

STORY AS SERMON AND SEDUCTION

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Let me warn you right now—you may hold a leadership position in a Zealous Litigators political action committee. You may organize the annual Owen Fiss fendschrift and hold a ritual reading of *Against Settlement* every holiday. You may, as a matter of both philosophy and temperament, admire General Sherman’s fiery march through Georgia more than Ghandi’s saltwalk to the sea. Still, I’ll wager, you will like this book.

You will like this book because its editors, Eric Galton and Lela Love, have harnessed the power of narrative to a cause. They have asked a talented group of writers and mediators to lift their able pens and share with the larger public “a rich array of stories about moving, successful, unsuccessful, happy, sad and funny mediations.”¹ The result is a stirring collection of short essays showcasing exactly how inspiring, in both quiet and noisy ways, mediation and the people who participate in it can be.

In the introduction to this volume, the editors suggest that a book of mediation stories is needed both to correct public misperceptions about the process and to bring the theatre of nonadversarial conflict resolution into the popular imagination.² Because courtrooms are largely open to the public, trial lawyers can trumpet their star-turn on the litigation stage without worrying about privacy violations.³ Authors like Harper Lee,⁴ Stephen Vincent Benét,⁵ and John Grisham⁶ built

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¹ Eric R. Galton & Lela P. Love, *Introduction* to *STORIES MEDIATORS TELL* xiii (Eric R. Galton & Lela P. Love eds., 2012).

² *Id.* at xi–xii.

³ *Id.*

⁴ Lee’s *To Kill a Mockingbird* was first published in 1960. HARPER LEE, *TO KILL A MOCKINGBIRD* (1960).

⁵ Benét’s *The Devil and Daniel Webster* was a short story published in a 1936 issue of *The Saturday Evening Post*. Stephen Vincent Benét, *The Devil and Daniel Webster*, GUTENBERG PROJECT AUS., <http://gutenberg.net.au/ebooks06/0602901.txt> (last updated June 2006).

⁶ Grisham has authored novels about the law and lawyering including such notable works as *A Time to Kill*, *The Firm*, *The Pelican Brief*, and *The Client*. JOHN GRISHAM, *THE CLIENT*

careers dramatizing the clash of prosecutorial titans and heroic defenders, and television networks and Hollywood producers have followed suit.⁷ Mediation, on the other hand, is a confidential process and there has been little in the way of big screen attention paid to the drama and denouement that fills a conflict resolver's days. *Stories Mediators Tell* endeavors to even that public relations score.

It would, however, be a mistake to read *Stories Mediators Tell* simply as a brochure lovingly assembled to edify a naïve public. It is equally a work of advocacy, directed as much to the alternative dispute resolution (ADR) community as to the larger world of mediation consumers. Woven into virtually every tale is encouragement for certain practices and discouragement for others. Mapping onto the vocabulary current in the field, the authors urge a humble, facilitative approach, rather than an intrusive evaluative one.⁸ Were the approved practices listed in a how-to book, they would sound hopelessly prosaic: be present, listen, avoid judgment, let the parties engage. But, embedded in New Yorker-worthy short essays, the lessons jump out at us as novel and important.

Because the editors present the goals of the collection as both descriptive and aspirational, a thorough assessment of *Stories Mediators Tell* must proceed on each of these two levels. First, how well does the text work as a portrayal of mediation practice in the second decade of the twenty-first century? Does it provide an accurate picture of the alternative conflict resolution path available to those wary of the litigation route? Will an aggrieved client and her attorney, upon reading this book, be able to make an informed decision about whether to try mediation? And will they have a realistic expectation of the process if they do?

Second, does the text, in the best literary traditions, “transport us into another world?” Does it grab at the heart and surprise us with the complexity and breadth of the human spirit? Does it challenge our assumptions about what angry and sad people embroiled in conflict want? Does it offer up mediation as a process where the most breathtaking and sublime behavioral turns are right around the corner?

(1993); JOHN GRISHAM, *THE FIRM* (1992); JOHN GRISHAM, *THE PELICAN BRIEF* (1992); JOHN GRISHAM, *A TIME TO KILL* (1989).

⁷ Television shows built around fictionalized law practice include *L.A. Law*, *Perry Mason*, *The Practice*, *Ally McBeal*, and *Law and Order*. Movies built around the law or lawyers include, *My Cousin Vinny*, *A Civil Action*, *The Rainmaker*, and *Inherit the Wind*. Best “Law” Television, IMDB.COM, http://www.imdb.com/keyword/law/?title_type=tv (last visited Apr. 13, 2013).

⁸ See Ben J. Cunningham, *The Other Sarah*, in *STORIES MEDIATORS TELL*, *supra* note 1, at 33, 48–49; Eric R. Galton, *A Meeting of Strangers*, in *STORIES MEDIATORS TELL*, *supra* note 1, at 3, 15–17; Galton & Love, *supra* note 1, at xvii–xviii; Debra Gerardi, *Noah’s Gift*, in *STORIES MEDIATORS TELL*, *supra* note 1, at 19, 28–29; Susan M. Hammer, *Sarah McCrae*, in *STORIES MEDIATORS TELL*, *supra* note 1, 57, 68–69.

In a phrase, does it inspire us to imagine that in mediation “great things are possible”?

Let us take the second, easier question first.

STORIES AS INSPIRATION

When addressing the question of why this book contains stories, not actual mediation transcripts, the editors supply reasons both pragmatic and poetic. In some instances, we are told, authors must depart from a mediator’s actual script because telling the narrative “too true” would violate both evidentiary rules and ethical strictures requiring mediators to keep disputant confidences. Not only names, but background circumstances and the specifics of the negotiation must be disguised so the parties do not recognize themselves or their intimate life details.

But, stories, rather than transcripts, are preferable for another reason. Literary license was taken in certain instances to “help the reader step into the shoes of people in the story.”⁹ Authors invented dialogue, embellished characters and added cinematic detail to pique the reader’s curiosity and draw her into the tension of the moment. If we did not care about the disputants described in these “stories,” the question of whether mediation can help them would not matter. But we do care and so we read on, hoping everything will turn out all right.

There are a number of stories that employ literary devices particularly successfully and it is no surprise that these are among the most moving of the volume. In *A Meeting of Strangers*, Eric Galton, an exceedingly talented raconteur, takes us on a journey to West Texas, where Ginny, the defendant in a fatal auto collision case, faces her victim’s grief-stricken daughters.¹⁰ Ben Cunningham, similarly brings into focus the vindictive rage that animates a father in a wrongful death mediation,¹¹ while Jeff Kichaven, author of *The Buzzard*, provides a humorous, yet poignant look at the shifting sentiments of players in an ADA mediation.¹²

In each instance, the authors pull us in with three-dimensional depictions of the protagonists. In Galton’s essay, we are introduced to the lead plaintiff, Jackie, in the following fashion:

Jackie, and her sisters, too, still mourned the fact they did not have a chance to say good-bye to their father. Dad, according to the doctors, had died instantly—“sort of like a bug hitting your

⁹ Galton & Love, *supra* note 1, at xi.

¹⁰ Galton, *supra* note 8, at 3–18.

¹¹ Cunningham, *supra* note 8, at 33–49.

¹² Jeff Kichaven, *The Buzzard*, in *STORIES MEDIATORS TELL*, *supra* note 1, at 93, 93–99.

windshield when you're driving ninety," said one of the physicians. Crystal often commented that "at least Dad didn't suffer"; and Jade would remind them that "he led a vital, healthy life, and he went out strong." Sometimes Jackie found some consolation in such thoughts; but the plain truth was that Dad didn't need to die, and she hadn't been ready for him to die.¹³

Cunningham helps us enter a mourning father's shaken world by explaining the bond the father had with the daughter, now dead:

Art had raised his daughter from the age of three after Sarah's mother succumbed to cancer. Art was the father who'd held Sarah's small hand as he walked her up the school steps on her first day of kindergarten almost forty years before, the father who had taught Sarah how to ride a bicycle, and the father who had driven her and her "boyfriend" on their first "date" to their middle school graduation party when she was almost fifteen. Art, Sarah's "Papa," had watched with deep pride and misty eyes as she graduated from college and embarked on her life as an adult. No father, Art told me, had "ever in the history of the entire world loved a child as much" as he'd loved his Sarah.¹⁴

Finally, Kichaven gives the primary defendant in his ADA mediation his own nickname revealing both the defendant's salient attributes and Kichaven's reactions to them:

The Buzzard. That wasn't really his name, of course, but in my mind's eye, he earned that moniker instantly. His posture was tied up tighter than a new Scotch drum, to borrow from classic sportscaster Dick Lane.

The Buzzard was dressed to impress—well actually, to intimidate: crisply pressed blue suit, powder blue shirt with white collar and cuffs, gold and diamond links, the *de rigueur* yellow power tie, loafers with tassels. The full Gordon Gekko look. I imagined him agonizing over whether to leave his Bentley with the Spanish-speaking valets who park cars underneath my building.¹⁵

The stories associated with these piquant descriptions follow a similar arc. Plaintiff and defendant enter miles apart, lacerated by anger, grief or remorse. The mediation beings. The parties speak and hear each other in new ways. Emotions calm. Intransigence melts. Hearts connect.

When Jackie hears Ginny's anguished apology, she asks to be alone with her. They spend two hours together and walk out arm in arm. They decide to spend Christmas dinner together. In Galton's words,

¹³ Galton, *supra* note 8, at 11–12.

¹⁴ Cunningham, *supra* note 8, at 34.

¹⁵ Kichaven, *supra* note 12, at 94.

In a way, this was an ending and a beginning. There was still much healing to be done. Not everything was neat and tidy and safe, and maybe it would never be completely so. But just as the West Texas weather can turn on a dime and change on you, something in that large West Texas way had changed—something that would likely grow in the retelling.¹⁶

Cunningham's story ends in equally eye-misting fashion with the angry father agreeing to accept the defendant's offer of two-thirds of the policy limits, provided the money is used to set up a college fund for the defendant's daughter, who happens to bear the same name as his own lost loved-one.¹⁷ Kichaven's Buzzard similarly reveals a soft heart underneath an abrasive exterior, agreeing both to redesign an entire shopping center to be wheelchair accessible and to pay whatever number the plaintiff names.¹⁸ When it comes time to pore over the architectural plans to make the stores wheelchair-friendly, we are told, "Buzzy showed just how creative he could be when he set his mind to it."¹⁹

Why stories, then? Because they are more engaging, more memorable and ultimately more persuasive as a "call to arms" than any dry transcript ever could be. Taken together, these stories urge us to deploy mediation, not simply as a tool for settling disputes, but as a means of fundamentally transforming people and their relationships. The book's premise—that mediation works best when the mediator gets out of the way and lets the disputants reveal and respond to their mutual vulnerability²⁰—requires portraits of people who are capable of just this sort of honesty, growth, and change. And, because the stories present a fundamentally optimistic view of the human condition as flawed, but essentially redeemable, the book does leave us with the conviction that in mediation "great things are possible."²¹

LITERATURE AS A CALL TO ARMS

When literature is used as a catalyst for reform, however, there is usually a price to be paid in both nuance and verisimilitude. Consider Harriet Beecher Stowe's triumph of moral suasion, *Uncle Tom's Cabin*.²² As a weapon deployed to further the abolitionist cause, the book was a stunning achievement. It caught the imagination of the country and

¹⁶ Galton, *supra* note 8, at 14.

¹⁷ Cunningham, *supra* note 8, at 46–47.

¹⁸ Kichaven, *supra* note 12, at 97.

¹⁹ *Id.* at 98.

²⁰ Galton & Love, *supra* note 1, at xvi–xvii.

²¹ *Id.* at xviii.

²² HARRIET BEECHER STOWE, *UNCLE TOM'S CABIN* (John P. Jewett & Co., Boston 1852).

became an almost immediate best seller. It sold 10,000 copies its first week and 300,000 its first year of publication.²³ It awakened the nation to the evils of slavery in the ways that the earlier writings of such notables as Ralph Waldo Emerson,²⁴ William Lloyd Garrison,²⁵ Alexis de Tocqueville,²⁶ and Henry Thoreau²⁷ had not. Indeed, when President Lincoln met Stowe in 1862, he is reported to have acknowledged the central role her novel played in igniting anti-slavery sentiment, remarking, “So you are the little woman who wrote the book that started this great war.”²⁸

And yet, as a work of art, Stowe’s work has encountered significant criticism. Derided as hopelessly sentimental, commentators have focused on the idealized, almost cartoonish, nature of its characters.²⁹ Uncle Tom and his patron, Eva, are “too good.” Simon Legree and the others profiting from the slave trade are “too bad.” They are symbols of moral qualities, not living, breathing people who behave in ways we could hope to understand. In his famous essay *Everybody’s Protest Novel*, novelist James Baldwin complains that Stowe’s “medieval morality” revolving around polarized constructions of “black, white, the devil and the next world” was a pamphlet masquerading as a “very bad novel . . . self-righteous [and] virtuous[ly] sentimental.”³⁰

Like Stowe’s work, *Stories Mediators Tell* is whipsawed by its ambition to function as both story and sermon. Sermons are most effective when they trade in idealizations and moral absolutes. These

²³ *Uncle Tom’s Cabin*, HARRIET BEECHER STOWE CTR., <http://www.harrietbeecherstowe.center.org/utc> (last visited Mar. 24, 2013).

²⁴ Noted American transcendentalist philosopher and abolitionist, Ralph Waldo Emerson wrote and spoke out against slavery including his 1855 *Lecture on Slavery*. 2 THE LATER LECTURES OF RALPH WALDO EMERSON, 1843–1871, at 1 (Ronald A. Bosco & Joel Myerson eds., 2001).

²⁵ Prominent American abolitionist, William Lloyd Garrison was the editor of *The Liberator*, an abolitionist newspaper, and co-founder of the American Anti-Slavery Society. *William Lloyd Garrison*, BIOGRAPHY.COM, <http://www.biography.com/print/profile/william-lloyd-garrison-9307251> (last visited Apr. 12, 2013).

²⁶ French Political Philosopher and historian, Alexis de Tocqueville wrote several articles calling for the emancipation of slaves in France’s Caribbean colonies. *His convictions—Slavery and Colonies*, ALEXIS DE TOCQUEVILLE, http://www.tocqueville.culture.fr/en/engagements/e_convi-esclav01.html (last visited Apr., 12, 2013).

²⁷ Noted American transcendental philosopher and abolitionist, contemporary of Emerson, Henry David Thoreau authored essays such anti-slavery pieces as *Slavery in Massachusetts*, and *A Plea for Captain John Brown*. *Henry David Thoreau*, BIOGRAPHY.COM, <http://www.biography.com/print/profile/henry-david-thoreau-9506784> (last visited Apr. 12, 2013).

²⁸ WILLIAM JOHN BENNETT, 1 AMERICA: THE LAST BEST HOPE—FROM THE AGE OF DISCOVERY TO A WORLD AT WAR, 1492–1914, at 284 (2006).

²⁹ See THEODORE R. HOVET, THE MASTER NARRATIVE: HARRIET BEECHER STOWE’S SUBVERSIVE STORY OF MASTER AND SLAVE IN “UNCLE TOM’S CABIN” AND “DRED” (1989); Peter Stoneley, *Sentimental Emasculations: Uncle Tom’s Cabin and Black Beauty*, 54 NINETEENTH CENTURY LITERATURE 53 (1999).

³⁰ JAMES BALDWIN, *Everybody’s Protest Novel*, in NOTES OF A NATIVE SON 13, 13–15 (1955).

exaggerations help clarify the message. But sermons do not purport to supply a faithful rendering of real life. Which takes us back to our first question.

STORIES AS SNAPSHOT

Does *Stories Mediators Tell* provide an accurate depiction of mediation practice, as it exists today? Was that even a goal? The editors themselves appear ambivalent. On the one hand, there is language in the introduction suggesting the editors are aiming to convey precisely, and without gloss, how mediation works. They note, “[o]ur stories were not collected to glorify or to vilify mediation, but to make the process accessible to readers generally.”³¹ The lens, they suggest, is an objective, unfiltered one³²—and, if some of the props or dialogue are invented, this invention only serves to bring the reader closer to an essential truth about the mediation process.

At the same time, the editors are careful to note that the stories selected for this volume are not typical.³³ They concede that truly transformational mediations are rare and that a ping-pong exchange of offers and counter offers remains very much the norm.³⁴ Still, a sustained snapshot of these sorts of horse-trades would provide little in the way of awe or enlightenment. And, since illumination and inspiration are the book’s true end-point, mundane reality takes a backseat to a more utopian vision of what mediation can—and in the contributors’ eyes, should—be.

STORIES FOR THE NEXT VOLUME

It may seem churlish to ask whether *Stories* makes good on its promise to educate using both positive and negative examples. The editors claim they wish to expose both possibility and danger, to shed light on the positive potential and worrisome pitfalls that attend the process.³⁵ But little in the way of a true “cautionary tale” is provided. Out of twenty-eight stories, twenty-six recount cases that either settled during mediation or shortly thereafter. In none of these cases can we really spot anything resembling a non-recoverable misstep on the part of the mediator. In each of these cases the parties are clearly better off

³¹ Galton & Love, *supra* note 1, at xi.

³² *Id.* at xii.

³³ *Id.* at xvii.

³⁴ *Id.*

³⁵ *Id.*

after the mediation than when they started. Of the two non-settling “failures,” one is entitled, *Failed Mediation: A Success Story*,³⁶ lest the reader forget that agreement is not the sine qua non of successful mediation. In one of the few stories to focus on a true error, Eric Galton fesses up to some political stereotyping that angered a disputant, but not enough to abort the mediation.³⁷ Galton’s “blunder,” as he titles his story, resulted from assuming that a black plaintiff in a race discrimination suit is a liberal Democrat when, in fact, the plaintiff was active in his local Republican party.³⁸ Profiling of this type is, of course, undesirable on many levels, as Galton admits, but in this instance the mistake is a venial one.³⁹ The plaintiff professes himself to be offended, Galton apologizes, the case settles.⁴⁰ More importantly, because Galton is a reflective practitioner, he learns from the mistake, noting, “I think my blunder actually made me a more effective mediator, more able to look more fairly and openly at the people I serve.”⁴¹ Even when mediators screw up, uplift ensues.

I agree with Galton and Love that stand-out-cases, both good and bad, warrant examination. We need, as they remind us, “stars as guides” and “buoys to avoid rocks.”⁴² There are many stars in this volume and they serve a valuable function. But perhaps, in a future volume, we could hear tell of some of the sharper rocks that line our mediation shores.

I offer such a story below.

THE NURSERY

Kay almost never went into that room any more, not even to clean. The crib and changing table were covered with a thick layer of dust; the gaily-striped curtains framing the windows were beginning to yellow. Whenever she did wander in, Kay always thought, “I really must clear this out,” but she could never actually bring herself to do it. And so, the nursery stayed as it did, a memorial—like Ms. Havisham’s bedroom—to long-abandoned hopes and regrets.

To the outside world, Kay’s life seemed the picture of structured activity. After the divorce, Kay had calmly and deliberately gone about collecting hobbies that would help fill her nights and weekends. Volunteering at the library, noon-time yoga at the gym, a book club,

³⁶ Carl S. Kaplan & Carol B. Leibman, *Failed Mediation: A Success Story*, in *STORIES MEDIATORS TELL*, *supra* note 1, at 351.

³⁷ Eric Galton, *A Blunder*, in *STORIES MEDIATORS TELL*, *supra* note 1, at 277.

³⁸ *Id.* at 280.

³⁹ *Id.* at 281.

⁴⁰ *Id.*

⁴¹ *Id.* at 282.

⁴² Galton & Love, *supra* note 1, at xvii.

bird watching on the weekends. It was a life; in many ways a pleasant one. It just wasn't the one she imagined she'd be living.

She had not given up that earlier imagined life easily. When her small, mid-Western hamlet did not offer up a suitable mate, she joined an online dating service and put 300 miles on her car the first month. She sipped her way through many awkward coffee dates before finding David, an ex-military man who worked as a postal worker and played the guitar. He was quiet and sometimes detached, but he brought her lilies on their second date and, like her, seemed eager to leave the singles diaspora behind and join the crowd of couples shopping for diapers and wipes at Costco.

When her eggs seemed stubbornly impervious to the scheduled blandishments of David's sperm, she talked David into taking out a loan at their local consumer's union and signing up for in-vitro fertilization at the fancy fertility center 100 miles away. As a girl, she could never bear the sight of needles, but when the doctors at the clinic said she'd have to inject herself in the stomach with hormones for months, she didn't flinch. And, when the first set of eggs didn't "take," she just took it as a sign that motherhood—like everything else in her life—was going to be a bit of a struggle.

When the doctors called to tell her that the latest procedure had gone well, that she and David were the proud "parents" of six fertilized embryos, she thought, finally, things were going to settle down and fly right. But within months, David was spending almost all his time playing his guitar and drinking beers with his band after their regular Saturday night gig. One hot, humid day, a day where Kay felt too tired to sweat, David told her he didn't love her anymore. She wasn't really surprised. Her first thought was, "Well at least I have the babies."

Kay didn't think the divorce would be bitter, but it was. David's dad, for some reason, decided to foot the bill for David's freedom. He set David up with an ambitious young thing from the city. She had fiery red hair, wore big gold jewelry and dizzyingly high heels, and she was bent on showing her partners just how tough she could be. Kay's parents didn't have any money. Even if they did, she wouldn't ask them to help. She felt too ashamed as it was.

Kay eventually hired Sean, a friend of one of her co-workers, who agreed to represent her for a reduced price. He wasn't really a divorce lawyer. In fact, he spent most of his professional life reviewing employment contracts. But Kay knew she needed someone to help her fill out forms. And, besides, she was still counting on being a mom, and if she knew anything about motherhood, it was that it took a little bit of money. She'd let David go—she just needed to be sure that she got the babies.

The idea of mediation was not hers, that's for sure. She actually hadn't known what Sean was talking about when he said he thought they should give it a try. What she did know was every piece of paper Sean filed was costing her. She thought if there was any last bit of David that she recognized, it would be the part of him that wouldn't want to hand over the entire proceeds of the house sale to lawyers.

She still remembers the mediator's office, bright with great light, decorated with expensive succulents she had read about in *House and Garden*. The first part, where the mediator talked about trying to move forward, not back, seemed hopeful. She remembers staring at those tiny cactuses and thinking maybe if she could explain to David how she needed those babies to move forward—and that she'd never ask him for money or help—it might just work out. But she never really got a chance to talk with David at all. They were in separate rooms the whole time.

The mediator seemed impatient with her from the beginning. He couldn't seem to understand why she was so "fixated," as he put it, on those embryos. He kept going back and forth, trying to get her to accept less money and to relinquish the embryos and just "move on." Move on to what she wanted to ask. She was forty-one. She had spent the better part of six years trying to get pregnant naturally and then another three in fertility treatment. Did he think she was just going to be able to hit up a local bar and "make things happen?" All along she had just assumed she'd be a mom. But here she was, not a mom, and now, not even married. This was her last chance.

The strangest thing about this mediation was how it ended. The mediator was so unsympathetic to her, she had concluded he was just one of those workaholic bachelor types who couldn't relate to kids or the desire to have them. Although her lawyer told her cases involving frozen embryos were complicated and the law was ever changing, this mediator declared a judge would "NEVER, EVER" grant her access to the embryos over David's objection. Furthermore, if she didn't agree to just give them up, he'd report to the trial judge the settlement had failed because of her.

But then, the weirdest thing happened. At 6:30 PM he got a call: his wife. His daughter was going off to law school and she needed him home for a last celebratory dinner. When he got that call, it was like some sort of buzzer went off in his brain. He just exploded. He shouted, "You guys have five minutes to hurry up and get out of here because that family is more important to me!" And, Kay remembered thinking to herself, "Exactly."

The above scene is a fictionalized rendering of the mediation that formed the basis of the dispute in *Vitakis-Valchine v. Valchine*.⁴³ The plaintiff in *Vitakis-Valchine* sought to set aside the agreement she reached with her ex-husband in mediation on the grounds that it was signed under duress and coercion.⁴⁴ According to the wife, she signed the agreement because she felt pressured by the mediator and believed she had no alternative.⁴⁵ The mediator told the wife that fighting over her husband's pension, the value of which had not been assessed, made no economic sense, her claims to the frozen embryos were weak and that the judge would hold her responsible if the case did not settle.⁴⁶ The plaintiff felt trapped in the mediator's thrall and signed the paper in front of her. She later regretted that decision, feeling that she would have better met her interests by going to court.⁴⁷

If one is to believe the plaintiff's version of events, the *Vitakis-Valchine* mediation presents a true cautionary tale—a showcase of the more worrisome threats that shadow the mediation field today. In a field increasingly dominated by ex-trial attorneys and judges, it is not rare to hear tell of heavy-handed, coercive tactics imposed on ill-informed or timidly represented clients. A not insignificant body of case law exists generated entirely by unhappy signatories to mediation agreements who seek rescission or reformation due to duress, fraud or coercion in the process.⁴⁸ Courts are unsympathetic to these claims, finding in the vast majority of cases that the mediation agreement should stand;⁴⁹ but the very existence of such satellite litigation attests to the fact that the mediation process is sometimes conducted in ways that thwart rather than promote party self-determination. Racial or political

⁴³ *Vitakis-Valchine v. Valchine*, 793 So. 2d 1094 (Fla. Dist. Ct. App. 2001) (holding that, although under Florida law, settlements may not be set aside based on coercion by a third party, mediators in court-ordered mediations are not typical third parties; the rules governing mediators in court ordered-mediation specifically prohibit the use of coercion to achieve a resolution and it would be unconscionable to hold an individual to an agreement obtained through such a tainted process). This case was remanded back to the trial court to investigate whether the mediator violated the rules governing mediators in court-ordered mediations. *Id.* at 1100.

⁴⁴ *Id.* at 1096.

⁴⁵ *Id.* at 1097.

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ See James R. Coben & Peter N. Thompson, *Disputing Irony: A Systematic Look at Litigation About Mediation*, 11 HARV. NEGOT. L. REV. 43 (2006), for an in depth analysis of litigation involving cases that had previously been mediated.

⁴⁹ See *Morse v. Morse*, 349 S.W.3d 55 (Tex. Ct. App. 2010) (holding that the post-dissolution mediated settlement agreement was binding on the former husband and not subject to revocation); *Mullins v. Mullins*, 202 S.W.3d 869 (Tex. Ct. App. 2006) (holding that the court lacked jurisdiction to amend a qualified domestic relations order and despite the fact the wife removed her consent, the mediated settlement was not ambiguous and was binding); see also *Mediation Case Summaries*, HAMLINE UNIV. SCH. OF LAW, http://law.hamline.edu/dri/mclp/case_summaries.html (summaries of litigation involving previously mediated cases).

profiling of the sort Galton owns up to is far from ideal, but this sort of momentary stereotyping pales in the face of the sustained bullying and badgering that sometimes passes for acceptable mediator conduct.

Ken Cloke, in his contribution to *Stories Mediators Tell*, suggests that every detail in the conflict stories we tell “provides a clue to who we are, what we think, how we feel about ourselves and others . . . what we fear and hope will happen to us.”⁵⁰ I have suggested in earlier work that this is true not simply about our conflict stories, but of our mediation stories as well.⁵¹ The stories we tell about mediation reveal our fundamental assumptions about human nature, the dynamics of conflict, the nature of justice, and the workings of both the adversary system and the rule of law. The authors in this volume have told stories that reveal their fundamental optimism about the power of individuals to change and the power of the mediation process to foster that change. But, as Cloke reminds us, conflict stories, like dreams and fairy tales, have their gaps, silences and untold truths—and we learn as much by the silence as we do by the telling.⁵² The same can be said for mediation stories.

We owe much to Galton and Love and the twenty-two contributors who helped craft this book. It shines a bright light on the mediation process and reminds us of all the good it can do. But, as advocates for the process, we must continue their good work. We must tell all the mediation stories, the happy and the sad, the ones where people are saved and the ones where people are hurt. It is only by telling these more difficult stories—the ones with not such happy endings—that we can continue to evolve as a community of practitioners.

⁵⁰ Kenneth Cloke, *Conflict Stories: Three Cases in Mediation*, in *STORIES MEDIATORS TELL*, *supra* note 1, at 225, 238–39.

⁵¹ See, e.g., Ellen Waldman, *The Concept of Justice in Mediation: A Psychobiography*, 6 *CARDOZO J. CONFLICT RESOL.* 247 (2005).

⁵² Cloke, *supra* note 50, at 240–41.