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Balancing the Scales of Confidential Justice: Civil Mediation Privileges in the Criminal Arena - Indispensable, Impracticable, or Merely Unconstitutional

Shawn P. Davisson

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Balancing the Scales of “Confidential” Justice: Civil Mediation Privileges in the Criminal Arena—Indispensable, Impracticable, or Merely Unconstitutional?

Shawn P. Davisson*

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*"[S]ociety's need for evidence to avoid an inaccurate decision is greatest in the criminal context—both for evidence that might convict the guilty and exonerate the innocent—because the stakes of human liberty and public safety are at their zenith."*¹

I. INTRODUCTION

"You are now being placed under mediation; you have the right to remain silent; and anything you say *can* but *probably won't* be used against you in a court of law." Surely such a facetious attempt at an opening statement should not commence any form of mediation.² But this recognition does not make the statement any less accurate, at least with regard to the enigmatic framework of mediation confidentiality.³ What this mediation *Miranda* does highlight, however, is an increasingly complex mediator's dilemma: to what extent are mediation communications protected, and what degree of disclosure is sufficient to place parties on notice? The web of confidentiality agreements, rules of evidentiary exclusion, common law and statutory privileges, sunshine laws, malpractice exceptions, and ethical disclosure requirements is difficult for even a lawyer mediator to navigate, let alone a community mediator or the actual parties to a mediation.⁴ Of course, this reality ignores the question of much greater consequence: to what extent *should* mediation be confidential or privileged, subsequently leaving competing policy interests in the balance?⁵

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1. UNIF. MEDIATION ACT, Official Comments, § 6(b)(1) (2001).

2. However, some might suggest this type of disclaimer or warning might be appropriate for the newfangled area of criminal mediations that have begun to see modest implementation, e.g., victim/offender mediation. *See generally* Maureen E. Laffin, *Remarks on Case-Management: Criminal Mediation*, 40 IDAHO L. REV. 571, 621-22 (2004).

3. Even this "warning" statement is not entirely accurate, as many courts enforce a good faith requirement during mandatory, court-annexed mediation that would effectively take away any right to remain silent. *See generally* Ulrich Boettger, *Efficiency Versus Party Empowerment—Against a Good-Faith Requirement in Mandatory Mediation*, 23 REV. LITIG. 1, 2-4 (2004).

4. From my brief experience as a court-approved mediator for the Small Claims Division of the Franklin County (Ohio) Municipal Court, it became readily apparent that determining what to tell parties at the beginning of a mediation session with regard to confidentiality is no simple task.

5. For the sake of clarification, it is important to highlight from the outset the potentially confusing terminology associated with a discussion of confidentiality in the legal context, especially as it relates to mediation. The term "confidentiality," while most often referring to a very broad concept that equates, in the current context, to the protection of all communications during and in furtherance of a mediation, is also utilized in a more specific respect when referring to keeping communications out of court via evidentiary privileges. *See* Scott H. Hughes, *The Uniform Mediation Act: To the Spoiled Go the Privileges*, 85 MARQ. L. REV. 9, 24-25 (2001) ("Confidentiality is constructed from two distinct, but intertwined principles which arise out of certain

When confronted with this quandary, the conventional response by the Alternative Dispute Resolution (ADR) establishment—now largely manifested within the Uniform Mediation Act (UMA)⁶—has long favored confidentiality over policies or interests that would threaten to erode the wall that has historically attempted to shield mediation from the outside world.⁷ This somewhat predictable response has been at least partially propagated by a mediation culture emphasizing a traditional and sustained focus on an interest-based paradigm—as opposed to a more rights-based approach—where perpetuation of the institution often sacrifices protection of the single participant.⁸ In other words, the good of the individual must frequently yield to the good of the whole, which is a dynamic not uncommon to the judicial system as a whole.⁹

This classic conflict in the mediation context is only magnified when the competing interests reside within the criminal arena, along the front lines of a constitutional battleground. These exceptional interests, which demand a greater degree of scrutiny, are directly implicated when mediation privileges are aimed at

professional relationships such as: attorney-client, clergy-penitent, doctor-patient, and now, mediator-disputant. Confidentiality represents, first, a positive duty not to disclose secret communications and, second, the freedom to refuse to answer questions in court.”); *see also infra* note 6 (illustrating the distinction between general confidentiality, “outside” confidentiality, and confidentiality in legal proceedings, as seen within the UMA framework).

6. *See generally* UNIF. MEDIATION ACT (2001); *see also infra* Part IV (discussing the UMA).

7. Even so, many ADR scholars recognize the need for limits on confidentiality. *See* Ellen E. Deason, *Predictable Mediation Confidentiality in the U.S. Federal System*, 17 OHIO ST. J. ON DISP. RESOL. 239, 240 (2002) (“The benefits of confidentiality flow from each party’s expectation, during a mediation, that neither the mediator nor the other party will be able to disclose later what transpires. But because mediation confidentiality is not (and should not be) absolute, the strength of this expectation depends on the ability to predict, at least roughly, the limits on disclosure in a future dispute.”); Kevin Gibson, *Confidentiality in Mediation: A Moral Reassessment*, 1992 J. DISP. RESOL. 25, 26 (expressing that some degree of confidentiality may be necessary to maintain the efficacy of mediation, but it would be incorrect to assume absolute confidentiality is necessary); UNIF. MEDIATION ACT, Prefatory Note (“As with other privileges, the mediation privilege must have limits . . . to give appropriate weight to other valid justice system values.”).

8. The fear that seems to persist, and perhaps justifiably so, is that a procedural focus on the protection of individual rights may jeopardize the substantive impact that mediation is capable of producing for participants across a broad spectrum of circumstantial boundaries. For example, in the area of mediation confidentiality, the web of confidentiality caveats enumerated earlier are rarely disclosed to parties in a mediation, at least not in their entirety. The default approach is to inform participants that the mediation is confidential and that the mediator will not voluntarily disclose communications during the mediation. But even where there is selective disclosure regarding exceptions to the confidentiality protection, the parties are never fully informed of the myriad of circumstances under which something said during a mediation may make its way onto the public streets or into the halls of justice, whether caused by actual party disclosure or an “involuntary” disclosure by the mediator.

9. The procedural posture of the current discussion does not even account for the impact, good or bad, that the interest-based paradigm has on the substantive aspects of mediation outcomes. The internal dialogue of the trained mediator does not ordinarily dwell on the question of whether a party is getting at least what they would be entitled to at trial, leaving them no worse off. Whether or not the mediator can even adequately assess the merits of a case, a party’s BATNA (Best Alternative to a Negotiated Agreement) is not of consequence except as a strategic tool for the mediator. Instead, only the willingness of the party to resolve their dispute is emphasized and ensured—i.e., to protect against a coerced settlement.

the criminal system.¹⁰ Classifying such interests as “exceptional” seems fitting in the sense that the classical debate surrounding evidentiary privileges for mediation communications customarily takes the form of “exceptions” to a broad privilege.¹¹ Thus, if we are to commence the discussion from a stipulated premise that a broad mediation privilege is beneficial and/or necessary to foster candor, exhibit neutrality, and maintain the viability of the mediation process, then the debate effectively shifts to a question of what policy interests warrant exceptions to an otherwise categorical privilege and to what degree will those exceptions operate to pierce the veil of confidentiality.

This Article offers an examination of such an exception that arises when a mediation privilege is invoked within a criminal context to exclude evidence. “This potential criminal proceedings exception could become one of the most controversial issues in emerging mediation law.”¹² In addressing the prospects of a mediation privilege that would apply in criminal proceedings, the UMA created a qualified privilege that effectively codifies the traditional legislative and judicial approach of weighing the systemic need for evidence in the criminal setting against the value of the mediation process and the importance of confidentiality to that process.¹³ Following an introductory discussion of the origins of these vying interests—the need for evidence versus confidentiality—in Parts II and III of this Article respectively, the details of the UMA approach are explored in Part IV, along with state reaction to the proposed legislation proffered by the UMA.

10. The drafters of the UMA acknowledged that “society’s need for evidence to avoid an inaccurate decision is greatest in the criminal context—both for evidence that might convict the guilty and exonerate the innocent—because the stakes of human liberty and public safety are at their zenith.” UNIF. MEDIATION ACT, Official Comments, § 6(b)(1).

11. An evidentiary privilege is defined as: “[a]n evidentiary rule that gives a witness the option to not disclose the fact asked for, even though it might be relevant; [or] the right to prevent disclosure of certain information in court, esp. when the information was originally communicated in a professional or confidential relationship.” BLACK’S LAW DICTIONARY 554 (8th ed. 2001). By contrast, substantive privileges are different from evidentiary privileges because “substantive privileges partly or completely shield the holder from liability for certain claims,” while evidentiary privileges “only shield the holder from providing certain evidence.” Eileen A. Scallen, *Federal Privileges in the 21st Century: Relational and Informational Privileges and the Case of the Mysterious Mediation Privilege*, 38 LOY. L.A. L. REV. 537, 538 n.4 (2004).

12. Rebecca H. Hiers, *Navigating Mediation’s Uncharted Waters*, 57 RUTGERS L. REV. 531, 578-79 (2005); see also Hughes, *supra* note 5, at 38-39 (referring to the criminal proceedings exception under section 6(b) as a “more controversial exception” relative to the categorical exceptions under section 6(a)).

13. See *infra* Part IV.B (discussing the specifics of the UMA’s privilege exception for criminal proceedings); see also STEPHEN B. GOLDBERG ET AL., DISPUTE RESOLUTION: NEGOTIATION, MEDIATION, AND OTHER PROCESSES 429 (4th ed. 2003) (“In deciding whether to recognize a mediation privilege, legislatures and courts weigh the need for the evidence against the importance of effective mediation and the utility of confidentiality in promoting the effectiveness of mediation.”). Of course, when this balancing is performed by a judge in a specific case, the evidentiary interest shifts from a systemic need for evidence that lawmakers consider when looking at the utility and policy of a privilege generally to an individualistic need for the particular evidence in question, looking most often to the reliability of the evidence as well as its probative value in the context of the contemporaneous trial.

The position of this Article is that the UMA's qualified privilege for civil mediation communications is unconstitutional as applied to *criminal* proceedings, or at the very least undesirable from a justice perspective.¹⁴ To that effect, the focus of this Article lies principally on the contention that the burden of proof required to overcome the mediation privilege in a criminal proceeding under the UMA—i.e., “substantially outweighs”—is an unconstitutional and undesirable threshold. This thesis will be developed in Part V, which weighs both sides of the debate in a manner similar to that of a court presented with a question of admissibility, although this hearing would not be conducted *in camera*. Finally, Part VI examines possible alternatives to the UMA framework, favoring one approach in particular.

II. ADMINISTRATION OF JUSTICE: THE NEED FOR EVIDENCE

For more than three centuries it has now been recognized as a fundamental maxim that the public . . . has a right to every man's evidence. When we come to examine the various claims of exemption, we start with the primary assumption that there is a general duty to give what testimony one is capable of giving, and that any exemptions which may exist are distinctly exceptional, being so many derogations from a positive general rule.¹⁵

These statements by Dean Wigmore simply recognize the self-evident truth that the administration of justice requires evidence. Whenever otherwise admissible evidence is made inadmissible because of competing interests, such as those anchoring evidentiary privileges, justice is necessarily affected. To what degree justice is affected, and even in what direction (i.e., negatively or positively), are the questions of greatest import; the answers to these questions will often prove dispositive in the ultimate determination of evidentiary admissibility.

In the law, there are two sides to every story. In the context of how mediation privileges impact the criminal justice system, there exists a similar sense of duality. Just as a privilege may keep out evidence adverse to a criminal defendant, a privilege may likewise be invoked to keep out evidence that is potentially advantageous to the defense of the accused.¹⁶ While the truth-seeking

14. The idea for this Article was initially sparked by the decision in *New Jersey v. Williams*, 877 A.2d 1258 (N.J. 2005). In *Williams*, the defendant asserted that the “substantially outweighs” qualifier under the UMA's mediation privilege exception for criminal proceedings “‘substantially’ represents an unconstitutional evidentiary restriction.” *Id.* at 1265. The defendant argued that the court should instead “consider only whether the need [for the mediation communications evidence] ‘outweighs’ the confidentiality interests, a standard that is less burdensome for [the] defendant.” *Id.* at 1265 (emphasis added).

15. *United States v. Bryan*, 339 U.S. 323, 331 (1950) (quoting J. WIGMORE, EVIDENCE § 2192, at 64 (3d ed. 1940)).

16. According to the UMA, the criminal proceedings exception to the mediation privilege was

function of the courts mandates a systemic need for evidence to discover truth generally, this function is most often explored from the prosecution's perspective and in terms of inculpatory evidence. Other principles, specific to the accused, are in place to ensure that criminal defendants have the ability to present a complete defense through offerings of exculpatory evidence.

The following discussion addresses both perspectives, beginning with the State's need for inculpatory evidence, and concludes by placing everything into context to better explain how these situations might arise.

A. *Inculpatory Evidence: Quaere Verum (To Seek the Truth)*

The general need for evidence is based upon the "normally predominant principle of utilizing all rational means for ascertaining the truth."¹⁷ While this so-called truth-seeking function is not explicitly articulated within the language of the Constitution,¹⁸ it is an essential precept recognized by the courts throughout the course of the common law as the singular, threshold function of the judiciary. "It is the fundamental duty of a public court in our society to do justice—to resolve disputes in accordance with the law when the parties don't."¹⁹

It is true that the pursuit of justice is not a one-sided pursuit. Truth and justice equates not only to convicting the guilty, but also to exonerating the innocent. After all, the accused are presumed innocent until proven guilty beyond a reasonable doubt. Ergo, the truth-seeking justification applies equally to both inculpatory as well as exculpatory contexts.²⁰ Nevertheless, for purposes of this discussion, and in an attempt to trace the traditional debate in this area, the truth-seeking function or justice interest will be articulated from the prosecution's

consciously drafted to apply equally to exculpatory as well as inculpatory evidence. See UNIF. MEDIATION ACT, Official Comments, § 6(b)(1) ("[I]t is drafted in a manner to ensure that both the prosecution and the defense have the same right with respect to evidence, thus assuring a level playing field.").

17. *Elkins v. United States*, 364 U.S. 206, 234 (1960).

18. But see the California Constitution's "Right to Truth-in-Evidence" provision:

(d) Right to Truth-in-Evidence. Except as provided by statute hereafter enacted by a two-thirds vote of the membership in each house of the Legislature, relevant evidence shall not be excluded in any criminal proceeding, including pretrial and post conviction motions and hearings, or in any trial or hearing of a juvenile for a criminal offense, whether heard in juvenile or adult court. Nothing in this section shall affect any existing statutory rule of evidence relating to privilege or hearsay, or Evidence Code, Sections 352, 782 or 1103. Nothing in this section shall affect any existing statutory or constitutional right of the press.

CAL. CONST. art. I, § 28(d).

19. *Olam v. Cong. Mortgage Co.*, 68 F. Supp. 2d 1110, 1136 (N.D. Cal. 1999). The court further explained that: "Confidence in our system of justice as a whole, in our government as a whole, turns in no small measure on confidence in the courts' ability to do justice in individual cases. So doing justice in individual cases is an interest of considerable magnitude." *Id.*

20. See, e.g., *Rinaker v. Super. Ct. of San Joaquin County*, 62 Cal. App. 4th 155, 165 (1998). In ruling that a mediator's testimony was admissible in a juvenile delinquency proceeding for impeachment, the court held: "When balanced against the competing goals of preventing perjury and preserving the integrity of the truth-seeking process of trial . . . the promotion of settlements must yield. . . ." *Id.*

perspective. This is primarily based on simplifying the discussion while simultaneously recognizing that the defendant's perspective (i.e., exculpatory evidence) is best presented and understood from a constitutional rights standpoint outlined in the forthcoming section.

Ironically, while the need for evidence from the prosecutor's perspective is often lost among the potential injustice that could occur when a defendant's constitutional rights are at stake, it is the much more common scenario where evidence sought from a mediation is inculpatory in nature.²¹ In other words, prosecutors are the more frequent proponents of mediation evidence, although such cases are still very rare. But the debate too often centers around exculpatory evidence as the sole justification for why mediation communications might be admissible, when the needs of justice, as symbolized by the prosecution's truth-seeking function, should be an equally weighty rationale. Even the UMA, in addressing the criminal proceedings exception, emphasized the conscious effort to "ensure that both the prosecution and the defense have the same right with respect to evidence, thus assuring a level playing field."²²

B. Exculpatory Evidence: Right to Present a Defense

Given the rights-based social structure in which we live our daily lives,²³ it would not be surprising that most non-lawyers, and even some practitioners, would consider the essential right of a criminal defendant to bring forth a proper defense to be of direct constitutional origin. However, there is no mention of any such right among the hallowed words of our founding document. But it is a well-known and vital constitutional precept, even for textualists, that the Constitution is a living document and contains a wealth of rights and laws not found in the ink that soaks the parchment. The Constitution may not explicitly articulate the right of an accused to present a defense; nevertheless, this quasi-constitutional sentiment has been guaranteed to defendants as an aggregate understanding of rights for the accused that are found within the black letter law of the Bill of Rights.

In essence, a defendant is understood to possess a right to a fair trial.²⁴ A fair trial, at its core, translates to both sides having equal opportunity to offer proof in the form of evidence. To the contrary, rules of evidence are in place to sustain certain countervailing policies. But over the latter half of the twentieth century

21. See *infra* Part II.C (outlining various scenarios where both inculpatory and exculpatory evidence can arise during a prior mediation).

22. UNIF. MEDIATION ACT, Official Comments, § 6(b)(1).

23. "There is no more telling indicator of the extent to which legal notions have penetrated both popular and political discourse than our increasing tendency to speak of what is most important to us in terms of rights, and to frame nearly every social controversy as a clash of rights." MARY ANN GLENDON, RIGHTS TALK: THE IMPOVERISHMENT OF POLITICAL DISCOURSE 3-4 (1991).

24. See *Rinaker*, 62 Cal. App. 4th at 165. The court discusses the defendant's constitutional rights pertaining to confrontation and due process. *Id.*

and into the new millennium, "Supreme Court decisions based on the compulsory process clause, the confrontation clause, and the due process clause have held that in some situations the defendant's right to present relevant evidence in her defense must override evidentiary rules to the contrary."²⁵ In other words, the individual constitutional rights of an accused can, should, and quite often do override evidentiary privileges when the circumstances of a case so require. These individual rights—namely compulsory process, the right to confrontation, and due process—are interpreted to collectively embody the commonsense notion that the accused should have the ability to present a proper defense of any accusations brought forward by the State.

1. *Compulsory Process*

The Sixth Amendment to the U.S. Constitution, as applied to the states through the Fourteenth Amendment,²⁶ guarantees that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have compulsory process for obtaining witnesses in his favor."²⁷ The compulsory process clause is considered one of the most "overlooked, underutilized, and rarely discussed" constitutional provisions in the Bill of Rights.²⁸ At first glance, it may seem that compulsory process simply authorizes subpoena power for defendants, which it does. The fundamental guarantee of compulsory process is the right to offer the testimony of witnesses and to subsequently compel their attendance. However, the significance of the right runs much deeper.

To bring this into the context of the current discussion, when an evidentiary privilege, namely a mediation privilege, operates to keep a witness from testifying, compulsory process is inevitably offended. The Supreme Court has interpreted compulsory process to be "a fundamental element of due process of law" and "is in plain terms the right to present a defense, [and] the right to present the defendant's version of the facts."²⁹ This recognition by the Court that compulsory process is a crucial piece of a defendant's right to a fair trial, and that the right "stands on no lesser footing" relative to other rights of the criminal defendant, illustrates the respect that the right to compulsory process demands.³⁰

25. Welsh S. White, *Evidentiary Privileges and the Defendant's Constitutional Right to Introduce Evidence*, 80 J. CRIM. L. & CRIMINOLOGY 377, 381 (1989).

26. See U.S. CONST. amend. XIV, § 1.

27. U.S. CONST. amend. VI; see also *Washington v. Texas*, 388 U.S. 14, 18 (1967) ("The right of an accused to have compulsory process for obtaining witnesses in his favor stands on no lesser footing than the other Sixth Amendment rights that we have previously held applicable to the States.").

28. See Janet C. Hoeffel, *The Sixth Amendment's Lost Clause: Unearthing Compulsory Process*, 2002 WIS. L. REV. 1275, 1276 (2002).

29. *Washington*, 388 U.S. at 19.

30. *Id.* at 18.

2. Right to Confrontation

In addition to compulsory process and various other rights of the accused, the Sixth Amendment also guarantees a criminal defendant the right “to be confronted with the witnesses against him.”³¹ However, as with the compulsory process clause, the confrontation clause has a much greater significance than what may appear on its face. According to the Supreme Court: “Confrontation means more than being allowed to confront witnesses physically. ‘Our cases construing the [confrontation] clause hold that a primary interest secured by it is the right of cross-examination.’”³² Cross-examination, and the coexisting right of impeachment, are the “principal means by which the believability of a witness and the truth of his testimony are tested.”³³

But the right to confrontation and subsequent cross-examination has never been absolute. In *New Jersey v. Williams*, a case involving a mediation privilege, the defendant was charged with aggravated assault and proffered a mediator’s testimony to support a claim of self-defense.³⁴ Ultimately holding that the defendant did not make the requisite showing to overcome the mediation privilege, the court rejected the defendant’s constitutional claims on several grounds, including the assertion that the defendant “received that which the Confrontation Clause guarantees: ‘an opportunity for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, the defense might wish.’”³⁵

Nevertheless, the right to cross-examine and the ability to impeach are crucial elements of presenting a defense. To illustrate, in *Rinaker v. Superior Court of San Joaquin County*, defendants in a juvenile delinquency proceeding for vandalism offered a statement made by the alleged victim in a civil harassment mediation that ran concurrent to the delinquency proceeding.³⁶ The victim admitted in mediation that he did not see who vandalized his car.³⁷ The court permitted the mediator’s testimony as a means of potentially impeaching the victim’s statements at trial if he decided to testify. Recognizing the essential place of cross-examination in the adversarial system, especially in the criminal context, the court held that “[w]hen balanced against the competing goals of preventing perjury and preserving the integrity of the truth-seeking process of trial . . . the promotion of settlements must yield to the constitutional right to effective impeachment.”³⁸

31. U.S. CONST. amend. VI.

32. *Davis v. Alaska*, 415 U.S. 308, 315 (1974) (quoting *Douglas v. Alabama*, 380 U.S. 415, 418 (1965)).

33. *Id.* at 316.

34. 877 A.2d 1258, 1260 (N.J. 2005).

35. *Id.* at 1270 (quoting *Delaware v. Fensterer*, 474 U.S. 15, 20 (1985)).

36. 62 Cal. App. 4th 155 (1998).

37. *See id.* at 162.

38. *Id.* at 167.

3. *Due Process*

If any constitutional maxim embodies the essence of a right of the accused to present a defense, it is the guarantee of due process that permeates every rung of the judicial process ladder. The Fifth Amendment to the United States Constitution, as well as the Fourteenth Amendment in the State context, demands that "no person shall be . . . deprived of life, liberty, or property, without due process of law."³⁹ In layman's terms, due process is effectively a recognition and enforcement of fair play. When the State takes action to prosecute one of its own, it is vital that the accused be given a full and fair opportunity to answer the charges and that procedures be put in place to ensure that the rights of the accused to be heard are protected at all stages of prosecution.

The guarantee of due process is often portrayed as a catch-all provision that inherently encompasses other rights of the accused in a criminal setting. For example, the right to confront and cross-examine witnesses has "long been recognized as essential to due process."⁴⁰ As such, due process is more of an abstract concept that represents a broad right to a fair trial and the protection of procedural and even some substantive rights.⁴¹ Accordingly, when a mediation privilege is invoked to prevent a criminal defendant from proffering testimonial evidence of prior mediation communications, the due process implications are inescapable.

C. *Contexts in Which Evidence Arises*

The preceding sections may identify the primary justifications behind the need for evidence in criminal proceedings, but it is not always clear how this evidence originates in a mediation setting. There are, however, several scenarios where communications made during civil mediations could carry potential criminal implications from both the prosecution and defense perspectives.⁴² In the context of inculpatory evidence, the first and perhaps the most easily comprehended scenario is an admission of past criminal conduct. It is not

39. U.S. CONST. amend. V; *see also* U.S. CONST. amend. XIV, § 1.

40. *Chambers v. Mississippi*, 410 U.S. 284, 294 (1973).

41. The Due Process clause has been interpreted "as imposing two separate limits on government, usually called 'procedural due process' and 'substantive due process.'" ERWIN CHEMERINSKY, *CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES* 523 (2d ed. 2002). Procedural due process applies in the context of evidentiary privileges, and rules of evidence generally, because it concerns "what form of hearing the government must provide when it takes a particular action." *Id.*

42. Although the subject of this article is civil mediations and how criminal evidence may arise therein, various criminal mediation mechanisms (e.g., victim-offender programs, night prosecutor mediation programs, juvenile mediations, etc.) are becoming more prevalent and by their very nature involve the disclosure of potentially inculpatory evidence. Accordingly, and in similar fashion to proffer sessions, criminal mediations require a categorical privilege to keep all communications out of court in order for such mechanisms to operate with any degree of success or to operate at all. *See infra* Part VI.B (proposing an amended privilege for the UMA that includes a categorical privilege for evidence arising from criminal mediations).

difficult to imagine a party discussing a past event that either knowingly or unknowingly involved criminal conduct.⁴³ When a mediation party makes such a statement, it is possible not only that the statement could be used as evidence in a future criminal proceeding but also that an inculpatory statement could actually spark an otherwise unlikely or even incognizable prosecution. Because of this reality, the UMA explicitly states that the various categorical *exceptions* pertaining to criminal activity found in the UMA do not cover “mediation communications constituting admissions of past crimes, or past potential crimes, which remain privileged.”⁴⁴

A similar scenario that likewise involves past criminal conduct and that frequently produces inculpatory mediation evidence is concurrent proceedings. Quite often, circumstances that result in criminal prosecutions also result in a civil action, and vice versa. However, the label “concurrent proceedings” is not meant literally, at least not in a temporal sense. It is when proceedings arise from the same events that the concurrent dynamic is in place. The reason why this scenario is so common, relatively speaking, is because discussing the circumstances of a case during civil mediation will inevitably involve discussing matters relevant to the concurrent criminal proceeding. Because this scenario may be the most common, yet instinctually feels the most unfair to prospective criminal defendants, some have argued for a categorical privilege (i.e., no exception) that would apply only to concurrent proceedings scenarios.

Another unique scenario that can arise in mediation, particularly family law mediations and other situations involving physical abuse or violence, is statements or threats of ongoing or future criminal activity. Because of the immediacy of such a scenario and the ability to prevent further harm from occurring, as well as the policy of preventing abuse of the mediation forum, most lawmakers have provided exceptions for these scenarios where a privilege might otherwise prevent disclosure. The UMA carves out several categorical exceptions

43. An example given by the UMA explains that “discussions of past aggressive positions with regard to taxation or other matters of regulatory compliance in commercial mediations remain privileged against possible use in subsequent or simultaneous civil proceedings.” UNIF. MEDIATION ACT, Official Comments, § 6(a)(4). The communications would also remain privileged against use in criminal proceedings unless the UMA’s criminal proceedings exception applied, which is of course the subject matter of this Article.

44. *Id.* § 6(a)(4). Section 6(a) of the UMA enumerates three categorical exceptions that pertain to potential criminal activity by a mediation party:

There is no privilege under Section 4 for a mediation communication that is:

- (3) a threat or statement of a plan to inflict bodily injury or commit a crime of violence;
- (4) intentionally used to plan a crime, attempt to commit or commit a crime, or to conceal an ongoing crime or ongoing criminal activity; . . .
- (7) sought or offered to prove or disprove abuse, neglect, abandonment, or exploitation in a proceeding in which a child or adult protective services agency is a party. . . .

Id. § 6(a).

for these types of scenarios,⁴⁵ and the justifications implicate alternative public policy rationales beyond, or perhaps in spite of, the need for evidence.⁴⁶

Unlike with inculpatory evidence, there are not as many well-defined scenarios where potentially exculpatory communications are made during a mediation that could be used in a future criminal setting.⁴⁷ However, there is one scenario similar to that discussed in the inculpatory context that has the potential to produce exculpatory evidence. Where a civil action runs concurrently with a criminal prosecution, and the civil case is mediated, it would seem likely that something said during such mediation, although almost always privileged in the actual civil action,⁴⁸ might be of exculpatory value for the criminal phase.

For example, in *New Jersey v. Williams*, the defendant was charged with aggravated assault and proffered a mediator’s testimony pertaining to the alleged assault victim’s statement in a concurrent civil harassment mediation that he attacked the defendant first.⁴⁹ The court prohibited the testimony under a statutory mediation privilege, and the trial resulted in the defendant’s conviction. The New Jersey Supreme Court upheld the conviction, applying the UMA analysis, even though the mediator verified after the conclusion of the assault trial that the alleged victim admitted, during the mediation, that he was the primary aggressor.⁵⁰

One can also speculate, in the same concurrent civil/criminal dynamic, that criminal defendants might sometimes wish to testify themselves about communications made during a civil mediation. However, not only would the Federal Rules of Evidence act to keep most such evidence out as hearsay, but this scenario would likewise be covered by most mediation privileges because the other party has the authority to block any testimony involving mediation communications, regardless of the first party’s obvious waiver.⁵¹ Under the

45. *See id.*

46. *See, e.g.*, UNIF. MEDIATION ACT, Official Comments, § 6(a)(3) (“The policy rationales supporting the privilege do not support mediation communications that threaten bodily injury or crimes of violence. To the contrary, in cases in which a credible threat has been made disclosure would serve the public interest in safety and the protection of others.”); *id.* § 6(a)(4) (“[I]t should be noted that this exception is intended to prevent the abuse of the privilege as a shield to evidence that might be necessary to prosecute or defend a crime.”); *id.* § 6(a)(7) (“An exception for child abuse and neglect is common in domestic mediation confidentiality statutes, and the Act reaffirms these important policy choices States have made to protect their citizens.”).

47. The case law in this area is sparse, as in the area of mediation privileges generally (especially involving criminal proceedings), and the notable cases that do exist mostly involve self-defense evidence. *See, e.g.*, *New Jersey v. Williams*, 877 A.2d 1258 (N.J. 2005); *State v. Castellano*, 460 So. 2d 480 (Fla. Dist. Ct. App. 1984).

48. Under the UMA, and most state law, there exist very few exceptions where something said during a civil mediation could ever be used in a trial for the same civil action. The justifications for privilege in such a scenario parallel the rationales for an absolute privilege for statements made during a criminal mediation when offered in a criminal case on the same matter.

49. *Williams*, 877 A.2d 1258.

50. *Id.* at 1270.

51. Of course, this is also the difficult reality for every scenario where someone other than the declarant testifies to a statement made during mediation, even when a *mediator* is subpoenaed to testify regarding

UMA's criminal proceedings exception, even absent hearsay considerations, it is unlikely that any communications from a mediation would ever be admissible when testified to by the defendant, rather than the mediator or even the other mediation participants.⁵² Regardless, the defense will always attempt to secure the testimony of the mediator, as opposed to the defendant, in a case where the judge permits evidence of the mediation communications, unless the mediator is physically unavailable to testify or is otherwise made "unavailable" at law.⁵³

Exculpatory circumstances are not always restricted to concurrent scenarios, however. In *Florida v. Castellano*, the defendant was charged with attempted first-degree murder and sought to subpoena a mediator's testimony concerning the alleged victim's statements in mediation to support a claim of self-defense.⁵⁴ The subject of the mediation was a previous altercation between the defendant and the alleged victim. The defendant ultimately claimed that the mediator would be able to testify that "during the course of the mediation the person who became the victim of the alleged attempted murder made life-threatening statements to the [defendant]."⁵⁵ The court held that, because Florida did not have a statutory

statements made during mediation. In such scenarios, the disputants' statements would be inadmissible hearsay as testified to through the mediator unless an exception somehow acted to take the evidence out of the hearsay rule's grasp. See FED. R. EVID. 801, 802. The two most relevant exceptions, although still applied sparingly, are: (1) "Statement against interest," found in Federal Rule of Evidence 804(b)(3), where the declarant must be unavailable (which is probable in this context due to either a mediation or Fifth Amendment privilege), the statement must tend to subject the declarant to civil or criminal liability, and if criminal liability is the "interest," then there must be other corroborating evidence; and (2) "Residual exception," found in Rule 807, where a declarant's statement may fall into the rare catch-all category serving the interests of justice.

The problem in an exculpatory context, as opposed to when statements would be inculpatory and introduced by the prosecution, is that the prevalent "Party-Opponent Admission" exception, which is technically *exempted* from the hearsay definition by Federal Rule of Evidence 801(d)(2). When statements are made by the defendant in a mediation and used against the defendant in a later prosecution, the evidence would constitute an "admission by [a] party-opponent" because a defendant is necessarily a "party" in a criminal prosecution. However, even though it may be somewhat intuitive to consider an alleged victim in criminal case as a "party" in addition to the government, courts have consistently held otherwise. See *Willover v. State*, 70 S.W.3d 841, 847 n.10 (Tex. Crim. App. 2002) (addressing the question of whether the victim in a criminal case is a party-opponent under the hearsay rule and citing various precedents holding that a victim is not a party).

Therefore, in a scenario where the defendant seeks to admit exculpatory statements made by an alleged victim during a civil mediation, the evidence would be considered inadmissible hearsay unless falling within the scope of the other exceptions discussed above. Notably, however, the lack of hearsay treatment in both cases and writings discussing mediation privileges is quite puzzling. In fact, a text search of the UMA reveals that the word hearsay is completely absent from both the text and commentary of the Act.

52. The weight of the proffered evidence in these cases would almost never outweigh, let alone substantially outweigh, the public's need for confidentiality in mediation because it is the criminal defendant who is testifying. See *infra* Part IV.B (outlining the criminal proceedings exception for privileges under the UMA). Furthermore, the negligible weight that a jury would attach to such testimony does not raise the same degree of justice concerns under the circumstances.

53. However, hearsay problems would seem to remain a ubiquitous obstacle in the quest for admissibility of even a mediator's testimony. See *supra* note 51 (addressing the hearsay issues that exist when seeking to admit mediation communications).

54. See *State v. Castellano*, 460 So. 2d 480 (Fla. Dist. Ct. App. 1984).

55. *Id.* at 481.

mediation privilege at the time, there was “no legal basis for a privilege which would prevent the [defendant] from obtaining [the mediator’s] testimony.”⁵⁶

Finally, while this Article will focus more heavily on the constitutional rights of the accused from an exculpatory perspective (rather than the State’s need for inculpatory evidence), society’s evidentiary interest is more than just exculpatory in nature. We may, as a society, make the conscious decision to err in favor of acquitting the guilty rather than convicting the innocent, but this does not mean that the interest in convicting the guilty should *necessarily* be subservient.⁵⁷ Justice equates to condemnation of the guilty just as it translates to vindication of the innocent. How we now frame the issue and the interests at stake inevitably shapes the ultimate analysis when attempting to balance the scales.

III. CONFIDENTIALITY AND THE COURTS

All relationships and communications are not created equal. This recognition may seem quite unremarkable, but as a characterization of how confidentiality has developed in the law, it would act as a telling subtitle for Cliff’s Notes on Confidentiality. Whether for a lack of reliability or probative value, or for reasons of public policy, and whether by means of statutory or common law, the legal system has a storied—albeit convoluted—tradition of protecting the confidential from entering the courtroom. However, as with most legal inquiries, the question of exactly what relationships are most valued at law and to what extent resulting communications are protected is most appropriately answered with the classic lawyerly retort: “It depends.” Although not entirely tangential to the current discussion, in the interest of avoiding a synoptic digression on confidentiality in the law, it is nevertheless sufficient, and worthwhile, to touch upon the most influential mechanisms employed by the courts in this area.⁵⁸

56. *Id.* at 482. Following the *Castellano* trial, in response to the court’s call that “the legislature is the proper branch of government from which to obtain the necessary protection,” the Florida legislature passed a statute that created a privilege for all parties in a mediation conducted by the Citizen Dispute Settlement Center (CDSC). *See* FLA. STAT. ANN. § 44.201(5) (2003). In 2004, the privilege portions of the statute were deleted in favor of a general mediation privilege, created in a different statute, that would still apply to CDSC mediations. *See id.* § 44.405(2); *Castellano*, 460 So. 2d at 482. Notably, the old and new privileges, unlike the UMA, do not confer a privilege upon the mediator; only when both parties waive their privilege do the mediations communications become unprotected. *See* FLA. STAT. ANN. § 44.405(4)(a)(1) (West Supp. 2007).

57. Hoeffel, *supra* note 28, at 1361 (“The criminal justice system was designed to reflect the most undesirable verdict as that of the conviction of the innocent.”).

58. The drafters of the UMA actually considered some of these other methods. *See infra* note 117 (discussing the alternative mechanisms considered by the UMA when deciding upon implementation of the privilege structure).

A. *Historical Sources of Refuge*

1. *Contracting for Confidentiality*

The first, and most easily understood, method of maintaining confidentiality across a wide range of scenarios is the confidentiality agreement. However, this frequently used tool is unfortunately of little consequence in the evidentiary context.⁵⁹ Confidentiality agreements operate to keep another party from disclosing information generally, and such disclosure may come with stiff legal consequences, but the contractual right has no authority to affect the operation of the judicial system. In other words, parties cannot contract to keep out evidence in subsequent legal proceedings because this would effectively be a form of private legislation. Nevertheless, confidentiality agreements maintain a significant role in keeping private mediation communications out of public discourse.⁶⁰

2. *Rules for Excluding Evidence of Compromise*

The second mechanism for protecting confidentiality, one that does operate to exclude certain communications from court, is the rules of evidence. Generally, there are many evidentiary rules that operate to exclude evidence, including evidence that might be inadmissible due to lack of relevance, the danger of unfair prejudice, hearsay limitations, or witness competency. One such rule most germane to the domain of mediation confidentiality is Federal Rule of Evidence 408.⁶¹ The “compromise discussion” exclusion of Rule 408 acts to forbid evidence relating to negotiations of a disputed legal claim from admissibility at trial.⁶² The rule has been justified on public policy grounds,

59. See *supra* note 5 (discussing the distinction between privileges, which operate to keep evidence out of a legal proceeding, and confidentiality generally, which targets “outside” disclosure).

60. See UNIF. MEDIATION ACT, Official Comments, § 8 (“In some situations, parties may prefer absolute non-disclosure to any third party, in other situations, parties may wish to permit, even encourage, disclosures to family members, business associates, even the media. These decisions are best left to the good judgment of the parties, to decide what is appropriate under the unique facts and circumstances of their disputes. . . . *Such confidentiality agreements are common in law, and are enforceable in courts.*” (emphasis added)).

61. See FED. R. EVID. 408. The text of FRE 408 reads:

Evidence of (1) furnishing or offering or promising to furnish, or (2) accepting or offering or promising to accept, a valuable consideration in compromising or attempting to compromise a claim which was disputed as to either validity or amount, is not admissible to prove liability for or invalidity of the claim or its amount. Evidence of conduct or statements made in compromise negotiations is likewise not admissible. This rule does not require the exclusion of any evidence otherwise discoverable merely because it is presented in the course of compromise negotiations. This rule also does not require exclusion when the evidence is offered for another purpose, such as proving bias or prejudice of a witness, negating a contention of undue delay, or proving an effort to obstruct a criminal investigation or prosecution.

Id.

62. GOLDBERG ET AL., *supra* note 13, at 429.

primarily as a means of promoting a settlement-rich environment but also in response to the fear that a jury could attach undue weight to communications that "may be motivated by a desire for peace rather than from any concession of weakness of position."⁶³

Although courts have applied Rule 408, and comparable state statutes, to negotiations regardless of whether a mediator is involved (i.e., the rule applies to mediations), many lawyer mediators, as well as those in the ADR field, have become increasingly wary, or at the very least uncertain, of the rule's protection of mediation communications.⁶⁴ This concern is principally a function of what the rule does not cover, including: mediations that do not involve actual and unliquidated legal claims, discovery requests of the confidential communications, and communications that are admissible for other purposes, such as proving bias or prejudice of a witness, because the rule "excludes only when the purpose is proving the validity or invalidity of the claim or its amount."⁶⁵ Accordingly, in the interest of either expanded protection or at least greater predictability, commentators have advised that "Rule 408's shortcomings in protecting mediation communications provide justification for a mediation privilege and suggest its design."⁶⁶

3. *Evidentiary Privileges*

The final, and by far the most widely utilized, method of excluding confidential communications from the evidentiary pool is the "privilege."⁶⁷ Despite the controversy that customarily surrounds evidentiary privileges, which

63. FED. R. EVID. 408 advisory committee's note (discussing the reasons behind the rule); *see also* GOLDBERG ET AL., *supra* note 13, at 429.

64. *See, e.g.*, Alan Kirtley, *The Mediation Privilege's Transition from Theory to Implementation: Designing a Mediation Privilege Standard to Protect Mediation Participants, The Process and the Public Interest*, 1995 J. DISP. RESOL. 1, 13-14 (1995) ("Evidence Rule 408's weakness is that it does not require exclusion of evidence from a negotiation offered for 'another purpose' Since mediation discussions tend to be free flowing and often unguarded . . . [t]he 'another purpose' clause in the hands of creative counsel leaves little in mediation definitely exempt from disclosure."). *But see generally* Charles W. Ehrhardt, *Confidentiality, Privilege, and Rule 408: The Protection of Mediation Proceedings in Federal Court*, 60 LA. L. REV. 91 (1999); *id.* at 126 ("Rule 408 clearly protects the confidentiality of mediation proceedings.").

65. FED. R. EVID. 408 advisory committee's note; *see also* GOLDBERG ET AL., *supra* note 13, at 429. Because this Article is focused on the mediation privilege in criminal proceedings, it is important to note an additional limitation that may exist as to the application of Rule 408. Assuming the mediation from which the communications arise is not a criminal mediation, it is possible that the mediation communications would be admissible "for another purpose," such as proving "the guilt of a criminal defendant." *Id.*

66. Kirtley, *supra* note 64, at 13. Interestingly, when assessing which mechanism would be most effective to protect confidentiality, the UMA drafters considered "the extension of evidentiary settlement discussion rules to mediation"—implying that such rules, including FRE 408, did not cover mediation communications. UNIF. MEDIATION ACT, Official Comments, § 4. The UMA passed on the idea of extending settlement discussion rules because they proved "underbroad in that they failed to meet the reasonable needs of the mediation process or the reasonable expectations of the parties in the mediation process." *Id.*; *see also supra* note 117 (discussing other alternatives considered by the UMA to protect confidentiality).

67. *See supra* note 11 (defining the term "privilege").

is a by-product of the perception by some that “privileges expressly subordinate the goal of truth seeking to other societal interests,”⁶⁸ the privilege structure remains the preeminent mechanism because of its scope and flexibility.⁶⁹ A derivation of English common law, privileges first arose with the establishment of the compulsory process—now guaranteed by the Sixth Amendment⁷⁰—which created a right of the accused to call witnesses and the coinciding duty of those witnesses to testify.⁷¹ The American privilege is now a labyrinth of predominantly state statutory and federal common law that subverts this duty to testify in the context of certain professional, social, or otherwise confidential relationships.⁷²

From the first recognition of an attorney-client privilege in the late sixteenth century to the Supreme Court’s announcement of a psychotherapist-patient privilege only a decade ago,⁷³ privileges have been extended to cover a myriad of relationships over the course of the law’s development.⁷⁴ The specific policy rationales offered to justify evidentiary privileges have endured over time, despite continued assault from dissenters, including a large judiciary contingent, who seek to limit the scope and impact of privileges.⁷⁵ Supporters, and even some courts, continue to focus principally on the cultivation of candor and encouraging

68. *Developments in the Law—Privileged Communication: I. Introduction: The Development of Evidentiary Privileges in American Law*, 98 HARV. L. REV. 1450, 1454 (1985) [hereinafter *Privileged Communication I*]. The controversy with evidentiary privileges is generally a function of their role. Unlike many other procedural and evidentiary rules, which exclude evidence out on grounds of relevance or prejudice, or “otherwise to aid in the truth-seeking function,” privileges “impede the realization of a central objective of the legal system in order to advance other, often less immediate, goals.” *Id.*; see also Hughes, *supra* note 5, at 32–33 (“Most rules of evidence are intended to aid an adjudicative body’s search for truth by distinguishing unreliable information from more probative evidence; rules of privilege, in contrast, exclude information which may be extremely helpful to the court in its search for the truth.”).

69. See UNIF. MEDIATION ACT, Official Comments, § 4 (“The Drafters ultimately settled on the use of the privilege structure, the primary means by which communications are protected at law, an approach that is narrowly tailored to satisfy the legitimate interests and expectations of participants in mediation, the mediation process, and the larger system of justice in which it operates.”).

70. See *supra* Part II.B.1 (discussing compulsory process under American constitutional law).

71. See *Privileged Communication I*, *supra* note 68, at 1455–56 (tracing the privilege mechanism back to the imposition of compulsory process in England).

72. States have slowly progressed to statutory privileges in the majority of scenarios. However, the federal courts, as a result of FRE 501, maintain a common law approach to the enforcement of existing privileges and the creation of new privileges. See FED. R. EVID. 501 (“[T]he privilege of a witness, person, government, State, or political subdivision thereof shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience.”).

73. See *Jaffee v. Redmond*, 518 U.S. 1 (1996).

74. See generally *Privileged Communication I*, *supra* note 68 (discussing the development of the American privilege). A quick look at California’s Evidence Code reveals at least six readily identifiable statutory privileges: lawyer-client, spousal, physician-patient, psychotherapist-patient, clergy-penitent, counselor-victim, and mediator-disputant. See CAL. EVID. CODE §§ 950–1037, 1115–28 (West 2005).

75. See Kirtley, *supra* note 64, at 3 (“These new rules of mediation privilege have emerged . . . against the current of judicial resistance to court created evidentiary privileges.”); see also *In re Parkway Manor Health Care Ctr.*, 448 N.W.2d 116, 121 (Minn. Ct. App. 1989) (“In view of the longstanding judicial hostility towards evidentiary privileges. . .”).

effective communication,⁷⁶ as well as recognizing a significant privacy interest, in justifying the not insignificant role that privileges play in the judicial system.⁷⁷ But these policy precepts are symptomatic of a larger and more abstract understanding of why privileges exist and operate potentially adverse to the administration of justice.⁷⁸ Privileges are "rooted in the imperative need for confidence and trust"⁷⁹ that arises "when certain classes of relationships—or certain classes of communications within those relationships—are deemed to be so important to society that they must be protected."⁸⁰

Although the exact breadth of exclusionary power does differ from privilege to privilege, the basic operation of a privilege today allows the holder of the privilege to prevent disclosure of certain confidential communications—in court—via a right not to testify and the right to block other witnesses from testifying, as well as the ability to exclude certain non-testimonial evidence. This explanation of how privileges function highlights an important aspect of privileges that may differ depending on the applicable law. Traditionally, especially in the area of "professional" privileges, ownership of the privilege is bestowed upon the client alone.⁸¹ This creates a dynamic where a waiver of privilege by the client will force the "professional" to testify if called because the client "holds" the privilege. However, this is one area where privileges for mediation communications have sometimes deviated from the norm.⁸²

B. *Privileges for Mediation Communications*

As the practice of mediation has continued to grow exponentially over the last quarter-century, calls for increasing confidentiality in the process have dominated the landscape of mediation legislation. Despite the opposition of a vocal but decided minority,⁸³ the legislative manifestation of confidentiality has occurred primarily in the form of privileges covering mediation communications.⁸⁴ Many scholars in the

76. See, e.g., *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981) (recognizing that the purpose of the attorney-client privilege is to "encourage full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and administration of justice").

77. See generally *Privileged Communication: II. Modes of Analysis: The Theories and Justifications of Privileged Communications*, 98 HARV. L. REV. 1471 (1985) [hereinafter *Privileged Communication II*].

78. See Scallen, *supra* note 11, at 538 ("Privileges do not in any way aid the ascertainment of truth, but rather they shut out the light.").

79. *Trammel v. United States*, 445 U.S. 40, 51 (1980).

80. Note, *Parent-Child Loyalty and Testimonial Privilege*, 100 HARV. L. REV. 910, 911 (1987).

81. See *infra* note 121 and accompanying text (discussing how clients are the traditional holders of privileges).

82. See *infra* notes 122-123 and accompanying text (addressing the UMA's approach to a mediation privilege, which makes mediators holders of privilege, as well as parties).

83. See, e.g., Eric D. Green, *A Heretical View of the Mediation Privilege*, 2 OHIO ST. J. ON DISP. RESOL. 1 (1986); Scott H. Hughes, *A Closer Look—The Case for a Mediation Confidentiality Privilege Has Not Been Made*, 5 DISP. RESOL. MAG. 14 (1998) [hereinafter *A Closer Look*].

84. See *A Closer Look*, *supra* note 83, at 14 ("Over the past two decades we have witnessed a vast

field have advocated for the use of the privilege structure to protect confidentiality on the same “party-candor” grounds that have traditionally justified other professional privileges.⁸⁵ There are, however, additional rationales for a mediation privilege that are unique to the mediation context.⁸⁶ The principle of maintaining mediator neutrality is one such rationale that has remained at the forefront.⁸⁷ The fear surrounds a perceived loss of public trust that will allegedly result if mediators are forced to testify adversely to mediation disputants.⁸⁸

Notwithstanding the lack of an empirical nexus between confidentiality and success of the mediation mechanism,⁸⁹ which has been a consistent point of emphasis for those opposing the push for broader mediation privileges,⁹⁰ lawmakers have nevertheless found the theoretical justifications for a mediation privilege to be convincing. Legislatures have been persuaded by such rationales, passing well over 250 privilege-related statutes now found within the large majority of states.⁹¹ However, there has been very little uniformity among the states in constructing their respective frameworks for mediation privileges.⁹²

proliferation of mediation statutes throughout the United States, many of which contain privileges shielding the mediator and/or the parties from the disclosure of events that take place during mediation, thus shrouding mediation proceedings in a veil of secrecy.”)

85. See UNIF. MEDIATION ACT, Prefatory Note (“Such party-candor justifications for mediation confidentiality resemble those supporting other communications privileges, such as the attorney-client privilege, the doctor-patient privilege, and various other counseling privileges.”); see also Ellen E. Deason, *The Quest for Uniformity in Mediation Confidentiality: Foolish Consistency or Crucial Predictability?*, 85 MARQ. L. REV. 79, 80 n.6 (2001) [hereinafter *Quest for Uniformity*] (providing examples of commentators who support a mediation privilege as the most effective method of protecting confidentiality).

86. See GOLDBERG ET AL., *supra* note 13, at 429. The book addresses other reasons given to support a mediation privilege, such as the fear that volunteer mediators will decrease in number if frequently called to testify, that mediation will be used as an informal discovery mechanism, and that the public confidence in mediators may be jeopardized by their testimony and what would be perceived bias. *Id.*

87. See *Quest for Uniformity*, *supra* note 85, at 82 (“[C]onfidentiality is important for maintaining the neutrality of the mediator. . . . [A] mediator who testifies will inevitably be seen as acting contrary to the interests of one of the parties, which necessarily destroys her neutrality. It is true that this departure from neutrality is not personal or intentional when a mediator is compelled to testify under subpoena. Nonetheless, if a mediator can be converted into the opposing party’s weapon in court, then her neutrality is only temporary and illusory.”); see also *NLRB v. Joseph Macaluso, Inc.*, 618 F.2d 51, 55-56 (9th Cir. 1980) (holding, in the context of labor mediations, that there is a “need for the appearance of impartiality,” and that there is the “potential for loss of that appearance through any degree of mediator testimony”).

88. See UNIF. MEDIATION ACT, Prefatory Note (“[P]ublic confidence in and the voluntary use of mediation can be expected to expand if people have confidence that the mediator will not take sides or disclose their statements, particularly in the context of other investigations or judicial processes. The public confidence rationale has been extended to permit the mediator to object to testifying, so that the mediator will not be viewed as biased in future mediation sessions that involve comparable parties.”).

89. See GOLDBERG ET AL., *supra* note 13, at 429 (“Lawmakers have little evidence to guide them in assessing whether assurance of confidentiality is necessary to promote the frank discussion necessary to achieve settlement. Nor are there studies to buttress other arguments given for mediation confidentiality. . . .”).

90. See, e.g., *A Closer Look*, *supra* note 83, at 14 (“To begin with, it should be noted that there is almost no empirical support for mediation privileges. . . . [T]here is no empirical work to demonstrate a connection between privileges and the ultimate success of mediation. Although parties may have an expectation of privacy, no showing has been made that fulfilling this expectation is crucial to the outcome of mediation.”).

91. See UNIF. MEDIATION ACT, Prefatory Note (“Approximately half of the States have enacted privilege statutes that apply generally to mediations in the State, while the other half include privileges within

Privilege statutes for mediation communications have differed from one another in several respects, including: “who may assert or waive the privilege (the ‘holders’ of the privilege); exceptions to the privilege; what programs or mediators are covered; and whether a court may order disclosure despite the privilege where the need for the evidence outweighs the purpose served by nondisclosure (whether the privilege is ‘qualified’ as opposed to ‘absolute’).”⁹³ An additional, and unquestionably crucial, area of divergence that has arisen between the states involves the determination of a privilege’s operational scope. In other words, lawmakers have had to decide in what types of “proceedings” should a mediation privilege apply. There are various proceedings to take into account, such as judicial civil, judicial criminal, administrative, arbitral, motion hearings, legislative hearings, as well as the discovery process.⁹⁴ Whether application of mediation privileges is appropriate in criminal proceedings and to what extent they should apply—which is the subject of this Article—is by far the most controversial question in this area because the answer carries with it the greatest of implications.

1. Recognizing a Civil/Criminal Distinction

Because courts, as well as legislatures, acknowledge the potential for injustice that exists whenever a privilege is recognized, the realities of the criminal justice system significantly alter any equation where the need for evidence resides on one side of the privilege scale.⁹⁵ The distinction between civil and criminal proceedings that has been recognized and subsequently manifested by lawmakers in their efforts to construct evidentiary privileges for mediation communications is most often a function of the inherent differences between the two independent systems and the distinct roles of each. The province of the criminal justice system is of course to seek justice, and in so doing, a criminal prosecution equates to society charging one of its own not only for harm against a part—which is the sole province of the civil system—but rather for harm against the whole, with the liberty or even life of the charged individual most often in the balance.

This recognition of the unique and heightened domain occupied by the criminal system applies with equal force in the current context, where the systemic evidentiary need is pitted against a general need for confidentiality in

the provisions of statutes establishing mediation programs for specific substantive legal issues, such as employment or human rights.”)

92. See generally UNIF. MEDIATION ACT, Prefatory Note (discussing the state of non-uniformity that exists with regard to legislation of mediation confidentiality).

93. GOLDBERG ET AL., *supra* note 13, at 429.

94. See UNIF. MEDIATION ACT, Official Comments, § 2(7) (addressing in what proceedings the UMA’s mediation privilege is applicable).

95. See GOLDBERG ET AL., *supra* note 13, at 438 (acknowledging the potential for injustice with mediation privileges).

the mediative process. Indeed, even the drafters of the UMA—although only carving out a relatively minor exception for criminal proceedings⁹⁶—conceded that the respective strengths of the competing interests in the criminal setting created a unique and troubling dynamic for constructing a privilege that would apply in criminal proceedings.⁹⁷ The drafters further conceded that even without an exception for criminal proceedings, “the courts can be expected to weigh heavily the need for the evidence in a particular case, and sometimes will rule that the defendant’s constitutional rights require disclosure.”⁹⁸

The few courts that have addressed the application of mediation privileges to criminal proceedings, as distinct from civil proceedings, have concluded that the criminal setting demands a greater need for evidence. In the case that established a federal mediation privilege, *Folb v. Motion Picture Indus. Pension & Health Plans*, the court addressed this issue in dictum, noting that a mediation privilege in the criminal context may prove a more difficult endeavor: “Although the Court need not, and indeed may not, address the outer limits of a federal mediation privilege, it seems appropriate to note one potential limitation here. A federal mediation privilege may be attenuated of necessity in criminal or quasi-criminal cases where the defendant’s constitutional rights are at stake.”⁹⁹

Another court even implicitly concluded that a juvenile delinquency proceeding, defined as a “civil action,” so resembled a criminal proceeding that the analysis moved outside of a mediation privilege statute that applied only to civil trials.¹⁰⁰ In *Rinaker v. Superior Court of San Joaquin County*, the court held that the defendant’s constitutional rights were violated by prohibiting the mediator’s testimony, even though a California statute created a privilege for all mediation communications sought as evidence in non-criminal proceedings.¹⁰¹ In other words, the court took a “civil action” and proceeded with a balancing analysis of defendant’s constitutional rights as if the case was effectively a criminal proceeding. The decision in *Rinaker*, as well as the statutory privilege at issue that exempts criminal proceedings, illustrates the intuitive division that exists between civil and criminal proceedings. However, although some courts may recognize that a mediation privilege does not carry the same weight in criminal settings as it would in civil, this sentiment of “criminal law is different” has not translated into any uniformity with respect to privilege statutes and their application to criminal proceedings, whether in the code books or the courts.

96. See *infra* Part IV.B (discussing the criminal proceedings exception in the UMA).

97. See UNIF. MEDIATION ACT, Official Comments, § 6(b)(1) (recognizing that “society’s need for evidence to avoid an inaccurate decision is greatest in the criminal context”).

98. *Id.*

99. 16 F. Supp. 2d 1164, 1178 (C.D. Cal. 1998).

100. See *Rinaker v. Super. Ct. of San Joaquin County*, 62 Cal. App. 4th 155 (1998). Perhaps this is what the UMA envisioned—likely since the drafters cited to *Rinaker*—when noting an expectation that courts would weigh a defendant’s constitutional rights to introduce evidence regardless of a statutory privilege that may be in place. See *supra* notes 97–98 and accompanying text.

101. *Rinaker*, 62 Cal. App. 4th at 164-67.

2. *Pre-UMA Treatment for Mediation Privileges in Criminal Proceedings*

We are undoubtedly in an era where State support for confidentiality in mediation is increasing. Nevertheless, the protections under state law, appropriately characterized as "uneven and lacking uniformity," reflect a collective dissonance with respect to the scope of not only the need for confidentiality in mediation, but also the right.¹⁰² "The unsettled state of the law reflects disagreement among judges and legislators on the weight of competing interests."¹⁰³ One area of divergence among states that resides at the forefront of the confidentiality discussion relates to how states treat mediation privileges in criminal proceedings, which is the principle jurisdiction of this Article.

State statutes that have extended a mediation privilege to preclude evidence of mediation communications from criminal proceedings do not always make an explicit distinction but rather include phrases of general application such as "any proceeding" or "any subsequent legal proceeding."¹⁰⁴ Others expressly apply to civil and criminal cases. Whether implicit or expressly enumerated, state law applying mediation privileges to both civil and criminal proceedings is considered "consistent with existing privilege law and will undoubtedly be interpreted to extend to such actions."¹⁰⁵

Of the state privilege statutes that do not apply to criminal proceedings, some simply omit any reference to criminal proceedings when defining the statute's scope by enumerating only civil or other non-criminal proceedings; others explicitly exclude criminal proceedings from the privilege's coverage. Before the construction of the UMA, "[v]ery few jurisdictions explicitly [applied] a balancing test to the criminal proceedings exception."¹⁰⁶ However, most of the states that except criminal proceedings from their privilege's application limit the exception to ongoing and future crimes only, thereby overtly rejecting the admission of past criminal conduct, which is of primary concern when discussing mediation privileges in a criminal context.¹⁰⁷

102. *Smith v. Smith*, 154 F.R.D. 661, 674 (N.D. Tex. 1994) (addressing the propriety of adopting a federal mediation privilege protecting compelled mediator testimony, an analysis later taken up by the court in *Folb*, 16 F. Supp. 2d 1164, which adopted a federal mediation privilege).

103. *Id.* (citing Michael D. Young & David S. Ross, *Confidentiality of Mediation Procedures*, C879 ALI-ABA 571, 578 (1993)).

104. See Joshua J. Engelbart, Note, *Federal Mediation Privilege: Should Mediation Communications Be Protected From Subsequent Civil & Criminal Proceedings?*; *In re: Grand Jury Subpoena Dated December 17, 1996*, 1999 J. DISP. RESOL. 73, 78-79 (1999).

105. Kirtley, *supra* note 64, at 28.

106. Hiers, *supra* note 12, at 582.

107. It is unclear how such a statute would operate when a defendant is the proponent of evidence offered for exculpatory purposes that neither pertains to past, current, or future criminal activity. See, e.g., *State v. Castellano*, 460 So. 2d 480 (Fla. Dist. Ct. 1984). Defendant was charged with attempted first degree murder and sought to subpoena a mediator's testimony concerning the alleged victim's statements in mediation to support a claim of self-defense. *Id.* The UMA also provides a categorical exception for ongoing or future crimes, in addition to the qualified exception for criminal proceedings generally. See UNIF. MEDIATION ACT, §§ 6(a)(3)-(4) (The Reporter's Notes indicated that "this exception does not cover mediation communications

The current state of mediation privileges in criminal proceedings—which closely resembles the statutory landscape at the time of the UMA’s introduction only five years ago¹⁰⁸—is such that a mediator would be wise to avoid answering questions regarding the confidentiality of mediations with respect to future criminal proceedings, at least in any definitive sense. This is exactly the “notice” problem that leaves parties at risk, a problem that the UMA pretends to solve.¹⁰⁹ As noted by the UMA drafters, “[e]xisting privilege statutes are silent or split as to whether they apply only to civil proceedings, apply also to some juvenile or misdemeanor proceedings, or apply as well to all criminal proceedings.”¹¹⁰ The bottom line is that there was and there remains a widespread lack of uniformity that is of paramount concern because of the notice issues that are heightened in the criminal context and subsequently threaten to erode public confidence in mediation.

IV. UNIFORM MEDIATION ACT

The rapidly expanding practice of mediation now occurs on many fronts, both from a legal and jurisdictional standpoint, as well as from a communal and cultural perspective. The aftermath has seen some collective dissonance in defining the goals of mediation, determining party expectations, enforcing institutional norms, and assessing how mediation should or does interact with the judicial process.¹¹¹ Simply put, while the practice of mediation is undoubtedly

constituting admissions of past crimes, or past potential crimes, which remain privileged.”).

108. Because the Act remains in its infancy, the states are far from adopting the UMA across the board. But with nine states already placing the UMA in action and a handful with bills currently in their respective legislatures, the UMA is certainly gaining favor. See *infra* note 135 and accompanying text (discussing state adoption of the UMA).

109. The Reporter’s Notes for the UMA’s criminal proceedings exception indicates that the balancing standard adopted by the UMA “puts the parties on notice” as to the limitation on confidentiality. UNIF. MEDIATION ACT, Official Comments, § 6(b)(1). However, such after-the-fact balancing does not place the parties in any better of a situation than if the UMA was silent on the issue. See *infra* Part V.B.2 (addressing the ex post balancing problems raised by the UMA’s balancing standard).

110. UNIF. MEDIATION ACT, Official Comments, § 6(b)(1).

111. This apparent identity crisis in determining just what role mediation is supposed to play in the bigger picture may underlie the recent push to, in a sense, rename what has traditionally been considered “alternative dispute resolution,” which encompasses a myriad of dispute resolution methods and processes. The new “appropriate” dispute resolution is a recognition that while ADR is technically an alternative to the courthouse, the almost staggering number of cases that settle prior to formal adjudication effectively renders ADR the primary arena for resolution of disputes, with mediation and negotiation at the forefront. Consequently, if “alternative” is an ADR misnomer—to the extent that “full-scale litigation, in the form of a trial, is really the alternative”—this inevitably affects the perspective from which we approach mediation because if mediation is used to settle a dispute that would otherwise reach formal adjudication, perhaps mediation should, at the very least, leave in tact the expectations of parties with reference to their legal rights in the judicial process. Carrie Menkel-Meadow, *Mothers and Fathers of Invention: The Intellectual Founders of ADR*, 16 OHIO ST. J. ON DISP. RESOL. 1, 2 n.6 (2000) (citing Albie Davis & Howard Gadlin, *Mediators Gain Trust the Old-Fashioned Way—We Earn It!*, 4 NEGOT. J. 55, 62 (1988), as renaming the term ADR). But if mediation is perceived as an independent form of dispute resolution altogether, a convention entirely or quasi-disconnected from the legal system (leaving court-annexed ADR issues aside), the mandates of such an

flourishing with decided utility, the institution of mediation is nevertheless suffering from a lack of uniformity. This absence of umbrella regulation has endured for decades at the potential expense of protecting party rights and expectations and unquestionably contributed to the call for and eventual construction of the UMA.¹¹²

The UMA, passed in its final form in 2001 and amended in 2003, was an attempt by the National Conference of Commissioners on Uniform State Law (NCCUSL), in collaboration with the American Bar Association’s Section on Dispute Resolution, to create a uniform set of laws that “promotes predictability and simplicity” in a complex area of the law to help “bring order and understanding across state lines.”¹¹³ The jury may be still out on the UMA’s success in fostering uniformity in the regulation of mediation,¹¹⁴ but the substantive approach of the NCCUSL in crafting the UMA’s proposed legislation has already, and not unexpectedly, seen its fair share of reasoned criticism, as well as a legitimate swell of support. The primary commentator contingent has focused on the true force of the UMA, which relates to how confidentiality is regulated under the provisions of the Act through the use of privileges.¹¹⁵

The question posed in the beginning of this Article—asking to what extent various mediation communications *should* be protected—strikes at the very heart of any mediation privilege. Legislating on all fronts of mediation confidentiality, the UMA’s answer to this inquiry has implicated a wide range of competing interests, the most dire of which is the criminal justice system’s need for evidence.¹¹⁶ The following discussion will first give a brief overview of how

institution would appear to be significantly altered by such a proclamation.

112. However, excessive regulation is legitimately frowned upon by many in the field who consider flexibility and informal procedure as distinguishing characteristics of the mediation mechanism, relative to the more formal judicial process. *See, e.g.*, UNIF. MEDIATION ACT, Prefatory Note (“[I]t is important to avoid laws that diminish the creative and diverse use of mediation.”).

113. UNIF. MEDIATION ACT, Prefatory Note. The UMA’s “Prefatory Note” discusses various principles behind its creation, the third of which is entitled “Importance of Uniformity.” *Id.*

114. The recent trend has certainly shown that the UMA is gaining favor. *See infra* Part IV.C (discussing adoption of the UMA by states). The UMA has been approved by the American Bar Association and endorsed by the American Arbitration Association, Judicial Arbitration and Mediation Service, CPR Institute for Dispute Resolution, and the National Arbitration Forum. *See* Uniform Law Commissioners, *A Few Facts About The . . . Uniform Mediation Act*, http://www.nccusl.org/Update/uniformact_factsheets/uniformacts-fs-uma2001.asp (last visited February 17, 2007) (on file with the *McGeorge Law Review*).

115. Although the UMA does not contain “purpose” clauses, it does begin with a Prefatory Note addressing the principles behind the Act. The first of these three broad principles is promoting candor: “The Drafters intend for the Act to be applied and construed in a way to . . . promote candor of parties through confidentiality of the mediation process, subject only to the need for disclosure to accommodate specific and compelling societal interests.” UNIF. MEDIATION ACT, Prefatory Note; *see also* Hughes, *supra* note 5, at 34-35 (“There is no doubt that confidentiality (both keeping secrets and avoiding testimony) represents the principle thrust of the UMA.”).

116. Legislating on all fronts of mediation confidentiality would not be an entirely fair characterization of the UMA’s position. The large majority of the UMA deals with mediation confidentiality generally, but the drafters recognized the important distinction between the confidentiality provided by evidentiary privileges, which prevent disclosures in subsequent legal proceedings, and “outside” confidentiality, which in this context

privileges work under the UMA and will then delve into the specifics of the privilege exception for criminal proceedings, taking a look at how the states have approached adoption of the Act's structure and standards.

A. *The Privilege Framework*

The first three substantive sections of the UMA construct the framework for the mediation privilege.¹¹⁷ Section 4 commences the privilege treatment by establishing the scope of the privilege, as well as dictating who “owns” the privilege. According to the Act, a mediation communication is privileged—and is, therefore, not subject to discovery or admissible in evidence—to the extent that every participant in a mediation may at least refuse to disclose, and may also prevent any other participant from disclosing, their own communications.¹¹⁸ Any

merely prevents disclosures outside of legal proceedings into the public sphere. UNIF. MEDIATION ACT, Official Comments, § 8 (“The evidentiary privilege granted in Sections 4-6 assures party expectations regarding the confidentiality of mediation communications against disclosures in subsequent legal proceedings. However, it is also possible for mediation communications to be disclosed outside of proceedings. . . . Section 8 focuses on such disclosures.”). The drafters were cognizant of the fact that confidentiality “is viewed by many as the lynchpin of mediation proceedings” and that “confidentiality of mediation communications against disclosures outside of proceedings may be as important to the integrity of the mediation process for some as the protection against disclosures of mediation communications in subsequent proceedings that is assured by the privilege.” *Id.* Nevertheless, the Act “takes an approach of restraint,” leaving it up to the parties to assure “outside” confidentiality because “[i]n some situations . . . parties may wish to permit, even encourage, disclosures to family members, business associates, [and] even the media.” *Id.*

The UMA's decision to stay away from the issue of “outside” confidentiality, instead leaving it to the parties, might also have stemmed from concerns about having a statutory confidentiality provision that could potentially hold liable a party who accidentally discloses mediation communications or did not know the limitations. *See* GOLDBERG ET AL., *supra* note 13, at 429, 447 (“Ultimately, the drafters were hesitant to impose general confidentiality obligations through statute . . . noting that such a statute might penalize those where were unaware of it . . .”). This is most likely an implicit recognition of the lack of, or at best the very informal, notice of legal rights often associated with mediation sessions. *See* UNIF. MEDIATION ACT, Official Comments, § 8 (“As the drafts [for a confidentiality statute] grew in length and complexity, the Drafters became concerned about the intelligibility and accessibility of the statute, which is particularly important given the important role of non-lawyer mediators and the many people who participate in mediations without counsel or knowledge of the law.”).

117. The decision by the UMA to utilize a mediation privilege as the preferred mechanism for protecting confidentiality was the result of examining other possible approaches in relation to the privilege structure. The alternatives and the reasons for not selecting other approaches was explained by the UMA:

The Drafters [of the UMA] considered several other approaches to mediation confidentiality—including a categorical exclusion for mediation communications, the extension of evidentiary settlement discussion rules to mediation, and mediator incompetency. Upon exhaustive study and consideration, however, each of these mechanisms proved either overbroad in that they failed to fairly account for interests of justice that might occasionally outweigh the importance of mediation confidentiality (categorical exclusion and mediator incompetency), underbroad in that they failed to meet the reasonable needs of the mediation process or the reasonable expectations of the parties in the mediation process (settlement discussions), or under-inclusive in that they failed to provide protection for all of those involved in the mediation process (mediator incompetency).

UNIF. MEDIATION ACT, Official Comments, § 4.

118. *See* UNIF. MEDIATION ACT, Official Comments, §§ 4(a), (b) (2001). The UMA privileges apply to all “mediation communications,” defined as: “a statement, whether oral or in a record or verbal or nonverbal,

further privilege rights bestowed by the UMA becomes a function of whose communication is in controversy and, more importantly, which participant is invoking the privilege. The breakdown is as follows:

1. A mediation *party* may refuse to disclose, and may prevent any other person from disclosing, a mediation communication.
2. A *mediator* may refuse to disclose a mediation communication and may prevent any other person from disclosing a mediation communication of the mediator.
3. A *nonparty participant* may refuse to disclose, and may prevent any other person from disclosing, a mediation communication of the nonparty participant.¹¹⁹

This sliding scale of “blocking power” is a product of who is attempting to “block” the disclosure, recognizing that the confidentiality interests of each group—parties, mediators, and nonparty participants—carry less weight as the analysis progresses down the scale.

However, the degree of privilege allocated across the board by the UMA should not be overlooked. Unlike traditional evidentiary privileges, such as the attorney-client privilege, the unique dynamic of a mediation results in at least two parties holding an absolute privilege to block any disclosure of a mediation communication. Therefore, unless all parties waive their absolute privilege, a waiver by a single party has no effect, and that party would still be precluded from introducing testimonial evidence relating to their own mediation communications.¹²⁰ Furthermore, the UMA’s mediation privilege places a great deal of power in the mediator’s hands, which is also a divergence from the approach conventionally taken with other “professional” privileges.¹²¹ The consequence of giving the mediator an absolute testimonial privilege is that even

that occurs during a mediation or is made for purposes of considering, conducting, participating in, initiating, continuing, or reconvening a mediation or retaining a mediator.” *Id.* § 2(2).

119. *Id.* §§ 4(b)(1)-(3) (emphasis added).

120. *See id.* § 5(a) (“A privilege under Section 4 may be waived in a record or orally during a proceeding if it is expressly waived by all parties to the mediation . . .”). It is important to note that although a party may not disclose a mediation communication in a proceeding unless all parties waive their privileges, if disclosure occurs anyway, that party is then precluded from asserting their privilege to the extent that the harmed party must then disclose to remedy the situation—beyond any procedural cures the court might invoke, such as asking the jury to disregard. *See id.* § 5(b) (“A person that discloses or makes a representation about a mediation communication which prejudices another person in a proceeding is precluded from asserting a privilege under Section 4, but only to the extent necessary for the person prejudiced to respond to the representation or disclosure.”).

121. Professional evidentiary privileges, including attorney-client and doctor-patient, are customarily held by the actual party alone, not by the professional. But under the UMA, the mediator holds a testimonial privilege identical to that held by the parties. *See Hughes, supra* note 5, at 36-37 (“[T]he idea of extending the privilege to the agent or helper is unique among all of the professional relationships. The argument for a separate privilege rests upon the continuing need for impartiality . . .”).

if both parties waive their privileges, the mediator can still refuse to testify regarding any mediation communications.¹²² The UMA justifies this decision in the interest of fostering mediator candor, as well as preserving the perception of neutrality or impartiality.¹²³

If anything is readily ascertainable from studying the somewhat perplexing framework of the UMA's privilege for mediation communications, it is the realization that the overall impact of the privilege is unquestionably significant. When looking at the scope of the privilege alone, without taking account of any exceptions that may exist, it becomes immediately clear that the number of circumstances where a privilege would fail to prevent disclosure in a legal proceeding are few and far between. Consequently, the role that potential exceptions to the broad privilege might play becomes compelling.

B. *The Criminal Proceedings Exception*

"As with other privileges, the mediation privilege must have limits . . . [as] exceptions primarily are necessary to give appropriate weight to other valid justice system values . . ." ¹²⁴ Section 6 of the UMA, considered to be the "key to understanding" the Act, enumerates an extensive list of exceptions that operate to prevent invocation of the mediation privilege.¹²⁵ The "laundry list" of specific exceptions addressed in subsection (a) cover everything from sunshine laws and mediator malpractice to ethical disclosure requirements and criminal conduct within the mediation.¹²⁶ They are categorical exceptions that apply without discretion on the part of the court because, according to the drafters, "society's interest in the information contained in the mediation communications may be said to categorically outweigh its interest in the confidentiality of mediation communications."¹²⁷

122. See UNIF. MEDIATION ACT § 5(a)(1) ("A privilege . . . may be waived . . . if it is expressly waived by all parties to the mediation and . . . in the case of the privilege of a mediator, it is expressly waived by the mediator . . ."). This circumstance, where both parties waive their mediation privileges but the mediator does not, occurred in *Olam v. Cong. Mortgage Co.*, 68 F. Supp. 2d 1110 (N.D. Cal. 1999) and highlights the impact of a mediator-held privilege. In *Olam*, the parties explicitly waived their privilege and requested that the court consider evidence about what occurred during an earlier mediation, which would inevitably include testimony from the mediator, in order for the court to resolve a motion to enforce a settlement agreement. The decision by Magistrate Brazil—a well-known scholar in the ADR field—held that "the mediator's testimony was essential to doing justice [in the case]." *Id.* at 1139. But Judge Brazil also noted that "[i]f a party to the mediation were objecting to compelling the mediator to testify [the court] would be faced with a substantially more difficult analysis." *Id.* at 1133.

123. See UNIF. MEDIATION ACT, Official Comments, § 4(b) ("Mediators are made holders with respect to their own mediation communications, so that they may participate candidly, and with respect to their own testimony, so that they will not be viewed as biased in future mediations . . .").

124. UNIF. MEDIATION ACT, Prefatory Note.

125. See Hughes, *supra* note 5, at 38 ("The key to understanding the UMA can be found in section 6 which contains the exceptions to the privileges created in section 4.").

126. See UNIF. MEDIATION ACT, Official Comments, § 6(a).

127. UNIF. MEDIATION ACT, Official Comments, § 6.

Conversely, and interestingly, the more general exceptions under subsection (b), which is where the exception for criminal proceedings resides, require balancing on the part of the trial court because the relative strengths of the interests—the need for evidence versus mediation confidentiality—“can only be measured under the facts and circumstances of the particular case.”¹²⁸ While this approach might seem to lend to a preponderance standard, where the evidence would come in if the evidentiary need outweighed the interest in confidentiality, this is simply not the case under UMA. Instead, subsection (b) creates a burden of proof upon the proponent of the evidence that is significantly more difficult to satisfy:

(b) There is no privilege under Section 4 if a court . . . finds, after a hearing in camera, that the party seeking discovery or the proponent of the evidence has shown that the evidence is not otherwise available, that there is a need for the evidence that *substantially outweighs* the interest in protecting confidentiality, and that the mediation communication is sought or offered in . . . a court proceeding involving a felony [or misdemeanor]. . . .¹²⁹

Although the drafters recognized that the cases in which this exception may arise are indeed rare, they nevertheless contend that in the situations which implicate the exception the evidence in controversy “should remain confidential but for overriding concerns for justice.”¹³⁰

The procedural operation of the privilege exception for criminal proceedings is rather simple, though the determination by the court may prove more difficult. As indicated in the provision above, to effectuate the exception, the moving party must first demonstrate to the court that the evidence is not attainable by other non-privileged means.¹³¹ Next, the moving party must make a showing—in camera—that the need for the evidence *substantially outweighs* the interest in confidentiality. As with most subjective legal standards, there is lack of guidance as to the quantification of such a high standard, and it is therefore left up to the court to determine what type of showing is necessary to meet the burden.¹³²

128. *Id.*

129. *Id.* § 6(b)(1) (emphasis added) (bracketed text in original).

130. UNIF. MEDIATION ACT, Official Comments, § 6.

131. It is important to note here that just because evidence is “otherwise available” does not necessarily mean what the literal reading of the words may suggest. Most often, evidence in this context is testimonial and just because another witness may be able to provide similar testimony does not equate to equal testimony. As courts have recognized, especially in the mediation context, “the testimony of a disinterested [witness], i.e., the mediator, may carry more weight of credibility.” *Rinaker v. Super. Ct. of San Joaquin County*, 62 Cal. App. 4th 155, 165 (1998). In other words, the testimony of a mediator is not always disallowed simply because the testimonial evidence offered by the mediator is attainable by some other means or witness.

132. See UNIF. MEDIATION ACT, Official Comments, § 6(b)(1) (“After great consideration and public comment, the Drafting Committees decided to leave the critical balancing of these competing interests to the sound discretion of the courts to determine under the facts and circumstances of each case.”). Presumably a

An important issue that the UMA leaves to the states when considering adoption of the Act is whether the criminal proceedings exception should apply to all criminal trials or only felony cases.¹³³ The language of the provision does allow for the addition of misdemeanors to the exception's coverage.¹³⁴ Nevertheless, as the UMA stands, the exception for criminal proceedings only applies in felony settings. The significance of this limitation is that in misdemeanor cases, the default *categorical* privilege under the UMA would be in effect, save application of a subsection (a) exception. Of course, states do have the final decision in choosing whether to adopt the UMA, and in doing so, they have the ability to determine the ultimate scope of the Model Act through modifying the legislation or enacting it in totality. Not surprisingly, different states have elected to take different paths.

C. State Adoption and Modification

At present, there are nine states that have adopted the UMA in some form and a few more that have introduced UMA bills in their respective legislatures.¹³⁵ The states that have adopted the Act to this point—District of Columbia, Illinois, Iowa, Nebraska, New Jersey, Ohio, Utah, Vermont, and Washington—have almost universally traced the exact structure, language, and substance of the UMA. Looking at the treatment of mediation privileges, and the exceptions that exist in criminal proceedings more specifically, the adopting states have not deviated much from the UMA's approach. However, differences do exist among the states, primarily in relation to the decision of applying the exception in misdemeanor cases.

Of the nine states that have codified the UMA, four states have chosen to allow application of the exception only in felony cases, following the direct guidance of the Model Act.¹³⁶ Consequently, in these states, the mediation

court, following the customary balancing process in the evidentiary context, would take into consideration how probative the evidence is and how reliable the evidence may prove. *See, e.g.,* *Olam v. Cong. Mortgage Co.*, 68 F. Supp. 2d 1110, 1138-39 (N.D. Cal. 1999) (discussing the reliability and probative value of a mediator's testimony in the civil trial context). In fact, the UMA ultimately chose to construct a privilege framework, rather than implementing other means of protecting confidentiality, because the structure "provides greater certainty in judicial interpretation because of the courts' familiarity with other privileges...." UNIF. MEDIATION ACT, Official Comments, § 4.

133. UNIF. MEDIATION ACT, Official Comments, § 6(b)(1) ("[T]he Act affords more specialized treatment for the use of mediation communications in subsequent felony proceedings, which reflects the unique character, considerations, and concerns that attend the need for evidence in the criminal process. States may also wish to extend this specialized treatment to misdemeanors, and the Drafters offer appropriate model language for states in that event.").

134. *See supra* note 129 and accompanying text (providing the text of the provision).

135. *See generally* Uniform Law Commissioners, A Few Facts About the Uniform Mediation Act (2001)(2003), http://www.nccusl.org/Update/uniformact_factsheets/uniformacts-fs-uma2001.asp (on file with the *McGeorge Law Review*).

136. *See* 710 ILL. COMP. STAT. 35/6(b)(1) (West Supp. 2006); NEB. REV. STAT. § 25-2935(b)(1) (West Supp. 2006); WASH. REV. CODE § 7.07.050(2)(a) (2005). New Jersey's offense classifications do not follow the

privilege remains intact for non-felony proceedings—save the categorical exceptions.¹³⁷ Four states have made the decision to permit the exception to operate in misdemeanor cases as well felonies.¹³⁸ Each of these six states have maintained the UMA’s “substantially outweighs” standard dictating whether or not evidence will come in under the privilege exception in each particular case.¹³⁹

While states have maintained a certain degree of uniformity in their adoption of the UMA, one state’s departure has been much more significant, at least in terms of substantive impact. The Ohio framework not only introduces a unique burden of proof applied to the exception analysis, but also alters the treatment of the privilege exceptions for felony and misdemeanor proceedings entirely.¹⁴⁰ Instead of following the qualified privilege for felony criminal proceedings under the UMA, Ohio shifts the felony proceeding exception into the categorical exceptions. Consequently, there is no mediation privilege in the context of a felony case within Ohio, which means that mediation communications are not protected. Furthermore, while Ohio does include a qualified exception for misdemeanor proceedings, they utilize a “manifest injustice” standard rather than a “substantially outweighs” burden of proof. These deviations, especially the blanket exception for felony proceedings, could potentially have a considerable impact on a criminal case in Ohio when mediation communications are offered as evidence.¹⁴¹

V. WEIGHING THE INTERESTS AND TIPPING THE SCALES

Notwithstanding the reality that evidence lies at the very foundation of our justice system, it is, of course, commonplace for courts to balance interests pertaining to the admissibility of evidence. After all, courts look at the relevance, probative value, and prejudicial nature of evidence on a daily basis in their attempt to determine whether evidence should be admitted. Therefore, the idea that courts should need to balance other interests, such as confidentiality in mediation, is certainly not a foreign one. Traditionally, however, these balancing

classic felony/misdemeanor distinction. Instead, offenses are classified as “crimes” if they authorize a sentence in excess of six months imprisonment—traditionally a felony—and “disorderly offenses” when less than six months of imprisonment is possible—traditionally a misdemeanor. The privilege exception for mediation communications in New Jersey applies only to “crimes,” and, therefore, the state’s approach is in line with the UMA in only allowing an exception for felony proceedings. *See* N.J. STAT. ANN. § 2A:23C-6(b)(1) (2006) (the privilege applies only in “a court proceeding involving a crime as defined in the ‘New Jersey Code of Criminal Justice’....”); *see also id.* § 2C:1-4 (2006) (defining the classes of offenses in New Jersey).

137. *See supra* notes 126-127 and accompanying text (addressing the UMA’s categorical privilege exceptions).

138. *See* D.C. CODE ANN. § 16-4205(b)(3) (2006); IOWA CODE § 679C.106(2)(a) (2005); UTAH CODE ANN. § 78-31c-106 (2006); VT. STAT. ANN. tit. 12, § 5717 (2006); *see also supra* note 133 (providing the reporter’s notes on the issue of applying the exception to felonies and misdemeanors).

139. *See supra* notes 129-132 and accompanying text (discussing the burden of proof under the UMA).

140. *See* OHIO REV. CODE ANN. §§ 2710.05(A)(9), (B)(1) (2006).

141. *See infra* Part VI.B (discussing the merits of the Ohio approach).

calculations are not performed *de novo*, but rather with significant deference or benefit of the doubt given to the systemic need for evidence. But the UMA's approach provides the counter position to this convention.

As Dean Wigmore illustrated in his oft-cited proposition,¹⁴² the default position for evidence in our system is admissibility; our courts do not work from a baseline of determining what evidence should be allowed to come in but rather what evidence should not come in. But what the Supreme Court has recognized as a "general rule disfavoring testimonial privileges"¹⁴³ can be overcome where there is present a "public good transcending the normally predominant principle of utilizing all rational means for ascertaining the truth."¹⁴⁴ Maintaining confidentiality in mediation is undoubtedly a "public good." Consequently, the debate shifts to whether and in what circumstances this public good "transcends" the truth-seeking function and when it does not.

A. *Mediation Confidentiality vs. Criminal Justice*

Discussing and debating the interests behind a criminal proceedings exception—the need for evidence versus the need for mediation confidentiality—is something that can occur in the abstract. In practice, however, the balancing occurs not between the general need for evidence and confidentiality, but between the general need for confidentiality and the particular need for specific evidence in any given criminal proceeding. In other words, one interest is weighed from a macro perspective while the other is weighed from a micro perspective. Therefore, the best way to illustrate how a criminal proceedings exception operates is to apply the exception in the context of an actual case.¹⁴⁵

The facts of the "hypothetical" case are as follows:

Carl and his brother-in-law BB became involved in a bitter feud because of family problems. BB began taunting Carl by leaving profane messages over the telephone. BB's actions led to a physical altercation. Carl alleged that BB hit him on the shoulder with a shovel. BB claimed that Carl retrieved a machete from his truck and proceeded to cut BB's wrist. Police subsequently arrested Carl after finding an unsheathed machete in his apartment and the sheath on the front yard of BB's house. Carl was charged and indicted on one count of aggravated assault and two counts of weapons possession.

142. See *supra* note 15 and accompanying text (providing the statement of Dean Wigmore).

143. *Jaffee v. Redmond*, 518 U.S. 1, 9 (1996). In this case, the Court departed from the default rule disfavoring testimonial privileges when they established the psychotherapist-patient privilege. *Id.*

144. *Trammel v. United States*, 445 U.S. 40, 50 (1980) (quoting *Elkins v. United States*, 364 U.S. 206, 234 (1960)).

145. I recognize, of course, that the factual circumstances chosen will inevitably shape the ultimate analysis, as it does in practice.

However, after his arrest and before his indictment, Carl filed a civil complaint against BB for harassment resulting from the earlier phone messages. The action was referred to mediation, but the parties were unable to resolve the harassment dispute. At his assault trial, Carl asserted a claim of self-defense and proffered the civil mediator as a witness. During an *in camera* session regarding admission of the mediation communications proffered by Carl, the mediator admitted to the court that BB stated in the mediation session that he had wielded the shovel against Carl during the original altercation. Nevertheless, the court excluded the mediator's testimony, and the defendant was convicted of third-degree aggravated assault and weapons possession.

In looking at the scenario posed, it is immediately apparent that the evidence at issue is exculpatory in nature. The evidence is essentially testimony by the mediator that will reveal an admission by the alleged victim, BB, that he wielded the shovel during the altercation. It is important to remember that Carl would undoubtedly make the self-defense claim regardless of the mediator's testimony, but testimony from Carl to that effect would carry only a fraction of the weight that the mediator's testimony would carry.¹⁴⁶ The bottom line is that a neutral third-party will always be more believable to the jury than a criminal defendant, and the evidence would, therefore, prove more probative. So with that in mind, the ultimate question is whether the mediator's testimony should be allowed?

Under the UMA's exception, the balancing test would ask: Does the need for the mediator's testimony *substantially outweigh* the interest in protecting confidentiality?¹⁴⁷ Presumably, the judge would look first to reliability and probative value in order to assess the weight that should be attached to the evidence.¹⁴⁸ It certainly appears that the evidence in the hypothetical has at least some probative value. In a basic "he said-he said" assault case, the testimony of an impartial mediator revealing that the alleged victim was at least a party to the aggression, if not the primary aggressor, has the potential to be quite potent. If the jury hears a mediator say that the victim threatened the defendant with a shovel during the fight, there is a good chance that the self-defense claim might lead to exoneration. Of course, there is no way to know this for sure, but it is safe to say that the mediator's testimony is highly probative.

As far as the reliability of the testimony is concerned, there was some indication during the *in camera* hearing that the mediation session was very heated and that it was difficult to hear exactly what was said and who said it at all times during the mediation. But the trustworthiness of the mediator is not in

146. See *supra* note 131 (discussing the intricacies of the "otherwise available" requirement).

147. See *supra* note 129 and accompanying text (providing the language of the UMA exception).

148. See *Olam v. Cong. Mortgage Co.*, 68 F. Supp. 2d 1110, 1138-39 (N.D. Cal. 1999). The court indicated that probative value and reliability were important in stating that "there was a substantial likelihood that testimony from the mediator would be the most reliable and probative on the central issues. . . ." *Id.*

doubt and the reliability, even with the concern indicated, is fairly strong relative to other testimony that is often given by partial eyewitnesses in assault cases. It is important to note, however, that there are a substantial number of other issues in the hypothetical that could presumably affect the balancing equation, but the idea here is to get a general sense of what a balancing test might look like in practice.

With the weight of the evidence now apparent, we are forced to determine whether the value of that evidence to this particular case is substantially greater than the value that confidentiality has in mediation. Mediation undoubtedly depends on confidentiality to a very significant degree. Without confidentiality, there would be no candor. Without candor, the very purpose of mediation is compromised. Furthermore, the testimony of mediators affects the appearance of impartiality that exists in the mediation profession. If mediators regularly testify about communications made during a mediation session, which inevitably favors one party or at least places one party in a better light, then the public will lose confidence in the mediation institution because the perception of impartiality will diminish or even disappear. These are grave concerns that merit very serious consideration in every case.

Accordingly, we are clearly left with a very troublesome decision, one that I am sure many judges can attest to. So how do we decide? The need for the exculpatory evidence is powerful, but is it stronger than the confidentiality interest? Or more accurately, does it *substantially* outweigh the need for mediation confidentiality? Conversely, the need for confidentiality is compelling, but is the fear that breaking confidentiality in this one case will affect the entire practice of mediation worth convicting a potentially innocent victim? What if you were the defendant? What if you were the alleged victim? What if you were the mediator? What the preceding analysis reveals is that even in a simplified fact pattern, the balancing of the two competing interests is extremely difficult. There is only one question left: Is the mediator's testimony admissible or inadmissible?

The case discussed above is a simplified version of *State v. Williams*,¹⁴⁹ the "first decision issued by a state high court interpreting the Uniform Mediation Act's evidentiary balancing test."¹⁵⁰ Although New Jersey had not yet adopted the UMA at the time of the original action, the New Jersey Supreme Court chose to utilize the UMA as an "appropriate analytical framework."¹⁵¹ The trial court in *Williams* excluded the mediator's testimony because of a statutory privilege and was affirmed by the appellate court. The New Jersey Supreme Court underwent a balancing test in order to determine if the defendant's asserted constitutional rights—confrontation, compulsory process, and due process—overrode the need

149. 184 N.J. 432 (2005).

150. New York State Dispute Resolution Assoc., *Court Upholds Mediation Confidentiality in Case Testing the Uniform Mediation Act*, http://www.nysdra.org/articles/article_details.asp?ID=125 (last visited February 17, 2007) (on file with the *McGeorge Law Review*).

151. *Williams*, 184 N.J. at 444-45.

for confidentiality in mediation that was protected by the presence of a statutory privilege under New Jersey law.¹⁵²

In beginning the analysis, the New Jersey Supreme Court acknowledged the strong interests on both sides of the case. The court first established that "if evidence is relevant and necessary to a fair determination of the issues, the admission of the evidence is constitutionally compelled."¹⁵³ But the court also recognized that "[s]uccessful mediation . . . depends on confidentiality perhaps more than any other form of ADR" and "[i]f mediation confidentiality is important, the appearance of mediator impartiality is imperative."¹⁵⁴

Ultimately, the New Jersey Supreme Court sided with "the sound policy justifications underlying mediation confidentiality" and held that the defendant's "need for the mediator's testimony [did] not outweigh the interest in mediation confidentiality"¹⁵⁵ However, the court's decision undoubtedly rested upon other factors not discussed in the earlier case analysis, including reliability problems with the mediator's testimony, lack of corroboration between the mediator's proposed testimony and defendant's version of the altercation, and a conclusion by the court that the defendant failed to demonstrate that the evidence in question was not otherwise available.

The *Williams* case also provides a great illustration of how judges can split with regards to balancing the competing interests in identical circumstances. The dissent in *Williams* essentially agreed with the standards applied by the majority but disagreed with the majority's conclusions "regarding the 'need' for the mediator's testimony," recognizing that such conclusions are certainly "fact-sensitive."¹⁵⁶ The dissent also departed because of a disagreement involving whether the evidence was "otherwise available." The dissent argued that all the evidence and testimony regarding the alleged victim's wielding of a shovel came from "interested" parties and, therefore, the evidence was not otherwise available because the "mediator's position as the only objective witness placed him in an entirely distinct role from the other witnesses in the case."¹⁵⁷ The dissent's ultimate conclusion was very telling with respect to the emotions of these cases and the difficulties involved:

There is nothing unclear about [the] testimony. Plainly, [BB] admitted, in the mediator's presence, to wielding a shovel. That, in turn, rendered the

152. *Id.* at 443-44.

153. *Id.* at 444 (quoting *State v. Garron*, 177 N.J. 147, 171 (2003)).

154. *Id.* at 447.

155. *Id.* at 454. The court did realize that the UMA standard was actually "substantially outweighs," as opposed to just "outweighs," but concluded nonetheless that it did not matter because "the mediator's testimony [did] not outweigh—let alone substantially outweigh—the interest in protecting confidentiality." *Id.* at 445-46. Notably, the defendant argued that the "substantially outweighs" standard was unconstitutional and that the court should apply an "outweighs" standard instead. See *infra* note 171 and accompanying text.

156. *Williams*, 184 N.J. at 454.

157. *Id.* at 455. See also *supra* note 131 (discussing the intricacies of the "otherwise available" requirement).

mediator's testimony "relevant and necessary" to the defense. . . . Indeed, [the testimony] could have turned the tide of a very close case. Therefore, it was essential both to the defense of the criminal charges against defendant and to the very fairness of the trial. That was a sufficient basis on which to breach the mediator's privilege.¹⁵⁸

Finally, what the balancing analysis undertaken in *Williams* further illustrates is how changing the balancing variables can dramatically affect the equation and the outcome. How would a burden different from "substantially outweighs," such as a preponderance standard ("outweighs"), affect your analysis and ultimate decision? What if the evidence was inculpatory? What if the alleged victim (BB) testified at Carl's trial and stated that he never had a shovel?¹⁵⁹ What if both parties agreed to waive their privilege but the mediator still refused to testify?¹⁶⁰ These are just a few of the quandaries that accompany any discussion of the enigmatic framework that is civil mediation privileges in the criminal arena.

B. *Why the UMA Got it Wrong*

I certainly do not pretend to know the answers to any of the questions I have posed in the preceding section, at least not in any absolute sense. I also am not suggesting that these are questions that have right or wrong answers, because they most often do not. What I will suggest is that the need for evidence in criminal cases is not treated seriously enough by the UMA, as manifested in the adopted standard. The reporter's notes use language that appears deferential not only to the need for evidence in criminal cases, but also to the special

158. *Williams*, 184 N.J. at 455-57.

159. This question, of course, implicates the issue of impeachment evidence. The use of mediation communications strictly for impeachment purposes can be seen as somewhat of a compromise in the privilege battle that is waged between advocates of strict confidentiality and those in favor of greater disclosure. Impeachment in the mediation privilege context is similar to the traditional use of criminal impeachment where certain otherwise inadmissible evidence is permitted as a means to impeach a defendant who chooses to testify in his or her defense. However, in the mediation context, evidence that arises during a civil mediation can be utilized as a means of impeachment, whether exculpatory or inculpatory, and whether the witness to be impeached is the defendant or perhaps even the victim (e.g., victim testifies that defendant attacked him first, but mediation testimony reveals that the victim was the aggressor).

When discussing the ideas for this article in front of a class of law students in a mediation clinic, many were very receptive to the idea of allowing mediation evidence to be used for impeachment purposes but were instinctually critical of rules that would allow for the admission of mediation evidence generally in criminal trials. This demonstrates the natural inclination toward compromise, where limiting the use for impeachment purposes only may seem like a fair middle ground for the mediation privilege debate. What role impeachment plays in the admissibility of mediation communications, assuming an impeachment distinction is prudent at all, is an important issue to consider in any privilege discussion. See *infra* Part VI.B (proposing an amended statute for the UMA that distinguishes evidence used for impeachment purposes only).

160. See *supra* note 122 (discussing the holding by Judge Brazil in *Olam* that based the decision to admit the mediator's testimony, at least to some degree, on the fact that both parties in the case waived their mediation privileges).

constitutional concerns that attend the need for exculpatory evidence.¹⁶¹ However, this amounts to nothing more than lip service because the balancing deference is undeniably aimed at the confidentiality interest alone, and there is no special treatment for exculpatory evidence.

The following will detail why the UMA's approach to a criminal proceedings exception is misguided. First, the UMA balancing standard is weighted too greatly against evidentiary needs. Second, the distinction made between felonies and misdemeanors is not prudent in the context of evidentiary privileges. Finally, the lack of a distinction between inculpatory and exculpatory evidence fails to account for the constitutional rights of the accused.

1. *Burden of Proof Too Much of a Burden*

When the drafting committee for the UMA first addressed the idea of creating an exception to what was, in the beginning, an absolute mediation privilege, they adopted an "interests of justice" standard that was effectively a catch-all exception.¹⁶² But this exception would not last long and was eventually replaced by a more refined balancing test that focused on preventing "manifest injustice,"¹⁶³ which was ironically modeled after Ohio law on mediation privileges.¹⁶⁴ The drafters believed that the early manifest injustice standard would only allow the admissibility of evidence in "exigent, unforeseen, or exceptional" circumstances¹⁶⁵ and believed that the high threshold would keep out most evidence of mediation communications: "Given the fundamental nature of advocacy, the Drafting Committee anticipates that many if not most such claims of manifest injustice will fail."¹⁶⁶ However, a large contingent of critics quickly crawled out of the woodwork against the proposed exception fearing that it "would open the floodgates of litigation."¹⁶⁷

161. See UNIF. MEDIATION ACT, Official Comments, § 6(b)(1).

162. Draft UMA, Apr. 1998, Reporter's Working Notes (c)(10).

163. Draft UMA, Mar. 1999, Reporter's Working Notes (d)(8). The entire standard originally read: "to prevent a manifest injustice of such magnitude as to outweigh the importance of protecting the . . . confidentiality in mediation proceedings." *Id.*

164. See OHIO REV. CODE ANN. § 2317.02.3(C) (1998). This statute, which has now been amended upon adoption of the UMA, previously read that a mediation privilege did not apply where "necessary in a particular case to prevent a manifest injustice, and that the necessity for disclosure is of a sufficient magnitude to outweigh the importance of protecting the general requirement of confidentiality in mediation proceedings." *Id.* This is ironic because Ohio has now adopted the UMA framework but drastically altered the criminal proceedings exception by creating a categorical exception for felony proceedings and a "manifest injustice" balancing standard for misdemeanor proceedings.

165. Draft UMA, Dec. 1999, Reporter's Working Notes 2(c)(5).

166. *Id.*

167. Hughes, *supra* note 5, at 55-57 (providing a very thorough timeline of how the criminal proceedings exception developed under the UMA, including a detailed account of critics voicing discontent during the process).

Although the drafters tried to save the basic “manifest injustice” framework by undergoing several reworks, the exception eventually gave way to the contemporary “substantially outweighs” balancing test.¹⁶⁸ Surprisingly, the mediation community did not organize against the new exception, which appears wrought with the same problems of the old. In fact, except for those few critics who wanted to rid the UMA of any balancing calculations altogether, the “substantially outweighs” test was embraced by most followers. In 2001, it became the standard under which a new criminal proceedings exception would be measured.

As this Article has repeated ad nauseam, for the admissibility of mediation communications in felony proceedings, the criminal proceedings exception in the UMA now requires that “the party seeking discovery or the proponent of the evidence has shown . . . that there is a need for the evidence that *substantially outweighs* the interest in protecting confidentiality.”¹⁶⁹ The problems with the “substantially outweighs” burden of proof, and the reasons why it is too high, are three-fold.

First and foremost, the balancing standard under the UMA is an unconstitutional threshold as applied to exculpatory evidence. The constitutional rights of the criminal defendant are of the utmost importance in any evidentiary equation. The ability of the accused to call witnesses in their favor (compulsory process), to cross-examine and impeach the government’s witnesses (confrontation), and to receive a fair opportunity to present a defense (due process) are absolutely imperative to ensure that truth is revealed, the innocent protected, and justice served.¹⁷⁰ The UMA standard, which places a strong benefit of the doubt in favor of inadmissibility, violates the Constitution because it forces courts to balance from an uneven starting point.¹⁷¹ In creating a “substantially outweighs” test, the UMA approach universally places the interests of mediation above the interests of justice and the constitutional rights of the accused.

It is not the case that the drafters of the UMA failed to take notice of the constitutional rights at stake. This could not be further from the truth. Instead, the UMA intentionally renders the constitutional rights of an accused subservient to the need for confidentiality. In fact, the reporter’s notes state: “[E]ven without this exception, the courts can be expected to weigh heavily the need for the evidence in a particular case, and sometimes will rule that the defendant’s constitutional rights require disclosure.”¹⁷² This is effectively a concession, on

168. *See id.*

169. UNIF. MEDIATION ACT § 6(b)(1) (emphasis added).

170. *See supra* Parts III.B.1-2 (discussing the constitutional rights implicated with evidentiary privileges).

171. The defendant in *Williams* likewise believed that “the qualifier ‘substantially’ represents an unconstitutional evidentiary restriction” and that the court should have considered “only whether the need ‘outweighs’ the confidentiality interests, a standard that is less burdensome....” *New Jersey v. Williams*, 877 A.2d 1258, 1265 (N.J. 2005).

172. UNIF. MEDIATION ACT, Official Comments, § 6(b)(1).

some level, that the constitutional rights at stake in criminal proceedings will in some cases render the application of a mediation privilege unconstitutional.

But even with this recognition, the UMA exception creates only a very small window of admissibility. In other words, if the constitutional issues involved are such that a statutory mediation privilege would not survive an as-applied constitutional challenge, then an exception that only permits the admission of exculpatory evidence in the rarest of cases—as was the documented purpose behind the UMA exception¹⁷³—treads on very shaky constitutional grounds. Although the courts have consistently recognized other evidentiary privileges as categorically constitutional, this argument fails to account for the inescapable differentiation between the policy interests implicated by such privileges and the interest in mediation confidentiality that provides the bedrock for the mediation privilege. There is no doubt that mediation is a vital institution that benefits millions of people. The interests involved may be sufficient to support a broad privilege in civil settings, but the constitutional rights that attend any criminal proceeding demand a significantly higher level of respect and deference.

Furthermore, not only are the needs for exculpatory evidence immeasurably greater in the criminal context relative to evidence proffered in a civil action, but the interests of mediation confidentiality are significantly lower than in a civil context. Unlike in a civil action, the use of exculpatory evidence in a criminal trial is not adverse to any party. The need for confidentiality is based largely on the fear that a lack of confidentiality will translate to a lack of candor. But if a party is not concerned about having their statements used against them legally, then they are not going to be discouraged from speaking openly during mediation.¹⁷⁴ The chilling effect just is not there.¹⁷⁵ Moreover, and for the very same reasons, the alternative interest supporting mediation confidentiality, impartiality of the mediator, is also implicated to a lesser extent when the proffered evidence is exculpatory in nature.

Therefore, because the constitutional interests are so high on the evidentiary side when dealing with exculpatory evidence, and the need for confidentiality is lower relative to proffering of other non-exculpatory evidence, the UMA's "substantially outweighs" standard does not pass constitutional muster. A categorical exception for exculpatory evidence may certainly be the answer, but the constitutional rights at stake at the very least demand a preponderance standard that will allow the courts to weigh each interest from equipoise.

173. See UNIF. MEDIATION ACT, Official Comments, § 6(b) ("[T]he exceptions listed in 6(b) include situations that should remain confidential but for overriding concerns [of] justice."); see also *supra* note 166 and accompanying text (revealing that the UMA was attempting to draft a standard that would effectively keep all evidence out but for the absolute rarest of cases).

174. See *infra* notes 196-198 and accompanying text (discussing the idea that exculpatory evidence is not legally adverse to any mediation party).

175. But see Hiers, *supra* note 12, at 584 ("Any criminal proceedings exception to the mediation privilege likely will have a significant chilling effect on the mediation process.").

Second, moving away from exculpatory evidence only and to the evidentiary need in criminal cases generally, the scarcity of criminal cases that directly implicate the need for a mediation privilege is to such a degree that the balancing equation should reflect this reality. The UMA exception does not. In *Olam v. Congress Mortgage Co.*, Judge Brazil addressed the infrequency issue and how it factors in to the equation:

We acknowledge . . . that the possibility that a mediator might be forced to testify over objection could harm the capacity of mediators in general to create the environment of trust that they feel maximizes the likelihood that constructive communication will occur during the mediation session. But the level of harm to that interest likely varies, at least in some measure, with the perception within the community of mediators and litigants about how likely it is that any given mediation will be followed at some point by an order compelling the neutral to offer evidence about what occurred during the session. I know of no studies or statistics that purport to reflect how often courts or parties seek evidence from mediators—and I suspect that the incidence of this issue arising would not be identical across the broad spectrum of mediation programs and settings. What I can report is that this case represents the first time that I have been called upon to address these kinds of questions in the more than fifteen years that I have been responsible for ADR programs in this court. Nor am I aware of the issue arising before other judges here. Based on that experience, my partially educated guess is that the likelihood that a mediator or the parties in any given case need fear that the mediator would later be constrained to testify is extraordinarily small.¹⁷⁶

This very interesting and telling analysis by Judge Brazil, an ADR aficionado, illustrates how the rarity of cases involving mediation privileges can impact the ultimate weight assigned to the interest in mediation confidentiality.

Although *Olam* was a civil action, the case law would suggest that criminal cases have implicated mediation privileges to an even lesser degree, which is saying a lot because it is extremely rare in the civil setting as Judge Brazil alluded to. The infrequency argument, therefore, would presumably hold more sway in the criminal arena. Even the UMA recognized how infrequently these cases arise, first noting that the entire gambit of exceptions “often apply to situations that arise only rarely, but might produce grave injustice if not excepted from the privilege.”¹⁷⁷ The drafters subsequently acknowledge that cases implicating the criminal proceedings exception constitute even “less common fact patterns.”¹⁷⁸

176. 68 F. Supp. 2d 1110, 1134 (N.D. Cal. 1999).

177. UNIF. MEDIATION ACT, Prefatory Note.

178. UNIF. MEDIATION ACT, Official Comments, § 6(b).

Simply put, the infrequency argument is that the interest in mediation confidentiality is founded upon the fear that repeated disclosure of "confidential" communications from mediations would have a chilling effect over time, both in terms of party candor and mediator impartiality. But if the breach were to occur in only the rarest of cases, then the aggregate breach would not rise to the level of a chilling effect, at least not to such a degree that such deferential treatment toward the mediation interest is warranted. Should not the rarity of the exception being utilized dramatically affect the standards used in determining when to allow the exception?

In other words, if the circumstances under which the privilege exception for criminal proceedings might arise are so rare, then that reality should necessarily affect the overall equation in terms of how much weight maintaining confidentiality in mediation would carry in the analysis. If this is so rare, as it appears to be, then what is everyone afraid of? Do confidentiality advocates sincerely fear an erosion of mediation confidentiality and a realistic breakdown in the process simply because mediation communications might come into criminal proceedings every once in a blue moon? Or are proponents just advocating generally, using the slippery slope argument to head off confidentiality breaches at every front? It may be reasonable to fear the breakdown of confidentiality if these exceptions would operate to breach a privilege in case after case, but in criminal proceedings where mediation communications would so rarely come up, why should the weight that the confidentiality interest carries remain the same. It should not. Accordingly, the burden of "substantially outweighs" overestimates the confidentiality interest and should be altered to reflect the infrequency of the exception's inevitable invocation.

Third, it is ironic that with all of the categorical exceptions that exist under the UMA, the criminal proceedings exception, with the attendant constitutional and justice concerns, is a qualified exception with such a heavy burden against disclosure.¹⁷⁹ In each case that the UMA provided for a categorical exception, it is an explicit recognition by the drafters that the interests in favor of disclosure automatically trump the interest in confidentiality to such an extent that disclosure does not require any form of balancing.¹⁸⁰ So what this conveys is that, according to the UMA, the justice and constitutional interests behind the criminal proceedings exception are so weak relative to the other categorical exceptions that a strong benefit of the doubt should be given to resisting disclosure. However, the UMA acknowledges that "society's need for evidence to avoid an inaccurate decision is greatest in the criminal context."¹⁸¹

179. See UNIF. MEDIATION ACT, § 6(a).

180. UNIF. MEDIATION ACT, Official Comments, § 6 ("The exceptions in Section 6(a) apply regardless of the need for the evidence because society's interest in the information contained in the mediation communications may be said to categorically outweigh its interest in the confidentiality of mediation communications.").

181. UNIF. MEDIATION ACT, Official Comments, § 6(b)(1).

Another irony found within the UMA, which further illustrates the instinct toward an equal standard, is the first statement explaining the qualified sections under section 6(b), which of course includes the criminal proceedings exception. The reporter's notes state: "The exceptions under this Section . . . may sometimes justify carving an exception, but only when . . . the need for the evidence *outweighs* the policies underlying the privilege."¹⁸² However, this is not the only inconsistency between the aspirations of the reporter's notes and the actual language of the UMA. As noted by Professor Scott H. Hughes: "The Prefatory Note requires a simple balancing while section 6(b) . . . requires a 'need for the evidence that substantially outweighs the interest in protecting confidentiality.' How are these two tests to be reconciled?"¹⁸³ Partially because of this and other internal inconsistencies, Professor Hughes contends that "the UMA test is unworkable."¹⁸⁴

An additional incongruity is found where the UMA pretends "to leave the critical balancing of these competing interests to the sound discretion of the courts to determine under the facts and circumstances of each case" whether the particular mediation evidence should be admissible.¹⁸⁵ If this is the case, and the UMA genuinely desired to leave the analysis to a judge's sound discretion, then why is there not a preponderance standard (i.e., "outweighs") for the criminal proceedings exception? Even if the drafters did not believe that the need for evidence is strong enough to universally warrant the admissibility of evidence over confidentiality concerns in the form of a categorical privilege, why place the burden at the other extreme?

It would seem that the powerful constitutional and justice interests behind the need for evidence in criminal cases—the same interests that the UMA repeatedly acknowledges—at least warrant making the balancing mechanism equal, which would translate to using a preponderance standard. If the courts are charged to balance these very strong interests on both sides, and the individual circumstances of each case must be dispositive as acknowledged by the UMA,¹⁸⁶ then, at the very least, the courts must be permitted to commence their balancing analysis from a level playing field. Creating a greatly lopsided standard that only applies in one category of criminal proceedings is hardly leaving it to the sound discretion of the judiciary.

182. UNIF. MEDIATION ACT, Official Comments, § 6(b) (emphasis added).

183. Hughes, *supra* note 5, at 53-54.

184. *Id.* at 51.

185. UNIF. MEDIATION ACT, Official Comments, § 6(b)(1).

186. *See id.* ("[T]he Drafting Committees decided to leave the critical balancing of these competing interests to the sound discretion of the courts to determine *under the facts and circumstances of each case.*") (emphasis added).

2. *A Misguided Distinction*

In designing a criminal proceedings exception, the UMA decided to apply the exception to felonies only, although the drafters do offer model language for states that “wish to extend [the exception] to misdemeanors.”¹⁸⁷ The majority of adopting states have followed the UMA’s guidance and only apply the exception to felony proceedings.¹⁸⁸ It is easy to understand why a distinction between felony and misdemeanor proceedings is appealing, especially when made within a balancing framework. After all, felony proceedings are, by their very nature, more “serious” than misdemeanors based on, if nothing else, the possible punishments that attach to each.¹⁸⁹ Ohio’s law now makes a similar and stark distinction, creating a categorical exception for felonies while instituting a “manifest injustice” standard for misdemeanors.¹⁹⁰ Nevertheless, acknowledging the inherent distinction between the two categories of cases and subsequently choosing to employ the distinction in certain legal settings is not unreasonable, as evidenced by the evolution of the categories themselves.

However, a distinction between felony and misdemeanor proceedings is not desirable in the case of mediation privileges. Any criminal proceeding exception should treat felony and misdemeanor proceedings equally, or at the very least should err on the side of admissibility, as seen under Ohio’s approach. It is unfair and amiss to create an artificial point of demarcation where crimes on one side of the line are ostensibly serious enough to warrant special treatment while crimes on the other side are not, especially when misdemeanors constitute the vast majority of criminal cases.¹⁹¹ In other words, can we honestly say that unauthorized computer use (F5) and repeat motion picture piracy (F5) are sufficiently worse than negligent homicide (M1) and repeat sexual imposition (M1) to the degree that “confidential” evidence should be permitted to potentially convict, or even acquit, a defendant in the former but not in the latter?¹⁹² Drawing

187. UNIF. MEDIATION ACT, Official Comments, § 6(b)(1).

188. See *supra* notes 136-138 and accompanying text (discussing the decision by adopting states to apply the exception in all cases or only in felony proceedings).

189. But even this is not always the case. Under Ohio law, which is similar to most state law, the maximum penalty for a misdemeanor in the first degree (M1)—which is 180 days—is exactly the same as the minimum penalty for felonies of both the fifth (F5) and fourth (F4) degrees—which is 6 months. This sentence overlap between felonies and misdemeanors suggests that utilizing the statutory distinction in other contexts does not always make sense.

190. See OHIO REV. CODE ANN. §§ 2710.05(A)(9), (B)(1) (2006). But Ohio’s modification of the UMA standard, which effectively placed the two types of proceedings on opposite ends of the spectrum, may have been the misguided result of political realities and compromise, rather than genuine policy agendas.

191. See Richard C. Reuben, *The Sound of Dust Settling: A Response to Criticisms of the UMA*, 2003 J. DISP. RESOL. 99 (2003).

192. See OHIO REV. CODE ANN. §§ 2913.04, 2913.07, 2903.05, 2907.06; see also *supra* note 189 and accompanying text (discussing the fact that sentences for misdemeanors and felonies overlap). Furthermore, there are often categories of offenses where one difference in the crime or in the offender’s history will increase the offense level from an M1 to an F5, which can also produce gross inequities when making any type of significant distinction between felonies and misdemeanors. For example, under Ohio law, motion picture piracy

such a fine line when the stakes are at their “zenith” has the potential to create profoundly unjust outcomes. Even the UMA drafters correctly concede that the need for a criminal proceedings exception arises from the “unique character, considerations, and concerns that attend the need for evidence in the *criminal* process,” not the *felony* process alone.¹⁹³

3. A Misplaced Distinction

Although the UMA utilized a distinction between felony and misdemeanor proceedings, the drafters at least provided optional language for states to reject the distinction. As to the differences between exculpatory and inculpatory evidence, however, the UMA explicitly and unfortunately rejected the making of a distinction for privilege purposes. In explaining the UMA’s criminal proceedings exception, the drafters reveal that it was “drafted in a manner to ensure that both the prosecution and the defense have the same right with respect to evidence, thus requiring a level playing field.”¹⁹⁴ This may appear equitable on its face, but in practice it simply does not make a great deal of sense. If our primary reason for stressing and protecting confidentiality is to prevent a chilling effect on the use of mediation, then it naturally follows that a distinction between exculpatory evidence and inculpatory evidence is not only practical but also necessary.

Even though the UMA admitted that the standard was constructed to apply equally to both sides, they acknowledge that “even without this exception, the courts can be expected to weigh heavily the need for the evidence in a particular case, and sometimes will rule that the defendant’s constitutional rights require disclosure.”¹⁹⁵ This statement effectively concedes that exculpatory evidence, because it implicates the constitutional rights of the accused, carries more weight than inculpatory evidence. But the ultimate standard under the UMA fails to reflect this concession, making no distinction between the two categories of evidence.

Unlike inculpatory evidence and all mediation evidence in a civil setting, allowing the admission of exculpatory evidence is presumably not adverse, legally speaking, to any mediation party.¹⁹⁶ In other words, considering the stakes

is an M1 for the first offense but is classified as an F5 for every subsequent offense. See OHIO REV. CODE ANN. § 2913.07.

193. UNIF. MEDIATION ACT, Official Comments, § 6(b)(1) (emphasis added).

194. *Id.*

195. UNIF. MEDIATION ACT, Official Comments, § 6(b)(1).

196. *But see* New Jersey v. Williams, 877 A.2d 1258, 1267 (N.J. 2005) (“Defendant’s position trivializes the harm that will result if parties are routinely able to obtain compulsory process over mediators. Simply because the mediator does not actually testify *against* the victim (who is, by definition, a non-party to a State criminal prosecution) does not mean that the victim is unaffected by the prospect that his statements, made with assurances of confidentiality, will be used to exculpate the person who victimized him. In such circumstances, the victim could hardly be expected to trust that the mediator was impartial.”).

involved, it is difficult to rebut the instinct that criminal defendants should be allowed to admit evidence from a mediation when the evidence will not legally harm the party who is the source of the communication.¹⁹⁷ Therefore, if mediation parties are informed, or repeat players become aware, that their communications during mediation may potentially be used exculpatory in a future criminal proceeding involving one of the other mediation participants, this reality will not adversely affect the perception and utilization of mediation because the evidence will not hurt the speaker, at least not enough to deter effective communication. The viability of mediation is simply not at risk because the chilling effect would be negligible, especially in light of how rare these cases arise.¹⁹⁸

Moreover, if defendants’ constitutional rights weigh so heavily into the privilege equation, as the UMA recognizes, then why treat both forms of evidence equally? Creating a more liberal exception for scenarios when mediation communications are to be used only for exculpatory purposes would presumably solve the constitutional questionability of the current UMA standard. At first glance, the inequity of an inculpatory/exculpatory distinction may feel wrong because it gives one side more right to evidence. But it is important to remember that we are dealing strictly with criminal proceedings. As such, the two adverse parties are the State and the accused, not two private citizens as in a civil action. My intent is in no way to downplay the importance of the State’s interest in bringing the guilty to justice—as evident from my earlier proselytizing¹⁹⁹—but we would all presumably feel more comfortable allowing “confidential” communications to be admitted as evidence in a criminal trial if it was admitted to exonerate the innocent as opposed to convicting the guilty. This is human nature and once again reflects our tendency to favor acquittal of the guilty over condemnation of the innocent.

VI. SEARCHING FOR A CONSTITUTIONAL COMPROMISE

A. *Alternatives to the UMA Approach*

The charge of drafting a complex mediation privilege is not a simple endeavor by any stretch of the imagination. The drafters of the UMA had an

197. When giving a presentation on the topic of this Article, students were almost universally reluctant to the idea of a categorical exception in all criminal cases. Being that the students were from a mediation clinic, they were obviously taught well with respect to the need for mediation confidentiality. However, a large number of students—those who actually chose to speak up during and after the presentation—qualified their general reluctance with the idea that exculpatory evidence should be admissible to a greater extent, relative to inculpatory evidence, not only because of the constitutional rights at stake but also because of the reality that use of the evidence would not be adverse to the speaker under exculpatory circumstances. Furthermore, many of the same students expressed an instinct that even inculpatory evidence should be admitted when used to directly impeach a witness at trial where the testimony is inconsistent with statements made during mediation.

198. *But see* Hiers, *supra* note 12, at 584 (“Any criminal proceedings exception to the mediation privilege likely will have a significant chilling effect on the mediation process.”).

199. *See supra* Part III.A (discussing the importance of inculpatory evidence).

unenviable task and even so, the eventual framework adopted is very successful on many fronts. However, it is the position of this Article that their attempt at a criminal proceedings exception falls short. Trying to construct an alternative structure for the exception is likewise an arduous position. There are so many variables to consider and so many combinations of standards, factors, and applications that settling on a final workable and viable framework is certainly going to be a trial and error process as various privilege structures are adopted and implemented among the states.

Of the issues that must be considered when talking about any type of criminal proceedings exception, the following arguably represent the most compelling. The obvious first step is deciding whether privileges and exceptions in the criminal context will be categorical or qualified. Second, if any form of qualified approach is adopted, selecting a legal standard for a possible balancing test becomes crucial. Next, what types of criminal proceedings (e.g., felonies, misdemeanors, etc.) will be covered is also very consequential. Fourth, it might be prudent to consider differential application of an exception to the State and the accused, in the form of an exculpatory/inculpatory distinction. Another important area where an exception might be given free reign is where the mediation evidence will be used for impeachment purposes only. A sixth possibility is to restrict the application of the exception to circumstances where the mediation session in question was not the subject of the criminal proceeding at issue—i.e., maintain privilege for concurrent civil/criminal scenarios. Perhaps any exception to a mediation privilege should only operate to allow discovery, rather than admission of evidence. Finally, maybe any balancing framework constructed should articulate certain factors and values for the judge to utilize when undergoing the balancing analysis.²⁰⁰

B. Prescribing a Happy Medium

Looking at the UMA and Ohio's approach side-by-side is helpful in not only seeing how a categorical exception can differ according to the many different variables involved, but also because the two standards reside near the extremes of the privilege spectrum. While the UMA has no exception for misdemeanor proceedings and a very high burden in felony proceedings, Ohio has a categorical exception in felony proceedings and a high burden in misdemeanor proceedings.²⁰¹ As is evident by these two divergent approaches and the consideration of factors in the preceding section, there are numerous ways to

200. This is quite common in the law. For example, federal judges and many state judges are charged with sentencing according to certain offense and offender characteristics, theories of punishment, and other factors. Particularly now that the federal sentencing guidelines have become effectively advisory, the federal courts are forced to pay much closer attention to Congress's guidance found in 18 U.S.C. § 3553(a) (2007).

201. See OHIO REV. CODE ANN. §§ 2710.05(A)(9), (B)(1) (2006); see also *supra* Part IV.C (discussing the adoption of the UMA by the states and the varied approaches, including Ohio's).

draft a criminal proceedings exception and the ultimate framework selected can have a significant impact on when evidence of mediation communications will come in to a criminal trial. The following will outline a proposal for a new criminal proceedings exception for consideration by the UMA, as well as the adopting states.

I propose, first, that the criminal proceedings exception should be extended to permit the admissibility of any otherwise admissible evidence that is exculpatory in nature (i.e., a categorical exception). Second, the mediation privilege should not apply to evidence that will be used only for the purposes of directly impeaching a witness who testifies inconsistently with statements made during a mediation (i.e., an additional categorical exception). Third, any criminal proceedings exception should not apply to mediation communications that originate from a “criminal mediation.”²⁰² Finally, the admissibility of all other evidence should be dependent upon a balancing of the need for the evidence and the need for confidentiality, where the former must only “outweigh” the latter to be admitted. Utilizing the general format of the UMA,²⁰³ the new criminal proceedings exception would look something like this:

SECTION 2. DEFINITIONS: In this Act:

(1) “Criminal mediation” means a mediation that is administered or sponsored by the State upon an actual or prospective criminal prosecution for purposes of resolving the potential criminal charges only.

SECTION 6. EXCEPTIONS TO PRIVILEGE

(a) Subject to subsection (b), there is no privilege under Section 4 for a mediation communication that is sought or offered in a **felony or misdemeanor proceeding**, if:

- (1) the communication is **exculpatory** in nature;
- (2) the communication is offered for **impeachment purposes only**; or
- (3) a court, administrative agency, or arbitrator finds, after a hearing in camera, that the party seeking discovery or the proponent of the evidence has shown that the evidence is not otherwise available, and that there is a need for the evidence that **outweighs** the interest in protecting confidentiality.

(b) Evidence of a mediation communication is **not made admissible** by subsection (a) if the communication originates from a **criminal mediation**.

202. See *supra* note 42 (discussing criminal mediations and the clear need for a categorical privilege).

203. This amendment does not represent an exact substitution of the UMA because the formatting of the UMA’s framework applies the relevant criminal proceedings standards to other subsections that are not directly implicated by this article.

My proposal is certainly not based solely on constitutional considerations. It is overtly value-laden on several levels. I recognize that the constitutional grounds for lowering the UMA's standard apply only to exculpatory evidence, hence the categorical exception. But because my proposed changes include a categorical exception for all exculpatory evidence and evidence admitted for impeachment purposes, that means that the only type of evidence that is necessarily implicated in lowering the "substantially outweighs" standard to "outweighs" is non-impeachment inculpatory evidence.²⁰⁴ Therefore, my decision to recommend a lesser standard is based more on a fundamental fairness to the criminal process and a loyalty to the UMA's alleged desire to "create a level playing field," as well as to leave the critical balancing of these issues to the sound discretion of the trial judge.

Some may say that the pages of this Article, and other forums of debate in this area, spend a lot of time parsing over what is, in the end, just one word: "substantially." But as any practitioner or judge can attest to, the difference between establishing that the need for a particular piece of evidence "substantially outweighs" a competing interest is worlds away from requiring a showing by a mere preponderance (i.e., "outweighs").²⁰⁵ Although there is no way to accurately quantify this comparison,²⁰⁶ the significance of the word "substantially" equates roughly to moving from a burden of 51% to a burden closer to 80 or 90%. Perhaps this is the difference between a preponderance standard and a clear and convincing standard. In practical reality, under the UMA as it stands, any evidence in the form of a mediation communication will come in only in the most egregious cases of injustice. Under a preponderance standard, however, evidence will be admissible whenever a judge determines that the probative value and reliability are such that the evidence is a necessary piece to the puzzle.

It is important to note that the purpose of the proposed amendment to the UMA's criminal proceedings exception is to spark an initial reexamination of mediation privileges in the criminal process. The implications of a new privilege framework would require a more in-depth assessment prior to actual implementation to ensure that the proposed prescription would not produce any negative and unforeseen side-effects. I also concede that the amendment suffers from the same, yet almost inescapable, ex-post balancing concerns that exist with any "weighing" of admissibility factors after the fact (i.e., parties can never be sure, absent categorical privileges or no privileges, that their statements during

204. See *supra* note 159 (discussing the impeachment distinction).

205. A preponderance of the evidence is, of course, the traditional civil standard that equates to "more likely than not." This is why, in the current equation, a preponderance approach translates to a test that only requires the need for the evidence to "outweigh" the need for confidentiality.

206. See Hughes, *supra* note 5, at 44 ("[W]hat should the burden of proof be on the proponent during the in camera hearing? Where the language reads 'substantially outweighs,' is the standard similar to probable cause or a prima facie case? Or does the language require a preponderance of the evidence, a clear and convincing showing, or an even greater level such as a 'beyond a reasonable doubt'?").

mediation will be disclosed in a future criminal trial). But unless and until a categorical privilege or exception proves prudent in all circumstances, it would seem impossible to draft a statute that could account for every scenario without necessitating an individual balancing of certain factors in each case. Overall, however, I believe the solution proposed constitutes a happy medium between the approach utilized by the UMA, which is overly exclusionary, and the Ohio approach, which is overly inclusive (at least for felony proceedings).

VII. CONCLUSION

Truthfully, when I began formulating the discourse for this Article, my own beliefs about how a mediation privilege should look in a criminal setting were far more black and white. In the further interest of candor, I will admit that I found it difficult to comprehend how evidence could ever be excluded from a criminal trial simply because it originated in mediation. It seemed preposterous at the time, though it still may in a given case.²⁰⁷ To that end, not only was I convinced—and remain so—that the “substantially outweighs” threshold under the UMA was too high and perhaps unconstitutionally so, but I was also initially prepared to flip the tables entirely, requiring instead that mediation evidence only be excluded in a criminal proceeding when the need for confidentiality in mediation “substantially outweighs” the need for the evidence brought forth. Going a step further, I thought that perhaps even a categorical exception was warranted for all mediation evidence in criminal proceedings given the stakes involved.

But I have since seen the light, or perhaps the penumbra, so to speak. I now realize that the infinite array of circumstances that arise in this context requires some form of balancing to address individual justice while still adequately accounting for the benefits society derives from mediation and the degree to which mediation requires confidentiality to remain a viable mechanism.²⁰⁸ This balancing, however, should commence in each case, at minimum, from equipoise. While my position on absolute admissibility may have softened, though only in the inculpatory context, my belief that the need for evidence in the abstract should at minimum stand on equal footing with the need for confidentiality in mediation remains vehemently adamant. Further, in maintaining the “substantially outweighs” standard, it communicates the wrong message. It is tantamount to saying that we as a society place the goals of an

207. See, e.g., *New Jersey v. Williams*, 877 A.2d 1258 (N.J. 2005).

208. See Hughes, *supra* note 5, at 46-47 (“When deciding whether to compel a mediator’s testimony, a court must determine whether the damage to the mediation process is outweighed by the damage to the individual’s interests. . . . However, the risk of such harm is highly contextual and depends both upon the nature of the mediator’s testimony and the mediator’s style of mediation, which seem to be as numerous as the blades on a well-manicured lawn.”).

institution in place to assist the administration of justice over the goals of a system that exists to do justice.

Nevertheless, regardless of what approach is adopted by states for criminal proceedings (absent states with absolute privileges), it is clear that mediators and the ADR field as a whole must collectively reassess how parties are informed about the “true” confidentiality of their communications during mediation.²⁰⁹ Parties should unquestionably be placed on notice concerning the rules and law that will govern their particular mediation session, even though that law is not always concrete when dealing with ex-post balancing standards.²¹⁰ The failure to do so, at least in the inculpatory context, and also when dealing with court-annexed mediation, raises very serious criminal due process and fair play concerns.

In the end, the mandate of mediation—“self-determination”—requires that parties are informed about the process, their rights, and the law with respect to confidentiality. Mediation is a vital mechanism in place to help both the individual parties to a dispute and the system as a whole, but in the worst of scenarios, parties should always be given the opportunity to exit mediation no worse off than when they entered. However, once evidence arises during civil mediation, justice will often demand the public utilization of such evidence in the criminal arena. After all, justice may be blind—need she also be deaf?

209. See Hiers, *supra* note 12, at 584 (“As states consider adopting the U.M.A., this significant exception to the mediation privilege deserves attention and discussion.”).

210. See *id.* (“In states which have adopted the U.M.A., attorneys and mediators probably should make sure that the parties know that statements they make during a mediation may be used later to prosecute them in criminal proceedings.”).

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