# Mediation Theory and Policy: The Legacy of the Pound Conference

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The Pound Conference marked an important moment in the history of mediation:[1] the beginning of a concerted effort to stimulate court-connected mediation programs[2] in the United States by framing the contemporary mediation movement—projects then underway in various countries, communities, agencies and courthouses—as a potential remedy for the perceived popular dissatisfaction with the administration of justice. Many impacts of the Pound Conference, on the ADR field generally and the mediation field particularly, will be discussed in this Symposium. I will direct my comments specifically to the impacts on mediation theory and policy, which I see as ripple effects of the Pound Conference, and its particular framing of the mediation movement.

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[1] The history of mediation itself is long and rich, and considerably predates the Pound Conference. *See, e.g.*, SARAH R. COLE ET AL., MEDIATION: LAW, POLICY & PRACTICE §§ 5:1–5:4 (2d ed. 2001); JAY FOLBERG & ALISON TAYLOR, MEDIATION 1–17 (1984); KIMBERLEE K. KOVACH, MEDIATION PRINCIPLES AND PRACTICE 18–21 (1994); Robert A. Baruch Bush, *Dispute Resolution—The Domestic Arena: A Survey of Methods, Applications and Critical Issues*, *in* BEYOND CONFRONTATION: LEARNING CONFLICT RESOLUTION IN THE POST-COLD WAR ERA 9–37 (John A. Vasquez et al. eds., 1995). *See generally* 1 THE POLITICS OF INFORMAL JUSTICE (Richard L. Abel ed., 1982) (identifying the history of and current trends in the area of "informal justice").

[2] I am using the term "court-connected" as used in the NATIONAL STANDARDS FOR COURT-CONNECTED MEDIATION PROGRAMS to include "any program or service, including a service provided by an individual, to which a court refers cases on a voluntary or mandatory basis, including any program or service operated by the court." NATIONAL STANDARDS FOR COURT-CONNECTED MEDIATION PROGRAMS, at iv (Ctr. for Dispute Settlement & The Inst. of Judicial Admin. 1990). This usage includes "court-annexed" and "court-referred" mediation." *Id.*

## I. FRAMING: THE POTENTIAL SOCIAL VALUE OF MEDIATION

The Pound Conference was organized around the premise that society was dissatisfied with the state of the justice system, and the task of the Conference was to explore the sources of dissatisfaction as well as the possible remedies.[3] Mediation was offered as one promising remedy for the particular dissatisfaction that arose from the cost, delay, and inaccessibility of adjudication attributed to a burgeoning judicial caseload.[4] Professor Sander argued that certain cases could be diverted from the judicial caseload to disposition through mediation, and that appropriate cases for diversion might be those that would benefit most from the unique social values mediation advanced—including "its capacity to reorient the parties toward each other . . . by helping them to achieve a new and shared perception of their relationship,"[5] its emphasis on party autonomy and self-determination in decisionmaking,[6] and its potential to rekindle a sense of community.[7] Despite the clear recognition of the unique social value of mediation in various dimensions of human interaction, this argument cast the potential value of the mediation process to the justice system primarily in terms of improved case management efficiency.

This framing of the mediation process has had a significant impact on the subsequent development of the theory, policy, and practice of the mediation field. As I discuss this impact, I want to recommend the image of a ripple effect rather than a chain of linear causation. When a stone is thrown into a pond, the ripple effect is quickly apparent. The first ripples appear closest to the point of impact, others spread quickly outward from there, and many ripples are visible at the same time. I begin with the ripples nearest to the point of impact—the Pound Conference itself—and follow the impact outward, recognizing that many of the ripple effects I discuss were and are visible almost simultaneously.

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[3] Warren E. Burger, Agenda for 2000 A.D.—The Need for Systematic Anticipation, Keynote Address Delivered at the National Conference on the Causes of Popular Dissatisfaction with the Administration of Justice (Apr. 7–9, 1976), *in* 70 F.R.D. 83, 93–95 (1976); Frank E.A. Sander, Varieties of Dispute Processing, Address Delivered at the National Conference on the Causes of Popular Dissatisfaction with the Administration of Justice (Apr. 7–9, 1976), *in* 70 F.R.D. 111, 133–34 (1976).

[4] *See* Sander, *supra* note 3, at 114–15.

[5] *Id.* at 115 (quoting Lon L. Fuller, *Mediation—Its Forms and Functions*, 44 S. CAL. L. REV. 305, 325 (1971)).

[6] *See id.* at 120–21.

[7] *See id.* at 128.

## II. THE GROWTH OF COURT-CONNECTED MEDIATION

One important impact of the Pound Conference was that the use of court-connected mediation grew as more and more court systems turned to mediation.[8] Although there are various sources of information on the rate and nature of this growth, the key themes across these various sources are that over the past twenty-five years court-connected mediation has grown in terms of the number of programs, the levels of the court system at which programs are operating, and the subject matter for which court-connected mediation programs are offered.[9]

### A. *Instrumentalization*

While any or all of the potential social values claimed for mediation might have attracted the courts, the promise of improved case management efficiencies appears to have propelled the interest in, and support for, court-connected mediation.[10] There are a number of possible explanations for this. Case management efficiency was a theme that had gained some currency in the field even before the Pound Conference.[11] It was certainly a prominent theme in the Pound Conference itself,[12] which gave it considerable weight in all further conversations within the legal community. Case management efficiency was also a theme with which individual courts could identify. While scholars might debate whether there was or was not any real crisis in litigation,[13] individual courts surely identified with the concrete reality of

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[8] *See, e.g.*, COURT-ANNEXED MEDIATION: CRITICAL PERSPECTIVES ON SELECTED STATE AND FEDERAL PROGRAMS (Edward J. Bergman & John G. Bickerman eds., 1998) (detailing a variety of ADR programs in state and federal courts) [hereinafter COURT-ANNEXED MEDIATION]; KOVACH, *supra* note 1, at 21–23 (tracing the modern development of court-connected mediation to the Pound Conference). *See also* Deborah R. Hensler, *In Search of "Good" Mediation: Rhetoric, Practice and Empiricism*, *in* HANDBOOK OF JUSTICE RESEARCH IN LAW 231, 232 (Joseph Sanders & V. Lee Hamilton eds., 2001).

[9] *See, e.g.*, COURT-ANNEXED MEDIATION, *supra* note 8, at i–iii; COLE ET AL., *supra* note 1, §§ 2:1–2:9, 5:1–5:4.

[10] *See, e.g.*, COURT-ANNEXED MEDIATION, *supra* note 8, at vii; Hensler, *supra* note 8, at 238. Case management efficiencies appear prominently as stated policy objectives for many court-connected mediation programs. *See also* COLE ET AL., *supra* note 1, § 5:3.

[11] *See* BERGMAN & BICKERMAN, *supra* note 8, at vii; COLE ET AL., *supra* note 1, §§ 5:1–5:2.

[12] *See* Sander, *supra* note 3, at 111–13.

[13] *See, e.g.*, Marc Galanter, *Reading the Landscape of Disputes: What We Know and Don't Know (and Think We Know) About Our Allegedly Contentious and Litigious Society*, 31 UCLA L. REV. 4, 5–11 (1983).

their own backlogs and the usefulness of improved case management. Finally, no matter which potential social values of mediation captured the imagination of the courts, pragmatics dictated the prominence of the case management theme because it was saleable. That is, courts had to cast their arguments for innovation and reform in terms that the legislature would be willing to fund, and promises of improved case management efficiency were, and are, appealing to funders.[14]

Where improved case management efficiency was promised in order to gain (or keep) political and financial support for court-connected mediation programs, pressures naturally came to bear to demonstrate that those efficiencies were being achieved. The need for tangible, measurable markers of case management efficiency argued for quantifying case movement and case closure. Therefore, research on program effectiveness measured such factors as case settlement rates, trial rates, case processing time to disposition, agreement-making rates during the period between receiving written notice of the referral to mediation and the mediation session itself, and agreement-making rates during the period after the mediation session concluded without agreement but prior to trial.[15]

The primacy of case management goals began to shape mediation practice and policy in significant ways. Settlement of a dispute through a negotiated agreement, a tangible marker of case closure, became part of the definition of mediation[16] and a yardstick for success in mediation. Standards for court-connected mediation, as well as court-connected programs themselves, were frequently built on the assumption that the goal of mediation was to produce an agreement that settled the case.[17] Effective mediator behaviors, in turn, were generally defined as those that were likely

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[14] *See, e.g.*, NAT'L CTR. FOR STATE COURTS & STATE JUSTICE INST., NATIONAL SYMPOSIUM ON COURT-CONNECTED DISPUTE RESOLUTION RESEARCH: A REPORT ON CURRENT RESEARCH FINDINGS—IMPLICATIONS FOR COURTS AND FUTURE RESEARCH NEEDS, at x (Susan Keilitz ed., 1994) (citing the need for "*more reliable findings on the benefits of ADR*, including any cost avoidance or reductions . . . to obtain political and financial support for the programs").

[15] *See id.* at 5–33.

[16] *See, e.g.*, FLA. R. FOR CERTIFIED & CT.-APPOINTED MEDIATORS 10.210 (2000), *available at* http://www.flcourts.org/osca/divisions/adr/Certrules.htm (last visited Mar. 26, 2002); STANDARDS OF PRACTICE FOR MEDIATORS (The Mediation Council of Ill.), *available at* http://www.mediate.com/articles/illstds.cfm (last visited Feb. 7, 2002). Compare various statutes and rules collected by COLE ET AL., *supra* note 1, apps. A–D.

[17] *See, e.g.*, NATIONAL STANDARDS FOR COURT-CONNECTED MEDIATION PROGRAMS, at ii (Ctr. for Dispute Settlement & The Inst. of Judicial Admin. 1990); COURT-ANNEXED MEDIATION, *supra* note 8, at 1–2, 28–29, 55–56, 126–29, 203, 251, 277, 338, 366–71 (profiling various court-corrected programs); Hensler, *supra* note 8, at 238–39.

to produce a settlement agreement; therefore, research questions and designs were shaped accordingly.[18]

Even in programs where articulated policy objectives included promotion of a broad array of social values as justification for court-connected mediation, the day-to-day policies and practices of many of those programs tended to prioritize case management efficiency. The privileging of some values over others in the policy and practice of the mediation field, despite the inclusive rhetoric, was inevitable. The broad, inclusive statements of abstract social values that appear in policy statements obscure the reality that some of those values are in tension with each other.[19] Achievement of one may only be possible at the expense of another. Policy statements rarely acknowledge this tension and the inherent potential for goal conflict.[20] Nor do they typically include an explicit prioritization of the social values to be realized, or guidance for decision-making when those values come into conflict. The conflicts become apparent when the value discussions are taken out of the abstract, and practitioners and policymakers try to achieve value-based goals. Goal conflicts force a prioritization, and the choices made reflect a privileging of certain social values over others.[21] Thus, while the

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[18] *See* Hensler, *supra* note 8, at 238–39; *see also* Joseph P. Folger, *Mediation Research: Studying Transformative Effects*, 18 HOFSTRA LAB. & EMP. L.J., 385, 387–88 (2001).

[19] For a discussion of the problems of goal competition in practice and policy, see generally ROBERT A. BARUCH BUSH, DEFINING THE JOB OF MEDIATORS: ADR'S BENEFITS AND MEDIATORS' ETHICAL DILEMMAS, NIDR FORUM 16–20 (1993); ROBERT A. BARUCH BUSH, THE DILEMMAS OF MEDIATION PRACTICE: A STUDY OF ETHICAL DILEMMAS AND POLICY IMPLICATIONS (1992); COLE ET AL., *supra* note 1, §§ 2:1–2:9, 5:1–5:4; Robert A. Baruch Bush, *Dispute Resolution Alternatives and the Goals of Civil Justice: Jurisdictional Principles for Process Choice*, WIS. L. REV. 893, 926–29 (1984). For an empirical study demonstrating the dynamics and effects of goal competition, see JOSEPH P. FOLGER ET AL., FLA.'S DISPUTE RESOLUTION CTR., A BENCHMARKING STUDY OF FAMILY, CIVIL AND CITIZEN DISPUTE MEDIATION PROGRAMS IN FLORIDA (2001).

[20] *Supra* note 19.

[21] *See, e.g., id.* Seven court-annexed mediation programs were studied in order to identify the goals and best practices of each program on its own terms. Each mediation program expressed, through their administrators, mediators, and users, a wide variety of social goals that the mediation program valued and attempted to serve. *See id.* However, in the day-to-day operation of the program, some of these goals came into conflict. Goal conflict emerged at key decision points: namely, space allocation for the program, evaluation and assessment of mediation service, structure of agreements, design of mediation sessions, referral procedure, and mediator status. *Id.* The decisions programs made at these key decision points reflected their value-based prioritization of some goals over others. For example, programs that relied heavily on the use of settlement rates, or flow-through rates, or other measures of case movement, to evaluate the effectiveness of the mediators or the mediation program, while paying little or no attention to what was

goals of many court-annexed programs were expressed in terms of a broad array of social values, the reality was that the justice system's goal of case management efficiency often prevailed over the more "humanistic goals embraced by the broader alternative dispute resolution movement" when conflicts arose and prioritization was required.[22]

In "connecting" with the courts, mediation became more an instrument to serve the traditional values, goals and interests of the judicial system, and less a social process in its own right, with its own separate history, traditions, norms, and goals.[23] Attention to the realization of social values not directly

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actually occurring in the mediation session itself, in terms of the quality of the human interaction in the room or afterwards, evidenced a prioritization of the goal of case management efficiency. *See id.* at 114.

[22] COURT-ANNEXED MEDIATION, *supra* note 8, at vii (citing NANCY H. ROGERS & CRAIG A. MCEWEN, MEDIATION: LAW, POLICY & PRACTICE 5-1 to 5-19 (2d ed. 1994); Carrie Menkel-Meadow, *Pursuing Settlement in an Adversary Culture: A Tale of Innovation Co-Opted or "The Law of ADR"*, 19 FLA. ST. U. L. REV. 1, 3 (1991).

[23] FOLGER ET AL., *supra* note 19, considered the different traditions, norms and histories of mediation and the judicial system to explain the findings in their benchmarking study. *Id.* at 99–116. In brief, mediation was historically an informal social process in which a disinterested third party assisted people in talking together and making their own decisions in a creative and collaborative process, based on a fundamental vision of human *capacity* and the value of human interaction (particularly party choice and inter-party voice) for constructive conflict resolution. In contrast, the traditions of the judicial system are more formal: discouraging parties from talking directly with each other, encouraging advocates to speak for the parties, and authorizing a powerful third party to make decisions about the process and the outcome. These traditions are based on assumptions of the fundamental *incapacity* of human beings to engage directly with each other for constructive conflict resolution. Thus, court-connected mediation is dilemmatic at the core: it is an attempt to marry the alternative to the status quo, when they are built upon fundamentally different social visions and values—about the nature of conflict, the nature of conflict resolution, and the motivations and capacities of human beings in conflict. Folger, Della Noce, and Antes identified three separate patterns of "connecting" the courts and mediation, through which mediation programs addressed this dilemma: assimilative, autonomous and synergistic. *Id.* at 101–10. Each pattern of connection was characterized by a distinct cluster of program practices. In the *assimilative* approach, mediation programs adapted the mediation process to the values and practices of the judicial system, which privileges efficiency over the traditional, relational, mediation values of honoring party voice and choice. *Id.* at 102–03. While the assimilative approach was perceived to offer parties certain enhanced efficiencies, it essentially maintained and perpetuated the core values of an adversarial court system by working against party voice and party choice. *Id.* at 107–10. In the *autonomous* approach, mediation programs claimed a separate existence from the court in order to ground themselves in the traditional values of mediation. *Id.* at 103–05. This augmented the judicial system by offering parties a meaningful alternative to conflict resolution processes based on the adversarial assumptions of the court system: an alternative that captured opportunities for constructive personal and social change in the midst of conflict. But these programs

related to case management—which generally meant those values related to improved quality of human interaction that were uniquely a part of mediation as an independent social process—tended to get lost. In the process, mediation began to look more and more like the legal and judicial processes for which it was once proposed as an alternative.[24]

## B. *A Wave of Closer Scrutiny*

As mediation became more widely used, the extent of claims made on behalf of its inherent social value and potential impact drew the attention of scholars and thoughtful practitioners. In some ways, the claims made for mediation resembled the claims sometimes made for herbal medicine—tremendous power to cure all manner of ills, yet no side effects. Such claims invited scrutiny, and a wave of closer scrutiny emerged in two forms: scholarly critique and research.

Critiques emerged from various quarters and included the voices of legal, feminist, and social justice scholars.[25] No matter the source of the critique, its essence was the same: mediation could not entirely live up to its broad and lofty claims. In the pursuit of certain social goals through the use of

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thereby sacrificed many of the potential benefits of court connection, including such benefits as "reach," referrals, funding, space, and other resources. *Id.* at 107–10. In the *synergistic* approach, the mediation programs maintained a close connection with the courts but also made every effort to preserve party voice and choice in program design and delivery. *Id.* at 105–06. These programs acknowledged and respected the constraints of a close working relationship with the courts, achieved a strong court connection, yet still managed to offer parties a meaningful alternative to traditional court processes. The majority of the programs studied exhibited the patterns and practices of the assimilative approach.

[24] FOLGER ET AL., *supra* note 19; *see also* COURT-ANNEXED MEDIATION, *supra* note 8, at v–vi; Stacy Burns, *The Name of the Game Is Movement: Concession Seeking in Judicial Mediation of Large Money Damage Cases*, 15 MEDIATION Q. 359, 365–66 (1998); Christopher N. Candlin & Yon Maley, *Intertextuality and Interdiscursivity in the Discourse of Alternative Dispute Resolution*, *in* THE CONSTRUCTION OF PROFESSIONAL DISCOURSE 201–22 (Britt-Louise Gunnarson et al. eds., 1997); Hensler, *supra* note 8, at 239.

[25] *See, e.g.*, JEROLD S. AUERBACH, JUSTICE WITHOUT LAW? (1983); MARTHA ALBERTSON FINEMAN, THE ILLUSION OF EQUALITY: THE RHETORIC AND REALITY OF DIVORCE REFORM 144–69 (1991); 1 THE POLITICS OF INFORMAL JUSTICE, *supra* note 1; Penelope E. Bryan, *Killing Us Softly: Divorce Mediation and the Politics of Power*, 40 BUFF. L. REV. 441, 444–46 (1992); Richard Delgado et al., *Fairness and Formality: Minimizing the Risk of Prejudice in Alternative Dispute Resolution*, 6 WIS. L. REV. 1359, 1391–1400 (1985); Trina Grillo, *The Mediation Alternative: Process Dangers for Women*, 100 YALE L.J. 1545, 1549–51 (1991).

mediation, society was likely to sacrifice other important social goals and values.

Researchers also began to assess the many claims made on behalf of the mediation process. Studies that examined indicators of case management efficiency provided relatively little empirical support for efficiency claims.[26] Meanwhile, other studies focused attention on what was happening in the mediation room itself. Evidence began to accumulate that mediators were engaging in patterns of practice that did not accord with the rhetoric of the field; that is, in the pursuit of settlement, mediators were exerting influence in their sessions in ways that did not demonstrate neutrality, did not honor party self-determination, and were sometimes even coercive.[27]

### C. *Toward Theory Development*

The next impact came as a reaction to the critiques and research findings, the growing concern with the instrumentalization of mediation for case management goals, and the soul-searching thereby generated. As scholars questioned whether the problems noted were inherent in all mediation, or limited to certain kinds and contexts of mediation, they began to pay explicit attention to the theoretical base of mediation as a social process in its own right.[28]

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[26] *See* COURT-ANNEXED MEDIATION, *supra* note 8; NAT'L CTR. FOR STATE COURTS & STATE JUSTICE INST., NATIONAL SYMPOSIUM ON COURT-CONNECTED DISPUTE RESOLUTION RESEARCH, *supra* note 14, at 6–12; Hensler, *supra* note 8, at 257–60.

[27] Folger, *supra* note 18, at 391; *see also* JOHN M. CONLEY & WILLIAM M. O'BARR, JUST WORDS: LAW, LANGUAGE AND POWER (1998); WILLIAM A. DONOHUE, COMMUNICATION, MARITAL DISPUTE, AND DIVORCE MEDIATION 169–71 (1991); DEBORAH M. KOLB ET AL., WHEN TALK WORKS: PROFILES OF MEDIATORS 460 (1994); Burns, *supra* note 24, at 361, 363, 364; Robert Dingwall, *Empowerment or Enforcement? Some Questions About Power and Control in Divorce Mediation*, *in* DIVORCE MEDIATON AND THE LEGAL PROCESS 150, 150 (Robert Dingwall & John Eekelaar eds., 1988); David Greatbatch & Robert Dingwall, *Selective Facilitation: Some Preliminary Observations on a Strategy Used by Divorce Mediators*, 23 LAW & SOC'Y REV. 613, 613, 636–39 (1989); Janet Rifkin et al., *Toward a New Discourse for Mediation: A Critique of Neutrality*, 9 MEDIATION Q. 151, 153–55 (1991); Karen Tracy & Anna Spradlin, *Talking Like a Mediator*, *in* NEW DIRECTIONS IN MEDIATION: COMMUNICATION RESEARCH AND PERSPECTIVES 110, 129–31 (Joseph P. Folger & Tricia S. Jones eds., 1994).

[28] *See generally* ROBERT A. BARUCH BUSH & JOSEPH P. FOLGER, THE PROMISE OF MEDIATION: RESPONDING TO CONFLICT THROUGH EMPOWERMENT AND RECOGNITION (1994). The authors constructed their transformative theory for mediation practice in light of the scholarly critiques of the potential social oppression fostered by the mediation movement as well as the mounting empirical evidence of mediator influence over the parties' interactions and the ultimate outcome of mediation. Similarly,

Theory is a coherent explanation of "the when and why" of mediator intervention,[29] anchored by fundamental social values and shaping mediator goals and practices in accordance with those values.[30] The development of a solid theoretical base for mediation was, and continues to be, critical to the development of the field.[31] Even before the Pound Conference, there had been little attention paid to explaining mediation as an independent and unique social process, built on a particular set of values, to achieve particular social goals through the grounded practices of third parties.[32] After the Pound Conference, the lack of a distinct and coherent theoretical basis for the mediation process very likely contributed to the ease of instrumentalizing the

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HOWARD H. IRVING & MICHAEL BENJAMIN, FAMILY MEDIATION: CONTEMPORARY ISSUES (1995), sought to address the feminist critique of mediation with their model of "therapeutic family mediation." *Id.* at 202–22.

[29] *See* Joseph A. Scimecca, *Theory and Alternative Dispute Resolution: A Contradiction in Terms?*, *in* CONFLICT RESOLUTION THEORY AND PRACTICE: INTEGRATION AND APPLICATION 211, 217 (Dennis J.D. Sandole & Hugo van der Merwe eds., 1993); *see also* Deborah M. Kolb & Kenneth Kressel, *The Realities of Making Talk Work*, *in* KOLB ET AL., *supra* note 27, at 459.

[30] BUSH & FOLGER, *supra* note 28; Dorothy J. Della Noce, *Seeing Theory in Practice: An Analysis of Empathy in Mediation*, 15 NEGOTIATION J. 271, 275–79 (1999).

[31] Dorothy J. Della Noce et al., *Clarifying the Theoretical Underpinnings of Mediation: Implications for Practice and Policy*, 3 PEPP. DISP. RESOL. L.J. (forthcoming 2002) (manuscript at 20–25, on file with author).

[32] The lack of a solid theoretical base for mediation has been a source of criticism of the field by scholars such as Joseph A. Scimecca and Deborah M. Kolb. *See* KOLB ET AL., *supra* note 27, at 489; Scimecca, *supra* note 29, at 211. While scholars criticize the mediation field for its lack of an articulated, scholarly mediation theory, this should not be confused with a complete absence of theory. If "theory" is understood as "the when and why" of intervention, it is apparent that mediators always have a theory underlying their practices, no matter how naïve or obscured. Like all social actors, mediators are "lay theorists"—people with their own vocabularies, frames of meaning, interpretive schemes and resources, and explanations for their social worlds and social activities. *See* ANTHONY GIDDENS, NEW RULES OF SOCIOLOGICAL METHOD 160 (2d ed. 1993). As mediators interact with the parties during the course of the mediation process, they constantly draw upon their lay theories to interpret the unfolding interactions and make choices about when and how to intervene based upon their interpretations. In turn, those choices reflect the mediators' goals for intervention, embedded in their own fundamental explanations of the social world and social activities. There is ample evidence that as mediation developed in the United States, in the absence of articulated theoretical frameworks, practicing mediators have tended to construct and express their lay theories by relying upon (1) "mythology," (2) "imported" theories, and (3) an overemphasis on skills and techniques that were presumed to be theory-free. Della Noce et al., *supra* note 31 (manuscript at 4). But constructing theories on these foundations obscures the fundamental social values on which they are based from practitioners and policy-makers. *See also* BUSH & FOLGER, *supra* note 28; Della Noce, *supra* note 30.

process. Without a clearly stated explanation of "the when and why" of the mediation process, anchored in social values, the process was easily reduced to a set of decontextualized communication strategies and techniques that could be placed in service of the social goals of any number of social processes, including adjudication, litigation, labor negotiation, or therapy.[33] Thus, the increasing instrumentalization of mediation and increasing scrutiny from researchers and critics spurred scholars to question and theorize about the essence of the mediation process itself.

A number of different theories, in various states of articulation, have emerged in the process. For example, one explanation is that mediation is a social process uniquely suited to promoting self-determination in the search for creative, individualized, and humane solutions for conflict situations.[34] Another explanation is that mediation is uniquely suited to changing the quality of human interactions in the midst of conflict, through the dynamics of empowerment and recognition.[35] Another is that mediation is uniquely suited to the generation of new discourses that respect and transcend important human differences without eliminating them.[36] Each of these theories is based on a particular set of social values and each shapes third party goals and "good" practice in different ways as a result.[37]

As scholars pursued theoretical clarity, the importance of those social values that are unique to mediation in the dimension of human interactions, many of which were cited in the original discussions at the Pound Conference, reemerged. The process of theorizing highlighted that case management, while important to the justice system, was never really the goal of mediation as a distinct social process. In effect, connection with the courts

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[33] Riskin acknowledged this danger in his analysis of the "lawyer's standard philosophical map," highlighting that a different "philosophical map" was needed to understand and support mediation as a practice distinct from the practice of law. Leonard Riskin, *Mediation and Lawyers*, 43 OHIO ST. L.J. 29 (1982). More recently, FOLGER ET AL., *supra* note 19, at 99–110, pointed out that, among the court-connected programs they studied, those that did not assimilate to the values and practices of the court system were those that were firmly anchored in the traditional mediation values of honoring party choice and inter-party voice.

[34] Riskin, *supra* note 33, at 33–35.

[35] BUSH & FOLGER, *supra* note 28; *see also* DOROTHY J. DELLA NOCE, INST. FOR THE STUDY OF CONFLICT TRANSFORMATION AT HOFSTRA UNIV. SCH. OF LAW, TRANSFORMATIVE MEDIATION: AN ANNOTATED BIBLIOGRAPHY OF INSTITUTE RESOURCES (2001), for a compendium of works by scholars and practitioners who have elaborated the theory and practice of the transformative framework since Bush & Folger's 1994 publication of THE PROMISE OF MEDIATION.

[36] W. BARNETT PEARCE & STEPHEN W. LITTLEJOHN, MORAL CONFLICT: WHEN SOCIAL WORLDS COLLIDE (1997).

[37] BUSH & FOLGER, *supra* note 28; Della Noce, *supra* note 30, at 277–97.

had distorted an incidental benefit of mediation into its primary goal. And in the process, the mediation process itself was distorted in service of the values and goals of the justice system.[38] Scholars began to note that preservation of the distinct social potential of mediation, such as fostering interpersonal empathy, community building and self-determination, required grounding in mediation-specific theory that treated such effects as important social goals in their own right rather than as serendipitous by-products of settlement.[39]

### D. *Taking Stock*

Rippling out from all of these other impacts of the Pound Conference is the crest on which we stand today—taking stock. We are now at the stage of considering whether and how the development and clarification of mediation theory matters for the future of the field.[40] If theory does not matter, mediation will continue down the path of instrumentalization in service of the goals and values of processes other than mediation. But if theory does matter, the mediation field will pursue theoretical clarity through careful articulation of the fundamental social values that mediation uniquely advances, identification of the value-based social goals that can and should be fostered through the use of mediation (and those goals that cannot and should not), and identification of the policies and third-party practices that support (or constrain) achievement of the desired goals.

There are significant pressures against the pursuit of theoretical clarity.[41] The considerable growth of court-connected mediation itself would appear to suggest that theory development is an unnecessary and self-indulgent academic exercise. After all, so many programs are now in existence—why bother with theory now? More to the point, the pursuit of theoretical clarity may threaten the sizeable "industry" that has grown up around mediation,[42]

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[38] For example, FOLGER ET AL., *supra* note 19, found that mediation programs that privileged case management goals "assimilated" to the traditional visions and values of the judicial system: they were marked by practices that operated to impart the authority and formality of the judicial process to the mediation process and to mediators, by the mapping of legal language onto the mediation process and by quality control practices that emphasized case management efficiency. *See id.* at 102–03.

[39] *See, e.g.*, BUSH & FOLGER, *supra* note 28; FOLGER ET AL., *supra* note 19, at 99–110; Della Noce, *supra* note 30, at 277–97. *See also* Robert A. Baruch Bush, *The Unexplored Possibilities of Community Mediation: A Comment on Merry and Milner*, 21 LAW & SOC. INQUIRY 715, 731–36 (1996).

[40] Della Noce et al., *supra* note 31.

[41] *Id.*

[42] *See* Deborah R. Hensler, *ADR Research at the Crossroads*, 2000 J. DISP. RESOL. 71, 77.

because it will force examination of the value-based assumptions on which the various programs and policies have been built and may even argue for the slowing of current policy initiatives or the deconstruction and reconstruction of existing policies and programs.

But the analysis I have presented here suggests that court-connected mediation programs, while numerous indeed, are at a crucial developmental stage of confronting their own limits and reexamining their own claims.[43] For example, if research does not sustain case management efficiency claims, what is the real value in maintaining court-connected mediation programs? Is the field willing and able to assert that even if mediation is less efficient than litigation and adjudication—that is, more costly in terms of money and time—it is still worth preserving? If so, how do we justify that stance? If there are social values beyond case management that really matter, can programs and policies that have been structured to foster case management foster realization of those alternative values? If not, what programs and policies should be in place? Is the field willing to adjust policies that orient to case management efficiency as a primary social value, and treat human interaction gain as an incidental benefit, in such a way that human interaction gain becomes the primary value to be served and case management efficiency becomes the incidental benefit? These questions beg for theory.

At this point of collective stock-taking, we are poised to reclaim the unique social potential of mediation—potential recognized during the Pound Conference but submerged by the instrumental use of mediation in service of the case management goals of the justice system. We are at a point of unique opportunity. Twenty-five years after the Pound Conference, we can look at the wealth of experience, research, and scholarship that has rippled out to help us answer in a deep and reflective way the most important question of all—what is this process that we call mediation really about?

## III. THE NEXT WAVE: HONORING DIFFERENCE

The ripple effects of the Pound Conference do not stop today, of course. I believe I can see at least the next wave on the horizon. As scholars and thoughtful practitioners begin to articulate theory, it is already apparent that not all theories are or will be the same. Theories differ significantly in terms of their underlying social vision and values, and these differences in vision, in turn, shape differences in practice. Likewise, distinct, value-based,

[43] *See* Hensler, *supra* note 8, at 249–60; *see also* Hensler, *supra* note 42.

theoretically grounded differences in goals and practices argue for differences in policy.[44]

The coming wave in the mediation field is meeting the challenge of dealing with differences in theory, practice, and policy in a respectful and thoughtful way.[45] I believe that this means moving beyond two current trends in the field that function to trivialize, marginalize, or obscure important theoretical differences—namely, the habit of dubbing differences in practice mere matters of personal "style" and the continued quest for uniformity in policy—and finding creative ways to build a discipline while respecting and preserving those important differences.

If we can meet this challenge, the field will have the opportunity—if not the obligation—to do what has not been attempted in any concerted way since the inception of court-connected mediation: to create (or recreate) court-connected mediation programs in explicitly theory-driven ways.[46] That is, we can turn our attention to articulating the specific social values in the human dimension that a given program seeks to advance, and carefully select a theoretical framework that is built on and advances the same values by treating them as goals in their own right and not just by-products of settlement.[47] The chosen theoretical framework will guide the selection and qualification of third parties, the practices that are deemed competent and incompetent, and the policies that will promote effective use of the program and effective evaluation. Measurement of the effectiveness of mediation will become explicitly theory-driven, in full recognition of the goals to be

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[44] Della Noce, *supra* note 30, at 294–97; Della Noce et al., *supra* note 31. *See, e.g.*, Dorothy J. Della Noce, *Mediation as a Transformative Process: Insights on Structure and Movement*, *in* INST. FOR THE STUDY OF CONFLICT RESOLUTION, DESIGNING MEDIATION: APPROACHES TO TRAINING AND PRACTICE WITHIN A TRANSFORMATIVE FRAMEWORK 71 (Joseph P. Folger & Robert A. Baruch Bush eds., 2001).

[45] Della Noce et al., *supra* note 31.

[46] FOLGER ET AL., *supra* note 19, concluded from their benchmarking study that the *synergistic* approach to court-connected mediation is the most likely to thrive in the courts and still succeed in offering, in that context, a truly alternative process of conflict intervention built on relational assumptions of human capacity for constructive change in the midst of conflict. *Id.* at 99–110. However, they reasoned that the synergistic approach is underdeveloped and underutilized at this time, because few court-connected mediation programs have been self-conscious and explicit about their underlying values, theories of practice, and social goals. *See id.* at 110–12.

[47] This approach was taken by the United States Postal Service in designing its REDRESS™ program for Equal Employment Opportunity (EEO) disputes. *See, e.g.*, Robert A. Baruch Bush, *Handling Workplace Conflict: Why Transformative Mediation?* 18 HOFSTRA LAB. & EMP. L.J. 367, 367–73 (2001); Cynthia J. Hallberlin, *Transforming Workplace Culture Through Mediation: Lessons Learned from Swimming Upstream*, 18 HOFSTRA LAB. & EMP. L.J. 375, 375–83 (2001).

attained and the practices that serve those goals.[48] In the process, the social claims made on behalf of mediation may become more modest, but they will also become more focused, supportable, and attainable. And court-connected mediation can become the truly *alternative* social process envisioned in the Pound Conference.[49]

I look forward to this future and thank those who tossed that first stone into the pond.

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[48] Folger, *supra* note 18, at 385–97. For studies of mediation effectiveness that are explicitly oriented to the transformative framework, see THE IND. CONFLICT RESOLUTION INST., MEDIATION AT WORK: THE REPORT OF THE NATIONAL REDRESS™ EVALUATION PROJECT OF THE UNITED STATES POSTAL SERVICE (2001); James R. Antes et al., *Transforming Conflict Interactions in the Workplace: Documented Effects of the USPS REDRESS™ Program*, 18 HOFSTRA LAB. & EMP. L.J. 429 (2001); Tina Nabatchi & Lisa B. Bingham, *Transformative Mediation in the USPS REDRESS™ Program: Observations of ADR Specialists*, 18 HOFSTRA LAB. & EMP. L.J. 399 (2001).

[49] *See* FOLGER ET AL., *supra* note 19, at 107–16.