word is supposed to mean, or what people who use it intend for it to mean? Prescriptive definitions might tell a reader what the word means by, for example, providing a history of the word's origin and by breaking it into component sub-meanings. To one who aims for prescriptive definitions, the fact that some people *mis*-use a word does not change the definition of that word. Instead, it is simply evidence that not all people know what the word means. Descriptive definitions, by contrast, concern themselves less with a word's etymological roots, and more with the meaning people give to it when they hear or say it. To overstate it only slightly, descriptive definitions do not care whether the usage is correct, only whether it is a usage.

The event that perhaps best highlights the clash between these competing visions of definitions came in 1961 when *Webster's Third New International Dictionary* was published. It is only a modest oversimplification to describe *Webster's Second* as falling into the *prescriptive* camp – providing “the” meaning of words, with the implication that other uses are improper.²⁶ When *Webster's Third* came along, significant portions of the academic community were aghast to learn that *Webster's Third* had added more than 100,000 new words. The new dictionary included terms like “ain't” and “beatnik,” and it offered additional definitions for existing words – including terms like “puff” and “shall.”²⁷ *Webster's Third* tends quite heavily toward the *descriptive* definition, telling the reader how speakers may intend the word to be understood.²⁸

26. Cf. *Webster's Way Out Dictionary*, BUS. WK., Sept. 16, 1961, at 89 (“Since Dr. Samuel Johnson published his famed lexicon in 1755, dictionaries have been mostly ‘prescriptive’ – establishing what is right in meaning and pronunciation.”).

27. The additional definition for the term “puff” came from Willie Mays, who had uttered not long before the dictionary was published the sentence, “Hit too many homers, and people start puffing you up.” It was MacArthur's quotation, “I shall return” that caused Webster's to add a definition for shall to indicate an expression of determination. See *100,000 Words Become Legal*, CHI. SUN-TIMES, Sept. 7, 1961.

28. For a detailed examination of the changes between these two dictionaries, and the fallout it caused among the lexicography crowd, see JAMES SLEDD & WILMA R. EBBITT, *DICTIONARIES AND THAT DICTIONARY* (1962).

The distinction between prescriptive and descriptive definitions is not always just a matter of subtle nuance. When I was a child attending a summer camp, one of the camp counselors pointed to the dwindling fire, indicated that I ought to adjust some of the half-burned logs, handed me a large glove, and said, "Don't worry, that's an asbestos glove – it's inflammable."²⁹ My counselor was part of the sizeable number of people who use "inflammable" to mean "impervious to flame." A strictly prescriptive definition of the word suggests that the word means precisely the opposite: "capable of bursting into flames." A descriptive treatment of the word's definition would mention my camp counselor's usage as well as the prescriptive definition.³⁰

What is the "real" meaning of a word? In the early 1980s, Bruce Feirstein published the book, *Real Men Don't Eat Quiche*.³¹ As a definition of manhood, even Feirstein would surely admit that his definition is incomplete. Indeed, it would be quite difficult for any negative to serve as a comprehensive definition. Telling us that something is not X does not satisfy our desire to know what it *is*.³² Invoking the qualifier "real" also adds nothing, except perhaps to signal that the author recognizes that some people who otherwise qualify as men seem to be eating quiche. Indeed, the thrust of this use of the term is entirely prescriptive, rather than descriptive. Quiche-eating, one is to assume, is inconsistent with the author's view of the prescriptive (rather than descriptive) definition of manhood.

Legal philosophers have long waged a similar definitional battle over the use of the word "law." In its most simplistic terms, the question is whether "law" means "law as it is" or "law as it should be."³³ Is it appropriate for an immoral or unjust governmental regulation to

29. To be clear, in the mid-1970s, the portion of this exchange I found noteworthy was the counselor's assertion about its inflammability, not the fact that the glove was made of asbestos.

30. Beyond the definitions of singular words, one finds examples of the *prescriptive-descriptive* divide in the usage of phrases as well. Descriptivists have no qualms understanding the phrases "I could care less" and "I couldn't care less" as identical, to the great concern of those who lean toward prescriptive definitions.

31. BRUCE FEIRSTEIN, *REAL MEN DON'T EAT QUICHE: A GUIDEBOOK TO ALL THAT IS TRULY MASCULINE* (1982).

32. J.L. Austin describes qualifiers such as "real," "genuine," and "good" as "trouser words" because they are only comprehensible as components of a definition if we permit the *negative* use of the word to provide the content of the definition – his words, "to wear the trousers." J. L. AUSTIN, *SENSE AND SENSIBILIA* 70 (G. J. Warnock ed., 1962).

33. These are not the only two options, of course. Holmes, for example, described the law as whatever the bad man knows it to be. See Oliver Wendell Holmes, Jr., *The Path of the Law*, 10 HARV. L. REV. 457, 459 (1897).

be termed “law”? Can the morality of law be separated from what the law is?³⁴ Again, in simplistic terms,³⁵ legal positivists tend to describe law “as it is,” for reasons roughly analogous to the practice of providing descriptive definitions. Adherents of a “natural law” view tend instead to describe law “as it ought to be,” in ways that parallel the efforts of those who provide prescriptive definitions in other contexts.

Whether one is prescribing a usage of a word or describing its current use has a profound effect on the definition one offers.³⁶

2. *Contextual or Acontextual Definitions*

The second aspect of definition-making I wish to highlight is the distinction between contextual definitions and acontextual (or global) definitions. Does a word’s meaning adapt, depending on the context? Or does it hold a relatively stable meaning, regardless of the circumstance?

With regards to the gender of quiche-eaters, Feirstein is not making a biological or legal assertion. He surely is not claiming that men who eat quiche suddenly become biologically indistinct from women. And he does not argue that men who eat quiche should not have to comply with laws requiring males to register for the draft. Feirstein’s suggestion is that quiche-eating relates to *one aspect*, a behavioral aspect, of what the author believes to be gendered behavior. His suggested modification to the behavioral definition would leave the biological definition intact, as well as many other possible aspects of the definition. In this respect, his definition of “real men” is at least impliedly limited in its context, scope, and purpose.

34. Influential exchanges between Lon Fuller and H.L.A. Hart on the possibility of “conceptual separation” took place in the pages of the *Harvard Law Review* during the mid-twentieth century. For a very accessible synopsis of these (and other) important exchanges, see Robert P. George, *One Hundred Years of Legal Philosophy*, 74 NOTRE DAME L. REV. 1533 (1999).

35. For an extended treatment of the ways in which the relationship between legal positivism and natural law school of thought are not necessarily diametrically opposed philosophies, see *THE AUTONOMY OF LAW: ESSAYS ON LEGAL POSITIVISM* vii (Robert P. George ed., 1996) (calling the binary juxtaposition of legal positivism and natural law theory “dubious, at best”).

36. To be clear, in labeling certain definitions as “prescriptive,” I do not intend to suggest that those suggesting the definition necessarily have a normative view about the propriety of the thing being defined. Some do have such a view, of course, and I address their (inelegant, often inappropriate) use of definitions as a tool of argument in section III below. For purposes of this section, however, what is important is to recognize that some definers reject certain proposed definitions of a word because the *definition* is not “correct” – regardless of their view of the correctness of the definition they are rejecting.

In cautioning against the idea that one might be able usefully to discern acontextual meaning from terms such as “real” or “true,” the early twentieth-century philosopher J. L. Austin wrote

A ‘real’ duck differs from the simple ‘a duck’ only in that it is used to exclude various ways of being not a real duck – but a dummy, a toy, a picture, a decoy, etc.; and moreover I don’t know just how to take the assertion that it’s a real duck unless I know just what on that particular occasion, the speaker has in mind to exclude.³⁷

Without context, many definitions are suspect – and unless the qualifier “real” or “true” somehow provides context, the words remain unhelpfully ambiguous.

Interpreting contractual terms is a circumstance in which the contextual-acentual distinction frequently arises. Recognizing the risks of acontextual interpretation, most courts will look at context in determining the meaning of a particular term.³⁸ If the parties to a contract are part of an industry that attaches specific meaning to a term, for example, then courts will consider that context in interpreting the term’s meaning – perhaps even if the term does not appear to demand a contextual definitional supplement. Many of us learned the implications of contextual meanings during our first efforts at do-it-yourself home-repair, as we discovered that lumber labeled “2 x 4” is neither “2” nor “by 4” in dimension. Context may be dispositive for a court resolving a dispute centered on the term.³⁹

Context matters. And yet, as I will describe below, acontextual definitions are troublingly persistent.

II. WHEN DEFINITIONS AND PRACTICE COLLIDE: THE CASE OF MEDIATION

Defining even a relatively simple word is no easy task. One *might* be able with relative precision to define something like the

37. AUSTIN, *supra* note 32, at 70.

38. The RESTATEMENT (SECOND) OF CONTRACTS makes this explicit, even as to the term “contract” itself. Restatement (Second) of Contracts § 1 (1981) (“In a statute the word [contract] may be given still other meanings by context or explicit definition.”).

39. See, e.g., *Metric Constructors, Inc. v. NASA*, 169 F.3d 747, 752 (Fed. Cir. 1999) (“To interpret disputed contract terms, the context and intention [of the contracting parties] are more meaningful than the dictionary definition.”); Henri E. Smith, *The Language of Property: Form, Context, and Audience*, 55 STAN. L. REV. 1105, 1180-84 (2003) (describing, *inter alia*, the implications of contextual variation on the parol evidence doctrine and on the interpretation of contracts in which third parties’ rights are at stake).

word “yardstick.”⁴⁰ When the word in question involves behavior, however, the task takes on at least two additional complications. First, any time humans are involved, it is reasonable to expect greater variation. If it were easy to describe human activity in simple, clear terms, the field of sociology would be far less rich and demanding. Second, most human practices worthy of description also raise normative questions that risk clouding the descriptive effort. To describe what a human does almost inevitably invites consideration of whether a human ought to do whatever is being described.

Despite the challenges facing those who seek to craft a definition of mediation, I suggest that the two aspects of definition-crafting I described at the end of the last section remain important. Definitions of mediation are either prescriptive or descriptive, and they are either acontextual or contextual.

A. *Prescriptive-Acontextual Definitions*

Some definitions of mediation are purely prescriptive-acontextual in character. That is, they include components at odds with observable practice and usage. They also include no qualifiers or contextual parameters. The definitions at least appear to apply to all uses of the word equally.

“Evaluative mediation is an oxymoron.” The article by this title, written by Lela Love and Kim Kovach, has received extraordinary attention – surely some of it due to the article’s catchy, definition-suggesting title.⁴¹ The article appeared as part of a broader debate about the propriety of mediators assessing likely court outcomes – so-called “evaluative mediation.”⁴² Prior to this article, most of the voices on each side of the facilitative-evaluative debate had limited

40. Even a term with a relatively “simple” definition may not be susceptible to universal definition. “You don’t have to be Ludwig Wittgenstein or Hans-Georg Gadamer to know that successful communication depends on meanings shared by interpretive communities.” *Continental Can Co. v. Chicago Truck*, 916 F.2d 1154, 1157 (7th Cir. 1990) (Easterbrook, J.).

41. See Kovach & Love, *supra* note 6. The title does not, in fact, suggest a definition, but instead suggests a refining negative. At most, it suggests one component of a definition – that which should *not* be included in whatever definition is under consideration.

42. For a brief sample of the divergent viewpoints, see Marjorie Corman Aaron, *Evaluation in Mediation*, in DWIGHT GOLANN, *MEDIATING LEGAL DISPUTES* 267-305 (1996) (considering evaluation as a strategic mediation choice); Lela P. Love, *The Top Ten Reasons Why Mediators Should Not Evaluate*, 24 FLA. ST. U. L. REV. 937, 948 (1997) (arguing against all evaluations under the title “mediation”); Leonard L. Riskin, *Understanding Mediators’ Orientations, Strategies, and Techniques: A Grid for the Perplexed*, 1 HARV. NEGOT. L. REV. 7 (1996).

their arguments to why the practice of evaluation was or was not appropriate. The arguments were largely in the nature of trying to define the “best practice” for mediators. The Love and Kovach article, or at least its title, raised the stakes in a sense, by suggesting that evaluation falls outside of the proper definition of mediation. One can almost hear the suggestion embedded in the authors’ argument that those who evaluate should be labeled schmediators – or something else.

“Evaluative mediation is an oxymoron” is a component of a prescriptive definition, as opposed to a descriptive one. Love and Kovach were not contending that no practitioners are providing evaluations. Indeed, it was the very fact that some practitioners were evaluating that caused the authors to write their piece. Instead, what troubled the authors was that there were practitioners out there evaluating *and calling themselves mediators*. This practice, under the name of mediation, offends their normative vision of the proper definition of mediation practice. Hence, their definitional assertion is prescriptive.⁴³

Their assertion is also acontextual. If one is to trust the face of the authors’ rhetoric, evaluation falls outside of the scope of mediation, no matter the context. Recall the earlier set of self-proclaimed “mediators” I listed: retired judges, international diplomats, seventh-grade peer mediators, and therapists dealing with family disputes. The authors almost certainly intended their piece primarily for the retired judges. Yet their assertion on its face suggests a more universal aspect.

A second example of prescriptive-acentual definitions related to mediation is found in many explorations of mediation ethics. “Mediators are neutral.”⁴⁴ Some scholars use the term impartial, some use the term neutral.⁴⁵ Many, however, include one or the

43. Recall that by labeling a definition “prescriptive,” I do not suggest that the definer is laying normative judgment on the activity being included or excluded. Kovach and Love, for example, may very well have no objection to the practice of evaluation. Their objection is with the attachment of that practice to the label “mediation.” There is a prescriptive treatment of the *definition*, not of the underlying practice.

44. For an extended treatment of the implications of claiming – or demanding – neutrality in mediation, see Scott R. Peppet, *Contractarian Economics and Mediation Ethics: The Case for Customizing Neutrality Through Contingent Fee Mediation*, 82 TEX. L. REV. 227, 253-58 (2003).

45. For an example of a scholarly treatment arguing that the terms are conceptually distinct, see Leda Cooks & Claudia Hale, *The Construction of Ethics in Mediation*, MEDIATION Q., Fall 1994, at 55. See also Peppet, *supra* note 44.

other in even the most basic definition of mediation.⁴⁶ Not all of those who call themselves mediators are neutral. This fact alone does not make it prescriptive to define mediators as neutrals. What makes it prescriptive is that this practice variation regarding neutrality is not just a matter of variation-by-error. It is not merely that some people who call themselves mediators mess up and slip out of neutrality.⁴⁷ What makes the inclusion of neutrality in a definition of mediation prescriptive is that not all scholars and mediators embrace the underlying idea that mediators *should* be neutral.⁴⁸

Perhaps the most vivid example of this disagreement over the proper role of neutrality comes from those interested in mediation in the context of international diplomacy. Jimmy Carter was in no way neutral, nor did he view it as integral to his role that he try to be (or even try to pretend to be) neutral. The definition “mediators are neutral” would suggest that Jimmy Carter was not a mediator, a conclusion that is unsatisfying for those who concern themselves with the descriptive aspects of definitions. If one took a poll on the street, asking passers-by to “name a mediator,” Jimmy Carter would probably be among the most frequently named. How then, the descriptivists would ask, could we possibly craft an acontextual definition that does not include him?

B. *Prescriptive Contextual Definitions*

Not all prescriptive definitions are acontextual. Some of those who offer definitions limit the scope of their prescriptive definitional assertions by adding some type of practice parameter. Rather than

46. See, e.g., Jamie Henikoff & Michael Moffitt, *Remodeling the Model Standards of Conduct for Mediators*, 2 HARV. NEGOT. L. REV. 87, 88-89 (1997) (citing examples of constructions of mediation ethics).

47. Instances of malpractice serve as something of a testing ground for definitions. If a definition implies a certain quality of practice, then does a doctor who commits malpractice cease to be a doctor at the moment of the malpractice? With respect to the prescriptive definitions discussed in this section, the issue is not one of malpractice. It is not that a mediator endeavored to refrain from evaluating, but messed up and blurted out an assessment of a likely trial outcome. Instead, the harder example is presented by the mediator who announces her capacity to provide an evaluation, seeks the parties' guidance, receives the parties' consent, and then provides the evaluation.

48. See, e.g., Lawrence Susskind, *Environmental Mediation and the Accountability Problem*, 6 VT. L. REV. 1 (1981). The original draft of the UMA included a definition of “mediator” as “an impartial person or program,” while the version ultimately adopted dropped any reference to impartiality or neutrality. For a complete history of the evolution of the UMA, see The National Conference of Commissioners on Uniform State Laws Drafts of Uniform and Model Acts Official Site, at <http://www.law.upenn.edu/library/ulc/ulc.htm> (last visited Jan. 31, 2005).

saying “mediation is. . .” for all purposes, they say “in this context, mediation means. . .” or “this *kind* of mediator does. . .” Their definitions remain prescriptive, however, because not all of those who practice within the particular context ascribe to the definitional parameters being offered.

One prominent example of prescriptive-contextual definitional work is found in the descriptions and applications of so-called “transformative” mediation. The term “transformative mediation” gained popular attention with the publication of *The Promise of Mediation* by Robert A. Baruch Bush and Joseph Folger.⁴⁹ At the heart of this vision of mediation is the idea that a mediator’s function is limited to two essential tasks: searching for opportunities to empower the disputants to exercise self-determination and self-reliance in solving their own problems (empowerment), and searching for opportunities to help the disputants acknowledge each other as fellow human beings (recognition).⁵⁰ The work of Bush and Folger is clearly contextual – the authors are not asserting that this is the only definition of *any* mediator’s tasks. Instead, they create a subcategory of mediators – transformative mediators – and assign the definition to this more limited set of practitioners. What I wish to highlight is that their definition, though contextual, is also prescriptive.

Bush and Folger present the reader with two different prescriptive definitions in their treatment of mediation. First, they offer a prescriptive definition of “transformative.” A mediation is transformational, according to their definition, if it helps the parties to achieve a particular form of human moral development. That is the only meaning of “transformative” consistent with the authors’ construction. Within their view, therefore, a mediation that enabled a party to resolve an issue and put it behind her would not be properly labeled “transformative.” Nor would a mediation be deemed “transformative” if it caused a massive collapse in the relationship between the parties, a marked escalation of rhetoric, or a fundamental shift in the nature of the dispute. An outsider might report that the mediation session was “transformative,” in that it transformed the dispute, but Bush and Folger’s definition includes a more limited view of the term. It is, therefore, a prescriptive definition.

Second, Bush and Folger appear to attach a procedural definition to an adjective that is facially focused on the outcome. That is, Bush

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

50. For a concise passage summarizing this view of mediation, see *id.* at 20.

and Folger define a mediation's transformative components by reference to the mediators' actions, rather than by reference to the impacts on the parties. The question that follows is this: can a mediator achieve the goals of transformation – that is, of promoting human moral development in mediation – through some other set of practices? In a comprehensive examination of the underlying assertions Bush and Folger make about the adult developmental impacts of this form of mediation, Jeff Seul has argued persuasively that other sets of mediator practice have at least as good a claim of “transforming” disputants.⁵¹ If Seul is correct, as I suspect he is, then Bush and Folger's definition of what is “transformative” is at most prescriptive. They define one path to transformative mediation as the path – a prescriptive definitional move.

The authors' definition of transformative mediation is also prescriptive in its treatment of mediators and their practices. Unlike Love and Kovach, however, Bush and Folger offer a contextual definition. They do not claim that only transformative mediators are mediators.⁵² Instead, they assert that all transformative mediators are engaged in a particular practice. And yet, in practice, one sees more variation among even those who profess to be “transformative mediators” than the authors would presumably countenance. Concerned with the prospect of such variation, some program designers have gone so far as to impose relatively rigid structures and practice parameters on their mediators. For example, the United States Postal Service has explicitly adopted the “transformative” model of mediation in its REDRESS program.⁵³ My anecdotal interviews with REDRESS mediators, however, suggest strongly that actual practices in that program vary considerably from the singular model presented

51. See Jeffrey R. Seul, *How Transformative is Transformative Mediation: A Constructive-Developmental Assessment*, 15 OHIO ST. J. ON DISP. RESOL. 135, 167 (1999).

52. In fact, the authors almost certainly would also admit that they have a normative view of the desirability of the practices they describe. Theirs is not a neutral expose of a range of mediator behaviors. Theirs is a call for mediators to adopt a set of behaviors. Their book was not called, “One of the Possible Benefits of One Kind of Mediation.” The book is called *The* (note the singular) *Promise of Mediation*, BUSH & FOLGER, *supra* note 49.

53. See Tina Nabatchi & Lisa B. Bingham, *Transformative Mediation in the USPS REDRESS Program: Observations of ADR Specialists*, 18 HOFSTRA LAB. & EMP. L.J. 399, 404 (2001). REDRESS is Resolve Employment Disputes Reach Equitable Solutions Swiftly. “REDRESS mediation is a voluntary alternative dispute resolution program offered to employees nationwide as part of the Postal Service's equal employment opportunity (EEO) complaint process. The REDRESS program is generally offered to employees at the informal counseling stage of the EEO process.” U.S. POSTAL SERVICE, REDRESS, at www.usps.com/redress (last visited Jan. 31, 2005).

in program trainings.⁵⁴ The mediators with whom I spoke varied not only as a matter of mis-step, but of practice. In the words of one, “I don’t go strictly by the book, but I still consider myself transformative.” This sort of practice variation helps to illustrate why the definitions offered by Bush and Folger are contextually prescriptive, rather than descriptive. Outside of a prescriptive definition of “transformative mediation,” no mediator who is otherwise inclined to describe his or her practice as transformative would need to hesitate in adopting the label.⁵⁵

C. Descriptive Definitions

What can those who would prefer not to craft prescriptive definitions offer with respect to defining mediation? Theirs is a more challenging enterprise, in many ways. The variety of things people do while calling themselves mediators is extraordinary. And yet a good descriptivist would search for the essential and common in those practices.⁵⁶ Consider the definition, “Mediators are third parties, not otherwise involved in a controversy, who assist disputing parties in their negotiations.”⁵⁷ The treatise from which this definition is drawn is almost certainly the most comprehensive, thorough treatment of mediation available today. That the authors of these volumes chose to offer a descriptive definition makes sense, given the breadth of audiences to whom they speak.

This definition has the effect of drawing certain behavioral boundaries. Under this definition, it is not that *anything* one might do is considered mediating. A mediator’s job is to assist the parties with their negotiations – not to design their building, or treat a disease, or fix their car. Intuitively, such behavioral boundaries make

54. Perhaps not surprisingly, each of the mediators with whom I spoke requested anonymity – each telling me that he or she wanted to avoid any possible trouble for having strayed from the accepted path.

55. Note that one possible explanation for the concern over labeling in this particular context deals with access to (or exclusion from) cases. I return to this possibility in section III.A. below.

56. Recall that a truly descriptive definition might include the vast ways in which people *mis*-use the word mediation. While arguments abound about what constitutes the technical practice of mediation, the term “mediation” is also simply mis-used by some. For example, “in Tennessee, courts have used the term ‘mediation’ and ‘binding mediation’ to describe a process in which each party met privately in chambers with the Court to offer testimony, present exhibits and other documentation after which the Court rendered a verdict.” SARAH R. COLE ET AL., *MEDIATION: LAW, POLICY, PRACTICE* § 5:3 n.18 (2d ed. 2003).

57. *Id.* at § 1:1.

sense. And yet, if one examines closely the work of architects, doctors, and mechanics, pieces of their jobs are surely at least related to mediation. No architect practices for long without recognizing the need to help satisfy a range of different interested parties' desires. No doctor practices for long without recognizing the complicated decision making processes at play in families in which one member is seriously ill. And no mechanic goes without seeing disagreements arise within households regarding car repair expenditures and practices. Should they be considered mediators?

Within the notion that mediators are "third parties. . .who assist disputing parties in their negotiations,"⁵⁸ we see a structural component (this is who a mediator is) and a behavioral component (this is what a mediator does). In a dispute between two parties, according to this definition, one of the two parties cannot suddenly claim to be "the mediator." Instead, the mediator is said to be a "third party." Intuitively, this sort of structural limitation makes sense. As one pushes the definition a bit, one quickly sees that there are ways in which this aspect of mediation may be overstated from a descriptive perspective. For example, in a circumstance involving absent clients or constituents, the representative of one side might take on a mediative role, mediating between her constituents and her counterpart – assisting in their negotiations. A manager in an organization may not have an immediate stake in a particular fight, and may step in to help the disputants resolve their issue. The mediating manager is not entirely removed, however, from interest in the outcome or in the process by which the disputants resolve their differences.⁵⁹

Still, the descriptive accuracy of this definition of mediation is relatively high. The vast majority of people out there who are calling themselves mediators *are* trying to help disputants with their negotiations. And the vast majority of them enter the dispute as a mediator, rather than as an initial disputant. Therefore, if descriptive definitions aim only for accuracy, a definition such as this may hit the mark. To one who is interested in learning more about the term being defined, however, accurate descriptive definitions tend to be relatively less helpful. If all we can say about mediators is that they are third parties who try to help disputants as they negotiate, we have said painfully little.

58. *Id.* at §5.3 n.18.

59. See, e.g., Hannah Riley Bowles, *What Can a Leader Learn from a Mediator?*, in MICHAEL MOFFITT & ROBERT BORDONE, *THE HANDBOOK OF DISPUTE RESOLUTION* (forthcoming 2005).

D. *The Ascendancy of Categorization Within Mediation*

One response to the difficulties in crafting both prescriptive and descriptive definitions has been the development of intra-mediation categorization. Some scholars and observers of mediation do not concern themselves so much with the question of who is in or out of the circle of mediators. Instead, they look at the world of those who call themselves mediators and then seek to describe ways of categorizing the population they observe. Their aim is not inclusion or exclusion with respect to the broader term “mediation.” Instead, it is to craft better descriptive tools with which to improve our understanding of what those who call themselves mediators are and what they do.

Len Riskin’s often-cited grids of mediator orientation are an example of an effort to provide categorization – without explicit definition.⁶⁰ According to Riskin’s grids, those who practice mediation have tendencies or orientations with respect to certain questions. And their tendencies may be measured along multiple continua. For example, Riskin suggests that mediators vary in the way they treat problem-definition. Some tend to view problems in narrow terms (Who owes who how much money? What business issues are at stake here?) and some view them in relatively broader terms (What is the ongoing dynamic between these two? What community interests are at stake in this dispute?).⁶¹ The way a mediator conceives of the problem to be solved influences the rest of the mediator’s decisions. Hence, Riskin suggests that both mediators and mediation consumers ought to have an understanding that different mediators fall into different problem-definition categories.

Other efforts to describe the variations among mediators have also stopped short of describing any of the variants as falling outside of the definition of mediation. Shortly after Riskin first published his grid, I described the differences between mediators who adopt transparent and non-transparent approaches to various aspects of mediating.⁶² Put simply, the question of transparency asks about the

60. See Riskin, *supra* note 42; Leonard L. Riskin, *Who Decides What? Rethinking the Grid of Mediator Orientations*, ABA DISP. RESOL. MAG., Winter 2003, at 22; Leonard L. Riskin, *Decisionmaking in Mediation: The New Old Grid and the New New Grid System*, 79 NOTRE DAME L. REV. 1 (2003).

61. See Riskin, *supra* note 42, at 22.

62. See Michael Moffitt, *Casting Light on the Black Box of Mediation: Should Mediators Make Their Conduct More Transparent?*, 13 OHIO ST. J. ON DISP. RESOL. 1 (1997). See also Michael Moffitt, *Will This Case Settle? An Exploration of Mediators’ Predictions*, 16 OHIO ST. J. ON DISP. RESOL. 39 (2000) (describing variations in the transparency – and indeed honesty – with which mediators treat their assessments of the likelihood of settlement in a dispute).

degree to which mediators share their thoughts with the parties. Do they tell disputants what dynamics they observe? Do the mediators share their diagnoses of what is happening between the disputants? Do they describe the processes they intend to follow and the changes in the bargaining dynamic they hope to achieve? Like Riskin, I suggest that mediators and those who work with mediators would be well-served to consider these variations on the mediation theme.

The questions Riskin and I ask, and the categories we suggest, are relevant to mediators regardless of their context. The retired judge will have a problem-definition orientation of one sort or another, under Riskin's grid. Perhaps she will see the dispute as a narrow legal contest. Perhaps she will see it as a larger, ongoing struggle for emotional satisfaction and appreciation between business partners. The same questions face each type of mediator. Is this international mediation about getting food to a particular group of refugees? Or is it about the systems of government in place in this region? Is the schoolyard mediation about a particular name-calling incident or a larger pattern of respect and security? Is the family mediation session about the division of concrete responsibilities, or about an ongoing relationship? Similarly, transparency issues arise for mediators in every context. Should the retired judge share her assessment that the negotiation dynamics are breaking down because of the tactics of one of the lawyers in the room? Should the international diplomat tell the parties what steps she envisions next? Should the schoolyard mediator share her perspective on why the two students can't seem to get along? Should the therapist tell the couple what changes she hopes to see in their interactions?

The move toward categorization is important because strong categorization may ultimately help us better to understand and advance the field. Without good descriptions, observational research is virtually impossible. One cannot test theories about the efficacy of different approaches unless one has the tools with which to differentiate the approaches. Distinguishing one practice from another is important – not for purposes of honing a definition, but for purposes of learning.

The process of categorization may have implied boundaries – limits on the set of behaviors, processes, or people under consideration. George Lakoff suggests that any categorization effort is bound to include “radial categories.”⁶³ Within Lakoff's construct, everyone

63. See GEORGE LAKOFF, *WOMEN, FIRE, AND DANGEROUS THINGS: WHAT CATEGORIES REVEAL ABOUT THE MIND* 91-96 (1987).

might agree to a certain archetypal example of the term under consideration. We might then describe the characteristics of this thing that all would accept as an example of the term to be defined. Around this complete set of characteristics, we could draw a tight circle and state with confidence that all things within the circle *are* whatever the term in question is. For example, if one were constructing a definition of the term “mother,” one might feel confident that a woman who contributes genetic material to an infant, carries the infant, gives birth to the infant, provides care to the infant, and loves the infant, qualifies as a mother. To include all of these things in the core definition, however, raises the prospect of radial definitions. Is a surrogate mother not a mother? Is a woman who adopts a child not a mother? What about a woman in prison who cannot care for her child? How about a den mother?

Riskin and I are attracted to acontextual categorization. These categorizing variables are not prescriptive definitions. People who call themselves mediators vary considerably in their responses to the categorizing questions Riskin and I ask.⁶⁴ Yet neither Riskin nor I would demand that some segment of the responders be labeled schmediators. It is not that we have no opinions about the relative strengths and weaknesses of the various approaches. It is that neither of us has suggested that we ought to exclude certain practices *definitionally*.

III. WHAT LURKS BENEATH DEFINITIONS OF ROLES?

Despite the challenges inherent in definitional efforts, the drive to define mediation in prescriptive terms persists. The explanation is not that we have an insatiable appetite for definitional arguments. Instead, the reason for these ongoing definitional disagreements is that there are important issues *buried* in the bright-line definitions being offered.

64. It may be that those who prescribe narrower definitions of mediation would contest my assertion that Riskin and I are engaged in categorization, rather than definition-crafting. They might accuse us of having implicitly adopted a broad definition before engaging in the category-crafting. Is an intervener who defines problems narrowly in legalistic terms a mediator? Is the intervener still a mediator if he or she offers an assessment of what a court would do with the case? What if he or she did all of the above without ever telling the parties that this is what she or he was doing? One only arrives at the prospect of categorization if one accepts each of these as behaviors within the definitional scope of that which is to be categorized. This response, however, assumes that bright-line definition-crafting is a necessary precursor to an inquiry into categorization. Even if we are incapable of delimiting the outer boundaries of practice, we may nonetheless benefit from clearer intra-practice categories. Neither necessarily depends on the other being strictly fixed.

My concern with bright-line, prescriptive definitional work is that it tends to mask these underlying issues of concern, many of which are critically important to the practice of mediation. In this section, I suggest that five questions may lurk within the relatively simple-sounding questions, “What is a mediator?” and “What does a mediator do?” Though they are too rarely made explicit, one or more of these questions is virtually always underneath a proffered prescriptive definition of a practice like mediation.

Given the costs associated with crafting bright-line, prescriptive definitional boundaries, I suggest that we ought to seek and endorse such definitions only when they are necessary. Only the first two of the five questions I list below depend on bright-line definitional boundaries. When one of those two questions (related to market exclusion and the disbursement of regulatory benefits) is in play, then we must tolerate the costs associated with tailoring a precise definition of the practice. On the other hand, when what is at stake is one of the other implied questions, I suggest that we would be better off avoiding definitional traps altogether.

A. *Who Is Allowed to Do It?*

In some practices, the biggest issue at stake in the definition of a practice is market exclusion. Doctors are allowed to practice medicine. Non-doctors are not. Anyone interested in being able to practice medicine has an extraordinary stake in making sure that the definition(s) involved are crafted in such a way that permits them to continue practicing. This concern is principally relevant only in practices in which market exclusion is possible. The state makes the definition of doctoring relevant by having laws against the unauthorized practice of medicine. Were it not for these laws and the prospect of their enforcement, we might have some other reason to be concerned about who constitutes a “doctor.” Those seeking to practice medicine, however, would not have concern about their ability to practice hinging on the acceptance of a particular definition.

With respect to mediation, concerns over market exclusion only rarely underlie definitional arguments. There are no general laws regarding the unauthorized practice of mediation. If anyone can hang a shingle, declaring himself to be a mediator, no one needs to be concerned about *formal* exclusion from the market. Anyone with a shingle (or more modernly, a website and a business card) can set up shop as a mediator without fear of state sanction stemming from extra-definitional practice.

In narrow contexts, of course, the state does establish restrictions on who can serve as a mediator. An appellate court mediation program might define the pool of program mediators in a way that requires mediators to be attorneys.⁶⁵ A social service agency might require all mediators to be social workers or psychologists, and many programs have training requirements.⁶⁶ These are not, however, full-blown exclusionary definitions. The appellate mediation program is not suggesting that only lawyers can be mediators – that mediators are by definition a subset of lawyers. Instead, the program is merely regulating that which it has the power to control – the profiles of those who wish to serve as mediators within its program.

In mediation, therefore, only a small part of the persistent debate over prescriptive-acontextual, bright-line definitions can be explained by concerns of market exclusion. Where market exclusion is a genuine possibility, we must, of course, draw the lines carefully and with precision. Market exclusion requires a prescriptive definition of the boundaries of the practice. Yet given the rarity of such exclusions in the context of mediation, this category of circumstances is not significant enough to justify generalized, prescriptive definition-crafting.

B. *Who Should Get Regulatory Benefits?*

While the state has not gotten into the business of controlling mediation practice through the mechanism of excluding certain people from practice, the state shapes the practice of mediation in other important ways. In particular, the state provides regulatory benefits to certain practitioners, while withholding them from others. This line-drawing related to regulatory benefits prompts vigorous definitional debate over who qualifies as a mediator – and therefore who gets the benefits.

A prominent, current example of the fight for regulatory benefits relates to the confidentiality provisions found in the Uniform Mediation Act (UMA) and in similar state codes. The UMA protects mediation confidentiality by awarding evidentiary privileges to certain

65. Appellate mediation programs in the federal courts uniformly require mediators to be attorneys. See Robert W. Rack, Jr., *Thoughts of a Chief Circuit Mediator on Federal Court-Annexed Mediation*, 17 OHIO ST. J. ON DISP. RESOL. 609, 614-15 (2002); Roselle L. Wissler & Robert W. Rack, Jr., *Assessing Mediator Performance: The Usefulness of Participant Questionnaires*, 2004 J. DISP. RESOL. 229, 241-42 (2004).

66. For example, “domestic relations mediators must have masters degrees in mental health in some jurisdictions, law degrees in other states, and no educational degrees in still others.” COLE ET AL., *supra* note 56, at § 11:2.

participants in mediation sessions. To receive this regulatory benefit, one must be a “mediation party” (prompting the question, what is a mediation?), a “mediator” (prompting the question, what is a mediator?), or a non-party participant in a mediation.⁶⁷ Holding a privilege (a device the privilege holder can choose to use or waive at his or her discretion) is relatively attractive. One might not be surprised, therefore, that those within the mediation community who were involved in the drafting of the UMA sought the broadest possible definition of the relevant terms.⁶⁸ Yet, as with any regulatory benefit, line-drawing is important. The stake underlying the definition-crafting in the UMA was access to confidentiality protections.

A second example of definitional debates being driven by concerns over access to regulatory benefits is the question of mediator immunity. As an empirical matter, very few mediators are ever subject to lawsuits for their practice.⁶⁹ As I have argued elsewhere, this lack of lawsuits against mediators should not be mistaken for evidence that mediators – unlike their colleagues in other fields – are not making any mistakes. Instead, the biggest reason for the lack of lawsuits is that it is extremely difficult to sue a mediator successfully. Among the many reasons why mediators are such an unattractive target for litigants is that some jurisdictions afford a form of immunity to mediators. Some states have passed statutes providing qualified immunity to mediators.⁷⁰ Those statutes present the same line-drawing challenges as the UMA example described immediately above.

In other states, courts have created quasi-judicial immunity as a protection for mediators. In constructing quasi-judicial immunity, a court considers whether the activity in question is sufficiently like that of a judge.⁷¹ In a sense, they engage in definitional line-drawing

67. See UNIF. MEDIATION ACT § 2 (2001).

68. See *id.* (“Mediation’ means a process in which a mediator facilitates communication and negotiation between parties to assist them in reaching a voluntary agreement regarding their dispute.”). Richard Reuben, the Reporter for the UMA, described the definition of mediation as “not particularly controversial,” pointing out that the drafters aimed for it to “embrace all types and styles of mediation.” E-mail from Richard Reuben, Associate Professor of Law, University of Missouri-Columbia School of Law, to Michael Moffitt, Assistant Professor of Law, University of Oregon School of Law (Sept. 20, 2004, 5:19am PST) (on file with author).

69. See Michael Moffitt, *Suing Mediators*, 83 B.U. L. REV. 147 (2003); Michael Moffitt, *Ten Ways to Get Sued: A Guide for Mediators*, 8 HARV. NEGOT. L. REV. 81 (2003).

70. See Cassondra E. Joseph, *The Scope of Mediator Immunity: When Mediators Can Invoke Absolute Immunity*, 12 OHIO ST. J. ON DISP. RESOL. 629, 661-62 (1997).

71. The most important articulation of the test for judicially-extended quasi-judicial immunity is found in *Butz v. Economou*, 438 U.S. 478 (1978). Before extending

akin to the radial definitions described above. In the most prominent case related to the extension of quasi-judicial immunity to mediators, the D.C. Circuit considered a complaint against a neutral case evaluator to whom the court had referred a dispute. After deciding the case evaluators' duties were sufficiently judicial to warrant immunity, the court articulated a rule extending immunity to *mediators* associated with the court system as well.⁷² To receive the regulatory benefit, therefore, proximity to the bright-line definition matters.

A final example of access to regulatory benefits being the true stake underlying a definitional argument can be found in jurisdictions with so-called mandatory mediation regimes.⁷³ In those jurisdictions, participation in mediation is a gateway requirement. One cannot, for example, access the courts unless one has first participated (and failed to settle) in mediation. It is not surprising, then, that such requirements prompt the question "What is mediation?" Without some definition of mediation, disputants wishing to thwart the regulatory intent could concoct a simple black-market fix. Disputants could, for example, jointly appear before a plumber, who would say, "By the power vested in me by nobody, I hereby declare you to have participated in a mediation. I'm sorry you didn't settle. That'll be ten dollars." A plumber barely going through the motions is not mediation within any stretch of the construction of these gateway requirements. Nevertheless, access to a state-granted benefit (in this case, access to the court system) hinges on the parameters of a definition of mediation.

The big picture here is not surprising: If the state is going to be giving a benefit to some people (in the form of an evidentiary privilege, immunity from suit, or access to the court system), the state has to decide who gets the benefit and who does not. What *is* perhaps

quasi-judicial immunity, the *Butz* tests require that the actor in question has responsibilities that are sufficiently judicial, that the actor is in jeopardy of future harassment or intimidation by litigants, and that there are other procedural protections in place sufficient to protect injuries inflicted by the actor. *Id.* at 513-17.

72. See *Wagshal v. Foster*, 28 F.3d 1249, 1254 (D.C. Cir. 1994) ("We hold that absolute quasi-judicial immunity extends to mediators and case evaluators in the Superior Court's ADR process."). I have separately criticized the breadth of this grant of immunity. See Moffitt, *Suing Mediators*, *supra* note 69, at 173-75, 200-06.

73. For discussions of the operation and effects of mandatory mediation programs in specific jurisdictions, see Julie Macfarlane, *Culture Change? A Tale of Two Cities and Mandatory Court-Connected Mediation*, 2002 J. DISP. RESOL. 241; John P. McCrory, *Mandated Mediation of Civil Cases in State Courts: A Litigant's Perspective on Program Model Choices*, 14 OHIO ST. J. ON DISP. RESOL. 813 (1999); Roselle L. Wissler, *The Effects of Mandatory Mediation: Empirical Research on the Experience of Small Claims and Common Pleas Courts*, 33 WILLAMETTE L. REV. 565 (1997); COLE ET AL., *supra* note 56, at 7-1 to -79.

striking is that some of those who argue over regulatory benefits speak in prescriptive-acontextual terms (“Who is a mediator?”) rather than in the more precise terms at hand (“Who should get the benefits in question?”). The risks here are considerable, because the definition one crafts for the purpose of dispensing state-created benefits may be (and probably ought to be) quite different from the definition one would craft with the questions listed below in mind. It is no problem that the state would define carefully the pool of practitioners to whom it extends benefits. It is a problem, however, if that same state-created definition is applied to contexts and questions that demand either a different definition or no definition of the practice.

C. *To Whom Should the Market Turn for Services?*

A third set of issues underlying some definitional fights about mediation relates to market share. The demand for mediation is much higher now than it was several decades ago. Many more people are practicing as mediators, and still more *want* to be practicing as mediators. If the market were not an attractive place to be, perhaps no one would care whether more people call themselves mediators. But the market is attractive and increasingly mature, and so there is much at stake in placing definitional parameters around mediation.

This stake underlying definitional disputes is different from the question of precise line-drawing for regulatory benefits because the target of the definition – the person that definitional arguers have in mind – is not a court, but rather a consumer. Many consumers have heard enough about mediation and/or about courts to think that they want “a mediator.” Some consumers are very sophisticated, knowing exactly what *kind* of mediator they want. Many are not so sophisticated. If the market cannot differentiate among different service providers *within* the pool, then the only hope for assuring some control over a share of the market is to draw boundaries around who can be inside the pool to begin with.

I have recently seen a number of advertisements for mediators (and that alone is evidence of the change in the marketplace) in which mediators have described themselves as “real mediators.”⁷⁴ This sounds definitional, but of course, it is laden with the prescriptive definitional problem described above in section I.C. (Do “real”

74. Cf. Floralyn Einesman & Linda Morton, *Training a New Breed of Lawyer: California Western's Advanced Mediation Program in Juvenile Hall*, 39 CAL. W. L. REV. 53, 56 (2002) (describing attorney-mediators who refer to themselves as “real mediators,” in contrast to student mediators); Kimberlee K. Kovach, *What Is Real Mediation, and Who Should Decide?*, DISP. RESOL. MAG., Winter 1996, at 5.

mediators eat quiche?) Asserting that one is a real mediator is either meaningless (because absolutely *anyone* can be a mediator) or laden with implied prescriptive meaning. I am confident that it is intended as the latter. The advertising mediators are seeking to differentiate themselves from others who claim a similar title, and they do so by suggesting an implied definitional exclusion.

Underlying these advertisers' efforts is a concern for market protection. Perhaps some of them seek the crassest form of market protection. ("I'm on board, now pull up the ropes.") Perhaps others are genuinely concerned that a relatively unsophisticated consumer population may be unable to differentiate between services of very different quality. In either event, the fundamental question driving the perceived need for definition is "Who gets the clients?"

D. *What Works?*

"That's not a knife." In a scene from the movie *Crocodile Dundee*, actor Paul Hogan plays a man from the outback of Australia who finds himself in an inner city in the United States.⁷⁵ Suddenly, a man jumps out, puts a knife in Hogan's face and demands money. The Australian looks at the attacker's knife, responds, "That's not a knife," and then taking out his own, much larger knife, says, "Now *this* is a knife." Hogan's character uses the language of definition, but he does not use it as part of a strictly definitional boundary. Instead, his usage suggests functional variation – some things are better than other things. We often call that which works better the "real" thing or even "the" thing, dismissing the other as something else.

I recall one set of clients with whom I worked on a relatively complex set of disputes. After a session in which the parties were able to overcome impasse on a number of important issues, one of the disputants approached me and said, "Now that was mediating!" I took the statement as a compliment, and yet, honesty compels me to report that I remain uncertain what, aside from the favorable result, I did differently than in other sessions with these parties or with others. My efforts did not feel categorically different from those I undertook in sessions that produced no progress. I suspect that this party would not have gone so far as to say that my earlier efforts were not mediating. Yet it was clear that the party associated functional success with the "real" definition of mediation.

75. CROCODILE DUNDEE (Paramount Pictures 1986).

It is not easy to say with any certainty what works well in mediation and what does not. Mediation presents a potential gold mine for someone clever enough to figure out how to do good empirical assessment work. To date, researchers have been largely unable to collect appropriately controlled sets of data, or have been able to measure only aspects of mediation that are relatively less prescriptively interesting to practicing mediators.⁷⁶ Along with our instincts, most of us have anecdotal and experiential evidence about the success of various practices. We must not, however, mask the important evaluative questions with prescriptive definitions that presume to encompass the very questions under examination.

E. *What Behavior Is Appropriate?*

Each of the four questions asked above rests beneath at least some of the definitional fights related to mediation. My perception, however, is that the most important issue lurking beneath these fights has to do with judgments about appropriate behavioral boundaries. Implied within many definitional pronouncements is a normative component, an aspect linked not to practice efficacy, but to practice propriety. At least some view themselves as fighting for the *soul* of mediation.

Many within the mediation community hold the practice of mediation on a high pedestal. Some outside observers would call it a curiously high pedestal, though it is not uncommon for those within a practice to view it more favorably than those outside of the practice. Some practicing mediators liken their work to missionary or other spiritual work.⁷⁷ Even many of those who would not declare themselves to be on a mission from God nevertheless describe the practice

76. For example, researchers have considered questions about what kinds of cases go to mediation, whether they are referred or required by the court, whether parties comply with settlement agreements, how long the process takes compared with other processes, and so on. These are all valuable inquiries, but none truly tells a practicing mediator much about how she or he ought to adapt her or his practice. See *MEDIATION RESEARCH: THE PROCESS AND EFFECTIVENESS OF THIRD PARTY INTERVENTION* (Kenneth Kressel & Dean G. Pruitt eds., 1989) (collecting research on various questions regarding mediation); Douglas A. Henderson, *Mediation Success: An Empirical Analysis*, 11 OHIO ST. J. ON DISP. RESOL. 105, 107-13 (1996) (summarizing research on case characteristics that affect mediation outcomes).

77. Cf. F. Matthews-Giba, *Religious Dimensions of Mediation*, 27 FORDHAM URB. L. J. 1695, 1710 (2000) (arguing, *inter alia*, that mediation offers the practitioner "an opportunity to employ religious values as a positive force toward reconciliation"); Carrie Menkel-Meadow, *And Now a Word About Secular Humanism, Spirituality, and the Practice of Justice and Conflict Resolution*, 28 FORDHAM URB. L. J. 1073 (2001) (considering the relationship of spirituality, moral values, and religion to the practice of conflict resolution).

in “superior” terms. Not long ago, for example, a book declared mediation to be a “path back” for “lost lawyers.”⁷⁸

It is no surprise then, that those who view mediation this way would argue that mediation has important (if implicit) boundaries on acceptable behavior. If it were true that anything goes in mediation – if anyone can be a mediator and do anything – then mediation would not deserve the lofty status these observers assign to it. Indeed, mediation would deserve no moral status whatsoever, because it would be boundless.

So we see definitions at play – *prescriptive* definitions. Those who make these definitional assertions are not contending that everyone who is currently calling herself a mediator is adhering to the speakers’ sense of propriety. In fact, they believe the opposite. This belief in the existence of norm-offending behavior is what drives them to suggest what “mediation” is, implicitly or explicitly, excluding the offending behavior.

Those who advance prescriptive definitions of mediation for the reasons described in this subsection do so primarily with the hope that their definition will *become* descriptive. They hope to advance a self-fulfilling definition. They hope that perhaps, if they repeat often enough that X is not the practice of mediation, people will stop calling X mediation. If that comes to pass, then their definition of mediation as a practice free of X will match the behavior and usage of those engaged in the process.

At stake in many definitional fights is what Lon Fuller might call the “moral integrity” of mediation. Fuller suggests that certain processes (like arbitration) or constructs (like law) have an internal integrity.⁷⁹ Their constituent parts work together to form a functional (Fuller would say “moral”) whole. To tinker with component pieces, however, risks disrupting the internal moral integrity of the enterprise – and therefore the integrity of the enterprise generally.

More than a decade ago, Jim Alfini wrote an article with the subtitle, “Is This the End of “Good Mediation?”⁸⁰ His subtitle was prompted by a question posed by Albie Davis, one of the leaders of the

78. JOHN R. VAN WINKLE, *MEDIATION: A PATH BACK FOR THE LOST LAWYER* (2001).

79. Regarding Fuller’s vision of processes’ moral integrity, see Carrie Menkel-Meadow, *Mothers and Fathers of Invention: The Intellectual Founders of ADR*, 16 OHIO ST. J. ON DISP. RESOL. 1, 13-15 (2000). For a thorough view of Fuller’s works, see *THE PRINCIPLES OF SOCIAL ORDER: SELECTED ESSAYS OF LON FULLER* (Kenneth I. Winston ed., 1981).

80. James J. Alfini, *Trashing, Bashing, and Hashing It Out: Is This the End of “Good Mediation?”*, 19 FLA. ST. U. L. REV. 47 (1991).

development of community mediation in this country, who was voicing concern over developments in Florida's statewide experiments with mediation.⁸¹ Her apparent definitional question was, in fact, a question about propriety. Davis was not asking whether the state would prohibit certain kinds of mediators from practicing. She was not asking whether certain kinds of mediators would receive regulatory benefits, or whether they would be recognized by consumers in the marketplace. She was not even making an assertion about an empirical assessment of whether the practices of those mediators were effective. Instead, underneath her definition rested concern about her conception of the moral integrity of the process about which she cared so deeply.

It is easy to sympathize with those who assert prescriptive definitions for these reasons. For those who have a vision of mediation that is offended by a current practice, how enormously frustrating and painful it is to watch as the term to which they attach so much change so significantly in meaning (or at least usage). One sees parallels on every side of intra-denominational disputes in religious establishments.⁸² The stakes are high when the attachment is so profound to the particular label. And yet in most cases, neither side can successfully claim monopoly on the definitional parameters of the term in question. Absent a larger conversation – perhaps paradoxically, one not focused on definitions – divergent usages are likely to persist.

CONCLUSION

The mediation community faces extraordinary and important decisions. Perhaps the relative youth of mediation as a more organized practice makes the crafting of definitions instinctive. The field of mediation is undergoing a process of speciation – figuring out its boundaries in reference to existing practices or professions. Yet we must be wary of the definitional forms we invite into the dialogue.

Of the critical questions facing mediation today, only a small subset demands bright-line, prescriptive definitions. Should the state take actions to prevent some from advertising their services as “mediation?” To whom should the state grant (and deny) regulatory

81. *See id.* at 47. For more on Albie Davis, see DEBORAH M. KOLB, *WHEN TALK WORKS: PROFILES OF MEDIATORS* 245-77 (1994).

82. For a scholarly account of the ascendancy of fundamentalism and the intra-denominational clashes it has produced in Christianity, Judaism, and Islam, see KAREN ARMSTRONG, *THE BATTLE FOR GOD* (2000).

benefits linked to mediation? Such questions may demand prescriptive definitions and the predictable clarity they offer.

Yet I fear that prescriptive-acontextual definitions figure far more prominently than they should in the dialogue among mediators, scholars, and policymakers. Such definitions make it harder, not easier, to craft wise answers to some of the most pressing questions facing mediation today. How should practicing mediators differentiate themselves from each other in a crowded and confused marketplace? How can we best learn whether certain mediation practices are more effective than others? And what, if anything, constitutes the underlying moral framework of the enterprise? Is there a mediator's equivalent to the fundamental principles that drive many important professions? Prescriptive definitions introduce clumsy proxies into these complex inquiries.

These are critical questions. They are too important to allow them be clouded by the troublesome demands of prescriptive definitions.

Academies have been instituted, to guard the avenues of their languages, to retain fugitives, and repulse intruders; but their vigilance and activity have hitherto been vain; sounds are too volatile and subtile for legal restraints; to enchain syllables, and to lash the wind, are equally the undertakings of pride, unwilling to measure its desires by its strength.⁸³

83. Samuel Johnson, *Preface to a Dictionary of the English Language* 1755, in JAMES SLEDD & WILMA EBBITT, *DICTIONARIES AND THAT DICTIONARY: A CASEBOOK ON THE AIMS OF LEXICOGRAPHERS AND THE TARGETS OF REVIEWERS* 28 (1962).