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STAYING IN ORBIT, OR BREAKING FREE: THE RELATIONSHIP OF MEDIATION TO THE COURTS OVER FOUR DECADES

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I. INTRODUCTION: FOUR DECADES, FOUR CYCLES—A SATELLITE IN ORBIT, OR AN EXPLORER BREAKING FREE?

The acceptance and use of mediation by courts—at the state and federal level—has grown steadily over the last several decades. Today, mediation is a central element in the overall case-management system of many courts, and this phenomenon continues to grow unabated.[1] At the same time, however, another quite different phenomenon has emerged—the expression of serious criticism from mediation scholars and experts about the way mediation is used by the courts.[2] Indeed, it appears that judges and

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1. *See* DWIGHT GOLANN & JAY FOLBERG, MEDIATION: THE ROLES OF ADVOCATE AND NEUTRAL 419-33 (2006) (describing the expansion of court-connected mediation and the correspondingly greater role played by lawyers); ELIZABETH PLAPINGER & DONNA STIENSTRA, ADR AND SETTLEMENT IN THE FEDERAL DISTRICT COURTS: A SOURCEBOOK FOR JUDGES AND LAWYERS 3-6, 14-19 (1996), *available at* http://www. fjc.gov/public/pdf.nsf/lookup/adrsrcbk.pdf/$file/adrsrcbk.pdf (documenting the growth in use of mediation in the federal court system); Deborah R. Hensler, *In Search of 'Good' Mediation: Rhetoric, Practice, and Empiricism*, *in* HANDBOOK OF JUSTICE RESEARCH IN LAW 260 n.5 (Joseph Sanders & V. Lee Hamilton eds., 2001) (summarizing data on the increased use of mediation by state and federal courts); Bobbi McAdoo & Nancy A. Welsh, *Look Before You Leap and Keep On Looking: Lessons from the Institutionalization of Court-Connected Mediation,* 5 NEV. L.J. 399, 405-08 (2004/2005) (describing the growing tendency of state and federal courts to offer mediation and that of trial lawyers and in-house counsel to use it, and citing research studies that document these trends); Leonard L. Riskin & Nancy A. Welsh, *Is That All There Is?: The "Problem" in Court-Oriented Mediation,* 15 GEO. MASON L. REV. 863, 870-71 & nn.38-40 (2008); Rochelle L. Wissler, *Court-Connected Mediation in General Civil Cases: What We Know From Empirical Research,* 17 OHIO ST. J. ON DISP. RES. 641, 643 n.3 (2002) (listing multiple research studies that document increased use of mediation by the courts).

2. *See*, *e.g.*, Jacqueline M. Nolan-Haley, *Court Mediation and the Search for Justice Through Law*, 74 WASH. U. L.Q. 47, 84-100 (1996) (suggesting that court-connected mediation

lawyers in the court system, on the one hand, and mediation experts on the other, understand court-related mediation—and mediation itself—in very different terms. Ironically, mediation's widest acceptance by the courts has become the occasion for intense concern and even fearfulness from the mediation "community" itself.

This article suggests that the current ambivalence about the relationship of mediation to the courts is only the latest phase of a four-decade-long tension in this "partnership" of two very different dispute resolution processes. From the earliest beginnings of the "modern mediation field" in the late 1960s to the present, the relationship of mediation to the courts has fluctuated between two orientations. In the first, mediation has been seen and has served as a faithful "servant" of the court system, performing functions vital to the courts and to effective judicial administration. In the second, mediation has been encouraged and has sought to "break free" and establish itself as a separate and distinct conflict resolution process, performing very different functions that are vital to society but unrelated to judicial administration per se. The cycling between these two orientations is driven by the very different potentials mediation offers as a social process, as viewed through different professional eyes. These different views explain why some today are gratified by what they see as mediation's success in finding a firm place in the court system, while others are discouraged by what they see as the court system "capturing" mediation and depriving it of its real social value.

To understand these different views of mediation, and thus the different attitudes toward court-related mediation today, the historical perspective of the forty-year history of the relationship of these two processes is essential. Against that context, the contending views of the relation of mediation to the courts may be better understood; and sounder conclusions can be

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may sacrifice the value of justice for the parties); *Panel Discussion: What Happens When Mediation Is Institutionalized?*, 9 OHIO ST. J. ON DISP. RES. 307, 309-14, 330-31 (1994) (raising concerns about court-connected mediation focusing too heavily on settlement and ignoring more humanistic dimensions of the process); Sharon Press, *Institutionalization: Savior or Saboteur of Mediation?*, 24 FLA. ST. U. L. REV. 903, 908-16 (1997) (expressing concerns that court rules will have a formalizing effect on mediator qualifications, training, and practices); Nancy A. Welsh, *The Place of Court-Connected Mediation in a Democratic Justice* System, 5 CARDOZO J. CONFLICT. RESOL. 117, 135-40 (2004) [hereinafter Welsh, *Democratic Justice*] (arguing that in the court context, self-determination is attenuated and the mediators become "judging adjuncts"); Nancy A. Welsh, *The Thinning Vision of Self-Determination in Court-Connected Mediation: The Inevitable Price of Institutionalization?*, 6 HARV. NEGOT. L. REV. 1, 3-33 (2001) [hereinafter, Welsh, *Self-Determination*] (describing how court-connected mediation involves mediator tactics that pressure parties into settlements); McAdoo & Welsh, *supra* note 1, at 415-19 (questioning the extent to which mediation achieves substantive, procedural or efficient justice); Riskin & Welsh, *supra* note 1, at 874-77 (arguing that court-connected mediation ignores problem-solving in favor of narrow, litigation-oriented case evaluation).

reached about the best way to support a healthy relationship between these processes. This article is intended to present a brief history and analysis of this relationship over four decades, from 1968 to 2008. The frame for that history is the cycling between the two orientations described above—mediation as serving the courts, or mediation as breaking free—and the history is divided into four periods, roughly corresponding to the four decades involved. The guiding metaphor for this historical analysis is that of a satellite orbiting a planet, whose purpose and value is ambiguous. Once launched, is the satellite meant to remain in steady orbit, performing functions that serve the "mother planet" in important ways; or is it meant to break free of the planet's gravitational field altogether, and search for "new worlds" whose discovery might fundamentally change understandings on the mother planet itself? Mediation has been seen and treated as each of these things—orbiting satellite and cosmic explorer—during different phases of its forty-year relationship with the court system. Examining these phases in some detail can help to envision and encourage a productive relationship between mediation and the courts in the coming decades.

An important qualification on this history is that it focuses on how mediation has functioned as a conflict intervention process in relation to the courts in particular. It is obvious to any student of the field that mediation has operated in many other venues over the last four decades—venues without a clear and direct connection to the court system. Thus, mediation has been used in the context of: managing public policy disputes and formulating public policy; resolving administrative claims in areas subject to regulations on discrimination, special education, healthcare, and social services; mediating conflict among student peers in educational settings at all levels; and addressing conflicts among staff, and with clients or customers, in businesses in the public and private sector.[3] In many of these sectors, mediation has operated largely independent of the courts. However, in most of the sectors, there are points of contact at which the conflicts involved may enter the court system. The "shadow of the law" is a very long one indeed. In any event, to keep the presentation within manageable limits, this historical analysis will not address the use of mediation in all of these areas directly and specifically. However, while differences can be found in the way mediation has evolved in these different arenas over the forty-year period in question, many of the patterns described in this history may be found in those other arenas as well.

3. *See, e.g.,* JAMES J. ALFINI, SHARON B. PRESS, JEAN R. STERNLIGHT & JOSEPH B. STULBERG, MEDIATION THEORY AND PRACTICE 14-22, 567-649 (2006) [hereinafter ALFINI] (describing and giving examples of the use of mediation in all of these contexts).

Therefore, this history of mediation in relation to the courts can shed light on how its use has evolved in other contexts, although the specifics of the history of mediation in other contexts are not addressed specifically.

One further clarification is necessary regarding the historical review offered in this article. According to current views on the nature of "knowledge," historical study is never purely objective and involves a substantial measure of interpretation.[4] Indeed, it is common today to find very different historical accounts of the same set of events, because of the different interpretive lenses used by the historians who present them. History, in short, is one kind of narrative, and all narrative involves interpretation. That is certainly true of the history offered here. The developments described below might be described differently by other narrators. This article presents one "take" on the history embodied in the four decades in question, offered by one particular narrator. Indeed, this author has been present and involved as a participant through most of the period in question. Therefore, there is no implied claim of purely objective, scientific accuracy in the narrative offered here. At the same time, historical narrative, even if affected by subjectivity, is essential as a way of trying to make sense of, and attach meaning to, unfolding events in the social world. This particular history is one effort to make sense of a set of events very important to the fields of law and mediation, and to find a meaning in those events that can inform our response to them as they continue to unfold.

To start now with an overview, which also outlines the structure of the succeeding four Parts of this article: The first cycle in the relationship of mediation and the courts, roughly corresponding to the 1970s (though beginning in the late 1960s), positioned mediation as "Clearly in Orbit" around the court system, used as a "diversion" mechanism to channel various cases out of the courts. In the second cycle, corresponding to the 1980s, many began to view mediation as "Breaking Free" of the courts, becoming instead an instrument for community, private ordering, problem-solving, and reconciliation—values quite different from those driving the legal system. The third cycle in the 1990s found mediation "Back in Orbit" as the courts began to enthusiastically embrace it as a tool for case management and settlement production. Finally, in the fourth cycle, beginning in the late 1990s and continuing today, mediation has shown a strong impulse toward "Breaking Free Again" and reaching toward new goals of generating

4. *See, e.g.*, RICHARD J. BERNSTEIN, BEYOND OBJECTIVISM AND RELATIVISM: SCIENCE, HERMENEUTICS, AND PRAXIS (1983) (explaining the role of interpretation in social science); Kenneth Gergen, *Constructionist Dialogues and the Vicissitudes of the Political*, *in* THE POLITICS OF CONSTRUCTIONISM (I. Velody & R. Williams eds., 1998) (describing the approach of social constructionism in political and social science).

"insight," "understanding," and "transformation" rather than focusing on settlement in the shadow of the courts.

In the following parts of this article, each of these cycles is explored in some detail, but one question implied by this overview should be stated and held in abeyance: Will the cycling process sketched here continue to repeat itself, with the satellite returning to orbit each time; or, are the successive cycles moving toward a point where the satellite actually breaks free? In the conclusion of this article, some suggestions are offered regarding what factors may determine the answer to this question.

II. 1968-78: CLEARLY IN ORBIT—"DIVERSION" FROM THE JUSTICE SYSTEM

A. BEGINNINGS: LABOR MEDIATION METHODS APPLIED TO URBAN DISORDERS

Many of those involved in the mediation field might be surprised to learn that, in an important sense, the "modern" mediation field grew out of the urban turmoil and civil unrest that struck the United States in the late 1960s. Prior to those momentous events—the disorders in Detroit, Watts, Boston, and elsewhere—mediation was a process used almost exclusively in the labor-management sector.[5] Its use in other arenas of conflict, outside small enclaves where traditional cultures functioned, was rare.[6] Then, when tensions over racial discrimination, school and housing integration, policing practices, and similar issues boiled over into open conflicts between groups of citizens, or citizens and government, an insight born of necessity emerged and launched the modern mediation field. Experts in labor mediation and community activists, supported by visionaries in government and the nonprofit sector, imagined that just as mediation had provided an alternative to violent intergroup conflict in the early era of collective labor-management bargaining, the process might provide an alternative to the same kind of conflict in the streets of our cities.[7]

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5. *See* LINDA R. SINGER, SETTLING DISPUTES: CONFLICT RESOLUTION IN BUSINESS, FAMILIES, AND THE LEGAL SYSTEM 5-6 (1990); ALFINI, *supra* note 3, at 1-2.

6. *See* LINDA R. SINGER, *supra* note 5, at 5-6; ALFINI, *supra* note 3, at 1-2; JAY FOLBERG & ALISON TAYLOR, MEDIATION: A COMPREHENSIVE GUIDE TO RESOLVING CONFLICTS WITHOUT LITIGATION 1-4 (1984); Anne Milne & Jay Folberg, *The Theory and Practice of Divorce Mediation: An Overview*, *in* DIVORCE MEDIATION: THEORY AND PRACTICE 3, 3-4 (Jay Folberg & Anne Milne eds., 1988) [hereinafter DIVORCE MEDIATION].

7. *See* Robert A. Baruch Bush, *Dispute Resolution—The Domestic Arena: Methods, Applications and Critical Issues*, *in* BEYOND CONFRONTATION 9, 12-13 (John A. Vasquez et al. eds., 1994); ALFINI, *supra* note 3, at 2-11; FOLBERG & TAYLOR, *supra* note 6, at 4-5.

The result was the initiation of an effort to provide visible, accessible conflict resolution resources to cities beset by conflict. Among the first to contribute to this effort were: the Community Relations Service (CRS) of the U.S. Department of Justice, a cadre of individuals trained to intervene as mediators in serious interracial and interethnic conflicts; the National Center for Dispute Settlement (NCDS), established by the American Arbitration Association (AAA) as a nonprofit program to provide interveners for major community conflicts and resources for community education; and the Institute for Mediation and Conflict Resolution (IMCR), another nonprofit center established by a noted labor mediator.[8] The latter two were both funded by the Ford Foundation, which continued to be the primary funder of mediation and other conflict resolution programs for a decade.

Initially, these and similar programs deployed trained interveners to mediate major intergroup conflicts of many kinds.[9] One of the early exemplars of this work, Bill Lincoln, was a former community organizer who became a mediator under the NCDS program. Lincoln described his first assignment by the AAA to intervene in a volatile interracial community conflict in Rochester, New York:[10]

> In 1971 there was a school desegregation battle in Rochester, New York. A Washington, D.C. representative person from the American Arbitration Association called me up and said "We've been asked to organize a massive mediation effort. People are getting hurt, and some schools are being temporarily closed. Someone in the community has to convene this community. . . ."
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> My first—informal as it was—mediation was in the streets of Rochester, New York, in the midst of a racial disturbance while arranging for fire fighters going into intercity areas without fear of being shot.

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8. *See* ALFINI, *supra* note 3, at 8-9 (briefly summarizing this early history); *see generally* DANIEL MCGILLIS, COMMUNITY MEDIATION PROGRAMS: DEVELOPMENTS AND CHALLENGES (1997) (discussing the establishment and development of community mediation over two decades, as well as the development of mediation in other sectors).

9. *See* ALFINI, *supra* note 3, at 8-9. These early steps in mediating intergroup conflict were the foundation for subsequent expansion of these kinds of efforts into fields like environmental and regulatory conflict, leading to the emergence of "public policy mediation" as an established and eventually institutionalized practice. *See, e.g.*, LAWRENCE SUSSKIND & JEFFREY CRUIKSHANK, BREAKING THE IMPASSE: CONSENSUAL APPROACHES TO RESOLVING PUBLIC DISPUTES (1987) (describing the use of mediation in land-use, housing, and environmental conflicts); LAWRENCE BACOW & MICHAEL WHEELER, ENVIRONMENTAL DISPUTE RESOLUTION (1984) (describing use of mediation in environmental conflicts).

10. Ana Schofield, *Interview With Bill Lincoln, available at* http://www.mediate.com/articles/schofieldW.cfm, March 3, 2003 (last visited Jul. 29, 2008).

> It was right in the street between several fire fighters, police officers, and several Black leaders. I said 'We're not going to resolve racism and the grievances of Blacks and Whites tonight, but it may be in the best interests of the entire community if buildings here are not burned.' We had to work out that the fire-fighters would not be targets, and how they could kind of 'team up' with Black leaders. Without such cooperation—indeed the commitment by community Black leaders—we would never have made it through that night.[11]

Other individuals working for CRS, NCDS, IMCR and other organizations, did similar work in other emergent crises: Theodore Kheel, George Nicolau, Willoughby Abner, and Joseph Stulberg.[12] Some were lawyers, some mediators, and some community activists. All were talented and brave, and all brought mediation to a troubled urban landscape. In the view of many, this was the beginning of the modern mediation field. In its earliest period of "modern" use, mediation was seen not as an alternative to the *courts*, but as an alternative to the *streets*.[13]

B. FROM THE STREETS TO THE COURTS, FROM INTERGROUP TO INTERPERSONAL CONFLICT: COMMUNITY MEDIATION CENTERS

Proponents of mediation soon realized that mediation could be useful for handling not only intergroup conflict, but interpersonal conflict as well. In fact, the reasoning behind the two uses was linked. An early report on what came to be known as "community or neighborhood mediation" explained: "[T]he major problem of American justice is . . . the inability of our system to deal promptly and justly with the little cases that can create 'festering sores and undermine confidence in society.'"[14] The link to large-scale conflict is implied if not clearly stated: A single interpersonal conflict left to fester could escalate into a major intergroup conflict, with disastrous consequences—and incidents of such escalation were not hard to find. On the other hand, providing a means of "promptly and justly" addressing the

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11. *Id*.

12. ALFINI, *supra* note 3, at 9.

13. This is true even of major intergroup and policy conflicts. *See supra* text accompanying note 3. Though mediation in these contexts was not directly "fed" or supervised by the courts, it was not wholly independent of them, because almost all these kinds of conflicts involve the potential for litigation of some kind. In serving as an alternative to the streets, mediation was automatically serving as an alternative to the courts as well, even at this earliest stage.

14. *See* Daniel McGillis, *Minor Dispute Processing: A Review of Recent Developments*, *in* NEIGHBORHOOD JUSTICE: ASSESSMENT OF AN EMERGING IDEA 60, 64 (Roman Tomasic & Malcolm M. Feeley eds., 1982) [hereinafter NEIGHBORHOOD JUSTICE] (quoting with approval syndicated columnist James Kilpatrick).

interpersonal incident could avoid the escalation. From this insight was born another key step in the growth of the mediation field: the introduction of accessible, local "community" or "neighborhood mediation centers," where trained individuals could be found to serve as mediators in interpersonal conflicts of all kinds.

One of the earliest of these centers was established in Rochester, New York, after the mediation of major conflicts there, like the one mentioned above.[15] Others were opened in other cities, including Philadelphia, Columbus, Boston, and Manhattan.[16] Sometimes the programs operated as nonprofit agencies, and sometimes they were run under government auspices. Almost always, these programs were "fed" their cases by the justice system—local courts, prosecutors, and police.[17] The reason for this relationship was threefold. First, those criminal justice agencies were the "gatekeepers" for interpersonal disputes of all kinds—the places most likely to be asked for help by citizens in conflict. Second, the kinds of cases involved were usually "minor" in character—not financially or socially consequential enough to justify (for the parties or the pubic) serious litigation, but nevertheless troublesome and potentially capable of escalating to larger conflict. Finally, while formal justice procedures were unlikely to provide effective help in such cases, it was believed that mediation could do so better.

In this way, mediation became linked to the courts, and the first cycle of the relationship between the two was born, in which mediation was seen as a useful servant of the courts. In the language of that time—still common today—mediation became a "diversion" process, channeling cases out of the criminal justice system and resolving them "promptly and justly."[18] Of course, mediation continued to be used independently of the courts, for larger-scale conflict.[19] To the extent it was linked to the courts, that link was established in the mode of a satellite-servant orientation.

Community mediation centers multiplied across the country through the 1970s, and have continued to do so to this day. As of 1981, there were

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15. *See* Joseph B. Stulberg, *A Civil Alternative to Criminal Prosecution*, 39 ALB. L. REV. 359, 360 (1975) (stating that the Rochester, New York, Center has been operating since September 1973).

16. McGillis, *supra* note 14, at 64.

17. *Id*. at 65-70; Roman Tomasic, *Mediation as an Alternative to Adjudication, Rhetoric and Reality in the Neighborhood Justice Movement*, *in* NEIGHBORHOOD JUSTICE, *supra* note 14, at 215, 242-48.

18. *See id*. at 244-45 (stating that the U.S. Department of Justice saw neighborhood justice centers as providing relief to overburdened courts by diverting matters not requiring a full hearing).

19. *See supra* notes 3, 9 and accompanying text.

roughly 140 programs, and today there are several hundred.[20] Significantly, the funding of such centers, in this first decade of the history under consideration, was not mainly from private foundation sources, but from governmental sources. In fact, the primary initial funder of community mediation centers was an agency called the Law Enforcement Assistance Administration (LEAA), a funding arm of the U.S. Department of Justice.[21] The presence of LEAA as a funding source indicated that mediation in these community centers was seen as a useful instrument of the justice system, a satellite of the system that was therefore deserving of justice system financing. By the late 1970s, this link between mediation and the justice system was strong enough that the U.S. Attorney General's office "showcased" the relationship by establishing federally funded "model" Neighborhood Justice Centers (NJCs) in several major cities.[22] Today, many of the original separately funded centers have been taken over by local governments, which was part of the original intent. The major part of the caseload of these centers continues to come from the local courts—criminal and civil—as well as from prosecutors and police.

C. MEDIATION AS DIVERSION FROM THE COURTS: SERVING FOR SETTLEMENT AND DISPOSITION

A final part of the picture of this first decade was established more firmly by later research, but it is important to note here the early findings of research on community mediation. There was considerable rhetoric, in the initial push to establish community mediation centers, that the centers would serve as places where citizens could engage in "self-determination" by resolving for themselves how to settle their differences in their own communities.[23] However, the actual practice of mediation in these centers, usually conducted by trained volunteers from different communities than those in which the parties lived, was heavily settlement-oriented. The main function of mediation in these centers was to generate settlements in the cases that had been "diverted" to them, so that those cases would not return

20. McGillis, *supra* note 14, at 63; *see also* ALFINI, *supra* note 3, at 10 (discussing early initiatives to establish neighborhood justice centers); SINGER, *supra* note 5, at 9 (describing the growth of dispute resolution in law schools, high schools and federal agencies).

21. *See* McGillis, *supra* note 14, at 64 (stating that Philadelphia and Columbus received LEAA funding). Private foundations, including the Ford Foundation and the William and Flora Hewlett Foundation, also helped to fund these programs. ALFINI, *supra* note 3, at 9.

22. ALFINI, *supra* note 3, at 10; McGillis, *supra* note 14, at 73.

23. FOLBERG & TAYLOR, *supra* note 6, at 34-36; *see also* JENNIFER BEER ET AL., PEACEMAKING IN YOUR NEIGHBORHOOD: MEDIATOR'S HANDBOOK 18 (1982) (stating that mediators are "present to help people talk to each other and find their own solutions"); Welsh, *Self-Determination*, *supra* note 2, at 15-21 (discussing the ideal of self-determination in the modern mediation movement).

to the justice system.[24] In the process of performing that function, the reality of mediation practice was often quite directive and even coercive, in contrast to the rhetoric of self-determination on which the centers were founded.[25] In other words, both at the level of institutional linkage and also at the level of individual mediator practice, mediation served to divert cases from courts and other justice system agencies and dispose of them efficiently.

Thus, while mediation began the first decade of this history as an "alternative to the streets," it soon became institutionalized in community mediation centers as an "alternative to the courts." In this first cycle of the mediation-courts relationship, mediation was intended to be, and readily became, a satellite and servant of the courts, or a forum to which cases could be "diverted" when they were too minor to warrant formal adjudication, but too troublesome to ignore completely. The climax of this first cycle was not only the establishment of the model NJCs in 1977, but the praise given to community mediation in general at a watershed federal judicial conference convened in 1976 by then Chief Justice Warren Burger.[26] At that conference, Professor Frank Sander of Harvard Law School delivered what has been regarded as a seminal address on ADR, in which he highlighted and praised "work that has been undertaken under the auspices of the Law Enforcement Assistance Administration . . . to divert certain types of minor criminal offenses . . . to a mediational proceeding."[27] Indeed, Sander's focus on community mediation at this important conference lent academic support to the Attorney General's soon-to-be-launched NJC program, and it brought community mediation to prominence with the many courts that had not yet encountered it. Clearly embodied in Sander's presentation is the orientation that mediation can serve the courts as a diversion mechanism. Mediation was the satellite, orbiting and serving the planet that launched it.

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24. Tomasic, *supra* note 17, at 243-44.

25. *See id.* at 225-27 (summarizing studies that documented directive and coercive practices); William L.F. Felstiner & Lynne A. Williams, *Community Mediation in Dorchester, Massachusetts*, *in* NEIGHBORHOOD JUSTICE, *supra* note 14, at 111, 117-18 (noting that mediator training encourages such practices). Mediation practices, as they evolved in this history, commonly involved mediator pressures for settlement. The evidence that mediation practices, as they evolved in this history, commonly involved mediator pressures, is discussed more fully *infra* Part IV.

26. *See* ALFINI, *supra* note 3, at 10; SINGER, *supra* note 5, at 6-7.

27. Frank E.A. Sander, *Varieties of Dispute Processing*, 70 F.R.D. 111, 128 (1976).

III. 1978-88: BREAKING FREE—COMMUNITY, PRIVATE ORDERING, PROBLEM-SOLVING, AND RECONCILIATION

Even before the end of the first cycle, some began to question the orientation that saw mediation primarily as the satellite of the courts. In fact, the questioning began in the very sector that saw the mediation satellite launched—community mediation of neighborhood disputes. In major part, the questioning focused on the gap between "rhetoric and reality in the neighborhood justice movement," and it generally came from critics on the political left who believed that "satellite"-type mediation was becoming a very effective means of extending the state's control over the life of citizens.[28]

The critique argued that many of the claims made about mediation and its benefits were not borne out in actual practice, including the claims that community mediation improved communicative capacities of disputants, operated without coercion, dealt with the roots of problems, and allowed disputants to solve their own problems themselves. The critics pointed to early research on community mediation centers that documented how all these claims were negated by the actual practices of mediators working in those centers. Typically, those mediators restricted direct communication between parties, employed various coercive techniques to produce agreements, dealt at best only with superficial aspects of conflicts, and took a major role in formulating solutions to the problems presented.[29] In short, community mediation practice, according to the critics, was not all that different from what litigants might encounter from judges in small claims courts.[30] If mediation was just another such satellite, the critics argued, it represented nothing new or positive, but simply one more device to shore up a flawed justice system. Beyond this negative view of the "mediation-as-satellite" orientation, however, many others came forward in this second period with more positive views of mediation, based on a different orientation to the mediation-courts relationship.

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28. *See generally* THE POLITICS OF INFORMAL JUSTICE VOLUME 1: THE AMERICAN EXPERIENCE (Richard L. Abel ed., 1982) (presenting a sustained critique of mediation as a social control mechanism); Richard Hofrichter, *Neighborhood Justice Centers Raise Basic Questions*, *in* NEIGHBORHOOD JUSTICE, *supra* note 14, at 193, 197-99 (suggesting that community mediation centers function as agents of social control).

29. *See, e.g.*, Tomasic, *supra* note 17, at 220-28 (summarizing and referencing the findings of several early research studies on community mediation).

30. Ironically, small claims courts had been instituted fifty years earlier as a satellite process intended to increase public satisfaction with the courts. *See* Barbara Yngvesson & Patricia Hennessey, *Small Claims, Complex Disputes: A Review of the Small Claims Literature,* 9 LAW & SOC'Y REV. 219, 221-28 (1975) (describing the rationale for and development of small claims courts).

A. MEDIATION AS A MEANS OF BUILDING COMMUNITY CAPACITY: COMMUNITY BOARDS

Beginning in 1977, a program was developed in San Francisco, California, that consciously rejected the idea that mediation was a satellite process of the justice system. The Community Boards Program (CBP) was founded by a former legal services lawyer with a strong belief in community-building at the grass roots level, and it offered a very different view of how mediation could and should relate to courts and other justice institutions.[31] CBP intentionally refused funding from the justice system—at the very height of the period of widespread LEAA funding for mediation centers—and instead sought private foundation funding, precisely in order to be independent of the court system. Moreover, CBP refused to seek or accept cases from courts or prosecutors, and only accepted referrals from individual police officers on an informal basis and without compulsion. Other cases came from community sources directly, through churches, neighborhood groups and associations, and individuals.[32]

In the view of its founder, Raymond Shonholtz, CBP would use mediation as a true alternative to the courts, through which members of communities, acting through mediation panels, would help other community members address disputed issues. The aim was not only enabling individual citizens to resolve their own problems, but "building capacity in neighborhoods to better manage individual and community issues and conflicts."[33] Problems would be solved without recourse to formal legal and political institutions, and in the process citizens would develop the capacity for self-governance, such that "a range of conflicts [could] be heard by the community itself."[34] For Shonholtz, disputing through the courts and legal systems weakened both the individual citizen's power and the community's integrity, and CBP mediation was meant to counteract both of these by "devolv[ing] to the most essential unit of democratic society, the citizen, the full power and ability to effectuate a range of rights and responsibilities without any governmental or intermediary structure."[35]

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31. *See* Raymond Shonholtz, *Justice From Another Perspective: The Ideology and Developmental History of the Community Boards Program*, *in* THE POSSIBILITY OF POPULAR JUSTICE: A CASE STUDY OF COMMUNITY MEDIATION IN THE UNITED STATES 201, 204-08 (Sally Engle Merry & Neal Milner eds., 1993) [hereinafter, POPULAR JUSTICE] (presenting a history of the CBP by its founder); Fredric L. DuBow & Craig McEwen, *Community Boards: An Analytical Profile*, *in* POPULAR JUSTICE, *supra* note 31, at 125, 126-33 (presenting a profile of the CBP by trained social scientists).

32. DuBow & McEwen, *supra* note 31, at 132-38.

33. Shonholtz, *supra* note 31, at 216.

34. *Id*.

35. *Id*. at 207.

In the long term, CBP saw mediation as a means to "strengthen a neighborhood's capacity to meet the local needs of citizens and build a more cohesive, interactive community."[36] In short, CBP wanted the mediation satellite to break away from the court system and reach for a new kind of conflict resolution process—one aimed not at settling disputes but at building social capacity, connection, and community.

In this view of the orientation of mediation to the courts—explorer of new worlds, not servant or satellite—Shonholtz and the CBP were not entirely original. For example, one of the early, influential scholarly works on community mediation had argued for a "complementary, decentralized system of justice," parallel to and independent of the court system, in which mediation would take the form of a "community moot," the traditional forum for dispute resolution in African customary society.[37] For law professor Richard Danzig, "[t]he moot . . . would be unique in prompting *community discussion* about situations in which community relations are on the verge of breaking down."[38] Danzig argued that this community-oriented mediation process should be supported by people "not because they want community control of the operations of the current system, but rather because they want a new system, one which fills a need overlooked in urban America to date."[39] Danzig envisioned something like the program that Shonholtz actually sought to create in the CBP, and for quite similar reasons. While few other programs followed the CBP model per se, it attracted a great deal of attention and had considerable impact in forming a new view of the orientation of mediation to the courts—as breakaway explorer, not orbiting satellite.

B. MEDIATION AS A MEANS OF PRIVATE ORDERING FOR FAMILIES: DIVORCE MEDIATION

Another move toward this new view of mediation and the courts was superficially less dramatic, but substantively more important. This move came from a very different quarter, and for quite different reasons. Beginning in the 1970s, slow changes in family law accelerated into a growing movement for "no-fault" divorce. Impressed by evidence of the devastating

36. *Id.* at 234.

37. *See* Richard Danzig, *Towards the Creation of a Complementary, Decentralized System of Criminal Justice,* 26 STAN. L. REV. 1, 41-54 (1974) (analogizing community mediation to traditional African dispute resolution methods); *see also* Robert A. Bush, Note, *Modern Roles for Customary Justice: Integration of Civil Procedure in African Courts,* 26 STAN. L. REV. 1123, 1128-31 (1974) (examining how traditional African processes influenced modern civil procedure in Africa).

38. Danzig, *supra* note 37, at 48.

39. *Id.* at 54.

effects of fault-based litigation on post-divorce family mental health—especially that of children—courts began to reject the fault requirement and favor "divorce by consent" for "irreconcilable differences."[40] However, doing away with the need to prove fault did not automatically do away with the need to resolve divorcing parents' differences about parenting—or custody and visitation, as it was then called. The difficulty was that conducting adversary proceedings to determine "parental fitness" and the child's "best interests" would simply put the negatives of the fault system back in place, despite the changes in the substantive law.[41]

Faced with this quandary, courts were open to an idea put forth by a small but growing number of family lawyers and mental health professionals: the mediation process offered a way to help parents resolve custody disputes without undue acrimony and on terms tailored to each family's needs.[42] In fact, these early "divorce mediators" were already offering the mediation process to clients in the private market, since they were familiar with the court system and saw it as inimical to their clients' real needs.[43] They saw mediation as meeting those needs far more effectively. As stated by Jay Folberg, a law professor and early advocate of divorce mediation:

> Mediation can help the parties learn how to solve problems together . . . and recognize that cooperation can be of mutual advantage. Mediation is bound neither by rules of procedure and substantive law nor by other assumptions that dominate the adversary process. The ultimate authority in mediation belongs to the parties. . . . [T]he emphasis is not on who is right and who is wrong . . . but on establishing a workable resolution that best meets the needs of the participants.[44]

As in community mediation, party self-determination was presented as a core characteristic and benefit of mediation. Similarly, Folberg and others stressed the communicative and emotional benefits of mediation: "Mediation reduces hostility by encouraging direct communication between the

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40. *See* Anthony J. Salius & Sally Dixon Maruzo, *Mediation of Child-Custody and Visitation Disputes in a Court Setting*, *in* DIVORCE MEDIATION, *supra* note 6, at 163; Patricia L. Winks, *Divorce Mediation: A Nonadversary Procedure for the No-Fault Divorce*, 19 J. FAM. L. 615, 615 (1980-81); ALFINI, *supra* note 3, at 19.

41. Milne & Folberg, *supra* note 6, at 4-5, 9; Salius & Maruzo, *supra* note 40, at 163-64; Winks, *supra* note 40, at 630-35.

42. Milne & Folberg, *supra* note 6, at 5-6, 9-10.

43. *Id*. at 13-14.

44. *Id*. at 9; *see* Jay Folberg, *Mediation of Child Custody Disputes,* 19 COLUM. J.L. & SOC. PROBS. 413, 414-18 (1985) (describing the rationale for divorce mediation and distinguishing it from other processes).

participants. . . . Feelings of esteem and competence are important by-products of the mediation process."[45]

This view of mediation, a view that stressed its major differences from adversarial court proceedings, adopted the insight proposed a decade earlier by an early and seminal mediation scholar, Professor Lon Fuller: "[T]he central quality of mediation [is] its capacity to reorient the parties toward each other . . . by helping them to achieve a new and shared perception of their relationship, a perception that will redirect their attitudes and dispositions toward one another."[46] Significantly, Fuller offered this summary of mediation's character as part of an argument that family conflicts could best be resolved by mediation rather than in court. Nearly a decade later, the wisdom of his view became the basis for both practitioners' and courts' gravitating to the mediation process for family disputes.

Thus, the private mediators' vision of mediation's value to clients coincided with the courts' realization that the no-fault era required some kind of new process. Though this meshing of views was by no means quick or easy—in some jurisdictions, it is still far from complete—it represented another significant change in the view of mediation's orientation to the courts. Divorce mediation could never be fully free from the legal process, given the need for judicial confirmation of mediated agreements; however, it was nevertheless an important step away from the view of mediation as mere satellite. In the divorce context, mediation was not seen simply a venue to which cases could be diverted for efficient settlement and disposition. Rather, it was seen as a genuinely different process than adjudication, in which parties could communicate more fully, address their problems with greater flexibility and creativity, and make decisions about their own families for themselves. Although "the shadow of the law" still existed, many in the divorce mediation field saw that shadow as quite a faint one, and saw that the mediation process would break new ground as a way to help divorcing couples "privately order" their affairs and structure their relationships, largely outside the court system.[47]

There was also another way in which the emergence of divorce mediation was a major step toward mediation's "breaking free" of the courts. For the first time, there was the possibility of mediation becoming a full-fledged profession, and not just a volunteer activity or part-time job.

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45. Milne & Folberg, *supra* note 6, at 9.

46. Lon Fuller, *Mediation—Its Forms and Functions,* 44 S. CAL. L. REV. 305, 325 (1971).

47. *See* Robert Mnookin, *Forward–Children, Divorce and the Legal System,* 19 COLUM. J.L. & SOC. PROBS. 393, 393-95 (1985) (characterizing divorce mediation as a form of private ordering); Milne & Folberg, *supra* note 6, at 3 (linking the idea of private ordering to the movement toward no-fault divorce).

The emergence of full-time professional divorce mediators, whose clients often came to them directly rather than from the court system, meant that mediators could begin thinking about what their profession really entailed. What were the ethical standards required of a mediator, and the competencies—as a mediator per se, rather than a lawyer, therapist, etc.? The need to define the profession and practice also meant the opportunity to assert an independent identity and mission, free of the courts' dominance. The growing practice of divorce mediation led, in relatively rapid succession, to the formation of a new professional organization—the Academy of Family Mediators, the first organization of its kind in the mediation field—and the development of standards of practice, minimum training requirements and credentials, and other similar measures.[48] All of this contributed to the sense that mediation was indeed reaching "breakaway" velocity on its path to becoming a separate social process, linked to the courts but not subservient to them.

C. MEDIATION AS A MEANS OF CREATIVE PROBLEM-SOLVING: HELP IN "GETTING TO YES"

Partially but not entirely related to the divorce mediation phenomenon, another force contributed to mediation's move toward breaking out of the courts' orbit in this second period. That contribution came from another related field—negotiation. In the early 1980s, many in the negotiation field were strongly attracted by a new "theory" that appeared, arguing that negotiation did not have to be a zero-sum game with winners and losers. That theory, advanced for a wide audience by Roger Fisher and William Ury, introduced and established the notions of "win-win bargaining" and

48. *See* Gary A. Weissman & Christine M. Leick, *Mediation and Other Creative Alternatives to Litigating Family Law Issues*, 61 N.D. L. REV. 263, 283-84 (1985) (describing the adoption of ethical standards in the 1980s by several mediation organizations); Thomas A. Bishop, *Standards of Practice for Divorce Mediators*, *in* DIVORCE MEDIATION, *supra* note 6, at 403 (describing one of the earliest efforts to draft standards of practice, for the American Bar Association and the Academy of Family Mediators). Since the early decades of the mediation field, several organizations have merged. Thus, the Academy of Family Mediators (AFM) merged with the Society of Professionals in Dispute Resolution (SPIDR) and one other organization in 2001, forming the Association for Conflict Resolution (ACR). Association for Conflict Resolution, *Frequently Asked Questions About ACR*, http://www.acrnet.org/about/ACR-FAQ2.htm (last visited July 31, 2008). However, as of 2000, AFM still described itself as "established in 1981 as a non-profit educational membership association and is the largest family mediation organization in existence." Academy of Family Mediators, http://www.mediate.com/people/personprofile.cfm?auid=724 (last visited July 31, 2008). The subject of what are proper standards and qualifications for mediators has been hotly discussed ever since this early period. *See generally* QUALIFICATIONS FOR DISPUTE RESOLUTION: PERSPECTIVES ON THE DEBATE 25-107 (Catherine Morris & Andrew Pirie eds., 1994) (presenting articles from various perspectives on the kinds of qualifications and practice standards appropriate for mediators).

"getting to yes" in the culture and practice of negotiation.[49] Some of the central notions of the theory soon impacted the mediation field as well. Most important among these notions was the concept that conflicts could and should be seen not as struggles for position, but as problems in how to meet seemingly (but not necessarily) incompatible needs and interests.[50] The "problem-solving" or "integrative" view of conflict and negotiation, which replaced the "positional" or "distributive" view as the favored vision of how the negotiation process should generally be conducted,[51] became the basis for the view that mediation should also be seen as a process for addressing conflicts through creative, mutual problem-solving, not just a process of settling cases in the shadow of expected court outcomes.

Prior to the advent of Fisher and Ury's *Getting to Yes* in 1980, mediation theorists paid little attention to the idea of problem-solving. Mediation was seen as an intervention designed to put a failed positional bargaining process back on track.[52] The new theory of negotiation had a major impact on that view of mediation. The clearest indicator of this impact is the appearance for the first time, in the literature of the mediation field, of the language of "needs and interests." The needs-and-interests language was the core of the new negotiation theory, reflecting the changed view that negotiation was not an adversarial battle for positions but rather a mutual problem-solving process aimed at uncovering and integrating needs and interests.[53] The needs-and-interests language, essentially absent from

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49. *See* ROGER FISHER & WILLIAM URY, GETTING TO YES: NEGOTIATING AGREEMENT WITHOUT GIVING IN 59-82, 91-96 (1980) (introducing integrative approach to negotiation in popular terms). The concept of integrative bargaining at the heart of Fisher and Ury's work had been developed much earlier in the industrial relations field by Walton and McKersie, but *Getting to Yes* gave this concept wide exposure in the emerging conflict resolution field. *See* RICHARD E. WALTON & ROBERT B. MCKERSIE, A BEHAVIORAL THEORY OF LABOR NEGOTIATIONS 126-37 (1965) (describing the use of integrative methods in the labor context in terms of "mutual gains bargaining").

50. *See* Donald G. Gifford, *A Context-Based Theory of Strategy Selection in Legal Negotiation,* 46 OHIO ST. L.J. 41, 52-57 (1985) (contrasting distributive and integrative negotiation); David Lax & James Sebenius, *Interests: The Measure of Negotiation,* 2 NEGOTIATION J. 73, 76-91 (1986) (analyzing different kinds of interests implicated in negotiation); Carrie Menkel-Meadow, *Toward Another View of Legal Negotiation: The Structure of Problem Solving*, 31 UCLA L. REV. 754, 794-813 (1984) (explaining the concept of interests as different and complementary needs); FISHER & URY, *supra* note 49, at 1-14 (advocating the fundamental integrative bargaining principle of focusing on underlying needs rather than positions).

51. *See, e.g.*, ROBERT H. MNOOKIN, SCOTT R. PEPPET & ANDREW TULUMELLO, BEYOND WINNING: NEGOTIATING TO CREATE VALUE IN DEALS AND DISPUTES 40-43 (2000); LEONARD L. RISKIN ET AL., DISPUTE RESOLUTION AND LAWYERS 165 (3rd ed. 2005).

52. *See, e.g.*, Joseph B. Stulberg, *The Theory and Practice of Mediation: A Reply to Professor Susskind*, 6 VT. L. REV. 85, 86-87 (1981) (describing mediation entirely in terms of fostering change in parties' positions, and omitting any reference to the language of "needs and interests," which is central to problem-solving or integrative negotiation).

53. *See* Lax & Sebenius, *supra* note 50, at 76-91; Menkel-Meadow, *supra* note 50, at 794-813.

early mediation literature, appeared in texts on mediation soon after 1980 and gradually became central to an understanding of what mediation does.

Thus, in the original edition of a classic text on mediation first published in 1986, Christopher Moore wrote:

> Often parties are engaged in a positional process that is destructive to their relationships, is not generative of creative options, and is not resulting in wise decisions. One of the mediator's major contributions to the dispute resolution process is assisting the negotiators in making the transition from positional to interest-based bargaining.[54]

Moore's references to "creative options," "wise decisions," and "interest-based bargaining" were direct reflections of the language used by Fisher and Ury in describing integrative negotiation.

Similarly, Jay Folberg, a key figure in the development of divorce mediation, explained in another important, early text on mediation practice that:

> [M]ediation is a promising if not compelling process when compared to the adversary [court process]. Mediation can educate the participants about each other's needs and . . . help them learn to work together . . . and see that through cooperation all can make positive gains. . . . They may, with the help of their mediator, consider a comprehensive mix of their needs, interests, and whatever else they deem relevant. . . . Mediation is a win/win process.[55]

Like Moore's language, Folberg's references to "needs and interests," "positive gains," and "win/win" were clear reflections of the influence of problem-solving negotiation theory. Toward the end of the decade under discussion, a further generation of negotiation theorists, studying barriers to reaching integrative solutions in negotiation, suggested directly that mediation could and should be seen as a way to support mutual problem-solving when the parties were unsuccessful on their own.[56] Eventually, the

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54. CHRISTOPHER W. MOORE, THE MEDIATION PROCESS: PRACTICAL STRATEGIES FOR RESOLVING CONFLICT 38-39 (1986).

55. FOLBERG & TAYLOR, *supra* note 6, at 10. Folberg and Taylor state generally that, "[t]he most useful way to look at mediation is to see it as a goal-directed, problem-solving intervention." *Id*. at 8.

56. *See* MARGARET A. NEALE & MAX H. BAZERMAN, COGNITION AND RATIONALITY IN NEGOTIATION 136-40 (1991) (suggesting how mediators can support effective integrative bargaining); Robert H. Mnookin, *Why Negotiations Fail: An Exploration of Barriers to the Resolution of Conflict,* 8 OHIO ST. J. ON DISP. RESOL. 235, 248-49 (1992) (suggesting that mediators can help parties overcome barriers to reaching integrative bargaining). For discussion of the kinds of strategic and cognitive barriers that prevent effective integrative bargaining, *see generally* NEALE & BAZERMAN, *supra*; Max H. Bazerman, *Negotiator Judgment: A Critical Look*

language of "mutual problem-solving to meet needs and interests" became part and parcel of standard mediation texts, training guides, competency tests, and ethical standards—at least, within the mainstream of what has come to be called "facilitative" mediation practice.[57]

The significance of this development in the conception of mediation's purpose and practice, as regards the present history, is that it represented another major step toward seeing mediation as a "breakaway" process separate from and not subservient to the courts. Thus, accompanying the characterizations of mediation as facilitated problem-solving, there is a constant effort to differentiate this sort of process from the adversary process of the courts. The passages quoted above from Folberg illustrate this intentional contrasting, as does the following from a more recent mediation text:

> [M]ediation is fundamentally different from adjudication. . . . Adjudication and the rule of law can clarify and develop public norms [and] gives society precedents that promote order by guiding similarly situated actors. Mediation, on the other hand, enhances communication, fosters collaboration, and encourages problem solving. . . . In comparing these two very different

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at the Rationality Assumption, 27 AM. BEHAV. SCIENTIST 211, 211-24 (1985); BARRIERS TO CONFLICT RESOLUTION (Kenneth J. Arrow et al. eds., 1995).

57. In "facilitative" mediation, the mediator's goal is to facilitate interest-based problem-solving by the parties. *See infra* note 109 (summarizing the basic goals and practices of facilitative mediation). The facilitative approach to mediation is the one claimed most often by mediators in practice. *See* Dorothy J. Della Noce, *Communicating Quality Assurance: A Case Study of Mediator Profiles on a Court Roster*, 84 N.D. L. REV. 769, 777 (2008) (reporting on research documenting the preference of mediators for facilitative mediation). It is also given greatest attention in mediation texts. *See, e.g.*, ALFINI, *supra* note 3, at 107-39, 170-77; MOORE, *supra* note 54, at 72-77; RISKIN ET AL., *supra* note 51, at 334-48. And it is the primary focus of standards of practice and competency tests. *See, e.g.*, Robert A. Baruch Bush, *One Size Does Not Fit All: A Pluralistic Approach to Mediator Performance Testing and Quality Assurance*, 19 OHIO ST. J. ON DISP. RESOL. 965, 969-99 (2004) (demonstrating that most performance tests focus on facilitative mediation skills); Linda C. Neilson & Peggy English, *The Role of Interest-Based Facilitation in Designing Accreditation Standards: The Canadian Experience*, 18 MEDIATION Q. 221, 222-24 (2001) (describing the intentional choice to develop a performance test focused on facilitative skills); Andrew Schepard, *The Model Standards of Practice for Family and Divorce Mediation,* 39 FAM. CT. REV. 121, 128-29 (2001) (presenting ethical standards reflecting the principles of the facilitative model). *See also infra* text accompanying notes 107-12 (noting that three different "models" of practice are widely recognized in the mediation field today: the facilitative, transformative and evaluative models); JAY FOLBERG, ANNE L. MILNE & PETER SALEM, DIVORCE AND FAMILY MEDIATION: MODELS, TECHNIQUES AND APPLICATIONS 29-92 (2004) [hereinafter DIVORCE AND FAMILY] (devoting one chapter to each of these three models); DWIGHT GOLANN, MEDIATING LEGAL DISPUTES: EFFECTIVE STRATEGIES FOR LAWYERS AND MEDIATORS 21-25 (1996) (recognizing these three models); Grace E. D'Alo, *Accountability in Special Education Mediation*, 8 HARV. NEGOT. L. REV. 201, 205 (2003) ("[M]ediation literature and practitioners commonly refer to three mediation models."); ALFINI, *supra* note 3, at 107 ("The most widely used approaches are facilitative, evaluative and transformative."); RISKIN ET AL., *supra* note 51, at 288-307 (describing these same three models).

> approaches to addressing disputes, it is important to note that they serve different masters and have their own distinct logic and integrity.[58]

The point could not be clearer: Mediation is not at all a satellite serving the courts; it is an independent and "very different" process serving very different social goals. The problem-solving theory provided a practical and intellectual justification for seeing mediation as breaking away from the courts and entering truly different conflict resolution territory. This problem-solving theory, for over a decade, held sway in all sectors of the mediation field—whether in the divorce arena, community centers, or otherwise.[59] One prominent scholar described mediation as "problem solving with an optimistic, creative third-party facilitator," and stated that "what we have learned from mediation as a field [are] 'insights into human problem solving.'"[60] Such a view certainly presented mediation as something very different from, and much more than, a satellite of the courts.

D. MEDIATION AS A MEANS TO RECONCILIATION AND HEALING: VICTIM-OFFENDER MEDIATION

One final development illustrates the way in which mediation, during the second decade/cycle of this history, moved in the direction of breaking free from the orbit of the courts. Indeed, this last development is the strongest example of how mediation was viewed as moving far beyond that orbit—even though it remained linked to the courts in a very concrete way. Beginning in the late 1970s, programs were established, first in a few jurisdictions and then in many more, to offer mediation as a process of reconciliation between victims and perpetrators of crime. By the end of the 1990s, nearly 300 such programs operated in the United States.[61]

These programs, first referred to as victim-offender reconciliation and later as victim-offender mediation, were based on a variety of different influences, but all were vastly different from the legal framework of the

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58. CARRIE MENKEL-MEADOW ET AL., MEDIATION: PRACTICE, POLICY AND ETHICS 92 (2006).

59. *See supra* note 57 and accompanying text. Although the discussion and references are focused on mediation in court-connected contexts, the facilitative approach is probably equally prevalent in other contexts, such as public policy mediation. *See supra* notes 3, 9 and accompanying text.

60. Carrie Menkel-Meadow, *The Many Ways of Mediation: The Transformation of Traditions, Ideologies, Paradigms, and Practices*, 11 NEGOT. J. 217, 225-26 (1995).

61. *See* Jean E. Greenwood & Mark S. Umbreit, *National Survey of Victim Offender Mediation Programs in the U.S.*, VOMA CONNECTIONS, Winter, 1998, at 1; Marty Price, *Personalizing Crime: Mediation Produces Restorative Justice for Victims and Offenders*, DISP. RESOL. MAG., Fall 2000, at 8.

courts themselves. While the process used in these programs was generally similar to that in other mediation venues, the aims were quite different: to bring about healing of the victim's sense of violation; "reintegration" of the offender (often but not always a juvenile) into the community; and reconciliation of victim, offender, and community. Usually, some specific agreement about offender conduct was involved, including restitution of some kind to the victim, but this was seen as reflective of reconciliation rather than important per se.[62]

As a practical matter, these programs had to be linked to the criminal courts, since the cases and parties were found there. The courts' viewpoint on these programs was similar to the view of divorce mediation: Adjudication, incarceration, and punishment of offenders, especially juveniles, were seen as serving little purpose, or indeed doing more harm than good. Mediation, on the other hand, might accomplish something different and reparative for all involved. From the viewpoint of the mediators, the good to be achieved was related to the value placed on healing and reconciliation, which reflected the mixed but largely consistent influences motivating those who established these programs.[63]

The influences ranged from theologically based church "conciliation" to nonwestern traditions of conflict resolution. The first programs in the United States were established by those experienced in the conciliation process in Mennonite religious communities, who saw the potential value of applying their model of mediation to victim-offender cases.[64] Later, connections were made with countries abroad, especially Australia and New Zealand, which suggested the use of elements from traditional mediation in the Maori culture.[65] Ultimately, the practices of victim-offender mediation were rationalized as part of the larger criminal justice theory known as "restorative justice," which was expounded in somewhat different versions both in the United States and abroad.[66]

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62. Price, *supra* note 61, at 9-10.

63. *See* Mark S. Umbreit & William Bradshaw, *Victim Experience of Meeting Adult vs. Juvenile Offenders: A Cross National Comparison*, 61 FED. PROBATION 33, 34 (1997) ("Many programs report an agreement rate of 95% or more. This agreement, however, is secondary to . . . the victim's emotional and informational needs that are central to their healing and to the offenders' development of victim empathy.").

64. *See* MARK S. UMBREIT, MEDIATING INTERPERSONAL CONFLICTS: A PATHWAY TO PEACE 137 (1995); John Paul Lederach & Ron Kraybill, *The Paradox of Popular Justice: A Practitioner's View*, *in* POPULAR JUSTICE, *supra* note 31, at 357, 369.

65. Jennifer Michelle Cunha, Comment, *Family Group Conferences: Healing the Wounds of Juvenile Property Crime in New Zealand and the United States*, 13 EMORY INT'L L. REV. 283, 292-93 (1999).

66. In both, restorative justice theory is based on what one of its founders, Howard Zehr, refers to as a "new paradigm" that, by contrast to a retributive orientation, stresses repair of social injury, mutuality, apology and acceptance of responsibility. *See* UMBREIT, *supra* note 64, at 141

Two well-known practitioner theorists of victim-offender mediation explained the view entailed in victim offender mediation or reconciliation:

> We view justice not primarily as punishment or retribution but as restoration of broken relationships. This involves the paradox of working on accountability and forgiveness. Such an approach assumes that conflict resolution goes beyond settlement or agreement [and] includes the dimension of relational reconciliation, the creation of something new. . . . The VORP [victim-offender reconciliation program] model . . . attempts to work at the restoration and the rehumanization of the conflict. . . . [I]t views justice as . . . the restoration of both parties rather than [the] imposition of pain to deter; the repair of social injury and the encouragement of mutuality and reconciliation.[67]

The practices used to achieve these ends varied somewhat from those of mediation in other venues, but there was a great deal of similarity. The point here, however, is not to detail those practices. It is rather to indicate that the advent and spread of victim-offender mediation represented another example of how mediation was viewed, in this second decade of the history recounted here, as a new social process, breaking away from the orbit of the courts even as it remained linked to them. As with the theory of "problem solving" mediation, victim-offender mediation saw itself as "fundamentally different" from the processes of the court system. It certainly was related to the courts, but was related as an equal partner serving radically different values, not as a mere satellite of the court system.

E. MEDIATION BREAKING FREE: A NEW SOCIAL PROCESS, NOT A MERE SATELLITE

In all the examples discussed above from the second decade of mediation's history, it is evident that this decade involved the strong impulse to move mediation beyond the orbit of the court system per se. Whether as an instrument for capacity-building in communities, a means of private ordering in family conflicts, a part of a new conceptualization of conflict resolution as problem-solving, or a powerful method of reconciliation—in

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(citing HOWARD ZEHR, RETRIBUTIVE JUSTICE, RESTORATIVE JUSTICE (1985)). However, in the United States, there is more of a religious cast, including concepts of repentance, redemption, and distinguishing between "the immoral act and the immoral agent." *See* Cunha, *supra* note 65, at 339-40. While, in the New Zealand/Australia context, the theory is based on a more psychological approach involving the notion of "reintegrative shaming" seen as a process of "social control" that has the effect of bringing the offender back into the community. *Id.* at 293-96 (citing JOHN BRAITHEWAIT, CRIME, SHAME AND REINTEGRATION (1989)).

67. Lederach & Kraybill, *supra* note 64, at 369.

each and all of these perspectives, mediation came to be seen as far more than a satellite orbiting and serving the courts. Rather, it represented, in many different ways, a new social process which, even if it could still relate to the courts, promised to carry the enterprise of conflict resolution into entirely new dimensions.

IV. 1988-98: SETTLING BACK INTO ORBIT—SETTLEMENT AND CASE-MANAGEMENT

The third decade of this history of mediation and the courts presents a mixed picture—one of successful institutionalization and yet "thinning aspirations." After so many lofty claims and strong efforts to move beyond the courts' orbit and break new ground in the second decade, mediation in the third decade was seen as falling back into the system that had helped to launch it twenty years before. Seen in one light, this period was one in which mediation had great success; seen in another light, it was one in which mediation proved to be a great disappointment. The following sections discuss and explain the reasons for those two very different perspectives.

A. FALSE PROMISES, HIDDEN DANGERS: CRITICAL RESEARCH ON MEDIATION PRACTICE

As noted earlier, the claims of mediation were not accepted uncritically even in the second decade. However, in the third decade of this history, the critique of mediation became stronger and more broadly based. In the previous section, the beginnings of the critique of community mediation were described, but that critique gained more force as time went on and study expanded. In one major compilation of research published at the end of the 1980s, several specific studies reinforced the suggestion that mediators practicing in community or small claims programs often applied pressure on parties, by various techniques, to ensure that settlements were reached.[68] That kind of finding was reported in other studies of community mediation, leading not only critics but also proponents of mediation to conclude that the foundational value of party self-determination was being

68. *See* Craig A. McEwen & Richard J. Maiman, *Mediation in Small Claims Court: Consensual Process and Outcomes*, *in* MEDIATION RESEARCH: THE PROCESS AND EFFECTIVENESS OF THIRD-PARTY INTERVENTION 53, 60-65 (Kenneth Kressel et al. eds., 1989) [hereinafter MEDIATION RESEARCH] (documenting the use of settlement pressure in small claims mediation); Dean G. Pruitt et al., *Process of Mediation in Dispute Settlement Centers*, *in* MEDIATION RESEARCH, *supra* note 68, at 368, 374-76 (suggesting how pressure tactics are increased in a combined mediation-arbitration process); Janice A. Roehl & Royer F. Cook, *Mediation in Interpersonal Disputes: Effectiveness and Limitations*, *in* MEDIATION RESEARCH, *supra* note 68, at 31, 44-45 (summarizing concerns about mediator coercion among researchers and theorists).

largely ignored, in community mediation, in favor of the much narrower goal of settlement production.[69]

The Community Boards Program (CBP), as discussed in Part III, intentionally divorced itself from the court system, claiming that doing so would enable it to support not only citizen self-determination, but also the broader goal of community capacity-building.[70] However, in one of the most thorough studies ever conducted of a community mediation program, a team of social scientists concluded that CBP ultimately achieved neither of those goals, and in the end evolved into a more conventional program focused on reaching resolutions, with its mediators using many of the standard directive strategies (and some unique ones) to do so.[71] In short, community mediation centers may or may not have ever sought to move out of the orbit of serving to divert and settle cases for the court system, but by the third decade of this history it appeared that they remained firmly in that orbit—even in the case of those programs that tried hardest to escape it.

Even more than community mediation, divorce mediation attracted intense study as its use expanded. Disappointingly for proponents who saw mediation as a means of self-determination and "private ordering" for

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69. *See, e.g.*, ROBERT A. BARUCH BUSH & JOSEPH P. FOLGER, THE PROMISE OF MEDIATION: RESPONDING TO CONFLICT THROUGH EMPOWERMENT AND RECOGNITION 41-46 (1994) (referencing research studies on settlement focus in community mediation, and offering examples); Charles Conrad & Lucinda Sinclair-James, *Institutional Pressures, Cultural Constraints and Communication in Community Mediation Organizations*, *in* CONFLICT AND ORGANIZATIONS: COMMUNICATIVE PROCESSES 67-70, 85-90, 93 n.7 (Anne Mayden Nicotera ed., 1995) (documenting how community mediators control communication in order to generate settlements that reduce courts' caseloads); William L.F. Felstiner & Lynne A. Williams, *Mediation as an Alternative to Criminal Prosecution*, 2 L. & HUM. BEHAV. 223 (1978) (documenting mediators' settlement production tactics in a community mediation center). Indirect evidence of this tendency to dilute the self-determination goal is reported in a study of mediator ethical dilemmas conducted by this author, in which the most common dilemma reported by mediators was whether they should take an action that would restrict parties' self-determination, in order to gain a settlement, protect a weaker party, etc. The suggestion of this finding is that at least sometimes the decision was to limit party self-determination. *See* Robert A. Baruch Bush, *The Dilemmas of Mediation Practice: A Study of Ethical Dilemmas and Policy Implications*, 1994 J. DISP. RESOL. 1, 41-42 (1994).

70. *See supra* text accompanying notes 30-38.

71. *See* Robert A. Baruch Bush, *The Unexplored Possibilities of Community Mediation: A Comment on Merry and Milner*, 21 L. & SOC. INQUIRY 715, 718-21, 725-29 (1996) (summarizing the findings of the CPB Study, noting that those findings found no noticeable social impacts of CBP mediation, and arguing that directive practices are evident in an extended case example presented in the study); Kem Lowry, *Evaluation of Community Justice Programs*, *in* POPULAR JUSTICE, *supra* note 31, at 89, 100-04, 112-17 (reporting the quantitative findings of the CBP Study); Judy H. Rothschild, *Dispute Transformation, the Influence of a Communication Paradigm of Disputing, and the San Francisco Community Boards Program*, *in* POPULAR JUSTICE, *supra* note 31, at 265, 272-312, 317-18 (presenting a case-study of CBP mediation that exemplifies the kinds of directive practices used to produce settlements); DuBow & McEwen, *supra* note 31, at 149-53, 164-66 (analyzing the CBP's work and suggesting that the goal of settlement was prominent in mediators' minds, and larger social impacts were minimal).

families in conflict, the research consistently showed that divorce mediation in practice wound up taking on a very different character. Study after study documented that divorce mediators used a variety of strategies to promote settlements on concrete issues, and to ensure that settlement terms conformed to the mediators' own views of what was feasible, fair, and adequately protective of all parties' (especially children's) interests—terms likely to be approved by supervising courts.[72] Those strategies included controlling the framing of issues, excluding difficult issues from discussion, limiting rather than supporting emotional expression, and actively intervening to shape and even approve or veto the actual terms of agreement.[73] Far from a novel means of private ordering through self-determination, divorce mediation seemed to take on the impositional and directive character of the court process it had evolved into serving.

As mediation expanded into other arenas, the research on the process reconfirmed the findings of the studies on community and divorce mediation. In most arenas, the majority of mediators were found to follow what one study tellingly called the "settlement model" of mediation practice.[74] As related in the conclusion of that study:

> Settlement-oriented mediators want to find a substantive outcome that will result in a "deal." . . . The structure of the mediation

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72. *See, e.g.*, WILLIAM DONOHUE, COMMUNICATION, MARITAL DISPUTES, AND DIVORCE MEDIATION 1-32 (1991) (documenting how mediators shape parties' discussions in order to reach what the mediators view as best outcomes); Joseph P. Folger & Sidney Bernard, *Divorce Mediation: When Mediators Challenge the Divorcing Parties*, 10 MEDIATION Q. 5, 10-15 (1985) (documenting how mediators tend to veto parties' agreements when they disapprove of the terms); David Greatbatch & Robert Dingwall, *Selective Facilitation: Some Preliminary Observations on a Strategy Used by Divorce Mediators,* 23 LAW & SOC'Y REV. 613, 613-14 (1989) (documenting how mediators use methods that favor discussion of some issues over others, according to their own views of the matter); Susan S. Silbey & Sally E. Merry, *Mediator Settlement Strategies*, 8 LAW & POLICY 7, 8-11, 19-25 (1986) (describing mediator tactics for directing parties' discussions).

73. *See* BUSH & FOLGER, *supra* note 69, at 59-68 (summarizing the findings of research, such as that cited at *supra* note 72).

74. Deborah M. Kolb & Kenneth Kressel, *Conclusion: The Realities of Making Talk Work*, *in* WHEN TALK WORKS: PROFILES OF MEDIATORS 459, 468-70 (Jeffrey Z. Rubin ed., 1994) (summarizing the findings of a study of a group of prominent mediators by a team of social scientists); *see also* Stacy Burns, *The Name of the Game is Movement: Concession Seeking in Judicial Mediation of Large Money Damages Cases*, 15 MEDIATION Q. 359, 360-63 (1998) (describing various strategies that mediators use to pressure for settlements); Nancy A. Welsh, *Making Deals in Court-Connected Mediation: What's Justice Got to Do With It?*, 79 WASH.U. L.Q. 787, 801-04 (2001); JONATHAN SHAILOR, EMPOWERMENT IN DISPUTE MEDIATION 48 (1994) (reporting that, based on findings from detailed case studies of three mediations, for two out of the three mediators studied, "[e]verything the mediators do is geared toward . . . the procurement of mediation's product–an agreement," and noting that mediators created their own meaning of a "good agreement"); Riskin & Welsh, *supra* note 1, at 874-83 (describing and illustrating settlement-oriented mediation in the courts); Welsh, *Self-Determination*, *supra* note 2, at 9-15, 23-27 (describing and illustrating settlement-oriented mediation in the courts).

> process follows a particular iterative sequence. . . . First, the mediator interrogates the parties for some period of time until he or she develops a sense of how . . . to solve the particular problem. . . . [This] become[s] the basis on which the mediators engage in rather directed conversations with the parties [and] tries out the ideas on the parties and they react. . . . As the mediators readily acknowledge, they are often ahead of the parties on these issues. They know what should happen, but the challenge is to make it occur. . . . Questions become suggestions in the guise of a query. . . . They orient their activities toward concrete problem solving and frequently make suggestions on matters of substance . . . [using their] expertise as the touchstone of their efforts at persuasion and influence. These . . . mediators are quite willing to acknowledge that they make judgments about what is a good and bad agreement and try to influence the parties in the direction of the good. . . . [They] are strongly inclined to believe that without their substantive and procedural know-how, the parties would flounder and settlement would be elusive.[75]

It was difficult to reconcile this picture with the view of mediation as a process of self-determination, problem-solving, and private ordering. Indeed, the results of this kind of research suggested that even the problem-solving vision of the second decade tended to be reduced to a strategy for producing settlements. Instead of "facilitated problem-solving" with the parties driving the process, mediation had to be viewed as a kind of *directed* problem-solving with the *mediator* driving the process toward the kind of settlement a court would accept.[76] Given that many of the cases being mediated had come from or could wind up in court, the effect was that

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75. Kolb & Kressel, *supra* note 74, at 471-74. In another telling report, the director of Florida's statewide court-connected mediation system noted their emerging experience under the system established to hear grievances against court-appointed mediators: "[A]n analysis of the grievances filed shows common concerns, namely the failure of the mediator either to allow the parties to exercise self-determination, to act impartially, or to refrain from providing professional advice." Press, *supra* note 2, at 913. Although the state's ethical code for mediators clearly required the opposite of these behaviors, court-appointed mediators engaged in them anyway, in order to gain settlements.

76. *See* BUSH & FOLGER, *supra* note 69, at 68-77 ("[P]roblem-solving mediation tends to become directive mediation. At its most obvious, this directiveness translates into a kind of four-step process in which the mediator 'hears the case,' diagnoses the problem, formulates what he or she sees as a good solution, and tries to persuade the parties to accept this solution."). Moreover, most major evaluative studies of mediation–not only programmatic but academic studies–concentrated on settlement rates as a primary indicator of success, effectively confirming that settlement was the main focus of mediation. *See id.* at 44-45 (referencing a number of such studies).

mediation was repositioned as being a settlement satellite—though an increasingly sophisticated and effective one—serving the courts.

One further and important development during this third decade was the emergence of a powerful critique that the directive, settlement-oriented methods that characterized much mediation in practice were particularly disadvantageous to parties from already disadvantaged groups—specifically, women and racial minorities. One such critique described these methods as "the betrayal of mediation's promises."[77] Mediator and law professor Trina Grillo argued that the techniques commonly used by divorce mediators—such as imposing limits on attributions of fault and expressions of emotion (especially anger), requiring discussions to address only future and not past behavior, and discouraging adoption of strong positions as "unreasonable"—effectively created informal rules in mediation that worked consistently against women.[78] Other feminist critics argued that mediators injected their own views on child custody into the process and used coercive means to ensure that agreements would conform to those views—similar to the above discussion of settlement-oriented mediation.[79] Still other researchers focused on the question of mediation's fairness to racial and ethnic minorities, and found that in at least one program for mediation of small claims cases, minorities consistently received less money as claimants, and paid more as respondents, than non-minorities—and the disparity was greater in mediation than in court.[80] The study did not offer an explanation in terms of mediator practice, but it reinforced concerns expressed by others about fairness to minority parties in mediation.

In sum, the research on mediation that emerged during the third decade seemed to show that mediation was not succeeding in its attempt to move beyond the role of satellite to the courts, and that while it might be growing

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77. Trina Grillo, *The Mediation Alternative: Process Dangers for Women*, 100 YALE L.J. 1545, 1555 (1991).

78. *Id*. at 1555-76; *see also* Kolb & Kressel, *supra* note 74, at 482-83 (describing mediator pressure tactics in very similar terms, in a general study of mediator practices).

79. *See, e.g*., Penelope E. Bryan, *Killing Us Softly: Divorce Mediation and the Politics of Power*, 40 BUFF. L. REV. 441, 523 (1992); Linda K. Girdner, *Custody Mediation in the United States: Empowerment or Social Control?*, 3 CAN. J. WOMEN & L. 134, 134-54 (1989); Laurie Woods, *Mediation: A Backlash to Women's Progress on Family Law Issues*, 19 CLEARINGHOUSE REV. 431, 434-36 (1985).

80. ALFINI, *supra* note 3, at 371-75 (citing MICHELLE HERMANN ET AL., AN EMPIRICAL STUDY OF THE EFFECTS OF RACE AND GENDER ON SMALL CLAIMS ADJUDICATION AND MEDIATION (1993)); *see, e.g*., Richard Delgado et al., *Fairness and Formality: Minimizing the Risk of Prejudice in Alterative Dispute Resolution*, WIS. L. REV. 1359, 1375-1404 (1985) (lending credibility to claims made earlier that mediation, as an informal process, would disadvantage minorities).

into a more sophisticated instrument for settlement, that instrument seemed to have troubling side effects on fairness and justice.

B. THE PROMISE OF CASE MANAGEMENT: THE SPREAD OF COURT-CONNECTED "CIVIL" MEDIATION

Ironically, at the very same time that academic researchers presented concerns about the role and risks of mediation, the mediation process was gaining increasing acceptance by the courts themselves. Thus, while many courts had begun in the early 1980s to mandate mediation in certain areas—especially custody disputes in divorce cases[81]—a new stage of acceptance began in 1988, when the state of Florida adopted a law authorizing all civil court judges, at their discretion, to order any case on their trial dockets to mediation.[82] Mediators could be chosen by the parties from court-approved rosters, which included only lawyers with substantial legal experience and a modicum of court-approved mediation training.[83] The Florida law marked a new era in the relation of mediation to the courts—the advent of general, court-ordered (or court-referred) mediation in civil cases, which is often referred to simply as "civil mediation." Many other states soon followed the same path, either with pilot programs or full adoption of civil mediation, including Texas, North Carolina, Minnesota, Massachusetts, Illinois, Ohio, and others.[84] Prior to the 1990s, the most commonly used court-connected ADR process was arbitration, but beginning in the 1990s a shift began toward the use of mediation, and that trend has continued to the present day.[85]

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81. *See* Lincoln Clark & Jane Orbeton, *Mandatory Mediation of Divorce: Maine's Experience*, 69 JUDICATURE 310, 310 (1986); Michelle Desi, *California's Answer: Mandatory Mediation of Child Custody and Visitation Disputes*, 1 OHIO ST. J. ON DISP. RESOL. 149, 176-77 (1985); Linda Silberman & Andrew Schepard, *Court-Ordered Mediation in Family Disputes: The New York Proposal*, 14 N.Y.U. REV. L. & SOC. CHANGE 741, 745-48 (1986). *See generally* Mary Kay Kristhardt, *The Use of Mediation and Arbitration for Resolving Family Conflicts*, 14 J. AM. ACAD. MATRIMONIAL L. 353 (1997); Isolina Ricci, *Court-Based Mandatory Mediation: Special Considerations*, *in* DIVORCE AND FAMILY, *supra* note 57, at 397.

82. FLA. STAT. § 44.302 (1987). *See* Robert A. Baruch Bush, *Efficiency and Protection or Empowerment and Recognition: The Mediator's Role and Ethical Standards in Mediation*, 41 FLA. L. REV. 253, 256 n.9 (1989) (considering the need for ethical standards under Florida's new law).

83. *See* Press, *supra* note 2, at 909-10 & n. 26 (reporting that under the Florida law, only lawyers and former judges qualify for certification as a court mediator for civil cases).

84. *See* Welsh, *Self-Determination*, *supra* note 2, at 21 n.86; Wissler, *supra* note 1, at 642-43 n.3; *see generally* SARAH R. COLE ET AL., MEDIATION: LAW, POLICY, PRACTICE 5-12, apps. B & C (2d ed. 2001).

85. *See* T. Donzhue & B. Deinhardt, *Survey: ADR Use Increasing*, 15 ALTERNATIVES 66 (1997) (reporting survey results showing that 87% of corporations used mediation in a three-year period in comparison to 78% using arbitration over the same period); PLAPINGER & STIENSTRA, *supra* note 1, at 4-6, 15-16 (reporting that mediation has emerged as the "primary ADR process" in the federal district courts); Hensler, *supra* note 1, at n.5 and accompanying text (reporting the perceived growth in preference for mediation); Press, *supra* note 2, at 907-08 n.19 (describing

A well-known researcher has stated: "There is a widespread perception that mediation is outpacing arbitration as a popular means of resolving legal disputes."[86]

A similar development occurred during the third decade of this history in the federal courts. In 1990, Congress adopted the Civil Justice Reform Act, requiring every federal district court to develop a case management plan and recommending the use of referral to ADR processes including mediation.[87] After a period of experimentation with pilot programs, the use of court-ordered or court-referred mediation began to catch on, and by the end of the decade, according to one study, "[m]ediation [had] emerged as the primary ADR process in the federal district courts. In marked contrast to five years ago, when only a few courts had court-based programs for mediation, over half of the ninety-four districts now offer—and, in several instances, require—mediation."[88]

This concentrated period of growth in court-connected mediation, at both the state and federal levels, can be directly (although paradoxically) related to the realization that, as described in the previous section, mediation practice was heavily oriented to producing settlement agreements—and was very effective in doing so. For those who saw mediation as a process offering novel benefits distinct from or beyond settlement, the evidence of settlement-oriented practice was a disappointment.[89] For those in the courts who were seeking means to manage caseloads and dispose of cases, the evidence revealed a great opportunity. As the Chief Justice of one state court put it, courts looked to mediation and ADR "to speed cases and save money."[90] Mediation could be a major element in case management, if it was an effective producer of settlements, and the evidence suggested that it was. Thus, in evaluating several studies on state and federal court mediation programs, one leading researcher concluded, "I interpret the findings of these leading studies as showing that the practice of mediation, at least as it applies to civil lawsuits other than family cases

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how mediation outpaced arbitration growth in one of the first statewide court-connected mediation systems).

86. Hensler, *supra* note 1, at 231; *see also* Robert A. Baruch Bush, *Substituting Mediation for Arbitration*, 3 PEPP. DISP. RESOL. L.J. 111, 113-24 (2002) (summarizing the research that shows increasing preference for mediation over arbitration, and offering alternative explanations for this trend).

87. 28 U.S.C. §§ 471-482 (2006); *see also* JAMES S. KAKALIK ET AL., AN EVALUATION OF MEDIATION AND EARLY NEUTRAL EVALUATION UNDER THE CIVIL JUSTICE REFORM ACT (1996) (evaluating the federal courts' efforts to comply with the Act); PLAPINGER & STIENSTRA, *supra* note 1, at 3; Hensler, *supra* note 1, at 261 n.9.

88. PLAPINGER & STIENSTRA, *supra* note 1, at 4.

89. *See infra* Part IV.C.

90. *See* Hensler, *supra* note 1, at 238.

[which were not studied], is generally evaluative, [i.e.,] adopting a distributive-oriented negotiation process . . . and (especially) assigning priority to settlement."[91]

Therefore, courts and court administrators—and many mediators as well, especially new mediators from the legal profession—welcomed the legislative mandate to develop court-connected mediation programs, and the programs grew apace. It is clear that, in terms of this history, the spread of court-connected mediation represented a reversal of mediation's thrust in the previous decade to move beyond the status of a satellite of the courts. In the third decade, mediation returned to being an even more important satellite, which was both subservient and very responsive to the courts' need to manage and dispose of cases.

In two other ways, the spread of court-connected mediation reinforced mediation's return to satellite status. First, the common requirement of court-connected mediation programs was that mediators had to be lawyers.[92] This requirement in itself reduced the likelihood that these programs would fulfill the aspirations of the previous decade that mediation could become a process of private ordering through mutual problem solving. Lawyer mediators were much more likely to consider "the shadow of the law" and possible court outcomes in the mediations they conducted. Moreover, despite the trend in legal education toward instruction in the problem-solving paradigm, the evidence suggests even now that lawyers in general—and probably lawyer-mediators—remain firmly rooted in a more positional if not adversarial approach.[93] Thus, if mediators as a whole tended to use directive, settlement-oriented practices, the likelihood was strong that lawyer mediators would do so—and that expectation seems to have been borne out.[94]

A second and related point is that, as discussed in the previous section, there was already a tendency in the mediation field to focus on settlement and use directive strategies. That tendency could only be reinforced by the influx into the field of lawyer mediators who strongly held that focus and

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91. *Id*. at 239.

92. *See* Press, *supra* note 2, at 909-10 n.26 (describing the qualifications for serving as a court appointed mediator in Florida); PLAPINGER & STIENSTRA, *supra* note 1, at 9 (describing the central role of attorneys as neutrals in court programs); Welsh, *supra* note 2, at 25-27 (discussing the impact of lawyer involvement in mediation).

93. *See* Welsh, *supra* note 2, at 25-27; Milton Heumann & Jonathan M. Hyman, *Negotiation Methods and Litigation Settlement Methods in New Jersey: "You Can't Always Get What You Want*," 12 OHIO ST. J. ON DISP. RESOL. 253, 254-57 (1997) (reporting findings from a study of lawyer negotiations showing that a large majority of attorneys continue to use positional, distributive bargaining methods).

94. *See infra* Part IV.C.

had few qualms about using such strategies. To remain competitive with this new cadre of lawyer mediators, even non-lawyer mediators had to consider the importance of their effectiveness in producing settlement.[95] In effect, the center of gravity of the field, which already tilted toward directive practice aimed at settlement, was shifted further in that direction by the onset of lawyer-dominated court-connected mediation.

In sum, the growth of court-connected mediation was a development that strongly reinforced the view, and the reality, that mediation's most important role was to serve as a settlement satellite for the court system—a view that many mediators now accepted and welcomed as cases from the courts flowed into their offices. Despite its several moves away in the second decade, mediation in the third decade was falling back into the orbit of the courts.

C. A SPIRIT OF DISCONTENT: "THINNING ASPIRATIONS," DISAPPOINTMENT, AND RESIGNATION

The self-reinforcing development of mediation toward becoming an increasingly directive and even coercive process, and one focused almost exclusively on settlement, evoked a stream of discontent from veterans of the earlier decades of this history. Many of those people—including academics, practitioners, and policymakers—saw the aspirations of the second decade drifting out of reach, and they were not happy with that prospect. This development of a spirit of discontent, right alongside the growing "success" of mediation as a case management tool, was another significant development in the history of mediation's relation to the courts.

The background of the discontent that emerged in the third decade was the steady evolution of mediation, described in Sections A and B, into a strongly directive, settlement-oriented process, especially but not only in court-connected mediation. The focus in this section is the *response* to that development by leading mediation scholars and policymakers—a response of grave concern and great disappointment. For example, mediation scholar and law professor Nancy Welsh complained that court-connected mediation now often bears "an uncanny resemblance to the judicially-hosted settlement conference":

> [F]irst, attorneys attend and dominate these mediation sessions while the disputants play no or a much-reduced role. Second,

95. *See* James J. Alfini, *Trashing, Bashing, and Hashing it Out: Is This the End of "Good Mediation"*, 19 FLA. ST. U. L. REV. 47, 56-59, 73-75 (1991) (describing the influx of lawyer-mediators into the mediation market in Florida, and the impacts of this trend); Hensler, *supra* note 1, at 237, 262 n.30 (referencing the struggle between lawyer and nonlawyer mediators in Florida).

> mediators are selected for their ability to value cases and to share their assessments with the parties; the mediators . . . regularly opine regarding the strengths and weaknesses of each side's case. Third, the [parties] generally are not kept together in joint session; caucus is preferred. Fourth, the mediators do not actively encourage the development of creative settlement options that respond to the unique needs of the parties.[96]

In a series of articles, Welsh tried to provoke others to carefully analyze practices in court-connected mediation, by detailing cases where parties complained that mediators' aggressive practices had coerced them into agreements. Welsh recounted actual examples like the following, from mediations of both civil damages and divorce cases:

> [The mediator] said to them . . . "Your family is going to be destroyed in this case [if you don't settle]. You got zero . . . chance of success on [getting damages in] this and your family is going to be destroyed. . . . [Then the mediator] sat there and harangued them for an hour and half. . . . [H]e just beat up on them vigorously for that hour and half. Finally, they signed it.[97]

> [The mediator] told her that the judge would *never* give her custody. . . . [A]t one point, the mediator came in, threw the papers on the table, and declared "that's it, I give up." Then . . . the mediator told her that if no agreement was reached, he (the mediator) would report to the trial judge that the settlement failed because of her.[98]

> [The mediator] repeatedly spoke in a threatening and manipulative manner, never . . . allowed [her] to discuss the division of assets directly with [her] husband and made the decisions and divisions of financial assets without [her] input.[99]

> [The mediator] was abusive ("yelled, pointed his finger in [the complainant's] face and threw papers during the session") . . .

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96. Welsh, *supra* note 74, at 796-97; *see also* Riskin & Welsh, *supra* note 1, at 866-67, 881-97 (describing settlement oriented mediator practices and contrasting them with other practices focused more broadly on solving problems and addressing emotional needs).

97. Welsh, *Self-Determination*, *supra* note 2, at 8 (quoting Transcript of Proceedings, Settlement Hearing, at 36-38, Allen v. Leal, 27 F. Supp. 2d 945, No. H-96-CV-30 (S.D. Tex. 1998)).

98. Nancy A. Welsh, *Reconciling Self-Determination, Coercion and Settlement in Court-Connected Mediation*, *in* DIVORCE AND FAMILY, *supra* note 57, at 420, 427-29.

99. *Id*. at 428.

> "dictated the solution he envisioned" . . . and attempted to intimidate the complainant.[100]

Welsh emphasized that these kinds of mediator practices were largely *accepted* rather than questioned by the courts that appointed the mediators—because they promoted settlement. In one case, even though the judge acknowledged that the mediator had engaged in "bullying" the party and that this was improper, he rejected the complaint because "the plaintiff's frontal attack on the mediation process itself . . . [might undermine a process which] has been responsible for the resolution of thousands of cases in this district, thereby avoiding the necessity for expensive adversary proceedings."[101]

The relevant point here is that, for veterans of the mediation field like Welsh and others,[102] who had seen greater promise for mediation in the second decade, this evidence of mediation's retreat into a directive, settlement-driven satellite of the courts (and other institutions) was deeply discouraging.[103] It meant that the aspirations of the second decade were being abandoned—most important among them, the aspiration that mediation would further the goals of party self-determination, and private ordering through creative problem solving. Welsh herself lamented that "Ethical codes for mediators describe self-determination as 'the fundamental principle of mediation,' [but] the party-centered empowerment concepts that anchored the original vision of self-determination are being replaced with concepts that are more reflective of . . . the courts' strong orientation to efficiency and . . . settlement."[104]

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100. *Id.*

101. Welsh, *Self-Determination*, *supra* note 2, at 14 (quoting *Allen*, 27 F. Supp. 2d at 949).

102. *See, e.g.*, Louise Phipps Senft & Cynthia A. Savage, *ADR in the Courts: Progress, Problems and Possibilities*, 108 PENN. ST. L. REV. 327, 335 (2003) (quoting the director of the Colorado state judiciary's dispute resolution office, who noted that "mediation in a significant number of court-annexed programs has begun to look more like the traditional pretrial settlement conference, and less like the alternative process originally intended"); Alfini, *supra* note 95; Welsh, *Democratic Justice, supra* note 2; Welsh, *Self-Determination, supra* note 2; Welsh, *supra* note 74; Welsh, *supra* note 98; Riskin & Welsh, *supra* note 1; *infra* notes 104-05 and accompanying text.

103. Although most of the concern voiced by critics has been directed at court-connected mediation—which can include civil, divorce and community disputes—there are also concerns about pressures for settlement in other domains, such as mediation of disputes between parents and school districts over special education plans, *see* Nancy A. Welsh, *Stepping Back Through the Looking Glass: Real Conversations with Real Disputants About Institutionalized Mediation and Its Value*, 19 OHIO ST. J. ON DISP. RESOL. 573, 643-51 (2004), as well as mediation of victim-offender cases, *see* UMBREIT, *supra* note 64, at 158-59.

104. Welsh, *Self-Determination*, *supra* note 2, at 3-5. By contrast to Welsh and others, there are other commentators who, while acknowledging the use of mediator pressure to achieve settlements, see nothing wrong with it. A leading proponent of this view is Professor Jeffrey Stempel, who argues: "[A] little bit of evaluation or some steering of one or both parties toward a reasonable position is required, both to prevent injustice and to facilitate settlement. . . . [Indeed,]

Another strong voice of discontent was Dean James Alfini, one of the architects of Florida's statewide court mediation system, who worried that "the general policy favoring settlement, while advancing the goal of judicial economy, may not always be consistent with mediation principles and values. In particular, allegations of settlement coercion raise troubling issues relating to mediation's core values of party self-determination."[105] The former president of a national mediators' association echoed the same concern in a comment on research showing that mediators were aggressively pursuing settlements to help clear court calendars: "Self-determination of the parties, which is . . . a foundation of mediation, is removed, [and these practices] are not consistent with the role of the mediator and the process of mediation."[106]

Thus, the perspective of the veteran mediation "community" was very different from that of the courts (and many new lawyer-mediators) on mediation's shift, during the third decade, back into the position of satellite to the courts dedicated to case disposition—the modern version of the first decade's "diversion" goal. For many mediation veterans, this thinning of earlier aspirations that mediation would "break free" was cause for disappointment and resignation. Some were pessimistic that much could be done to staunch the tide of high-pressure mediation practice. Welsh herself considered several possible strategies for doing so, rejected them as unlikely to succeed, and was eventually forced to suggest the idea of mandating a "cooling off" period for all court-connected mediation agreements. This protective device, she argued, would remove the incentive for mediators to use high-pressure tactics, because the settlements they produced by doing so would be vulnerable to party rescission.[107] The pessimistic quality of such a "last-ditch" proposal was evident to Welsh herself, who acknowledged that it treated mediators as little better than high-pressure door-to-door salespersons, against whom consumers should be similarly protected. The implications were indeed discouraging.

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the most highly sought mediators are those who . . . use some measure of evaluation . . . to [generate] settlement." Jeffrey W. Stemple, *Beyond Formalism and False Dichotomies: The Need for Institutionalizing a Flexible Concept of the Mediator's Role*, 24 FLA. ST. U. L. REV. 949, 969-73 (1997). Note that this viewpoint admits to the *existence* of settlement focus and pressure, but sees it as a positive and not a negative feature of how mediation developed in the third decade.

105. James J. Alfini & Catherine G. McCabe, *Mediating in the Shadow of the Courts: A Survey of the Emerging Case Law*, 54 ARK. L. REV. 171, 173 (2001).

106. Sharon Press, *Commentary,* 15 MEDIATION Q. 368, 368-69 (1998).

107. Welsh, *supra* note 98, at 434-40; Welsh, *Self-Determination, supra* note 2, at 78-92.

D. RETURN TO SATELLITE STATUS: PERMANENT OR TEMPORARY?

Although the developments of the third decade strongly suggested to some that "breaking free" of the courts' orbit was increasingly unlikely, other veterans of the first and second decades opted for resistance rather than resignation to seeing mediation return to satellite status. They believed that if mediators themselves could be reminded of the broader promises they had seen in the process in earlier decades, they would find ways to resist falling completely and permanently into the orbit of the courts. This resistance was the beginning point for the final cycle of this historical narrative, and it is the subject of the next Part of the article.

V. 1998-2008: BREAKING FREE AGAIN—SUSTAINABLE CONFLICT TRANSFORMATION

The fourth period of this history began during the third decade itself, as an expression of resistance to the return of mediation to the satellite orientation alone. For some who had always viewed mediation as a new and different kind of social process, an exclusively satellite orientation had to be resisted in some manner. Even if mediation was useful as a settlement satellite, the resisters could not accept that as the whole story, because they had seen for themselves the possibility of something more. In fairness, the author of this article was (and is) one of these resisters; so Part V of this article should be read with the appropriate "grain of salt," given the identification of the narrator.

The source of the impulse to resist one state of affairs is the deep sense that there is another state of affairs that is both better and attainable. That sense of an attainable alternative to the state of mediation in the third decade motivated numbers of practitioners and academics to articulate a conception of mediation's purpose and practice that would be more successful in escaping the orbit of the courts and the settlement orientation. There were a few stages in this development, and they are described below.

A. THE END OF "MEDIATION AS MONOLITH": MODELS OF MEDIATION PRACTICE

The first step toward this new thrust to escape the limits of the settlement orientation was to establish that mediation was not monolithic—that is, not only were mediators employing different styles as individuals, they were enacting entirely different models of mediation, each with different purposes and practices. Several different studies introduced this idea in the mid-1990s. One was a study already referred to above, which contrasted a settlement-oriented model of practice with a communication-

oriented model.[108] Another was a study that had long-standing influence on the language of the field, which contrasted a facilitative model of mediation with an evaluative model.[109] A third was co-authored by this article's author, and contrasted a problem-solving model of mediation with a "transformative" model.[110] All three of these formulations presented a major

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108. *See* Kolb & Kressel, *supra* note 74, at 468-79 (presenting the settlement/communication typology and explaining the difference in the two approaches). In the settlement model, the mediator focuses on producing a settlement, and does so by gathering information about the problem, developing an idea of what will solve it, and persuading the parties to accept some version of this solution. *Id.* at 470-73. In the communication model, by contrast, the mediator aims to "have the parties come away . . . with a better understanding of the problem, if not with a definite settlement," and the role is to facilitate dialogue and enhance communication "in ways that further . . . better understanding and cooperation." *Id.* at 474-75.

109. *See* Leonard L. Riskin, *Understanding Mediators' Orientations, Strategies and Techniques: A Grid for the Perplexed*, 1 HARV. NEGOT. L. REV. 7, 8-13, 17-39 (1996) (introducing the facilitative/evaluative typology and explaining the differences between each approach). According to one authoritative view of the facilitative model, the mediator in that model acts solely as facilitator or manager of the parties' negotiation or problem-solving process. *See* Kimberlee K. Kovach & Lela P. Love, *Mapping Mediation: The Risks of Riskin's Grid*, 3 HARV. NEGOT. L. REV. 71, 74-75 (1998) (arguing that evaluative mediation represents a dangerous mutation of the original and authentic facilitative process); ALFINI, *supra* note 3, at 107-39 (presenting an extended introduction to the skills of facilitative mediation). She or he establishes ground rules, facilitates information exchange, defines issues and structures an agenda, tries to generate movement toward agreement by various means—such as encouraging parties to focus on interests rather than positions, emphasizing areas of agreement, discouraging discussions of past incidents and limiting expressions of intense negative emotions—and structures the closing of the discussions. However, the facilitative mediator expresses no views whatsoever on the merits of any substantive issue. By contrast, in the evaluative model, the mediator not only serves as process manager, but also offers expert case-evaluation (assessing strengths and weaknesses of each parties' case or proposals), substantive settlement recommendations (including, for example, predictions of court outcomes or other consequences), and strong pressures to accept those recommendations. *See* Riskin, *supra* note 109, 26-32. The articulation of the two approaches as distinct models of practice led to significant controversy—including argument over whether an evaluative model could be called mediation at all. *See* Chris Guthrie, *The Lawyer's Philosophical Map and the Disputant's Perceptual Map: Impediments to Facilitative Mediation and Lawyering*, 6 HARV. NEGOT. L. REV. 145, 146-54 (2001) (summarizing the debate over the legitimacy of the two approaches). Nevertheless, the distinction persisted.

110. *See* BUSH & FOLGER, *supra* note 69, at 55-112 (introducing the problem-solving/transformative typology, and contrasting the two models). In the problem-solving model, as Bush and Folger described it, the mediator focuses on achieving an agreement that solves the tangible problems involved in the parties' dispute. More concretely, the mediator uses directive measures that control the process of discussion, so as to identify and narrow the problem, find a workable solution, and then persuade the parties to accept it in some form. *Id.* at 63-71. By contrast, in the transformative model, the mediator focuses on supporting each party's development of clarity and confidence about their own views of the situation, together with understanding and empathy for the other party's views—without any specific focus on resolution per se. More concretely, the mediator employs a variety of interventions to support party decision-making and interparty perspective-taking, but tries to avoid all forms of directiveness and to ensure party control over not only outcome but process decisions. *Id.* at 85-94, 100-01; *see also* Robert A. Baruch Bush, *"What Do We Need a Mediator For?": Mediation's "Value-Added" for Negotiators*, 12 OHIO ST. J. ON DISP. RESOL. 1, 29-32 (1996) (summarizing the basic practices of the transformative model); Robert A. Baruch Bush & Sally G. Pope, *Changing the Quality of Conflict Interaction: The Principles and Practice of Transformative Mediation*, 3 PEPP. DISP. RESOL. L.J. 67, 85-96 (2002) (describing specific practices of transformative mediation); Joseph

contrast to the view that had dominated in earlier decades, that mediation involved a basically common set of practices that flowed in a standard sequence and if conducted competently would lead to the desired end of resolution. In that earlier view, differences in mediator practices were considered matters of individual style, not matters of basic theory or strategy.[111]

P. Folger & Robert A. Baruch Bush, *Transformative Mediation and Third Party Intervention: Ten Hallmarks of a Transformative Approach to Practice*, 13 MEDIATION Q. 263 (1996) (identifying benchmarks of competent transformative mediation practice). Like the facilitative/evaluative distinction, the transformative/problem-solving typology has been controversial. *See, e.g.*, Neal Milner, *Mediation and Political Theory: A Critique of Bush and Folger*, 21 L. & SOC. INQUIRY 737 (1996) (arguing that the transformative model provides insufficient protection against power imbalances); Michael Williams, *Can't I Get No Satisfaction? Thoughts on THE PROMISE OF MEDIATION*, 15 MEDIATION Q. 143 (1997) (arguing that the distinction between the two models is illusory and that good mediation practice combines both); Menkel-Meadow, *supra* note 60, at 235-41 (agreeing that the distinction is illusory, and arguing that solely transformative practice would impose mediator values on the parties). However, the model has also gained currency and thereby weakened the premise that there is only one universal model of mediation in use.

111. *See, e.g.* Christopher Honeyman, *Five Elements of Mediation*, 4 NEGOTIATION J. 149 (1988) [hereinafter Honeyman, *Elements*] (laying the foundation for the view that all good mediation practice employs the same basic elements); Christopher Honeyman, *On Evaluating Mediators*, 6 NEGOTIATION J. 23 (1990) (arguing that competency in mediation can be measured in relation to the common basic elements); Christopher Honeyman, *The Common Core of Mediation*, 8 MEDIATION Q. 73 (1990) [hereinafter Honeyman, *Core*] (elaborating the supposed common basic elements of practice). Honeyman's work elaborated two main premises: first, that there is a "common core" of behaviors involved in the work of effective mediators; and second, that these behaviors are the means to an end that comprises the ultimate goal of mediation—achievement of an agreement that settles the parties' dispute. In Honeyman's work, it is clear that the meaning of "effectiveness" is success in attaining a settlement. Each of the elements he finds "common" to the work of the mediators he studied—investigation, empathy, persuasion, invention and distraction—are described in terms of their usefulness in promoting settlement, which is taken for granted as the goal of their work. *See, e.g.*, Honeyman, *Elements*, *supra* note 111, at 153-55. At the time of Honeyman's work, this conception of the goal of mediation—and the resulting view of how the process is most effectively conducted—was essentially unchallenged. That is, there was only one "model" of mediation known or imagined, and it was a model focused on the production of agreements. *See* BUSH & FOLGER, *supra* note 69, at 55-68. Although differences in "styles" of practice had been identified and studied by researchers – including such distinctions as "orchestrators versus dealmakers," s*ee* DEBORAH M. KOLB, THE MEDIATORS (1983), or "bargaining versus therapeutic," *see* Silbey & Merry, *supra* note 72—all of these were regarded as stylistic variations on the common theme of how best to produce settlements. It was only in the mid-1990s that it was first argued that mediators differed not merely in the way they approached the common goal of settlement, but also—and more profoundly—in the very conception of what goal they were pursuing, and that some mediators were following a genuinely different "model" of practice aimed at a goal other than settlement. *See* BUSH & FOLGER, *supra* note 69, at 81-95 (arguing that the transformative model was based on entirely different conceptions of conflict and intervention from those of the problem-solving model). Moreover, apart from a common view of mediation's goal, the field in the 1980s and early 1990s also had a fairly consistent view of how mediators could achieve that goal in practice. Thus, there were numerous, fairly detailed "guides to practice" published prior to Honeyman's work, including classic works still recognized as authoritative by many today. *See, e.g.*, JOHN M. HAYNES, DIVORCE MEDIATION (1981); JOHN M. HAYNES & GRETCHEN L. HAYNES, MEDIATING DIVORCE: CASEBOOK OF STRATEGIES FOR SUCCESSFUL FAMILY NEGOTIATIONS (1989); DONALD SAPOSNEK, MEDIATING CHILD CUSTODY DISPUTES (1983); JOSEPH B. STULBERG, TAKING CHARGE/MANAGING CONFLICT (1987);

The emerging conceptualizations or "typologies" of different models of mediation rejected the idea that all mediators were following the same basic approach to practice, with only stylistic differences. These typologies suggested that to the contrary, there were several significantly different approaches to practice extant, and they succeeded in establishing the idea that mediation did not operate and should not be seen "in one mold." An obvious corollary was the possibility that the mediation process, operating through different models, might serve quite different social functions.[112] In the terms of this history, *one* model of mediation might be very well suited to serve settlement functions within the orbit of the courts, but *another* model could be highly useful to serve other social functions beyond the orbit of the courts per se. The mere recognition of different "models," in other words, was a key step toward freeing mediation—in part at least—from the orbit of the court system. Today, the recognition of different models of mediation is very widespread, and almost every text on mediation describes several such models.[113]

FOLBERG & TAYLOR, *supra* note 6; MOORE, *supra* note 54. The practice of mediation as described in these works—and still employed by many today—involved the mediator leading the parties through a sequence of stages: opening the session and setting ground rules, gathering information, defining issues, generating options, generating movement (by persuasion), and achieving agreement and closure. *See* ALFINI, *supra* note 3, at 107-40 (describing the stages and practices of facilitative mediation). The description of stages and strategies differed from text to text, but the commonalities were very clear, as to both the goal and the means to achieve it. Finally, the classic works cited above also presented a common view of "best practices" for mediators to use in securing agreements, which included: focusing parties away from distributive, positional bargaining and toward integrative, needs-and-interests-based bargaining; emphasizing "common ground" while deemphasizing areas of disagreement; focusing discussion on future commitments and not past grievances; and limiting strong emotional expression in order to avoid undermining rational discussion. *See* Bush, *supra* note 57, at 978-81 (referencing the many classic mediation texts that support this view of best practices). It is evident that these "best practices" owed much to the new literature on "principled" or "problem-solving" negotiation. *See supra* text accompanying notes 48-57.

112. *See* ROBERT A. BARUCH BUSH & JOSEPH P. FOLGER, THE PROMISE OF MEDIATION: THE TRANSFORMATIVE APPROACH TO CONFLICT 259-66 (2d ed. 2005) (suggesting that facilitative and transformative mediation are both valuable as means of satisfying different social and individual goals); Dorothy J. Della Noce et al., *Clarifying the Theoretical Underpinnings of Mediation: Implications for Practice and Policy*, 3 PEPP. DISP. RESOL. L.J. 39, 59-61 (2002) (arguing that policymakers should recognize that different mediation models can fulfill different goals); Bush, *supra* note 57, at 1000-04 (arguing in favor of pluralism in mediator performance testing, for similar reasons).

113. *See, e.g.*, ALFINI, *supra* note 3, at 107; DIVORCE AND FAMILY, *supra* note 57, at 29-92; GOLANN, *supra* note 57, at 21-25; RISKIN ET AL., *supra* note 51, at 288-307; D'Alo, *supra* note 57, at 205.

B. BEYOND SETTLEMENT: FROM TRANSACTIONAL TO INTERACTIONAL MODELS OF MEDIATION

A second and more important step away from the courts' orbit in the fourth decade was the actual articulation, in clear, understandable, and practicable terms, of models of mediation focused on goals beyond settlement per se. Several such models were articulated over this last decade, each of which would require lengthy discussion to fully explain. Although such discussion is beyond the scope of this article, it is useful to at least mention the range of models that have been identified. These include transformative mediation,[114] narrative mediation,[115] insight mediation,[116] and

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114. *See* BUSH & FOLGER, *supra* note 112, at 41-84, 131-214 (elaborating the underlying theory of transformative mediation, and illustrating the practice of the model with an extended case study); BUSH & FOLGER, *supra* note 69, at 81-112, 191-226 (presenting and explaining the transformative model of mediation, as conceived by the originators of the model); Bush & Pope, *supra* note 110, at 85-96 (describing specific practices of transformative mediation); Folger & Bush, *supra* note 110 (identifying key benchmarks of competent transformative practice). *See also* DESIGNING MEDIATION: APPROACHES TO TRAINING AND PRACTICE WITHIN A TRANSFORMATIVE FRAMEWORK (Joseph P. Folger & Robert A. Baruch Bush eds., 2001) (presenting essays on training and practicing transformative mediation by a number of experts in the process); James R. Antes et al., *Is a Stage Model of Mediation Necessary*?, 15 MEDIATION Q. 287 (1999) (explaining that the transformative model does not follow preconceived steps or stages as do most other models of mediation); Robert A. Bush & Sally Ganong Pope, *Transformative Mediation: Changing the Quality of Family Conflict Interaction*, *in* DIVORCE AND FAMILY, *supra* note 57, at 53 (explaining the theoretical and practical application of the transformative model in the divorce context); Dorothy J. Della Noce, *Seeing Theory in Practice: An Analysis of Empathy in Mediation*, 15 NEGOTIATION J. 271 (1999) (illustrating the difference between transformative and facilitative mediation by reference to the role empathy plays in each). The following summary is condensed from BUSH & FOLGER, *supra* note 112, at 45-46, 49-56, 65-68. The transformative model sees conflict as a crisis in human interaction. It asserts that what people find most significant about conflict is that it alienates them from their sense of their own strength and their sense of connection to others, and thus it undermines the interaction between them as human beings. This crisis of deterioration in human interaction is what parties find most disturbing about the experience of conflict, and help in overcoming it is a major part of what parties want from a mediator. The crisis is in two dimensions, affecting a person's experience of both self and other. First, conflict generates a sense of weakness and incapacity of self. At the same time, conflict generates a sense of self-absorption and hostility to others. These experiences of weakness and self-absorption can reinforce each other in a vicious circle, such that the parties' interaction degenerates to a point of mutual alienation and demonization. Faced with this interactional degeneration, what parties most want from a mediator is help in reversing the downward spiral and restoring constructive interaction. More commonly, they explain that want not just agreement but "closure," to get past their bitter experience and "move on" with their lives. However, to help parties move on, the mediator's intervention must directly address the interactional crisis itself. If the negative conflict cycle is not reversed, if parties don't regenerate a sense of their own strength and their understanding of each other, it is unlikely they can move on. In effect, without a change in the conflict interaction between them, parties are left disabled, even if an agreement on concrete issues is reached. Their confidence in their own competence remains weakened, and their ability to trust others remains compromised. Therefore, with or without the achievement of agreement, the help parties most want involves helping them end the vicious circle of disempowerment and demonization, and move beyond the negative interaction that has entrapped them in its crippling effects. Thus, according to the transformative model, parties who come to mediators are looking for more than an efficient way to reach agreements on specific issues. They are looking for a way to change and transform their destructive conflict interaction into a more positive one, to the

greatest degree possible, so that they can "move on" with their lives constructively, together or apart. Transformative mediation can thus best be understood as a process of assisting in "conflict transformation"—that is, changing the quality of conflict interaction. In the transformative mediation process, parties can recapture their sense of competence and connection, reverse the negative conflict cycle, re-establish a constructive (or at least neutral) interaction and move forward on a positive footing, with the mediator's help. This positive potential exists because conflict interaction is a dynamic phenomenon in which parties can shift in remarkable ways. They can shift out of weakness, becoming calmer, clearer, more confident, more articulate and more decisive—in general, moving from weakness to strength. They can shift away from self-absorption, becoming more attentive, open, trusting, and understanding of the other party—in general, shifting from self-centeredness to responsiveness to other. These are called the "empowerment" and "recognition" shifts, and they lead to a reinforcing circle between strength and responsiveness. The term "conflict transformation" is used because, as the parties make empowerment and recognition shifts, and as those shifts gradually reinforce, the interaction as a whole begins to transform and regenerate. It changes back ("transforms") from a destructive and demonizing interaction to one that becomes constructive and humanizing, even if conflict and disagreement may still be continuing. Transformative mediators can provide support for the shifts by each party, from weakness to strength and from self-absorption to understanding. This is perhaps the central claim of the transformative theory—that mediators' interventions can help parties transform their conflict interaction. This leads to the definition of mediation itself, and the mediator's role, in the transformative model. Both of these definitions differ markedly from the normal definitions found in mediation literature. In the transformative model, mediation is defined as a process in which a third party works with parties in conflict to help them change the quality of their conflict interaction from negative and destructive to positive and constructive, as they explore and discuss issues and possibilities for resolution. The mediator's role is to help the parties make empowerment and recognition shifts. The mediator's primary goals are: (1) to support empowerment shifts, by supporting—but never supplanting—each party's deliberation and decision-making, at every point in the session where choices arise (regarding either process or outcome); and (2) to support recognition shifts, by encouraging and supporting—but never forcing—each party's freely chosen efforts to achieve new understandings of the other's perspective. However, it is important to recognize that, while the mediator's job is solely to support empowerment and recognition shifts, the transformative model does not ignore the significance of resolving specific issues. Rather, it assumes that, if mediators do the job just described, the parties themselves will very likely make positive changes in their interaction and find acceptable terms of resolution for themselves where such terms genuinely exist.

115. *See* JOHN WINSLADE & GERALD MONK, NARRATIVE MEDIATION: A NEW APPROACH TO CONFLICT RESOLUTION (2000) (presenting and explaining the narrative model of mediation, as conceived by two of the key developers of the model); Sara Cobb, *A Developmental Approach to* Turning Points: *"Irony" as an Ethics for Negotiation Pragmatics*, 11 HARV. NEGOT. L. REV. 147, 160-71 (2006) (linking narrative theory to relational development through the use of irony in negotiation); Sara Cobb, *Creating Sacred Space: Toward a Second-Generation Dispute Resolution Practice*, 28 FORDHAM URB. L.J. 1017, 1020-33 (2001) (arguing that narrative practice infuses moral discourse into mediation, and offering examples of this kind of practice); Sara Cobb, *Empowerment and Mediation: A Narrative Perspective*, 9 NEGOTIATION. J. 245, 250-55 (1993) (identifying how narrative processes can both support and impede full party participation in mediation); John Winslade & Gerald Monk, *A Narrative Approach in Mediation*, http://narrative-mediation.crinfo.org/documents/mini-grants/narrative_mediation/Context_narrative_mediation.pdf (last visited August 4, 2008) (summarizing the goals, elements and practices of narrative mediation). Narrative mediation was largely inspired by "narrative therapy", a particular approach to therapy based in theories of discourse. *See, e.g.*, Carlos E. Sluzki, *Transformations: A Blueprint for Narrative Changes in Therapy*, 31 FAM. PROC. 217 (1992) (presenting the basic concepts of narrative therapy). Thus far narrative mediation has, second to transformative mediation, gained the most attention from both academics and practitioners as an alternative approach to practice. Winslade and Monk, who are among the developers of this model of mediation, describe its differences from the standard facilitative model, and relation to transformative model, as follows:

> In a problem-solving approach, the goal is the formulation of an agreement that solves the problem. This is the fabled win/win solution that satisfies the interests of the disputing parties. . . . Advocates of the transformative approach have questioned the instrumentalism involved in a reliance on reaching agreements as the primary goal of mediation. . . . They urge the inclusion of more intangible goals such as improved understanding or communication, making people better human beings, and social transformation through improved relationships. From a narrative perspective, goals need to be formulated in terms of narrative trajectory and discursive shifts. We would suggest three goals for a narrative mediator to bear in mind: a) the creation of the relational conditions for the growth of an alternative story; b) building a story of relationship that is incompatible with the continuing dominance of the conflict; and c) opening space for people to make discursive shifts. . . . In narrative terms, the goal of mediation might be constructed in terms of the development of a narrative towards some kind of denouement. A written agreement may well be an aspect of such a narrative, or it may not. We can avoid the trap of becoming too attached to the goal of 'resolution' if we focus not on one component of the solution-bound narrative but on the narrative trajectory itself. . . . In Wittgenstein's words, a mediation may be considered successful if people 'know how to go on'. Or in Bakhtin's terms, ongoing dialogue should be the goal rather than a fixed agreement that ends the conversation.

Winslade & Monk, *supra* note 115, at 1-2. A popular summary of the narrative model notes:

> Narrative Mediation . . . challenges the problem-solving orientation . . . prevalent in the field of mediation today. . . . [T]he feasibility of separating content and process issues, considered an integral aspect of the problem-solving model, is seriously questioned. . . . Furthermore, the problem-solving orientation and its orientation towards settlement, tends to emphasize substantive issues over relational issues. The Narrative approach to mediation places substantive issues as a secondary aim after considering the primary, relational needs of the conflict parties. . . . The goal is not simply to reach agreements but to use the intervention as an opportunity to improve communication and to develop a foundation for addressing problems in general. . . . [I]t is critical that the mediator be tuned into the dominant discourses affecting the thoughts and actions of clients throughout the mediation process. Taken-for-granted assumptions by one or both parties relating to either the conflict itself, the conflict parties themselves, or their roles . . . are addressed and reconsidered throughout the mediation sessions. . . . This involves pulling apart old, comfortable modalities of thought, old stories pertinent to the conflict, of the conflict itself, of the other party, or even of oneself, to make room for the new modalities, the new stories. The mediator must be ever vigilant in searching for . . . alternative ways of viewing the conflict and the other party. These are often hidden within the dominant discourses which color the client's worldview. . . . From these alternative ways of considering moments contained within the stories of conflict parties, they can identify preferred options from which to generate a new shared narrative, outside of their established modes of thinking. . . . [T]he parties and the mediator can work together to "coauthor" a new narrative. . . . Narrative Mediation is thus interested in resolutions that go beyond simple settlement to consider the effects of the mediation on the society at large and, like transformative mediation, considers mediation as a means for conflict parties to achieve a higher moral self.

Toran Hansen, *The Narrative Approach to Mediation*, Sept., 2003, *available at* http://www.mediate.com/articles/hansenT.cfm.

116. *See* Cheryl R. Picard & Kenneth R. Melchin, *Insight Mediation: A Learning-Centered Mediation Model*, 23 NEGOTIATION J. 35 (2007) (presenting and explaining the insight model of mediation, as conceived by two of the originators of the model). Its originators contrast the insight model with both the transformative and narrative models as follows:

> Transformative and narrative approaches to mediation have been positioned as alternatives to the interest-based approach that has dominated mediation practice. . . . In the interest-based approach, mediators focus on the problem itself. . . . Their approach to the problem is pragmatic. . . . Transformative and narrative mediators

understanding-based mediation.[117] While there were important differences among these "new" models of mediation, those differences are less important here than the common themes that they presented.

The first common theme presented by these models was that sustainable conflict resolution required more than settlement alone; it required more than the resolution of whatever might be the tangible, concrete issues on which the parties disagreed. The logic of this claim was that the tangible issues in a dispute cannot be fully divorced from the social interaction that had taken place, and was still taking place, between the parties as human beings. Put differently, instrumental transactions over "stuff" were inevitably tied to human interactions involving persons, and failing to address the interactional dimension practically guaranteed that resolutions would be neither satisfying nor sustainable in the long run.[118] For purposes of

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> assume that . . . helping [the parties] requires a shift in focus away from the problem. In our experience, disputants are, unsurprisingly, deeply concerned with the problem itself. . . . Moreover, gaining insight into the issues related to the problem itself can, indeed, lead to breakthroughs in perspectives and attitudes that can shift relationships onto new ground. . . . [W]e turned to the "insight theory" developed by Canadian philosopher Bernard Lonergan. . . . At the heart of what we came to call "insight mediation" are moments when parties begin to understand enough about each other that they cease regarding each other as a threat to cooperation and begin to believe that they can either live with their differences or resolve them. . . . Insight transforms feelings, alters perspectives, and creates new possibilities for relationships.

Id. at 37-38.

117. *See* GARY J. FRIEDMAN & JACK HIMMELSTEIN, CHALLENGING CONFLICT: MEDIATION THROUGH UNDERSTANDING (forthcoming, 2008) (presenting and explaining the understanding-based model of mediation, as conceived by the two originators of the model). According to the authors:

> The overarching goal of this approach to mediation is to resolve conflict through understanding. Deeper understanding by the parties of their own and each other's perspectives, priorities and concerns enables them to work through their conflict together. With an enhanced understanding of the whole situation, the parties are able to shape creative and mutually rewarding solutions. . . . [The] model shares much in common with a number of other approaches to mediation. For example, we stress the importance of articulating [underlying] interests and developing solutions that will serve those interests. There is also much that distinguishes this approach. In the Understanding-Based Model, the emphasis is on the parties' responsibility for the decisions they make. Many models of mediation assume that the mediator should take a strong role in crafting a solution . . . and persuading them to adopt it. In this approach, the assumption is that it is the parties . . . who have the best understanding of what underlies the dispute and are in the best position to find the solution.

RISKIN ET AL., *supra* note 51, at 307-08 (quoting FRIEDMAN & HIMMELSTEIN, *supra* note 177). The understanding-based model emphasizes techniques that focus on enhancing understanding, including a method described as "looping" which "borrows much from what others have referred to as 'active listening,' [but] 'looping' captures a fuller sense of it for us. We term it the 'loop' of understanding because the goal is to complete a loop. . . . When a party confirms that the mediator understands what he or she has been trying to express, that loop is complete." *Id*. at 348.

118. *See* BUSH & FOLGER, *supra* note 112, at 51-53.

> [W]ithout a change in the conflict interaction. . ., parties are left disabled, even if an agreement on concrete issues is reached. The parties' confidence in their own

managing cases in court, this concern for sustainability might not matter, since a settlement disposes of the case and ends the court's involvement. For the satisfaction of the full purposes of the parties to a conflict, and the social goals of conflict intervention, sustainability could matter greatly—at least in some contexts and to some parties.

Thus, most of the "new" models emphasized that settlement-oriented mediation probably would not produce sustainable resolutions because it did not address the interactional dimension—*but* that other approaches to mediation were possible which *would* address that dimension and thereby lead to sustainable outcomes. Therefore, these new models turned away from focusing practice on defining and framing tangible issues for settlement and then addressing them in a transactional fashion—whether positionally or through mutual problem solving. Instead, they focused heavily, and in some cases almost exclusively, on mediator practices that supported party conflict interaction and helped parties change the quality of the interaction from destructive to constructive.[119] The premise was that, when and as interaction changed, resolutions of tangible issues would emerge without the need for mediator coercion or even mediator-directed problem solving.

A second and equally important common theme presented by at least some of these alternative models of mediation was the view that interactional change cannot and would not result from mediator-directed, top-

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> competence . . . remains weakened and their ability to trust others remains compromised. The result can be permanent damage to the parties' ability to function, whether in the family . . . the boardroom or the community.

Id. at 52; *see also* JOSEPH P. FOLGER ET AL., WORKING THROUGH CONFLICT: STRATEGIES FOR RELATIONSHIPS, GROUPS AND ORGANIZATIONS (6th ed. 2008) (presenting an overarching view of conflict as interaction, on the foundation of communication theory and research). The potential that transformative mediation offered to address both the "interests" and the "interactions" of the parties—and thereby produce positive "upstream effects"—was a prime reason that the U.S. Postal Service adopted the model for its REDRESS Workplace Mediation Program. *See* Cynthia J. Hallberlin, *Transforming Workplace Culture: Lessons Learned from Swimming Upstream*, 18 HOFSTRA LAB. & EMP. L.J. 375, 378 (2001) ("I knew almost any type of mediation could result in 'settlements,' but the Postal Service wanted more. . . . I needed more than 'deals'. I was looking for improved relationships.").

119. *See* Winslade & Monk, *supra* note 115.

> In narrative terms, the goal of mediation might be constructed in terms of the development of a narrative towards some kind of denouement. A written agreement may well be an aspect of such a narrative, or it may not. We can avoid the trap of becoming too attached to the goal of 'resolution' if we focus not on one component of the solution-bound narrative but on the narrative trajectory itself. . . . [A] mediation may be considered successful if people 'know how to go on'. . . . [O]ngoing dialogue should be the goal rather than a fixed agreement that ends the conversation.

Id. at 1-2. In the transformative model, the central focus is on interaction; in the narrative model the focus is on discourse or narrative. The two are very close indeed, and certainly both are closer to each other than to a focus on tangible issues or problems involved in a transaction or dispute.

down, controlling interventions during the mediation process. Just as people cannot be forced to eat or drink (at least, not for long), they cannot be forced to think more clearly, make decisions, or communicate effectively and empathetically—the key behaviors involved in productive social interaction. Rather, the most an intervener could do—and all that was really necessary—was to act in ways that allowed and supported the parties' own intrinsic capacities for thought, decision-making, expression, and understanding. If this were done consistently and effectively, parties would naturally find their own footing in their interaction, and then address disputed issues effectively.[120] Therefore, these models of mediation focused on identifying, describing, and teaching concrete mediator practices that follow a bottom-up rather than top-down approach to intervention. Mediators supported rather than supplanted party decision-making, and they allowed and supported, rather than forced, party communication and perspective-taking. The resultant approach to mediation was what could be described as a party-driven rather than mediator-driven process, in all respects.

These two themes—that interactional change was a prerequisite for sustainable conflict resolution, and that employing exclusively supportive rather than directive mediator practices was a prerequisite for interactional change—began to define a genuinely different approach to mediation, in contrast to the transactional, settlement oriented mediation that came to dominate in the third decade.

C. FINDING NEW GROUND: MEDIATION BEYOND THE ORBIT OF THE COURTS

The articulation of this overall alternative approach in the fourth decade—in one or another of the specific new models—reinvigorated those

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120. *See* BUSH & FOLGER, *supra* note 112.

> A mediator who tries to 'get' shifts to happen actually impedes this process by removing control . . . from the parties' hands. . . . [I]f mediators do the job just described, the parties themselves will very likely make positive changes in their interaction and find acceptable terms of resolution for themselves where such terms genuinely exist. . . . Outcomes that are reached as a result of party shifts toward greater clarity, confidence, openness and understanding are likely to have more meaning . . . for parties than outcomes generated by mediator directiveness, however well meant.

Id. at 68-71.

> In the Understanding-Based Model, the emphasis is on the parties' responsibility for the decisions they make. Many models of mediation assume that the mediator should take a strong role in crafting a solution . . . and persuading them to adopt it. In this approach, the assumption is that it is the parties . . . who have the best understanding of what underlies the dispute and are in the best position to find the solution.

RISKIN ET AL., *supra* note 51, at 307-08 (quoting FRIEDMAN & HIMMELSTEIN, *supra* note 117).

who had come to the mediation field because they saw in it the promise for more than efficient settlement of conflicts for courts or other institutions. As a result of this reinvigorated spirit, mediators began casting their net wider and presenting their craft in new ways.[121] Mediation could be practiced as a means of helping people change the way they interacted in conflict, and many clients were interested in just that goal, both for itself and because it very naturally paved the way to sustainable issue resolution. The result of this new spirit in the field was that many new avenues opened up for the practice of mediation, beyond serving as settlement satellite of the courts. Mediation genuinely began to move beyond the orbit of the courts, precisely because mediators began to approach the marketplace with a form of mediation that went beyond settlement per se.

The past decade saw significant growth, not only intellectually but practically, in the development of the "alternative" version(s) of mediation that are interactionally rather than transactionally focused. Again, a full exposition of this development is beyond the scope of this article. However, in the case of the new model most familiar to the author—transformative mediation—the last ten years saw increasing use of this model in many domains, including: workplace mediation, beginning with the adoption of the model by the United States Postal Service's REDRESS program in 1997 and its use since then to mediate over 75,000 cases;[122] community mediation, with dozens of mediation centers having adopted the model due its resonance with the original goals and principles of community mediation;[123] elder mediation, an area in which the model's emphasis on party empowerment corresponded to core principles of how to sustain geriatric well-being;[124] and family mediation, including parent-child

121. *See, e.g.*, BUSH & FOLGER, *supra* note 112, at 113-29 (summarizing new applications of the transformative model, and the rationales offered by the practitioners involved in them).

122. *See* LISA BLOMGREN BINGHAM, MEDIATION AT WORK: TRANSFORMING WORKPLACE CONFLICT AT THE UNITED STATES POSTAL SERVICE 15-27, 34-35 (2003) (describing the use of transformative mediation for workplace disutes in the postal service, and documenting its impacts); 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) (presenting the results of a qualitative research study of transformative mediation's impacts in workplace mediation).

123. *See, e.g.*, Patricia Gonsalves & Donna Turner Hudson, *Supporting Difficult Conversations: Articulation and Application of the Transformative Framework at Greenwich Mediation* (July 2005), http://www.mediate.com/articles/greenwichM1.cfm (last visited March 1, 2009) (describing the use of transformative mediation in a community mediation center, and its impacts); Thomas Wahlrab, *Dayton Mediation Center 2005 Annual Service Report*, www.domediation.com/annsvc.doc (last visited August 4, 2008) (describing the use of transformative mediation in a community mediation center, and is impacts).

124. *See, e.g.*, Ruth L. Schemm, Kathryn R. Mariani & Michele Mathes, *Conflict in Assisted Living: The Promise of Elder Mediation*, ASSISTED LIVING CONSULT, Nov./Dec. 2007, at 28 (advocating use of the transformative model for elder mediation).

mediation, where the directiveness of conventional mediation practices left mediators disenchanted and clients unsatisfied.[125] In these areas and others, mediation began in the fourth decade to find a place for itself as more than a mere satellite of the courts. The point is not that conflict in these arenas is wholly unconnected to the courts, since a court case is usually at least a possibility in many situations. The point is that, even in areas where courts might still be called upon to intervene, mediation's role was no longer simply to divert or settle cases within the courts' orbit. It was directed at other, interactional, goals that go beyond what courts and similar institutions normally do.

Moreover, the fourth decade also saw the emergence of a new body of research that documented the effectiveness of an interactional approach to mediation in achieving outcomes that go beyond settlement per se. Of course, the research on this subject only started to accumulate, but the findings were nonetheless suggestive. For example, in fairly extensive study of the use of transformative mediation to address workplace conflict in the United States Postal Service, the results suggested that it was successful in producing both interactional change and sustainable resolution.[126] Interestingly, the research on this new model of mediation was conducted with new models and methods of study, which again emphasized that in order for mediation to move beyond the orbit of the courts, a new framework for understanding, conducting, and evaluating mediation was critical.[127] The research model developed for this study on workplace mediation is now being used to evaluate transformative mediation in other contexts.[128]

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125. *See, e.g.*, Robert A. Baruch Bush et al., *Supporting Family Strength: the Use of Transformative Mediation in a PINS Mediation Clinic*, 47 FAM. CT. REV. 148, 154-63 (2009) (describing the use of transformative mediation in parent-child conflicts); Dee DePorto & Jody B. Miller, *Honoring the Victim's Voice: The Domestic Violence and Mediation Safety Project*, ACR RESOLUTION, Summer 2005, at 22 (describing the use of transformative mediation in intimate partner conflicts, including cases with a history of domestic violence); Bush & Pope, *supra* note 114 (describing the theory and practice of transformative mediation in divorce disputes).

126. *See* BINGHAM, *supra* note 122, at 32-37 (citing multiple studies of the REDRESS Program).

127. *See* Joseph P. Folger, *Mediation Research: Studying Transformative Effects*, 18 HOFSTRA LAB. & EMP. L.J. 385 (2001) (noting the need for alternative research models to measure the impacts of transformative mediation); Antes et al., *supra* note 122, at 429-34 (describing the design of an alternative research model formulated to measure the impacts of transformative mediation).

128. *See* Bush et al., *supra* note 125, at 161-62 (describing the design of a study aimed at measuring the impacts of transformative mediation as used in parent-child conflicts).

D. ANOTHER CYCLE, OR A NEW ERA?

Despite the ground broken by alternative models of mediation during the fourth decade, in gaining a new foothold in domains beyond the courts per se, it is still possible that mediation may slip back into satellite orbit. For even in those new domains, there are institutions that, like courts, have their own interests in case management, settlement and efficiency. Employers, schools, hospitals, and social service and administrative agencies are all driven by mixed motives, including human welfare and administrative efficiency. Those mediators who have offered and promoted the newer models of mediation in such arenas will need to be clear in articulating the values of using the process to achieve more than simple issue settlement. However, there is no guarantee that they will succeed in convincing enough clients to sustain these new models in the conflict intervention marketplace.

The obvious question at this juncture in the four-decade history of mediation and the courts is: What if anything suggests that new approaches to mediation focused on interactional change will finally escape the courts' "settlement" orbit, by contrast to approaches that were focused on "community, problem-solving and reconciliation" in the second decade, which ultimately fell back into that orbit? The conclusion of this article offers some suggestions as to why, in the fifth decade, mediation may finally "break free," at least in some measure.

VI. BEYOND 2008—THE FORESEEABLE FUTURE: MEDIATION WITHIN AND BEYOND THE COURTS

The historical narrative presented above points to a few conclusions about what lies in the foreseeable future of the relationship between the mediation field and the courts. The most obvious and reliable conclusion is that mediation in its most common form—a process oriented toward the production of agreements that settle concrete disputed issues—will continue to play a major role as a satellite process serving the courts and other similar institutions. The process has simply become too useful to those institutions, and too rewarding for practitioners, to expect this satellite role to change from its present state. However, it is possible that mediation may also, and simultaneously, find a place beyond the courts' orbit, as an independent social process. The basis of this latter prediction is explained in the following concluding sections, by reference to the contrast between the innovations introduced in the fourth decade of mediation's history and those of earlier decades, and also by reference to changes in the attitudes of the mediation field as a whole.

A. DRIFTING BACK INTO ORBIT: THE DYNAMIC OF RECAPTURE

As discussed in Part III, the proponents of mediation in the second decade of this history (the 1980s) tried to show how mediation could and should operate as a "fundamentally different" process than that of the courts.[129] For some, the difference was that mediation could foster self-determination at the community level, rather than keeping citizens bound to the formal justice agencies of the state. For others, the difference was that it could permit and support engagement in private ordering and mutual problem solving, rather than reinforcing adversarial bargaining in the shadow of the law. For still others, the difference was that mediation could open the door to reconciliation and healing, rather than limiting parties to the narrow compensatory remedies of the legal system. In all these visions of mediation as something that could go "beyond" the realm of the courts and settlement, the common theme was that mediation would attain fundamentally *different goals* than those attainable in the courts and that it would do so by a fundamentally *different process* than that of the courts.[130] Thus, through offering the attainment of different goals through a different process, mediation would "break free" as a new social process.

As the development of mediation unfolded, however, it turned out that the mediation of the second decade was *not different enough* from the courts whose orbit it sought to escape. This was so in both dimensions of difference mentioned above: the goal sought, and the process used to reach it. As to the first dimension, all of the different visions of mediation in that decade retained a strong focus on resolution as an ultimate goal and justification of the process. Thus, despite the emphasis on goals like "capacity-building" and "community self-governance" in community mediation, neighborhood mediation programs wound up focusing heavily on the production of agreements as their primary aim and measure of success—even those like the Community Board Program that dissociated themselves from the courts.[131] Similarly, despite the stress on reconciliation and healing as goals, victim-offender mediation programs generally gravitated to a focus on reaching restitution agreements.[132] Moreover, apart from programmatic goals in mediation agencies, the focus on agreement was reinforced by training and practice texts. As noted above, mediation in this

129. *See supra* Part III.

130. *See supra* text accompanying notes 31-67.

131. *See supra* text accompanying notes 68-71.

132. *See, e.g.*, Tony Dittenhoffer & Richard V. Ericson, *The Victim/Offender Reconciliation Program: A Message to Correctional Reformers*, 33 U. TORONTO L.J. 315, 329-32 (1983); UMBREIT, *supra* note 64, at 158-59.

period was seen as a common process, with common stages and strategies, no matter what the arena of practice—the concept of different models had not yet emerged. Within the singular, common model of practice, reaching agreement was always presented in standard texts and materials as the ultimate stage of a successful mediation session.[133] By the end of the decade, the mediator's ability to generate an agreement was identified as the most important skill of a competent practitioner.[134]

This focus on agreement as a primary goal automatically meant that mediation programs and practitioners shared a common bond with the court system and similar institutions. Courts understood and valued the goal of settlement, and looked for ways to promote it, both as an administrative necessity and as a means of satisfying litigants. Any mechanism that offered new opportunities to promote settlement was bound to be attractive to courts, and this was certainly the case with forms of mediation that—whatever their original vision—developed a focus on agreement and settlement in practice. To put it differently, those forms of mediation were easily "digestible" by the court system—their product was understandable and valuable to the courts, and therefore the courts were ready and willing to support and absorb them. Indeed, this is precisely what happened, as the lion's share of mediation activity migrated to some form of court-connected mediation in the 1990s.[135]

A similar pattern is visible with regard to the second dimension of second-decade mediation's supposed "difference" from the courts: the nature of the process itself. In all the visions of what mediation could do—build community, foster private ordering, promote healing—one common theme was that the process would operate through party self-determination.[136] Indeed, this was presented as a cardinal difference from the courts, and from other adjudicative third-party processes like arbitration. The distinguishing characteristic of mediation was supposed to be that the parties themselves, rather than the third party, would hold the power to make ultimate decisions affecting outcome. Even in emerging ethical standards for the field, a key principle was preserving party self-determination—

133. *See supra* note 111 and accompanying text.

134. *See* Bush, *supra* note 57, at 969-81; Honeyman, *Core*, *supra* note 111; Honeyman, *Elements*, *supra* note 111. *See also* TEST DESIGN PROJECT, PERFORMANCE-BASED ASSESSMENT: A METHODOLOGY FOR USE IN TRAINING, SELECTING AND EVALUATING MEDIATORS 14-25, 38-40 (1995) [hereinafter TEST DESIGN] (incorporating "Interim Guidelines" for mediator performance evaluation originally published in 1993, as well as advice on how to apply those guidelines in evaluating mediators).

135. *See supra* notes 82-88 and accompanying text.

136. *See supra* text accompanying notes 31-60; Welsh, *Self-Determination*, *supra* note 2, at 15-21.

although in early "codes" it was not always clear that this principle was paramount.[137]

The development of practice in the second decade was far from consistent with this articulated "first principle" of the mediation process. As discussed in Part IV, the standard practices of mediators involved a heavy measure of control and direction of the process, which could not help but influence the outcomes of mediation sessions and was often intended to do precisely that. This was the documented nature of practice across different contexts—community, family, victim-offender, civil cases—and it was also the type of practice endorsed by standard mediation texts.[138] Parallel to the focus on attainment of agreement as the criteria for practice competence, the focus on control and direction of the session was cast as critical in emerging "performance competency" standards. Mediators were judged favorably for controlling the terms of discussion, limiting emotional expression, generating movement through persuasive argument with each party in caucus, pressing for concessions, etc.[139] Each of these and other similar practices were expected of "competent" mediators, and each of them undermined party control of the process—and thus made mediation less "different" from the authoritative procedure of the courts themselves.

Thus, the development of mediation practice in the mold of mediator control and direction of the process—even at the expense of party self-determination—meant that mediation was not as "fundamentally different" from the courts as had been claimed. It also meant that the process was familiar to the courts, lawyers and judges in the legal system—all of whom were very comfortable with the type of process in which third parties and other experts control the process and make decisions for the parties. The effect was again that mediation as it developed in practice was not so "different" that it could not be assimilated by the court system as a satellite or adjunct process. As seen in Part IV, that is precisely what happened in the following decade.[140]

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137. *See* Bush, *supra* note 83, at 256-62, 277-86 (criticizing the inconsistency of early mediator ethics standards on the importance of upholding party self-determination); Welsh, *Self-Determination, supra* note 2, at 3 n.1 (noting that mediation ethical codes referred to self-determination as a fundamental principle of the process).

138. *See supra* Part IV.

139. *See, e.g.*, TEST DESIGN, *supra* note 134, at 22-25 (presenting a performance test using these and similar measures of performance); Bush, *supra* note 57, at 972-78 (summarizing the measures commonly used by mediator performance tests). Some critics even pointed out that the "informal" mediation process had rules very much like those of courts, and that mediators were the ones who enforced them. *See* Grillo, *supra* note 77, at 1555-56.

140. *See supra* Part IV; *see also* Dorothy J. Della Noce, Joseph P. Folger & James R. Antes, *Assimilative, Autonomous, or Synergistic Visions: How Mediation Programs in Florida Address the Dilemma of Court Connection*, 3 PEPP. DISP. RESOL. L.J. 11, 21-23, 29-32 (2002) (reporting

From a different perspective—that of the parties using mediation—the assimilation of mediation goals and practices to those of courts and other authoritative institutions meant that mediation was not clearly differentiated as a product to "conflict resolution consumers." Parties to conflict considering mediation were presented with a process that *did not look different enough* to be recognized by them as a new and valuable alternative. Instead, they saw a process that looked much like other court-related mechanisms they were already familiar with—small claims courts, settlement conferences, etc. In this sense, settlement-oriented mediation was not only familiar to courts, it was also familiar to parties. Furthermore, because settlement-oriented mediation presented nothing markedly new, it simply didn't generate as much interest as expected among parties to conflict. One of the great disappointments of the mediation field is the fact that despite four decades of work, the private market for mediation services remains comparatively small. The large majority of cases are initiated through some form of mandatory mediation, whether the mandate comes from courts or other agencies.[141] Thus, the "recapture" of mediation by the courts occurred partly because, as it developed, mediation never developed its own independent "market" of customers. Without that independent market, it was bound to gravitate back into the orbit of the courts, as a settlement satellite.

In sum, the failure of mediation, in the second decade, to follow through on its promise of being "fundamentally different" from the courts—in both its aims and its practices—made it susceptible to "recapture" by the court system, in the third decade, as an adjunct process. It simply did not become different enough to develop its own independent clientele, and to avoid being pulled back into the courts' orbit and positioned as a useful satellite. To use another metaphor introduced above: despite its initial claims of difference, mediation in the second decade became quite "digestible" by the court system because it developed a similar character as a third-party-driven, settlement-oriented process similar to the courts themselves. Moreover, lacking a clearly differentiated character, and therefore a

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on a qualitative research study of selected court-connected mediation programs, and finding that many of them reflected an "assimilative" approach that "adapt[ed] mediation to the underlying values and norms of the court system").

141. *See* BERNARD S. MAYER, BEYOND NEUTRALITY: CONFRONTING THE CRISIS IN CONFLICT RESOLUTION 56-57 (2004) (describing the mediation process as underused unless part of a mandatory system); Welsh, *Democratic Justice*, *supra* note 2, at 141-42 (discussing the evolution of court-mandated mediation and arguing against reliance on mandatory mediation); Welsh, *Self-Determination*, *supra* note 2, at 23-25 (noting the trend toward "mandatory" mediation as a result of "lackluster reception" of mediation offered to parties as a voluntary option).

recognizable unique value to potential users, it was vulnerable to recapture and absorption as a useful and welcome component of the court system itself—and that is exactly what happened during the third decade.

B. ANCHORED ELSEWHERE: INTERACTIONAL MODELS AND AVOIDING RECAPTURE

The key question is whether there are significant new elements, in the alternative models of mediation introduced in the fourth decade, to suggest that these approaches can avoid the fate of the second-decade attempts to break free. If nothing new and different can be found in these approaches, then despite the seeming successes described in Part V, they can be expected to eventually fall back into the courts' orbit like their predecessors in the 1980s. The argument of this conclusion is that a critical difference *can* indeed be found in at least some of these new approaches, in contrast to the mediation of the 1980s. By comparison to their earlier counterparts, the differentiation of these new models from the courts is more emphatic and more deeply rooted, in the very same dimensions discussed in the previous section—their goals and processes.

This claim can be illustrated by reference to transformative mediation, the fourth-decade model that is probably best-known, and that is most familiar to the author of this article.[142] In contrast to second-decade views of mediation's goals, the transformative model does not view settlement of any kind as a direct aim of the mediation process or a goal of the mediator. The aim is not the production of a creative, mutually beneficial solution to a problematic issue, or the restoration of harmony in a damaged relationship. Rather, the goal is to help parties to change the quality of their interaction with each other, within the conflict itself, regardless of whether a "resolution" of *any* kind is attained.[143] Usually, such interactional change *will* lead to decisions that resolve disputed issues or mend relationships—

142. *See supra* note 114 (summarizing briefly the key principles of the transformative model, and referencing the primary authorities on transformative mediation).

143. *See, e.g.*, Della Noce et al., *supra* note 112, at 51 ("The model assumes that the transformation of the interaction itself is what matters to the parties in conflict—even more than settlement on favorable terms."); BUSH & FOLGER, *supra* note 112, at 53, 65-66 (describing as one of the "guiding principles" of transformative mediation that "the mediator's role is to help the parties make positive interactional shifts"). Note that, as stated earlier, this does *not* mean that the model ignores the significance of resolving specific issues. "Rather, it assumes that if mediators do the job just described, the parties themselves will very likely make positive changes in their interaction and find acceptable terms of resolution for themselves where such terms genuinely exist." *Id.* at 68.

but that is a side effect of the process and not its goal per se.[144] Success in transformative mediation is measured *not* by whether specific issues are settled and relationships are mended, but by whether parties experience their conflict interaction differently.[145] Specifically, the measure of success is whether parties shift in their experience of themselves, from weakness and confusion to a strengthened sense of competency, and in their experience of each other, from hostility and alienation to an increased sense of understanding. Indeed, research studies evaluating transformative mediation measure precisely these factors—the shifts in experience of self and other—not the rate at which settlements are achieved or the content and quality of those resolutions.[146]

Without delving into the theoretical basis of the transformative model, which has been explained at length elsewhere,[147] the point is that this model of mediation is focused entirely on helping to achieve positive interactional change—and that is something *fundamentally different* from what courts do. Moreover, because the model identifies the changes being sought very clearly and precisely, so that they can be and are used as evaluation measures, transformative mediation is not easily susceptible of going off track in practice, and drifting back into a focus on settlement. As a result, it is not likely to be pulled back into the orbit of the courts (or other institutions) as a settlement satellite—because it no longer fits easily into the same conceptual or practical universe. The courts are entirely unconcerned with the quality of interaction between disputing parties. Rather, as some have suggested, legal processes do nothing to improve the quality of

144. *See* BUSH & FOLGER, *supra* note 112, at 217-18 (addressing the "myth" that transformative mediation is ineffective in addressing issues and relationships, and citing research on the U.S. Postal Service REDRESS program that refutes this myth).

145. *See* Lisa B. Bingham et al., *Mediating Employment Disputes at the United States Postal Service: A Comparison of In-house and Outside Neutral Mediator Models*, 20 REV. PUB. PERSONNEL ADMIN. 5, 10-18 (2000) (using "procedural justice" indices, keyed to parties' experiences of interactional shifts, to evaluate effectiveness of mediation in both models); Antes et al., *supra* note 122, at 431-32, 453-61 (documenting transformative shifts that occurred during USPS REDRESS sessions); Della Noce et al., *supra* note 112, at 59 (arguing that the crafting of policy should accommodate different mediation goals, including interactional change).

146. *See* BINGHAM, *supra* note 122, at 23-27, 32-35 (presenting the results of research on REDRESS mediation impacts, including measures of interactional change). The REDRESS research, which is extensive, was designed using the framework of the "procedural justice" school of theory and research, which evaluates social processes in terms of whether they afford rich opportunities for participation and expression. *Id.* at 34-35; E. ALAN LIND & TOM R. TYLER, THE SOCIAL PSYCHOLOGY OF PROCEDURAL JUSTICE 94-106, 206-17 (1988). For an argument that the stated measures of procedural justice correspond closely to the dimensions of empowerment and recognition shifts central to transformative mediation, *see* Bush, *supra* note 110, at 18-19 & n.30, 27-32. It is possible that this correspondence was taken into account in the REDRESS Program's choice of the procedural justice framework as a basis for its research design.

147. *See* BUSH & FOLGER, *supra* note 112, at 41-8; *see also supra* note 114 (summarizing the theoretical basis and referencing the major sources).

human interaction and a great deal to deteriorate it.[148] Courts measure their success in terms of case disposition and preservation of legal rights, without regard to the impact on interaction between the parties. There is simply very little common ground between the goals of courts and the goals of interactionally focused forms of mediation like the transformative model. This discontinuity of territory is precisely what may help fourth-decade models like transformative mediation avoid the fate of their second-decade predecessors.

The same is true for the second dimension of difference between mediation and the courts—the locus of control over the process. As discussed above, second-decade models claimed that they would vest control in the parties, following the principle of self-determination. However, the actual practice of mediation—and even the principles by which the mediators were taught—ignored or set aside the ideal of party decision-making in many respects, despite the contradiction with the larger ideal of self-determination.[149] By contrast, at least some of the new fourth-decade models are far more explicitly and deeply committed to teaching and using methods that give the parties and not the mediator real control over the process.

To use transformative mediation once again as the example, the leading text on that model teaches explicitly that the mediator's role is "supporting—but never supplanting—each party's deliberation and decision-making, at every point in the session where choices arise (regarding either process or outcome)."[150] Although the mediator's goal is also to help parties achieve shifts in their views and understanding of each other, the principle is that mediators should "suppor[t]—but never forc[e]—each party's freely chosen efforts to achieve new understanding of the other's

148. *See* Susan Daicoff, *Law as a Healing Profession: the "Comprehensive Law Movement,"* 6 PEPP. DISP. RESOL. L.J. 1, 5-8 (describing an array of approaches that are being developed to counteract the "anti-therapeutic consequences" of traditional, adversarial legal processes, among which she includes transformative mediation). *See generally* DAVID B. WEXLER & BRUCE J. WINICK, LAW IN A THERAPEUTIC KEY: DEVELOPMENTS IN THERAPEUTIC JURISPRUDENCE (1996) (examining the "anti-therapeutic" impacts of many legal processes and exploring ways to minimize these impacts).

149. *See supra* Parts III-IV.

150. BUSH & FOLGER, *supra* note 112, at 66.

> [T]hese are shifts that the parties . . . alone can make. No mediator can 'get' parties to shift out of weakness or self-absorption, nor should he try. Parties gain strength and openness by making decisions by and for themselves, in their own way and at their own pace. A mediator who tries to 'get' shifts to happen actually impedes this process. . . . [T]his mediator violates the defined goal of supporting empowerment by supplanting party decision making.

Id. at 67.

perspective."[151] In other words, party self-determination is never to be sacrificed to any other goal, whether to achieve a settlement *or* to promote understanding or reconciliation.[152] Moreover, specific intervention practices that preserve and encourage party control are not simply presented in transformative mediation texts, they are taught in authorized training materials and incorporated in protocols used to evaluate and "certify" the competence of practicing mediators.[153] Significantly, research on transformative mediation provides evidence that practitioners of the model actually follow through on the principles they are taught, and therefore their mediation sessions do indeed give parties genuine and full control over what happens in mediation.[154] In short, party self-determination and control is not mere theory in transformative mediation; it is a documented practice.

In this respect, as with regard to the dimension of goals, fourth-decade models like transformative mediation are *fundamentally different* from the courts. Court and related processes almost by definition remove control of both process and outcome from the parties' hands, placing them in the hands of the third-party decision-makers and, to a lesser degree, expert advocates. The parties themselves are relegated to a back-seat role as observers while various measures are taken for them by advocates and third parties. The principle and practice of party control simply does not fit into the conceptual and practical universe of the courts. Placing parties in the front seat, and giving them full control over all decisions, is fundamentally different than what courts do. Indeed, many beginning transformative mediators with experience in court and related processes find this reversal

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151. *Id.* at 66.

152. *See* Robert A. Baruch Bush, *First if Not Foremost: The Centrality of Empowerment in Conflict Transformation Theory and Practice*, in DOROTHY J. DELLA NOCE, JOSEPH P. FOLGER & ROBERT A. BARUCH BUSH, TRANSFORMATIVE MEDIATION: A SOURCEBOOK FOR MEDIATORS, LAWYERS AND JUDGES (forthcoming, 2009) (describing how even mediators committed to the transformative model are sometimes tempted to use directive interventions to promote reconciliation) (manuscript on file with author).

153. *See* Dorothy J. Della Noce et al., *Identifying Practice Competence in Transformative Mediators: An Interactive Rating Scale Assessment Model*, 19 OHIO ST. J. ON DISP. RESOL. 1005, 1008-17 (2004) (describing a protocol for evaluating mediator performance that measures competency in skills specific to transformative mediation practice); *see also* Institute for the Study of Conflict Transformation, Inc., *Mediator Certification: Frequently Asked Questions*, http://www.transformativemediation. org/documents/Frequently%20Asked%20Questions.pdf (last visited August 5, 2008) (describing how the performance evaluation process discussed in the above article is applied in practice to certify mediators as competent in transformative practice).

154. *See* Tina Nabatchi & Lisa B. Bingham, *Transformative Mediation in the USPS REDRESS Program: Observations of ADR Specialists*, 18 HOFSTRA LAB. & EMP. L.J. 399, 405-27 (2001) (reporting the results of a survey of REDRESS staff who monitor mediators, providing evidence that REDRESS mediators are following the transformative model in practice); Antes et al., *supra* note 122, 431-62 (reporting the results of interview research providing similar evidence).

of control extremely difficult to accept and practice.[155] Once again, this fundamentally different practice at the heart of the transformative model represents a safeguard against being pulled back into the orbit of the courts. There is no common ground between the practices of courts and those of genuinely party-driven forms of mediation like the transformative model. This discontinuity may help the fourth-decade models avoid the fate of their second-decade predecessors.

A deeper point is that the differences between the new mediation models and the courts are by no means superficial. The differences in goals and practices stem from the fact that courts and interactional mediation processes are rooted in two quite different views of human motivation, human capacity, and social interaction. This point has also been explained elsewhere, in terms of the difference between the individualist and relational views of human beings and society, or worldviews.[156] While a

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155. *See* Susan Beale & Judith A. Saul, *Examining Assumptions: Training Mediators for Transformative Practice*, *in* DESIGNING MEDIATION, *supra* note 114, at 9, 12-15 (describing discussions of role play exercises with mediators new to the transformative model who "acknowledged that because they could not control the interaction or turn it into one they found acceptable, they were at a loss and didn't know what to do").

156. *See* BUSH & FOLGER, *supra* note 112, at 59-61, 242-45, 250-56; BUSH & FOLGER, *supra* note 69, at 236-44; Della Noce, *supra* note 114, at 275-77; Della Noce, Folger & Antes, *supra* note 140, at 17-20. Bush and Folger describe these worldviews as follows, citing numerous sources in fields such as political science, philosophy, sociology, and others:

> [According to the *individualist worldview*,] the human world is composed of radically separate individuals, each driven by his unique desires, each interested in others only as instruments for the fulfillment of his desire. . . . That is, interaction with others is important only if it is needed for the fulfillment of one's desires. Of course . . . social interaction is necessary, even though it is not ideal. Unfortunately, however, interaction often leads to conflict, which then becomes an obstacle to fulfillment for all involved—because in the ensuing conflict interaction the participants, lacking full capacity for either agency or empathy, will probably reach stalemate, make a bad agreement, or escalate the conflict destructively. . . . [I]n the broader world of political and social thought, [this] is often called the ideology of individualism. The social world is really only an aggregation of separate individuals, useful at times for each other but essentially separate from each other—and often dangerous to themselves and each other, because not fully capable of either agency or empathy. Social institutions are therefore needed to facilitate joint pursuits, but they are even more important to protect against oppression and self-inflicted harm. . . . Individualist ideology thus views conflict as something to be controlled judiciously—so it does not spread or persist, so it does not lead to oppression, and so it does not squander satisfaction through impasses and poor deals. At the same time, individualist ideology views social interaction itself as something to be tolerated but watched carefully, something likely to produce problems—something ultimately to be feared as a negative force. And, paradoxically, it views human beings themselves as lacking in the very capacities needed to engage in both social interaction and conflict without harming themselves and each other.

BUSH & FOLGER, *supra* note 112, at 244-45 (citations omitted).

> [According to the *relational worldview*,] human beings have inherent capacities for both agency and empathy—the capacity to make sound decisions about their own affairs and the capacity to consider and understand the situations and perspectives of

full review of these worldviews is beyond the scope of this article, the point is that if the courts and interactional mediation models are based on different underlying views of human nature and society, it is far less likely that these forms of mediation can be recaptured and absorbed by the courts. Therefore, there is good reason to believe that the new mediation models of the fourth decade will not simply fall back into the orbit of the courts, as occurred during the preceding cycle of this history. This is unlikely because these models of mediation are firmly anchored elsewhere—in a different, relational vision of society that can stand on its own outside and beyond the individualist vision of the courts.

Finally, the pronounced difference between court processes and interactional models of mediation means that the newer forms of mediation present disputing parties with a clearly recognizable new "product"—one that looks very different than court processes, aims at very different goals and uses very different methods. For parties to whom these differences matter, interactional models of mediation can stand out from the courts and attract a population of users whose needs and values are different. Mediation can then develop its own clientele, without reliance on the courts and similar institutions to direct cases to the mediation process. As discussed in Part V, that is precisely what transformative mediation and other new models have done in recent years, and their direct attraction for clients may

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> others . . . so that outside control is not needed in order for conflict interaction to move in a productive rather than destructive direction. On the contrary, such control . . . reduces parties' opportunity and ability to activate these inherent capacities. . . . [This] view that conflict interaction is positive carries the implication that social interaction in general, far from being a necessary evil, is a fundamental good. This premise is connected with the view . . . that human beings are inherently social beings. That is, while having separate self-consciousness and agency as individuals, we also have an inherent consciousness of our connection to each other, as part of humanity as a whole and as part of smaller human communities, all the way down to the two-person 'community' involved in every interpersonal interaction. As a result of this dual, personal and social consciousness, we as human beings are by nature averse to both social submergence and social isolation. Rather, we need and seek measures of both individual autonomy and social connection, freedom and responsibility, and a healthy balance and integration of the two. Given this view of human nature, it is clear that social interaction is not just a means to an end, a way of satisfying desires for things we cannot attain on our own. . . . Rather, social interaction [including conflict] is a process of discovering and becoming fully 'who we really are'. . . . It is through this interaction, in effect, that we 'constitute' ourselves, give meaning to our lives, and thereby create the basis for deciding what goals we actually want to attain, separately and together—a constitutive process that continues throughout life. We are 'works in progress', in other words, and as social constructionist thinkers have long argued, social interaction is the process by which the progress is made. . . . It is also the process by which we transcend the unwanted isolation of the seemingly separate self, and realize our participation in a common humanity larger than ourselves.

Id. at 250-52 (citations omitted).

be related to their differentiation from court and settlement-oriented processes. The strongly differentiated character of interactionally oriented mediation, for both courts and consumers, may be the force that helps this type of mediation break free of the courts orbit, precisely because it is anchored elsewhere.

C. RECEPTIVITY IN THE MAINSTREAM: OPENNESS TO "BREAKAWAY" MEDIATION

Another phenomenon has unfolded in the fourth decade that supports the view that newer, interactional models of mediation may succeed in avoiding "recapture" into the orbit of the court system. That phenomenon is a shift in the attitude of those using mainstream models of mediation practice—especially so-called "facilitative" mediation. Within the spectrum of models of mediation that the field recognizes today, the one with which most practitioners identify is the facilitative model.[157] That model has always focused primarily on the goal of agreement rather than interactional change, and it has generally emphasized problem-solving methods that are significantly more mediator-driven than an alternative model like transformative mediation.[158] Nevertheless, in the "official" literature of the mediation field, largely authored by proponents of the facilitative model, there has been an obvious and marked shift during the fourth decade, toward greater recognition of the importance of interactional goals and party-driven mediation practices. This mainstream recognition of the importance of key elements of alternative mediation models may represent and promote a greater openness to allowing those alternative models to flourish on their own terms, even if outside the mainstream.

One striking example of this shift can be found in the way that mediator ethical standards have evolved over the last decade. In 1994, three of the mediation field's major organizations published a jointly drafted set of "Model Standards of Conduct for Mediators." Ten years later the same three organizations published a revision of those Model Standards, and the comparison of the original and Revised Standards is quite revealing.[159] In

157. *See* Della Noce, *supra* note 57, at 786 (presenting the results of a study in which mediators self-reported their model of practice).

158. *See* Della Noce et al., *supra* note 153, at 1023-36; Dorothy J. Della Noce et al., *Signposts and Crossroads: A Model for Live Action Mediator Assessment,* 23 OHIO ST. J. ON DISP. RESOL. 197, 212-15, 225-29 (2008) (both comparing typical interventions of transformative mediators with those of mediators using other models).

159. *See* A.B.A., DISPUTE RESOLUTION POLICIES: MODEL STANDARDS OF CONDUCT FOR MEDIATORS, *available at* http://www.abanet.org/dispute/webpolicy.html#8; AMERICAN ARBITRATION ASSOCIATION, A.B.A., & ASSOCIATION FOR CONFLICT RESOLUTION, MODEL STANDARDS

the 1994 document, the Preface describes mediation as "a process in which an impartial third party—a mediator—*facilitates the resolution of a dispute by promoting voluntary agreement* . . . by the parties to the dispute."[160] In the 2005 Revised Standards, the Preamble describes mediation as "a process in which an impartial third party *facilitates communication and negotiation and promotes voluntary decision making* by the parties to the dispute."[161] The comparison of the two shows that, by contrast to the original Standards' focus on "resolution" and "promoting agreement" as the goal of the mediator, the Revised Standards define the goal as "communication" and "promoting decision making," without specific reference to agreement per se.

Another shift in language is found in the all-important Standard on "Self-Determination," which both documents describe as the fundamental principle of mediation. In the 1995 Standards, the provision states that "[s]elf-determination . . . requires that the mediation process rely upon the ability of the parties *to reach a voluntary, uncoerced agreement*."[162] In the Revised Standards a decade later, the parallel provision states more precisely that "self-determination is the act of *coming to a voluntary, uncoerced decision* in which each party makes free and informed *choices as to process and outcome*."[163] In this provision, there is also a shift in focus from reaching "agreement" to making "decisions" and "choices." However, the Revised Standards go further and make clear that party choice is privileged not only as to outcome decisions, but process decisions as well—a significant shift from the traditional principle of facilitative practice that "the parties control the outcome, but the mediator controls the process."[164]

These changes of key provisions, in one of the major documents establishing ethical standards for the field, seem clearly to reflect the influence of the new, interactional models of mediation that developed in the fourth decade, *after* the original Standards were drafted. The new

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OF CONDUCT FOR MEDIATORS (2005), *available at* http://www. abanet.org/dispute/documents/model_standards_conduct_april2007.pdf.

160. A.B.A., COMPARISON DOCUMENT FOR THE MODEL STANDARDS OF CONDUCT FOR MEDIATORS 2, *available at* http://www.abanet.org/dispute/news/comparison1994vaugust2005.pdf (last visited August 5, 2008) (emphasis added).

161. *Id*. (emphasis added).

162. *Id*. at 4 (emphasis added).

163. *Id*. (emphasis added).

164. *See* HAYNES & HAYNES, *supra* note 111, at 3, 16; Stulberg, *supra* note 52, at 96 (both suggesting that the proposition in the text is an accepted principle of mediation practice). *But see* Joseph P. Folger, *Who Owns What in Mediation?: Seeing the Link Between Process and Content*, *in* DESIGNING MEDIATION, *supra* note 114, at 55 (arguing that the distinction between process control and outcome control is illusory, since control over process usually leads to control over outcome).

emphasis on promoting communication and decision-making as the goal, rather than agreement per se, and the clarification that self-determination includes control over process as well as outcome, can both be attributed at least in part to the influence of the new, interactional models of mediation. And these changes suggest a recognition that the new models are legitimate bases for practice, that offer value to parties in conflict. This implicit endorsement of the alternative models is likely to give practitioners of these models significant leverage to resist falling back into the framework of a more settlement-oriented form of practice.

A similar shift toward recognition of the legitimacy of the new, interactional models of mediation can be seen in the academic and instructional literature of the field as it developed over the fourth decade. For example, authoritative writers on the problem-solving model of conflict resolution, who had previously focused almost entirely on transactional needs and interests, suggested that other dimensions were also important to address, including the balance between "assertiveness and empathy"—dimensions relating to the parties' experience of the conflict interaction and not just the outcome.[165] Another leading authority on mediation published a volume that critiqued the field's overemphasis on agreement, and suggested the need for more attention to "communication" and to assisting parties in "constructive engagement" per se.[166] In these shifts, the influence of the new interactional models is evident, and the implicit endorsement of key elements of those models, by major mainstream authorities, lends legitimacy and strength to the new models. That strength may help counter the tendency to dilute interactionally oriented practices, and thus help the new models to preserve enough difference from court processes that they are hard to reabsorb and recapture.

These shifts in viewpoint in the mainstream can be understood in different ways. On the one hand, they may represent an emerging development in the facilitative model itself, toward a more explicitly interactional orientation. Many individual mediators who began practicing in a facilitative model shifted toward a more interactional orientation gradually, after exposure to one of the new models, and it could be that the field as a whole is following the same course of gradual development to a new "center."[167]

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165. *See* Robert H. Mnookin, Scott R. Peppet, and Andrew S. Tulumello, *The Tension Between Empathy and Assertiveness*, 12 NEGOT. J. 217 (1996) (suggesting that parallel to the need to balance value-creation and value-claiming, which is central to problem-solving theory, is the need to balance different interactional values).

166. *See* MAYER, *supra* note 141, at 129-33, 181-214 (discussing the overemphasis in the mediation field on transactional concerns).

167. *See* BUSH & FOLGER, *supra* note 112, at 231-32 (suggesting this phenomenon may be occurring in the field); Sally Ganong Pope, *Inviting Fortuitous Events in Mediation: The Role of*

On the other hand, it may be that mainstream practice is continuing, without major change, in a mode that is compatible with the courts' emphasis on generating settlements by using conflict management strategies, but that mediators working in this mode are endorsing the idea that other models of practice also have value and deserve to be afforded the opportunity for development. Moreover, the authorities acknowledging that value are themselves, at least in part, actors within the court and legal systems. One implication is that the court system itself is beginning to recognize the value of allowing mediation to become more than a satellite serving the system. That recognition, coupled with the increasing clarity of the mediation field itself about the value of alternative models, offers additional hope that mediation beyond the fourth decade will at least in part break free from its orbit around the courts.

D. MEDIATION WITHIN AND BEYOND THE ORBIT OF THE COURTS: THE FORESEEABLE FUTURE

As stated at the beginning of this Part, it is almost certain that mediation in its most common form—a process oriented toward the production of agreements that settle concrete disputed issues—will in the foreseeable future continue to play a major role as a satellite process serving the courts (and other similar institutions). The process has simply become too useful to the courts—and too rewarding for practitioners—to expect this satellite role to end. However, this article has made the case that it is possible and even likely that mediation will also, in the foreseeable future, take new forms that go beyond the orbit of the courts and beyond the goal of dispute settlement per se, and serve different and important functions for new "markets" of users. That is what the transformative model of mediation, for example, has begun to do in the workplace, family, elder, community and other conflict arenas. In doing so, it seems to be retaining its interactional focus and avoiding the tendency seen in earlier decades for new ventures in mediation to "fall back" into the orbit of the courts and their settlement orientation.[168]

Empowerment and Recognition, 13 MEDIATION Q. 287 (1996) (describing one mediator's transition from the facilitative to the transformative model); Beale and Saul, *supra* note 155, at 9-10, 18-19 (describing the same transition in the context of a community mediation center).

168. Admittedly, not enough time has passed to see whether this new "independence" of the fourth-decade models will last. There are tendencies still evident for even some of these models to slip back into a focus on some version of the settlement goal, or into practices that stray from a firm commitment to a party-driven process. *See, e.g.* Hansen, *supra* note 115 (discussing "insight" and "narrative" practices that include "probing," "untangling emotions," "finding alternative ways of considering the stories of parties," "identifying preferred options from which to generate a new shared narrative"—all of which could dilute the party-driven character of the

Therefore, an optimistic view of the future would suggest that the long history of cycling of mediation away from and back into the courts' orbit may be coming to an end—not because mediation "comes to rest" firmly within or beyond that orbit, but because it establishes itself as having a "pluralistic" character that functions valuably in both realms.[169] That is, courts, mediators and parties may soon benefit from the acceptance of genuine diversity in the use of mediation—with different models of mediation using different practices, to achieve different goals for different clienteles. In such a pluralistic universe, settlement and interaction-oriented models of mediation would both operate and flourish, because both would have value—in the eyes of courts, mediators, and parties.

As for the courts, they have certainly realized at this juncture that the court system itself—even supported by a settlement satellite as effective as mediation—cannot perform many of the functions that are critical not only to individuals in our society, but to the society as a whole. Judges, lawyers, and court personnel are still the primary gatekeepers of the conflict resolution field, the ones to whom citizens turn for help when caught in conflict, and the profession that influences through policymaking how other

process); Picard & Melchin, *supra* note 116, at 45-49 (discussing similar practices in insight mediation). Resisting those tendencies will not be simple or easy, because of the strong pull of values like social justice and reconciliation, which lead interveners into directive postures that undermine interactional change and attenuate self-determination. *See also* Joseph P. Folger, *Harmony and Transformative Mediation Practice*, 84 N.D. L. REV. 823, 849-54 (2008) (discussing the tendency toward confusion of transformative practices with more directive, reconciliation-based practices); Bush, *supra* note 152 (recounting how early enactments of "transformative" mediation practices risked undermining empowerment in order to pursue recognition shifts).

169. Of course, by contrast to the view expressed in this section, it is possible to take a more pessimistic—some would probably say more realistic—view of what the future holds. Thus, the "openness" of the mainstream to alternative, interactionally-oriented mediation practices may be more rhetorical than real. *See, e.g.*, Bush, *supra* note 57, at 986-1000 (arguing that mediator performance tests that claim to accommodate different models of practice are actually oriented more strongly in favor of the mainstream facilitative model). Similarly, the support of court systems for mediation programs using diverse models of practice may be limited, and programs using genuinely alternative models may face tough challenges. *See* Della Noce, Folger & Antes, *supra* note 140, at 34-35 (discussing the challenges of "autonomous" programs that do not share the courts' goals or values). Moreover, the means used by court systems to identify different models of practice, including interactional models, may not promote clear understanding of practice differences, and may even encourage mediators to adopt a "combination" approach that effectively assimilates the alternative models back into the mainstream. *See, e.g.*, Dorothy J. Della Noce, *Communicating Quality Assurance: A Case Study of Mediator Profiles on a Court Roster*, 84 N.D. L. REV. 769 (2008) (documenting such effects in a particular court system). Finally, as noted above, *see supra* note 168, the alternative models themselves may lack the theoretical clarity or practical vigor to resist assimilation back into mainstream facilitative practices, instead reverting to a settlement orientation of some kind and to practices that restrict self-determination and dialogic engagement. Some combination of the kinds of developments described here might well lead to a repetition of the cycle of recapture, in the coming decade, rather than a breaking free that establishes a pluralistic universe. The conclusion in the text takes a more hopeful view.

institutions and actors address conflict. Now that alternative models and visions of mediation have begun to take root and gain recognition, legal system actors are beginning to recognize that it is part of their responsibility to assist those models to find their place. The drafting and adoption of ethical standards for mediators that afford room for an interaction-oriented approach to practice, as discussed above, is one strong piece of evidence that this is taking place.[170]

From the perspective of mediators, the greater awareness and clarity about differences between models of practice offers choices to practitioners. How those choices will be made remains to be seen, but once again the shifts noted above in ethical codes and guiding texts suggests that the field may be allowing, and encouraging, mediators to take different paths in their practices. For some, the newer texts may be viewed as primarily "aspirational" in character, reminding them of the importance of self-determination but still permitting a focus on attaining agreement, and doing so by the use of mediator-driven practices when necessary. For others, those same texts may be taken more seriously, encouraging them to focus exclusively on supporting communication and decision-making, and doing so by adopting party-driven practices. Practitioners will find their own places on those paths, and whether the field as a whole leans more toward the settlement function, or more toward the interactional domain, will probably take several more decades to determine. However, there is a good likelihood given the trajectory of the history traced above, that neither path will overwhelm the other. If so, the field will establish a stable state of pluralism, in which both paths of practice will continue and develop, with mutual acceptance among the mediators following them.[171]

Ultimately, however, this optimistic view of how the courts and the mediation field will reach a stable balance depends on how they are seen by

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170. *See supra* text accompanying notes 159-64. *See also* Della Noce, Folger & Antes, *supra* note 140, at 21-38 (documenting how a statewide court-connected mediation system has supported diverse mediation approaches).

171. *See* BUSH & FOLGER, *supra* note 112, at 259-66 (offering a vision of diversity in the field as it moves forward). However, in order for this kind of diversity to flourish, policies that regulate mediation—including training protocols and requirements, ethical standards, performance tests, etc.—will have to develop a pluralistic rather than unitary character, as this author and others have argued forcefully elsewhere. *See* Dorothy J. Della Noce, *The Beaten Path to Mediator Quality Assurance: The Emerging Narrative of Consensus and Its Institutional Functions*, 19 OHIO ST. J. ON DISP. RESOL. 937, 960-64 (2004) (criticizing the tendency of policymaking to seek and enact unitary rather than pluralistic standards); Bush, *supra* note 57, at 984-1004 (describing the flaws of unitary policies, with reference to specific examples); Della Noce et al., *supra* note 112, at 61-65 (offering a critique of the dangers of unitary policymaking, with specific examples). As of yet, this kind of pluralistic policymaking on mediation has not fully developed. This is another factor that might temper the optimism of the conclusion in the text.

the parties to conflict who are served by both. If the central premise of the interactional mediation models is valid—that many disputants are more concerned about the quality of their interaction with others than with the outcomes of those interactions—then disputing parties themselves will welcome and support a pluralistic regime that allows for mediation to function not only within but beyond the courts' orbit. Parties will sometimes choose one type of mediation, to settle disputes in the orbit of the courts and other institutions. Parties will sometimes choose a recognizably different type of mediation, to achieve interactionally oriented goals that courts and similar institutions cannot satisfy. In the end, it is the universe of disputing parties themselves who hold the answer to where this history is headed.[172] The author who has recounted this narrative is content to "trust the parties" and leave that answer in their hands.

172. Some could argue that institutional forces will inevitably constrain parties' choices and thus be the main determinants of future developments. This author believes that public demand will eventually be a stronger force than institutional structures. *See* Bush, *supra* note 86, at 127-31 (suggesting that consumer preference has driven a rise in the demand for evaluative mediation, independent of policymakers' preference for facilitative mediation). In this, as in other respects, the view taken by the author is an optimistic one.