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CONFLICT AND PARADOX IN THE NEW AMERICAN MEDIATION MOVEMENT: STATUS QUO AND SOCIAL TRANSFORMATION

TED BECKER*

INTRODUCTION	109
PART I. MODES OF DISPUTE RESOLUTION AND PACIFIC CROSSCURRENTS	111
A. <i>Problems In and With the Legal System</i>	113
B. <i>Social Transformationalism</i>	114
PART II. MEDIATION DEVELOPMENTS IN AMERICA: PARADOX PROLIFERATES	115
PART III. ACADEMIC COUNTERPARTS: CAMPUS CONTRACTIONS	121
EPILOGUE	128

INTRODUCTION

For various reasons, recent innovations in methods of conflict resolution have become both a social movement and a growth industry. From all indications, the industry is rapidly gaining momentum, but the social movement is straggling.

Still, taken together, there has been an explosion of interest in modes and applications of a wide variety of conflict resolution techniques. This burst of enthusiasm knows no national boundaries. What is more, many professions and disciplines are involved, from the most theoretical and ideological to the most practical. Finally, the level of applications range from the most trivial interpersonal dispute to the most volatile international conflict.

As might be expected from such widespread growth and change that involves so many different types of people and thinking in many different countries, a good deal of stress and strain has occurred. In other words, although it may seem ironic, there is significant conflict among those who presently identify themselves as conflict resolvers. Disagreements involve many aspects of what is occurring, including philosophies, approaches, styles, techniques, processes, sponsorships, sources of finance, and so forth. These dis-

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agreements are not negative, per se. Indeed, properly understood and addressed, the friction among the conflict resolvers eventually may be directed into positive channels and even stimulate important, future syntheses.

This essay will focus on some of the disharmony in the field of mediation in the United States, particularly from the perspective of those who try to utilize mediation's potential as an instrument of socio-political transformation. The work of these individuals remains a relatively well-kept secret in a time of much publicity about the numerous virtues of mediation as an "alternative" to the legal system. Among the reasons for this secrecy is that, for the time being, the American conflict resolution movement has been substantially overwhelmed by the force and forces of the legal system, professionalization, bureaucracy, and interest-group politics.

This result is not to say that various professionals and volunteers who work under the auspices of government or quasi-government bureaucracies failed to do a good job of resolving a wide variety of disputes in the United States. It is unfortunate insofar as some of the major originators and innovators of the American mediation movement had deeper and broader social and political objectives in mind. Pure "community mediation centers" and university-based mediation centers linked to "people empowerment" mediation objectives are more closely attuned to achieving socio-political transformation than are the rapidly proliferating legal system-professional-bureaucratic models. The former, however, are relatively ill-funded, poorly publicized, and have few powerful and wealthy friends.

The first part of this essay will provide a general idea of the ideology and preferred future of the American mediation movement. The second part will offer evidence that, at this time, only one major goal of the American mediation movement shows substantial promise of being reached, if not overreached. Part II. will review some of the abundant indications that various professions, government, and quasi-government agencies have cleverly utilized available power and money bases to convert mediation to their own ends. Other evidence will be produced, however, to show that though the trend is in their favor, it is not inexorable, since there has been some progress made in reaching other political and social goals as well. Part III. of this essay will discuss the university-based model, particularly that of the University of Hawaii in Honolulu. This model demonstrates a commonality between such a university program and the political and social values inherent in the community-based, democratically-oriented, citizen-empowerment programs. However, the remainder of Part III. will illustrate that the same tendencies seen in the general American mediation movement are manifest in what is presently happening with mediation in academia. An epilogue will discuss possibilities that the future may hold.

PART I. MODES OF DISPUTE RESOLUTION AND PACIFIC CROSSCURRENTS

Before discussing the “new mediation movement”¹ in the United States, it will be useful to distinguish between the various means of neutral, third party dispute resolution practiced around the world. For although it is a universal phenomenon to have an impartial intermediary help two or more feuding parties resolve their differences peacefully, there are differences in how this process is done as well as disagreement on what to call the variations in process. There have been numerous attempts to differentiate between what Daniel McGillis and Joan Mullen call “third party resolution techniques,”² including litigation, arbitration, mediation, conciliation, and so forth. But most people seem to differentiate the processes by use of a number of common factors.

These factors include: (1) whether legal or cultural norms are applied by the intermediary; (2) the degree of rigidity of such application or rigidity in the application of the process itself; (3) the degree of formality in the process; (4) whether participation in the process is mandatory or not; (5) whether the third party intermediary makes a decision (resolves the dispute him/herself); (6) the degree of intervention in the dispute by the intermediary; (7) the amount of external enforcement of the decision—whether by the intermediary or by outside agencies. The following table ranks six forms of third party dispute resolution on a continuum, utilizing these seven factors.

Using this scale as a guide, it is fair to say that every society uses one of these modes of dispute resolution as its principal way of ending, managing, or containing social or interpersonal conflict within its borders. This is illustrated by Japan and China which utilize their own forms of conciliation and mediation as the major societal mode of third party dispute resolution.³ On the other hand, the United States of America—in many minds one of the world’s most individualistic and competitive societies—strongly favors resort to the legal system. Demonstrative of this view is the mounting number of cases filed in American courts. For instance:

1. J. AUERBACH, *JUSTICE WITHOUT LAW?* (1983) (demonstrates that not only was mediation a major, if not dominant, mode of conflict resolution in 17th Century America, but that there have been a number of movements concerning mediation and arbitration throughout American history).

2. See e.g., D. MCGILLIS & J. MULLEN, *NEIGHBORHOOD JUSTICE CENTERS* 10-24 (1977); see also, J. FOLBERG & A. TAYLOR, *MEDIATION* 27 (1984).

3. See T. KAWASHIMA, *Dispute Settlement in Japan*, in *THE SOCIAL ORGANIZATION OF LAW* (1973); V. LI, *LAW WITHOUT LAWYERS* (1978).

TABLE 1
DISPUTE RESOLUTION SCALE

	(A) Litigation	(B) Arb	(C) Med/Arb	(D) Med	(E) Conciliation	(F) Facilitation
Application of norms	Yes	Yes	Mostly No	No	No	No
Degree of Rigidity	High	High	Moderate	Low	Very Low	Very Low
Level of formality	High	High Moderate	Moderate	Low	Low	Low
Level of Coercion	High	High Low	High None	High None	None	None
Third party makes decision	Yes	Yes	Only as a last resort	No	No	No
Degree of third party participation	High	High	High	Med-Low	Med-Low	Very Low
Amount of external enforcement	High	High (None	High Binding None Non-Binding	High) None	None	None

[b]y 1980 lawsuits were being filed in the fifty state court systems and the local courts of the District of Columbia and Puerto Rico at the rate of 5 million a year. And according to the National Center for State Courts in Williamsburg, Virginia, the number could be as high as 12 million a year. Federal courts, a much smaller, though far more noticeable, judicial operation, were receiving nearly 170,000 suits annually. According to one widely quoted estimate, if the rate of lawsuits filed in federal courts alone during the decade 1965-75 continues to increase as it has, by early in the next century federal appellate courts will hear more than 1 million cases annually—and the appellate branch typically gets only a tiny fraction of the cases decided by the trial courts each year. During this same period, the number of lawsuits brought to these courts has increased by 84 percent, and though statistics of state dockets are not nationally maintained, the experience in individual states that do keep statistics suggests a similar rise (for example, California's

judicial dockets, in courts of general jurisdiction, had swelled by 90 percent from 1968 to 1976).⁴

Even traditionally mediation-oriented societies such as Japan and China, however, are finding it difficult to stem a rising demand in their own societies to develop more lawyers and to increase their employment of legal processes. Other traditional bastions of conciliation, mediation, and arbitration such as the Polynesian, Melanesian, and Micronesian cultures, have seen legal thinking and legal systems influence their style of remedying disputes. The Hawaiian system of *ho'oponopono* has fallen into virtual non-use by the Hawaiian people. And even the remote Pacific society of Ponape is now experimenting with the use of the American judicial system.⁵ One explanation for this phenomenon is that as commerce between these nations and the United States increases, so does their exposure to western values and interests.

Yet, despite the general growth of litigation in America and elsewhere, there is a contradictory movement afoot, particularly in the United States, to use other methods of third party dispute resolution, particularly what is called mediation. This movement, which we will refer to as the "new American mediation movement," started in the 1970s and has spread rapidly in the United States and elsewhere in the Pacific Basin. There are two major sources for the beginning and growth of this surge: (a) inherent and growing problems in the legal system and the use of the courts, and (b) certain social and political tendencies in contemporary American society.

A. *Problems In and With the Legal System*

Without belaboring the obvious, there are many problems in the legal system, wherever practiced. It is very costly. It is frequently "backlogged." It is very difficult for ordinary people to understand. People tend to distrust lawyers (and lawyers tend to distrust people). In many types of cases, the legal mechanism is very inappropriate, being likened to using a cannon to kill a flea. Professors Cecilio Pe and Alfredo Tadiar use similar concepts to describe the problem in the Philippines legal system: (1) "delay"; (2) "high costs"; (3) "popular incomprehensibility"; and (4) "unsuitability for minor disputes."⁶

This scenario has led to many calls for reform; many of which emanate

4. J. LIEBERMAN, *THE LITIGIOUS SOCIETY* 5 (1981) (footnotes omitted).

5. Dator, *Inventing a Judiciary for the State of Ponape*, 34 *POLITICAL SCIENCE* 92 (July 1982).

6. C. PE & A. TADIAR, *INTERNATIONAL SURVEY OF CONCILIATION SYSTEMS* 9-14 (1982).

from the highest echelons of the legal establishment itself. Two of the most outspoken American advocates for "streamlining" the American legal system have been former Chief Justice Warren Burger and the former United States Attorney General, Griffin Bell. Their calls and their work—along with that of many other lawyers, law professors, and court administrators—have produced a number of "reforms" that would treat cases, as two authors put it, "beyond the courtroom."⁷ Included in these reforms are pretrial diversion, advisory sentencing panels, restitution, assistance to victims of crime, and, of course, mediation and arbitration.⁸

B. *Social Transformationalism*

Coinciding with this legal self-help movement was a much broader sociopolitical movement. This latter movement is best summed up as "transformational" in its perspective and values.

Those who have written on the subject describe this surge of transformational activity as "the third wave,"⁹ "new age politics,"¹⁰ or "the aquarian conspiracy."¹¹ For example, Marilyn Ferguson, in the chapter on "right power," describes the elements of power in the new society she sees taking shape.¹² They include: (a) change coming by consensus, rather than being imposed by authority; (b) individual help and voluntarism becoming more important than institutional help and services; (c) win-win power relationships instead of win-lose; (d) more feminine, intuitive processes than rational, linear, and masculine processes; and (e) more decentralization and diffusion of power instead of more centralization of power. Clearly, "right power" resembles the processes at the right side of Table 1, and is not compatible with the kind of power exercised by the legal system, lawyers, arbitrators, and so forth.

In like fashion, one of John Naisbitt's "megatrends" of the 1980's is also consistent with the movement in the United States away from legalism toward mediation and conciliation.¹³ This movement is what he perceives as a trend "from representative democracy to participatory democracy." The

7. B. ALPERS & L. NICHOLS, *BEYOND THE COURTROOM* (1981).

8. For a good introduction to pre-trial diversion, see A. BLUMBERG, *CRIMINAL JUSTICE*, 22-25, 49-51 (2d ed. 1979).

9. A. TOFFLER, *THE THIRD WAVE* (1980).

10. M. SATIN, *NEW AGE POLITICS* (1979).

11. M. FERGUSON, *THE AQUARIAN CONSPIRACY* (1980).

12. See Rifkin, *Mediation From a Feminist Perspective: Promise and Problems*, *LAW AND INEQUALITY: A JOURNAL OF THEORY AND PRACTICE* II (February, 1984).

13. J. NAISBITT, *MEGATRENDS: TEN NEW DIRECTIONS TRANSFORMING OUR LIVES* 179-209 (1982).

major principle behind this paradigmatic shift in socio-political relationships is stated by Naisbitt as follows: "People whose lives are affected by a decision must be part of the process of arriving at that decision."¹⁴ Although Naisbitt does not include the movement from legalism to mediation as one of his illustrations, it fits neatly within his principles and analysis. Thus two quite disparate trends came together in the mid to late 1970s in the United States—legal reformism and social transformationalism.

PART II. MEDIATION DEVELOPMENTS IN AMERICA: PARADOX PROLIFERATES

The new American mediation movement traces its origins to some early anthropological¹⁵ and legalistic writings, a rare case where academic ideas preceded socio-political action.¹⁶ Consequently, both legal reformers and community organizers heard opportunity knocking and opened the door.

Some progressive judicial administrators and unorthodox elements in the American Bar Association, as well as some social and community organizers, began experimenting with mediation and conciliation techniques and processes to reach totally different goals. The lawyers, judges, and judicial administrators ostensibly saw mediation as a way to help alleviate persistent problems in the legal system; the community organizers saw mediation as a method that could help put the power to resolve conflict back into the hands and minds of ordinary people, local neighborhoods and communities.

The legal reformers soon found they had many powerful allies with similar values, styles, and interests. Their allies included other professionals and administrators. Moreover, the social revolutionary times of the 1960's and early 1970's were moribund and a new conservatism was ascendant. Thus, a coalition of professionals had formed made up of lawyers, social workers, psychologists, politicians, administrators, and academics. This coalition saw a new "profession" on the horizon: conflict resolver. This budding profession had various support groups to sustain it and make it flourish: trainers in conflict resolution, judicial administrators and planners, and so on. Most of these conflict resolvers would work in or adjacent to court systems. Others would ply their trade in private practice. What they have in common is their adherence to some of the major values in American society:

14. *Id.* at 175.

15. Nader, *Styles of Court Procedure: To Make a Balance*, in *LAW IN CULTURE AND SOCIETY* 69-91 (L. Nader ed. 1969).

16. Professor Richard Danzig is credited with a major contribution in the development of the new American mediation movement through his article, *Toward the Creation of a Complementary, Decentralized System of Criminal Justice*, 26 *STAN. L. REV.* 1 (1973).

the profit motive, hierarchical institutionalism, professionalism, and elitist politics.

Therefore, it should not be surprising to learn that the major advances in mediation and conciliation in the United States from the late 1970s to the present have been endorsed, originated, coordinated, funded, and evaluated by such institutions as the U.S. Department of Justice, the American Arbitration Association, Harvard Law School and the American Bar Association. Many state judiciaries and universities have jumped on the bandwagon, which is now gaining momentum rapidly.

All this comes at a most opportune time for the legal profession in America, i.e., when there is a large number of young, eager attorneys (and other "Young Urban Professionals") in the marketplace. The American legal profession has managed to weather numerous crises in the 20th century. Wedding itself to, if not substantially absorbing, a new profession of conflict resolvers may well be the way to deal with present and near- future economic exigencies.

After all, the first wave of studies on the impact of a variety of court-sponsored, court-affiliated mediation projects clearly indicated that these new programs had little noticeable effect on reducing case-loads or court backlogs, or the budgets of state judiciaries and, indeed, according to the observer, may even have had the reverse effect.¹⁷ Nonetheless, such revelations have done nothing to diminish the increasing affection the legal establishment has for "Alternative Dispute Resolution" (hereinafter "ADR"). The reason for this is simple to grasp. What the first evaluators also found was that ADR methods (particularly mediation) are less time consuming, less costly, highly effective, and very satisfactory to disputants.¹⁸ Since law students and lawyers can learn these techniques and use them, it is to their economic advantage to do so. If lawyers utilize such techniques and processes, then they are certain to charge fees appropriate to their professional station in life. Thus, the new phenomenon of "attorney-mediator" has made its appearance in some jurisdictions and the American public can expect to see such a hybrid soon sprouting ubiquitously.

At this point in time, however, the major practitioners of "alternative dispute resolution" have not been practicing attorneys as such (many of whom still distrust the whole idea of mediation and conciliation). Instead, it has been a cadre of professional bureaucrats (who are frequently lawyers) operating various kinds of "centers" that train and use citizen volunteers to do most of the dispute resolution.¹⁹

17. R. COOK, J. ROEHL, & D. SHEPPARD, NEIGHBORHOOD JUSTICE CENTERS FIELD TEST—FINAL EVALUATION REPORT 83 (1980); R. DAVIS, MEDIATION AND ARBITRATION AS ALTERNATIVES TO PROSECUTION IN FELONY ARREST CASES 66 (1979).

18. See PERSPECTIVE, Vol. III, No. 2, at 8 (Fall/Winter 1979) (statement by Assistant Attorney General Daniel J. Meador).

19. For example, of the three experimental centers set up by the LEAA to

These centers come in several varieties. The most prominent has been dubbed the "agency model."²⁰ It is called such because, in fact, it is primarily a government agency and usually an arm of the court system. All or most of the funding for this type of center is derived from the court system and the policies of the center, as well as its processes and personnel, are controlled or dominated by judicial authorities and values. Mediation may be practiced therein, but one would be hard pressed to view this arrangement as an "alternative to the legal system."

These "agencies" are hierarchical in nature and bureaucratic in outlook and style. They are thought and said to be successful by the typical worldview of any bureaucracy—how cost-effective is the program? This translates into: (a) the amount of the case-load and (b) the size and disbursement of the budget. Thus, in the first major evaluation of three of the U.S. Department of Justice's pilot projects, the evaluators concluded by saying:

One finding that is especially noteworthy is that when cases are referred to the centers directly from the judges themselves—as was the case in Atlanta and Kansas City—they have the highest hearings rate of any other source. . . . Obviously, any dispute resolution project relying on bench referrals as its primary source of cases will probably have a very high hearings-to-referral ratio.²¹

Resolving disputes is the function of these programs. Setting up a system to process the greatest number of disputes at the convenience of those administering the program, becomes the major objective. Keeping costs down is another aim, and to this end, utilizing "volunteer citizen mediators" in these centers is useful. Some centers prefer, however, to pay the extra costs of "professionalizing" their agency by "certifying" only professional mediators and remunerating them for their services.

All these centers maintain that one of their major objectives is to help citizens resolve their own disputes and to provide them with a quicker, cheaper way to accomplish that goal than previously available. So, each center surveys its own clientele periodically with "follow-up" studies to calibrate the degree of satisfaction of its clients with the mediation process and to learn how well the mediated agreements endured over time. The results of these "follow-ups" are almost universally favorable to the work of the centers. Large majorities of disputants report they are quite satisfied with the mediators and the process, and that the agreement usually lasted (at least in part). Yet, those familiar with survey research realize that these "follow-up surveys"

test various models of "neighborhood justice centers," two of the Executive Directors were lawyers (Atlanta and Los Angeles).

20. MCGILLIS & MULLEN, *supra* note 2, at 1-31.

21. D. SHEPPARD, J. ROEHL, R. COOK, NEIGHBORHOOD JUSTICE CENTERS FIELD TEST: INTERIM EVOLUTION REPORT 62 (1979).

are largely self-serving. This claim is because the design, execution, and analysis of such research is used, primarily, to justify further funding.²²

All of these contradictions are most inherent in the "agency" model of mediation and conciliation. This statement is explored in great depth by Roman Tomasic who concludes that there is a wide "gulf between rhetoric and reality" in the mediation movement. For example:

One of the paradoxes of the Neighborhood Justice Center Movement is its heavy reliance upon the justice system for case referrals, on the one hand, and its attempt to sustain a commitment to the ideology of community in an effort to preserve its independence from the justice system, on the other. Needless to say, these are two somewhat contrary situations. A commitment to high caseloads necessitates strong ties to the justice system, while total commitment to those notions of community will necessitate low caseloads and uncertain sources of funding for NJCS. Moreover, cases referred to NJCS from the justice system are more likely to be resolved in a way that is perceived as adequate by the NJCS, due largely to the coercive backdrop of the courts, while the few cases that are referred from community sources are far less likely to be seen as satisfactorily resolved. As a consequence, there is an incentive for NJCS to concentrate upon improving their justice system networks, as these seem to provide the best hope for ensuring the survival, success and institutionalization of the NJCS. Despite the apparent obviousness of this strategy, which seems to run in the face of a commitment to community, the retention of the community ideology may be explained as a legitimating device, which need bear no relation to reality, and may simply serve to mask the reality of the expansion of justice system bureaucracies in society.²³

The other major track of the professional practice of mediation in the United States has come in the fields of family and domestic disputes (particularly divorce) and environmental disputes. Almost every major city in America has a variety of psychologists, social workers, and attorneys practicing "divorce mediation" or "family mediation" for a fee. One reason for this practice is that this area concerns the type of dispute where the most money is found for such services at this time. There is also a new market emerging for planners, academics, and attorneys to help resolve disputes concerning property developers, environmentalists, and public officials. The professional mediators in the market call themselves "environmental mediators" or "conflict managers." They are usually funded by governments or private foundations or both.

These areas of professional mediation are an important component in the growth industry, and its practitioners are major advocates for keeping

22. Tomasic, *Mediation as an Alternative to Adjudication: Rhetoric and Reality in the Neighborhood Justice Center Movement*, in NEIGHBOR JUSTICE CENTERS 241-42 (1980).

23. *Id.* at 243.

these skills from being widely dispersed and routinely practiced. To accomplish this they insist that the subject matter (e.g., divorce, environment) is difficult, that mediators in this kind of dispute need special substantive expertise, and that specially structured mediation training and certification is required. It is in their financial and status interests to keep professional prediction for themselves. Paul Wahrhaftig, one of the founders of the "new American mediation movement," recently wrote of this phenomenon:

Both the Academy of Family Mediators and the Family Mediation Association recommend that one have at least a master's degree in behavioral sciences or a law degree before entering the field. Some local councils (proto-professional organizations), like the Family Mediation Council of Western Pennsylvania are currently debating whether non-lawyers or non-behavioral scientists can be certified as family mediators, even if they are expert mediators. It is unclear why an M.A. or a J.D. is a more appropriate base upon which to build mediation skills than degrees in cosmetology or mixology.²⁴

With the public largely ignorant of these developments, the growth in the legal and professional systems' invasion of ADR territory will continue, aided and abetted by the "multi-door courthouse" strategy, which harbors numerous lawyers, legal administrators, mediators, and arbitrators within the friendly confines of legal coercion and professionalism.²⁵ On the other hand, there is still some life left to that part of the mediation movement dedicated to pursuing its socio-political transformational goals. For the most part, this is confined to a scattered few "community based" or "home-grown" programs.

The major success story of a "community" project is the Community Boards Program of San Francisco. This is the brainchild and pet project of Raymond Shonholtz who conceived and started it in 1978. Despite several community-style predecessors and legislation in New York state setting up community alternatives to the judicial agency model, the Community Boards Program is unique. This uniqueness stems from its adherence to the theory that mediation training and the practice of mediation is a way to help develop a socio-political community awareness. The program also actively promotes and practices the values and benefits of decentralized, democratic organizational processes in its work. Community Boards' idea is not to process as many cases as possible, but to return the power of conflict resolution to individual citizens in a community setting. This theory and practice is an essential element in a true community mediation organization.

24. Wahrhaftig, *Non-Professional Conflict Resolution*, VILL. L. REV. 1463, 1470-71 (1984).

25. See Sander, *The Multi-Door Courthouse* 1984 PHI KAPPA PHI JOURNAL 24-25; *Justice Department Backs Multi-Door Centers*, in DISPUTE RESOLUTION (A.B.A. Newsl.) Winter 1984, at 1-2.

The key to a successful, community-style mediation program, one that is truly non-institutional, non-hierarchical, non-professional, and decidedly democratic in theory and practice, is to *educate* the disputants, staff, and ordinary citizens who wish to learn the art and science of peacemaking and democratic organization. Shonholtz sees education as a major “bridge” and catalyst in developing the “democratic dimension” of community. As stated by Schonholtz:

Effective neighborhood self-governance depends on the firm relationship between the skill-building necessary to perform the civic activity effectively and the democratic dimension necessary to make the civic activity a self-governance function of the entire community. The skill-building and training programs are the bridges and initiating steps that change the civic activity into a democratic self-governance function of the community. The skill-building program makes possible two other essential factors requisite to a democratic activity: broad resident representation and full participation.²⁶

Another essential element in a community mediation program is to help people realize that interpersonal disputes belong to the parties themselves, i.e., the disputes are their own property. The disputants are the ones who are most intimately involved. They understand it best. They can resolve it best. They are the ones who must live with the resolution. They own it. Another major ingredient is to teach the disputants that in many circumstances there are external factors directly responsible for their predicament. These may be economic, social, political, or a combination of all three. Community mediation, properly practiced, can help alert the disputants to the role these factors play in creating the problem. The program can also assist the parties in organizing themselves so as to combat their mutual enemies instead of one another.

This set-up is the theory and practice of Community Boards in San Francisco. These underpinnings create the novel and innovative style of its mediation sessions, which are open to the public and which emphasize the overt teaching of socio-political communications to the disputants. They also explain its unique method of public education (the Community Boards community newspaper), the frequent rotation of volunteer mediators through the program, the use of four and five-person mediation panels, and its refusal to accept case referrals from the courts.

Although Community Boards' fame has spread, only a few centers replicate its concept of educating the public through its process. There are pretenders, that is, actual agency models that adopt some of Community Boards' rhetoric to enhance their own image in their communities. They rely largely on courts for referrals and for a large part of their funding, directly or indirectly. Indeed, at a recent panel discussion concerning community

26. Shonholtz, *Neighborhood Justice Systems: Work, Structure, and Guiding Principles*, *MEDIATION QUARTERLY* September 1984 at 26.

dispute resolution, *all* the community mediation representatives “reported a substantial relationship between their mediation programs and the *court control* of their programs. (They) represented about twenty community mediation programs.”²⁷

There is sparse data to prove any assertion concerning the success of the unique Community Board program. Considering the difficulties in getting and processing cases at the community level, the time span necessary to accomplish such lofty social and political goals (developing community awareness and educating the public in democratic organizational principles), and the difficulty of rigorously measuring this kind of success empirically, such data will be difficult to derive. At this point, proponents of the community-style theory and practice have little with which to nurture their faith except their ideals, principles, and the sense of intrinsic worth in the job they do.

PART III. ACADEMIC COUNTERPARTS: CAMPUS CONTRACTIONS

In 1978, there were already well over 100 mediation centers and neighborhood justice centers throughout the United States. Prior to 1978, Hawaii had none and there was no local movement afoot to get any started. Two members of the Department of Political Science at the University of Hawaii thought that the time was ripe to initiate a Hawaiian mediation movement. After all, most people from major cultures in Hawaii (Hawaiian, Chinese, Japanese, Filipino, Samoan) had migrated from societies where mediation was a major mode of conflict resolution.

Christa Slaton and Ted Becker conducted a community survey in 1978-79 and found very favorable sentiment toward establishing some kind of mediation center in Honolulu. Slaton and Becker worked with students to publicize the value of mediation throughout the community. As a result, several university administrators agreed to help start a joint university-community type center and appropriated seed money for this purpose.

Slaton and Becker then collaborated with several representatives of a local “neighborhood board” (whose job was to serve in an advisory capacity to city government on neighborhood planning- in designing and implementing the first mediation service in Hawaii. As the planning and organizational activities went on, it became apparent to the founders that there were deep ideological rifts that existed between the members of this original group. There were those who were interested in having lawyers, judges, court administrators, and politicians run the center’s board of directors. This group favored a hierarchical arrangement of power with an “executive director” and was a close approximation to a typical “agency model.” Their preference

27. *Burning Issues Discussed*, DISPUTE RESOLUTION (A.B.A. Newsl.) Summer 1986, at p.8.

was to recruit mediators from the professional ranks: lawyers, social workers, retired military officers, and the like. They saw the role of the university as being secondary, that is supporting the policies and activities of the center by supplying interns and researchers.

The second group, which included Slaton and Becker, held different values. Their idea was to have the mediators hail from all walks of life and to be representative of all ethnic groups in the state. There was a strong feeling that the Hawaiian mediation organization should disperse power equally among the mediators, who in turn would control the direction and policy of the center. It was also felt that the university should play an equal role with the community because the university had provided the original research and volunteers and had expertise in public education, which was the key to developing community awareness, involvement, and support.

The notion of university engagement in this kind of center was relatively novel. Law schools had played the major role in one of the earliest mediation centers, the Columbus Night Prosecutor program. However, the Columbus, Ohio program was very much an "agency model." The Hawaiian concept was to utilize an undergraduate program as the major educational tool for a community-based model. Students and faculty would combine with community people in training, public education, staff work, and mediation. At the University of Hawaii, undergraduate students live mainly at home and come from all neighborhoods and communities in the state. Becker and Slaton saw an excellent opportunity to link a university program with the community and synthesize two forces into a unique community-style mediation program, emphasizing democratic organizational principles and decentralized mediation.

Obviously, no one mediation program can cohere with such different philosophies and approaches. The inevitable split occurred, with the two groups going their separate ways in the autumn of 1979. The community-oriented group chose the name of the "Community Mediation Service" (which started its operations out of the University of Hawaii in November, 1979) and the agency-oriented group called itself the "Makiki Neighborhood Justice Center" (but several months later changed that to "The Neighborhood Justice Center of Honolulu, Inc.").

Consistent with its principles, one-half of the first group of Community Mediation Service (CMS- mediators reflected the university community and the other half came from the outside community: a lawyer, a motorcycle policeman, a housewife, a retired civil servant, an unemployed Hawaiian activist, and two community workers. The mediators represented the age and ethnic diversity of the Islands. Their diversity enhanced the training program by providing insight into many ways in which mannerisms and words are interpreted by various cultural groups.

CMS's office staff was composed exclusively of university faculty, community volunteers, and students who volunteered their services for approximately fifteen hours per week. In keeping with its concept of democratic

organization, the staff and mediators became the board of directors, with each person having an equal vote. They established CMS policies on all issues, and took orders from community leaders, politicians, and experts who dominated the board of directors of many centers.

Under the board's guidance, CMS developed a case-referral system that initially relied heavily on the city prosecutor's office. The caseload, however, also consisted of referrals from various county, state, and federal (military) agencies. CMS public relations work, such as designing and distributing pamphlets, broadcasting radio spots, making club and organizational presentations, and holding press conferences, generated numerous cases from community and private organizations.

CMS utilized existing office space, telephones, computers, files, and other office materials at the Department of Political Science for record keeping. For the convenience of the parties involved, however, the mediations were set up in various public and private facilities across the Island, such as YWCAs, community centers, and libraries. The center's major operating cost was for mailing. The cost of printing brochures and pamphlets was contributed by private individuals and a city agency serviced by the Center.

The CMS Board of Directors also decided to utilize three-mediator panels in all formal sessions. There were several advantages in working on a panel rather than singly. First, with the great ethnic diversity in Hawaii and frequent instances of racial hostility between disputing parties, the directors believed it would be easier to obtain the trust of the disputants when mediators reflected the ethnic diversity of the parties. Second, the CMS mediators found it helpful to work with a mediator of another ethnic background. Jargon could be better handled, and unfamiliar customs and mores could be explained during the private caucuses of the mediation panel. Third, working on a panel, the mediators received support from one another. When it appeared the mediation was going nowhere, a line of questioning had taken the wrong turn, or one of the disputants was suspicious of one of the mediators, another mediator could change the direction of the process. This helped relieve pressure when acting alone in a hostile environment. It also helped lessen tension afterwards, to help each mediator "wind down."

The most important reason for using a panel method for a university-based NJC, however, is its educational value. This value takes several forms. Obviously, there is the continual learning process that occurs in working with others. One learns from observing other mediators how to handle certain situations. After each hearing, mediators got together to discuss the case, how the agreement was reached, what seemed to work and what did not, and how they might handle similar situations in the future. It also allowed CMS the luxury of developing an "apprenticeship model" of training.

This policy of using panels had a few inherent problems. It created scheduling difficulties for the staff—finding three mediators reflecting the ethnicity, sex, and age of the disputants who could mediate at the same time was difficult at times. This difficulty, however, was never a serious problem

even though mediators were sometimes given only a few hours notice before a hearing. This problem also led to the Board of Directors agreeing to permit the use of two-mediator panels (which also work well).

After nearly a year of experimentation CMS conducted an analysis of the type of cases referred to it and the methods used to resolve the cases (Table 2).²⁸ Out of 227 cases referred to the Center, the overwhelming number

TABLE 2

CMS RESULTS, FIRST EIGHT MONTHS OF OPERATION

Nature of Dispute	Number of Cases
Domestic: Visitation	11
Domestic: Child Support	4
Domestic: Family Dispute	29
Neighbor Dispute	54
Friend/Ex-Friend Dispute	58
Landlord-Tenant	29
Consumer-Merchant	36
Employer-Employee	5
	<hr/> N = 226
ORIGIN OF CASE	
Family Court	13
Prosecutor's Office	103
Community Agencies	25
Self-Referrals	41
Legal Aid	20
Military	11
Neighborhood Commission	13
	<hr/> N = 226
OUR RECORD (CASES CLOSED)	
Fail to arrange/screen-out	93
*Hearing set/no-show	8
Hearing held/no agreement	4
**Hearing held/agreement reached	38
Telephone conciliation	38
Parties reach agreement themselves	30
	<hr/> N = 211***

* = No-show/cancellation rate is 17%

** = Rate of success in hearings is 90%

*** = Number of cases closed at time table was compiled

28. Slaton & Becker, "Hawaii's Community Mediation Service: The University-Based Model of Neighborhood Justice Centers," Paper presented at 1981 Convention of the American Psychological Association, Los Angeles, California (August, 1981).

were referred by the prosecutor's office (45%). However, the public relations program and the community outreach program worked well enough to get nearly a third of the cases from self-referrals (18%) and community agencies (11%). The remaining cases were referred by legal aid (9%), family court (6%), and the Neighborhood Commission (6%). (CMS developed a close working relationship with the Neighborhood Commission because they were a lightning rod for neighborhood disputes). CMS had also worked hard to attract cases from the military. Because military personnel in Hawaii frequently get involved in many disputes with locals, community mediation provided a welcome service.

Half of the cases referred to the center involved either disputes between friends or disputes between neighbors. These were the cases that CMS had always felt would be best served by mediation centers. The two types of cases that produced considerable debate when the board was determining what cases to take, e.g., domestic disputes (quarrels among family members, child support, visitation rights) and consumer-merchant disputes, comprised nearly one third of all cases referred to the center. The remaining two-thirds involved disputes between either landlord-tenant or employer-employee.

The staff screened out over 40% of the cases referred to CMS because there was no on-going relationship between the parties or because one of the parties was unwilling to mediate. However, some form of agreement was reached in 50% of the cases coming into CMS, either by the parties reaching an agreement themselves (14%), telephone conciliation conducted by a staff member (18%), or mediation through a successful session (18%). If a mediation session was held, the rate of success in reaching agreement was 90%. This success rate compares very favorably with that of all the major agency models in the United States.²⁹

Shortly after CMS began operation, a letter was received from the University of Massachusetts at Amherst inquiring about the program. They had been thinking about involving an undergraduate program in a community outreach type of program and wanted information on the CMS program. In February 1981, the UMass Mediation Project commenced operations.

The UMass Center is also community-related, but there are significant differences from the CMS model. First, campus-related disputes were to be the major concern. Second, the UMass organization is hierarchical in nature. Third, the University of Massachusetts at Amherst is located in a small community rather than a large city area. Thus, although it was to be community-oriented, it expected that many (if not most) of its cases would involve students. "A large portion of the caseload in the local court system is directly traceable to disputes arising within the university. Approximately one-third of the district court docket consists of cases from the university or

29. See COOK, ROEHL & SHEPARD, *supra* note 17, at 83.

involves people from the university."³⁰ Thus, the UMass university-based, community-style center focuses more on a university-as-a-community and works with a community that is substantially impacted by the university itself.

As with CMS at the University of Hawaii, the Massachusetts Center is based at the university itself. And, like CMS, the statistics collected on its operations show that a university-based center does well in accomplishing its goals: (1) the UMass Mediation Project reports a steady growth in the demand for its services, (2) it reports a remarkable ratio of referrals from non-coercive sources (see Table 3). (3) approximately 71% of all formal mediated cases are successfully resolved with a formal agreement, and (4) "it has been one of the unanticipated benefits of mediation training that the conflict resolution skills required in the training are readily transferrable to non-formal mediation settings."³¹

TABLE 3

REFERRAL SOURCES

Community Referrals		51% TOTAL
Newspaper/radio/media	34	11%
Friends	31	10%
Self-referral	21	7%
Student Group	2	1%
Off-Campus Housing	8	3%
Social Service Agency	30	10%
Other	25	9%
Legal and Quasi Legal Referrals		27% TOTAL
Court	11	4%
Legal Service Agency	35	12%
University Judicial	22	7%
Lawyer	13	4%
Other		22% TOTAL
Dorm Staff	6	2%
Missing	58	20%

A preliminary assessment of the UMass experiment appears to indicate that it is closer to an agency model than Hawaii's CMS. In addition to its apparent hierarchical structure, it frequently alludes to the "professionalization" of its training and mediators. Thus, it may well be akin to the so-called "hybrid" agency-community models that exist around the nation, having characteristics of each, but having more characteristics of an "agency" model than anything else.

30. UNIVERSITY OF MASSACHUSETTS-AMHERST, PAMPHLET NO. 127, UMass MEDIATION PROJECT 5 (1985).

31. *Id.* at 1.

Meanwhile the UMass model is thriving on campus. Also, with strong university administration support it is helping other campuses replicate its model wherever feasible. The CMS project ended an eight month experimentation by merging with a city and county of Honolulu community-mediation network designed to establish four community mediation centers. These centers were to be run by community volunteers in cooperation with CMS-trained community outreach workers.

The idea of "professionalizing" mediation through the non-law school academic community is also practiced at the graduate level of education in about a dozen universities in the United States. A prototypical program along these lines has been established at George Mason University in Virginia where an integrated, multi-disciplinary graduate program produced its first group of Masters in the Science of Conflict Management in 1984. The objective of this program is to have these "conflict managers . . . pursue specialization in family, organizational, community, environmental, labor/management, or international conflict intervention and mediation."³²

Thus, as might be expected, the development of university and college mediation programs in the United States closely parallels the general development of mediation throughout the country. Law schools and graduate programs are interested primarily in producing professionally oriented people, conversant with mediation skills, so they may use them in their careers. The George Mason program makes room for those who might desire to ply their skills in community programs, but produced none in its first group of graduates.

A few years ago, a private, non-profit financial and technical support organization came into existence in Washington, D.C. It calls itself the National Institute of Dispute Resolution (NIDR, not to be confused with SPIDR, the Society of Professionals in Dispute Resolution, a major professional-style association promoting such values in the mediation movement), although it has no governmental or quasi-governmental affiliation or status. Indeed, all of its money comes from the private sector, primarily from large foundations (like Ford, Hewlett, and MacArthur) and multi-national corporations (like Exxon, AT&T and Prudential Insurance).

Its first round of funding financed "six statewide offices of mediation for the resolution of public policy disputes, a nationwide effort to increase the use of court ordered arbitration, [and] grants to private mediation services working in collaboration with public agencies."³³ Judging from these accom-

32. Sandole, *Training and Teaching in a Field Whose Time Has Come: A Postgraduate Program in Conflict Management* 12-13, Paper presented at 12th International Conference of the Society of Professionals in Dispute Resolution, San Francisco (1984).

33. NATIONAL INSTITUTE FOR DISPUTE RESOLUTION, *GRANTS PROGRAM IN PROFESSIONAL EDUCATION 2* (1985-1986).

plishments, NIDR's values in the field of ADR would appear to be professional, governmental, bureaucratic, and legal.

NIDR then turned its attention from "practitioners" to the world of higher education. Its largesse in 1984-85 was channelled to law schools, funding curriculum development and research. In the 1985-86 academic year, its monies have been appropriated for graduate schools of "business," "public affairs," "public administration and public policy," and "planning."³⁴ NIDR's emphasis, once again, seems to be toward graduate programs in mediation that serve commercial, governmental, and professional interests.

It is clear that the unfolding dynamic in the practice of mediation in the United States is being replicated on university campuses in their development of curriculums and in the value being instilled in students interested in acquiring and promoting mediation skills.

EPILOGUE

That the new American mediation movement's development—in society at large as well as in higher education—should be so drastically skewed towards professionalization, bureaucratization, and legalization is hardly a revelation. Auerbach recently observed that there is an element of ostensible inevitability in mediation's present dominance by the legal system in particular. In his view, the struggle is over, the battle won. Using his own brand of historical determinism, by detailing a series of defeats suffered by past mediation efforts at the hands of lawyers, he states:

The quest for community may indeed be 'timeless and universal.' In this century, however, the communitarian search for justice without law has deteriorated beyond recognition into a stunted off-shoot of the legal system. The historical progression is clear: from community justice without formal legal institutions to the rule of law, all too often without justice. But injustice without law is an even worse possibility, which misguided enthusiasm for alternative dispute settlement now seems likely to encourage. Our legal culture too accurately expresses the individualistic and materialistic values that most Americans deeply cherish to inspire optimism about the imminent restoration of communitarian purpose. For law to be less conspicuous Americans would have to moderate their expansive freedom to compete, to acquire, and to possess, while simultaneously elevating shared responsibilities above individual rights. That is an unlikely prospect unless Americans become, in effect, un-American.³⁵

Trends, however, are not inexorable. No one can disagree with Auerbach that a trend exists towards the absorption of mediation into the body of the legal system. But even though history repeats itself, it also has a strange way of defying itself and darting into wholly unpredictable channels.

34. *Id.* at 1.

35. AUERBACH, *supra* note 1, at 146.

Thus, the fact that there is still the semblance of life in the corpus of community-style, community-based transformational mediation means that alterations in near future environments can produce changes in its growth patterns as well. Given a sudden wind, embers produce forest fires. Indeed, there is sufficient evidence to reveal that recent American history of the twentieth century may illustrate cycles or spirals, as well as trends.

Around the turn of the century, the Progressive Movement flourished as a reaction to corporate corruption of the democratic process. It produced an emphasis on direct democracy, citizens initiatives, and anti-trust laws. Fifteen years or so later, American politics shifted from an anti-establishment bias to a reaction against foreign radicals, i.e., the "Red Scare" of the early 20s. About fifteen years later, during the Great Depression, a new anti-establishment movement waxed: The New Deal and the advent of welfare capitalism. This movement was followed, approximately fifteen years later, by the McCarthy Era, a time of extreme conservatism. Fifteen years subsequent to that, America found itself in the middle of strongly anti-establishment "generation gaps," the women's liberation movement, and the "counter-culture." And after another fifteen years had passed, Ronald Reagan was ensconced in the White House as the apostle of a new conservatism.

This does not mean that the late 1990s, at the threshold of the Third Millennium, will witness a new anti-establishment movement reaching a new peak. But it may. If a transformation-rooted political wave were cresting then, it would not be unlikely that community mediation programs might be the rage. Such a development might also cause the legal embrace of mediation to loosen substantially. This possibility is not a prediction. It is simply an alternative scenario to the one Auerbach envisions.

In the meantime, supporters and practitioners of transformational mediation must content themselves with prospects of: (a) a struggle to survive; (b) continued sacrifices of principle and compromises of convenience; (c) future retrenchment as professional and official forces monopolize and/or stratify mediation training and service; and (d) the hope that the future holds the reappearance of a favorable cycle rather than the endless continuation of a hostile trend.

